

## **NOTE**

### “WAS THAT A YES OR A NO?” REVIEWING VOLUNTARINESS IN CONSENT SEARCHES

*James C. McGlinchy\**

*“Can we take a look inside your car?” More than half of all roadside searches begin this way. A consent search is a cop’s quickest and easiest way to look for evidence in a car, in a home, or on a suspect’s person. Perhaps because of that, it is not always clear in practice that answering no really means no. The Supreme Court has long held that consent searches must be completely voluntary or evidence stemming from that search may not be admitted against the suspect searched. This rule deters unconstitutional law enforcement tactics. But the Court has not provided the doctrinal tools to keep law enforcement in check. Appellate courts are currently free to review voluntariness only for “clear error” by the trial court, leading to a toothless review. This Note argues that voluntariness in consent searches must be reviewed de novo on appeal. This independent review doctrinally aligns with the Supreme Court’s criminal standard-of-review jurisprudence. In contrast, deferential review leaves criminal defendants with insufficient Due Process surrounding the waiver of constitutional rights. It allows individual trial courts, rather than appellate courts, to determine the substance of the law and allows similar facts to lead to different legal results. It thus leaves law enforcement officers with inadequate guidance on what the Fourth Amendment allows and demands. The inherent psychological pressure of being questioned by the police, cultural fear of law enforcement, and a pattern of discriminatory requests to search create situations likely to result in coercion. Although de novo review of voluntariness would lead to added burdens on the appellate docket, courts should grasp the nettle and take steps to unify the law.*

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\* J.D., 2017, University of Virginia School of Law; Associate at a Washington, D.C. law firm. I would like to thank Brandi Streauslin, Erin Trodden, and Phillip Ogea for their feedback and insights.

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INTRODUCTION

The Fourth Amendment’s warrant requirement can be waived by a voluntary consent to search. But lower courts are divided on how to review the voluntariness of a defendant’s consent. Several state high courts have examined analogous criminal law decisions on appropriate standards of review and found that de novo review is required on appeal. Others, including most of the federal circuits, have applied rules-of-thumb to the issue, usually without much examination, and decided that a deferential “clearly erroneous” standard is sufficient. This Note argues that only de novo review is proper.

Deferential review is not rigorous enough. It leaves criminal defendants with insufficient opportunities to argue their consent was coerced. It leaves appellate courts with insufficient power to shape the law in an area of critical constitutional importance. It leaves law enforcement officials with insufficient guidance for a practice that beat cops may use on a daily basis. Although de novo review of voluntariness would lead to added burdens on the appellate docket, courts should grasp the nettle and ensure that the hierarchical judicial system is properly preserved.

This Note contributes to the literature on consent searches by giving appellants who were coerced into a consent search their best chance of success: as this Note explains, the standard of review at appeal may be the most determinative factor in a case.<sup>1</sup> While the standard of review for consent searches has been litigated, it has not been addressed in academic literature. The academic literature has tended to address the general idea of consent searches<sup>2</sup> or circumstances that as a matter of law should render consent invalid.<sup>3</sup> This Note is written under the

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<sup>1</sup> See *infra* Parts III–IV.

<sup>2</sup> See, e.g., Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 *Sup. Ct. Rev.* 153, 156 (“[T]he 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—a mere device for attaining the desired legal consequence.”); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 *Wash. U. L.Q.* 175, 176–91 (1991) (examining the meaning of “consent,” “voluntary,” “third party,” and issues of scope and motivation); Stephen A. Saltzburg, *Lecture: The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 *Am. Crim. L. Rev.* 133, 139–41 (2003) (critiquing the Court’s compulsion decisions); Ric Simmons, *Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 *Ind. L.J.* 773, 817–23 (2005) (identifying inconsistencies in the existing consent doctrine); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 *Sup. Ct. Rev.* 271, 318–21 (arguing that the Court’s vehicle consent search jurisprudence fails to take into consideration the unique perspective of minorities); Marcy Strauss, *Reconstructing Consent*, 92 *J. Crim. L. & Criminology* 211, 221–52 (2001) (detailing vagueness in the existing consent doctrine and exploring the perspective of searched minorities); David John Housholder, *Note, Reconciling Consent Searches and Fourth Amendment Jurisprudence: Incorporating Privacy into the Test for Valid Consent Searches*, 58 *Vand. L. Rev.* 1279 (2005) (arguing that a person’s expectation of privacy should be considered in determining the validity of the consent given for a search).

<sup>3</sup> See, e.g., Megan Anitto, *Consent Searches of Minors*, 38 *N.Y.U. Rev. L. & Soc. Change* 1 (2014) (arguing that different standards for consent searches should apply to minors); Blanca L. Hernández, *Incapacity to Refuse Consent: Fourth Amendment Offenses in Consensual Searches of Individuals with Mental Illness*, 23 *S. Cal. Rev. L. & Soc. Just.* 387 (2014) (addressing mental illness and its effect on the ability to consent); Ginny Kim,

assumption that consent searches are not going anywhere and, therefore, does not attack their general constitutional validity. This Note does not focus on special classes of defendants, specific factual scenarios, or new means of consent that are socially contingent. There is a wealth of literature on those subjects.<sup>4</sup> Instead, this Note focuses on a question of general applicability, but one that has the opportunity to reshape the landscape of consent search law.

Part I of this Note provides an overview of where consent searches fit within Fourth Amendment jurisprudence. Part II incorporates empirical literature to discuss how consent searches have been used by police, a brief survey of literature by academic commentators on consent searches, and the Supreme Court's perspective on what place consent searches hold in the criminal justice system. Part III explains how appellate courts have reviewed the voluntariness of consent and their reasoning, showing how and why there is a split in the lower courts on the standard. Part IV discusses the importance of standards of review generally and in criminal law in particular. Part V analyzes the standard of review for voluntariness in light of analogous Supreme Court precedent and doctrine, and it demonstrates that *de novo* review is required for voluntariness. The final Part offers concluding thoughts.

#### I. A VOLUNTARY CONSENT TO A SEARCH IS AN EXCEPTION TO THE WARRANT REQUIREMENT

The Fourth Amendment to the U.S. Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>5</sup> This “inestimable right” of security from unreasonable intrusions into privacy “belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”<sup>6</sup> And the bounds of this right should not be narrowed unduly because, as stated by the Supreme Court, “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the

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Note, *Unconstitutional Conditions: Is the Fourth Amendment for Sale in Public Housing?*, 33 *Am. Crim. L. Rev.* 165 (1995) (criticizing a joint HUD-DOJ proposal to mandate blanket search consent as a condition for receiving public housing).

<sup>4</sup> See *infra* notes 38–48.

<sup>5</sup> U.S. Const. amend. IV.

<sup>6</sup> *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968).

possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>7</sup>

The “central inquiry” under the Fourth Amendment is the “reasonableness in all the circumstances” of the particular governmental invasion of a person’s reasonable expectation of privacy.<sup>8</sup> As a general matter in deciding reasonableness, courts first focus on the governmental interest which allegedly justifies the state’s invasion of the constitutionally recognized interests of that person because there is no easily articulated test for judging reasonableness besides “balancing the need to search [or seize] against the invasion which the search [or seizure] entails.”<sup>9</sup>

A search without a warrant is presumptively unreasonable and invalid unless it falls within one of the narrowly demarcated exceptions to the warrant requirement.<sup>10</sup> In the absence of an exception to the Fourth Amendment warrant requirement, courts must exclude from evidence the fruits of an illegal search or seizure.<sup>11</sup>

A search conducted pursuant to a suspect’s voluntary consent is one such exception to the Fourth Amendment’s warrant requirement.<sup>12</sup> In a typical instance, a police officer asks a person for permission to search their person, home, car, or belongings, and the person either says “yes” or “no.” When a person consents to a search, their consent acts as a waiver of the Fourth Amendment protections they would otherwise enjoy.<sup>13</sup>

But not all searches that follow a police officer’s request are valid—sometimes when a suspect says “yes” it does not mean “yes.” Due Process requires that the state cannot benefit from forcing a person to “voluntarily” waive her constitutional rights.<sup>14</sup> To hold otherwise would be perverse.

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<sup>7</sup> *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

<sup>8</sup> *Terry*, 392 U.S. at 19.

<sup>9</sup> *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 534–37 (1967).

<sup>10</sup> *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (per curiam); *Coolidge v. New Hampshire*, 403 U.S. 443, 477–78 (1971); *Stoner v. California*, 376 U.S. 483, 486 (1964).

<sup>11</sup> See *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

<sup>12</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

<sup>13</sup> *Id.* at 235.

<sup>14</sup> *Id.* at 228.

In these instances, and others where the state violates the Fourth Amendment, the primary judicial remedy is the exclusionary rule.<sup>15</sup> Because the Court has been unable to fashion a more effective sanction, the rule prevents the prosecution in a criminal case from using evidence stemming from the constitutional violation in its case against a defendant.<sup>16</sup> The exclusionary rule is not mandated by the Fourth Amendment; rather, it is a judicially created remedy to facilitate the enjoyment of constitutional rights.<sup>17</sup> Application of the exclusionary rule most often takes place after a defendant files a pretrial motion to suppress evidence.<sup>18</sup> A suppression hearing is conducted somewhat like a bench trial. The prosecution and defense call witnesses who are sworn in and testify; counsel may make opening and closing arguments. The court's decision will often turn upon factual questions and witness credibility since the court is the only fact finder deciding whom to believe between witnesses, who are likely to have conflicting stories.<sup>19</sup>

Suppression hearings often are as important as the trial itself.<sup>20</sup> In fact, "in many cases," a suppression hearing may de facto be "the *only* trial" because so many defendants thereafter plead guilty after failing to suppress evidence that more or less seals their fate.<sup>21</sup> As a result, decisions on whether evidence is admitted or not become outcome determinative for many defendants. Enforcement of the Fourth Amendment's strictures will often require the acquittal of defendants; the Supreme Court has accepted as a necessary cost that application of the exclusionary rule can hinder the truth-finding functions of judge and jury.<sup>22</sup> This is because, besides nominal damages, the innocent have no

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<sup>15</sup> *Mapp v. Ohio*, 367 U.S. 643, 656–60 (1961).

<sup>16</sup> *Franks v. Delaware*, 438 U.S. 154, 171 (1978). But evidence obtained in violation of the Fourth Amendment and inadmissible in the prosecution's case in chief may be used to impeach a defendant's direct testimony. *Walder v. United States*, 347 U.S. 62, 64–66 (1954); see also, *United States v. Havens*, 446 U.S. 620, 627–28 (1980) (barring the use of illegally obtained evidence for impeachment would greatly hinder truth finding and only incrementally advance the ends of the exclusionary rule).

<sup>17</sup> See *United States v. Leon*, 468 U.S. 897, 906 (1984); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

<sup>18</sup> Fed. R. Crim. P. 12(b)(3)(C).

<sup>19</sup> *Waller v. Georgia*, 467 U.S. 39, 47 (1984).

<sup>20</sup> *Gannett Co. v. DePasquale*, 443 U.S. 368, 397 n.1 (1979) (Powell, J., concurring).

<sup>21</sup> *Waller*, 467 U.S. at 47 (holding that a defendant has a right to a public suppression hearing).

<sup>22</sup> *Mapp v. Ohio*, 367 U.S. 643, 659–60 (1961).

remedy under the exclusionary rule.<sup>23</sup> Thus, if only innocent people received Fourth Amendment protection, the exclusionary rule would have “little force” in shaping police behavior toward anyone, including the innocent.<sup>24</sup> As a result, the guilty may go free or serve reduced sentences, and that is all part of the plan.

## II. LAW ENFORCEMENT OFFICERS COMMONLY USE CONSENT SEARCHES: ACADEMICS DO NOT FAVOR THEM, BUT THE COURT DOES

Consent searches are often used by police to expedite the business of policing. They may be used when probable cause exists, but the police feel that there is insufficient time to go through the process of gaining a warrant. Or they may just be used because the police do not want to go through the administrative hassle of getting one. However, “more often,” police will ask a member of the public for their consent to a search because there is no probable cause, and thus no valid warrant would be issued.<sup>25</sup>

Police officers and prosecutors favor consent searches. First, there is the elbow grease incentive—consent searches are easy.<sup>26</sup> They do not require the administrative energy, time, and risks that go along with obtaining and executing a warrant. Evidence from consent searches is also seen “as the ‘safest’ course of action in terms of minimizing the risk” that the evidence gathered would be excluded after a suppression hearing.<sup>27</sup> In addition, whereas a warrant must be defined in scope and targets, a consent search can give the police the authority to search to their hearts’ content, bounded only by their discretion and the subject’s

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<sup>23</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment) (the exclusionary rule is “irrelevant” for those who have not or will not be convicted of a crime).

<sup>24</sup> *Illinois v. Caballes*, 543 U.S. 405, 422 (2005) (Ginsburg, J., dissenting) (quoting *Minnesota v. Carter*, 525 U.S. 83, 110 (1998) (Ginsburg, J., dissenting)).

<sup>25</sup> Wayne R. LaFare et al., *Criminal Procedure* 279 (5th ed. 2009).

<sup>26</sup> See, e.g., Richard Van Duizend et al., *The Search Warrant Process: Preconceptions, Perceptions, Practices* 68–69 (1985) (“[L]istening to some law enforcement officers would lead to the conclusion that consent is the easiest thing in the world to obtain.”).

<sup>27</sup> 4 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* 4–5 (4th ed. 2004); see Strauss, *supra* note 2, at 259 (“[E]ven if the police have probable cause to search, and even if procuring a warrant would not be onerous, an officer may elect to obtain consent because it increases the likelihood that the search would be deemed valid.”).

caginess.<sup>28</sup> As Professor Wayne LaFave explains, a consent search “has the added benefit, at least when the consenting party does not carefully condition or qualify his consent, that the search pursuant to consent may often be of a somewhat broader scope than would be possible under a search warrant.”<sup>29</sup>

Finally, law enforcement like consent searches because they permit police to exercise their discretion and power in contexts where the subject will probably be reluctant to say “no” when the police ask if they can conduct a search. This reluctance to refuse a search is most apparent when police request consent during routine traffic stops. Drivers and their passengers stopped for traffic offenses are the classic examples of a “captured audience,” who for a variety of reasons feel they cannot or should not refuse the police when they ask for consent.<sup>30</sup> There is a natural inclination to cooperate with the police to avoid potential conflict: we have all seen enough episodes of “COPS” to know what can happen when you say “no.”

Law enforcement agencies recognize this implicit coercion. For example, in 2017, the District of Columbia Police Complaints Board issued a report noting a surge of complaints alleging improperly coerced consent searches. The Board found that officers had been provided “insufficient guidance” on how to conduct a truly voluntary search.<sup>31</sup>

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<sup>28</sup> See *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (holding that the scope of defendant’s consent to search a vehicle was not exceeded because the consent included an implicit authorization to open a paper bag found on floorboard); *United States v. Coleman*, 588 F.3d 816, 820 (4th Cir. 2009) (holding that the scope of consent to search a home was not exceeded when police searched the entire house because the consent was given to conduct a complete search of the premises and property); *United States v. Jones*, 523 F.3d 31, 39–40 (1st Cir. 2008) (holding the scope of consent was not exceeded because it was not unreasonable for officers to conduct a search of other rooms in a hotel suite for drugs, including the kitchen cabinet, when the suite occupant consented to search of “motel room” generally and did not confine his consent to search a single room); *United States v. Snype*, 441 F.3d 119, 136–37 (2d Cir. 2006) (holding the scope of consent was not exceeded because the resident renter voluntarily consented to a search of the apartment where the defendant was staying as a guest).

<sup>29</sup> 4 LaFave, *supra* note 27, at 5 (footnote omitted).

<sup>30</sup> Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 *McGeorge L. Rev.* 27, 31–32 (2008).

<sup>31</sup> Gov’t of D.C., Office of Police Complaints, PCB Policy Report #17-5: Consent Search Procedures 1–2 (2017), <https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Consent%20Search%20Report%20FINAL.pdf> [<https://perma.cc/SA2X-94VF>].



The Board wrote further: “When a community member encounters an officer in full uniform who requests to conduct a search of their person, belongings, vehicle or home, a very thin line exists between voluntariness and coercion.”<sup>32</sup> Because of the inherent power dynamic created by an officer’s show of authority, the Board recognized “[t]here is often an implicit assumption” that a person has no choice but to comply with a police officer’s requests.<sup>33</sup>

Although “precise figures” that spell out the exact number of consent searches “are not—and probably can never be—available,” there can be “no dispute” that at the least, tens of thousands of people are subject to them annually.<sup>34</sup> In 2005, the Department of Justice attempted to quantify these numbers. “More than half (57.6%) of all [roadside] searches” that law enforcement conducted in 2005 involved the target’s consent.<sup>35</sup> These searches happened because either the officer asked for permission to search and the driver then granted it, or the driver told the officer she could conduct a search before the officer even asked.<sup>36</sup>

The likelihood of a search being conducted is highly dependent on who is the target of the search. According to the same Department of Justice data, in 2005, police officers searched about 5% of stopped drivers during traffic stops, which includes searches of the vehicle only, the driver only, and both the vehicle and the driver. Male drivers (6.8%) were more likely than female drivers (1.6%) to be searched by police during a traffic stop. Black (9.5%) and Hispanic (8.8%) motorists stopped by police were searched at higher rates than whites (3.6%). In 2005, drivers in the two youngest age categories—teenage drivers (9.5%) and drivers in their twenties (8.1%)—were more likely than drivers in their thirties (3.3%), forties (3.3%), and fifties (2.3%) to be searched to some extent by law enforcement.<sup>37</sup>

Law enforcement also recognizes that its consent searches may be conducted in a racially discriminatory manner. In the District of

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<sup>32</sup> *Id.* at 3–4.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> Strauss, *supra* note 2, at 214.

<sup>35</sup> Matthew R. Durose et al., U.S. Dep’t of Justice, *Contacts Between Police and the Public, 2005 (2007)*, at 6, <https://www.bjs.gov/content/pub/pdf/cpp05.pdf>. [<https://perma.cc/2BJJ-VUPK>].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 7.

Columbia Police Complaints Board report described above, the Board stated it was concerned about the “disproportionate use of consent searches” in minority jurisdictions: the Board’s report noted that 76% of complainants alleging an improper consent search were African American, with a similar percentage of complaints coming from just three majority-minority police districts.<sup>38</sup> These searches, however, at least in the traffic-stop context, are not particularly fruitful, with only 11.6% of searches conducted during traffic stops in 2005 revealing drugs, an illegal weapon, open containers of alcohol, or other illegal items.<sup>39</sup> Despite law enforcement’s preference for consent searches, “[c]onsent and nonconsent searches turned up evidence of criminal wrong-doing at similar rates.”<sup>40</sup> Thus, consent searches—inherently raising the risk of coercion by law enforcement—are no more effective than other means of conducting searches. Increasing numbers of ordinary citizens are exposed to unnecessary police intrusion—a high cost—without a clear societal benefit.

For a number of reasons, academics tend to disfavor consent searches. Some argue that they dilute constitutional protections generally, that

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<sup>38</sup> Gov’t of D.C., Office of Police Complaints, *supra* note 31, at 1–3; see also Peter Hermann, D.C. Police Oversight Agency Says Complaints Are Rising over Searches, *Wash. Post* (Sept. 26, 2017, 10:30 PM), [https://www.washingtonpost.com/local/public-safety/dc-police-oversight-agency-says-complaints-are-rising-about-searches/2017/09/26/b8c16c5a-a2a6-11e7-8cfe-d5b912fab99\\_story.html](https://www.washingtonpost.com/local/public-safety/dc-police-oversight-agency-says-complaints-are-rising-about-searches/2017/09/26/b8c16c5a-a2a6-11e7-8cfe-d5b912fab99_story.html). [https://perma.cc/5KUB-RB3D].

<sup>39</sup> Durose et al., *supra* note 35, at 7.

<sup>40</sup> *Id.* The Department of Justice is not alone in its findings. A report from the New Jersey Attorney General’s Office found that “most consent searches do not result in a positive finding” of criminal activity, even though the police are required to have a “reasonable, articulable suspicion” of criminal behavior before asking a citizen for permission to search. Peter Verniero & Paul H. Zoubek, N.J. Office of the Attorney Gen., *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* 28 (1999), [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf). [https://perma.cc/LGL5-VEYE]. The report continued to state that even the “positive” findings disclosed by the police concerning consent searches were

somewhat misleading, since a positive result is recorded if the search led to any arrest or seizure of contraband without considering the seriousness of the charge or the type, quantity, or value of contraband that was discovered. Based upon anecdotal reports, most arrests are for less serious offenses, and major seizures of significant drug shipments are correspondingly rare. *Id.* at 36.

*Id.* at 36–37. Unsurprisingly perhaps, this report also found “that minority motorists were disproportionately subject to consent searches.” *Id.* at 30.

“[c]onsent is an acid that has eaten away the Fourth Amendment.”<sup>41</sup> Another view is that consent searches put too much power in the hands of police; it argues that “[c]onsent searches come dangerously close to general warrants by giving the searching police officer undue discretion to determine the scope of the search.”<sup>42</sup> The charge of “general warrants” matters especially because they were a particular concern of the Framers of the Bill of Rights.<sup>43</sup> The term described warrants lacking particularized information, a complaint under oath, or a showing of proper cause for the search.<sup>44</sup> The Framers condemned these general warrants because they vested too much discretionary authority in law enforcement officers, allowing them to search or arrest as they liked, without court supervision.<sup>45</sup> In addition to fearing searches without probable cause, the Framers were concerned about leaving the essential decision on probable cause, or when to search without it, in the hands of the police.<sup>46</sup> The best means of preventing improper invasions of privacy, in the Framers’ views, was to ensure that authority stayed with judges and magistrates.<sup>47</sup> Further, critics argue that the expansiveness of the law of consents “does almost nothing to protect motorists on the nation’s roadways from the enormous intrusion of the routine traffic stop turned consent search.”<sup>48</sup> As a result, citizens must effectively always be on notice that a search may occur, chilling and disrupting perfectly acceptable behavior.

All this academic teeth gnashing has not convinced the Supreme Court. In fact, the Court endorses consent searches. In a 2002 case,

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<sup>41</sup> George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 *Miss. L.J.* 525, 541 (2003).

<sup>42</sup> Rebecca Strauss, Note, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 *Mich. L. Rev.* 868, 876 (2002); see also *Maryland v. King*, 133 S. Ct. 1958, 1980–82 (2013) (Scalia, J., dissenting) (examining the colonial mistrust of “despised” general warrants used under British Rule).

<sup>43</sup> Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 *Mich. L. Rev.* 547, 558 (1999) (noting that the effect of the second clause of the Fourth Amendment is to ban the use of general warrants).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 578–80.

<sup>46</sup> *Id.* at 577–78.

<sup>47</sup> *Id.*

<sup>48</sup> Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 *Ohio N.U. L. Rev.* 1, 6 (2001) (emphasis and footnote omitted).

*United States v. Drayton*, the Court wrote, “In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent.”<sup>49</sup> Thus, because in the process of obtaining consent the police must ask a person for permission, the Court wrote that it implicitly “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. When this exchange takes place, it dispels inferences of coercion.”<sup>50</sup>

Further justifications from the Supreme Court include the idea that consent searches are better for citizens. They enable the police to investigate in situations where the “stigma and embarrassment” of arrest or a “far more extensive search pursuant to a warrant” may be avoided.<sup>51</sup> In addition, the Court has argued that “fruitless” searches may result in fewer privacy invasions and a net positive for the public, encouraging police officers to be more judicious in selecting the targets of their searches.<sup>52</sup> This has, however, not played out in practice, and it is not clear that the Court will always agree.<sup>53</sup>

Although it does favor consent searches, the Court does not take a purely Pollyannaish view—it has recognized that competing concerns are at stake when the police ask a citizen for permission to search either her person or property. In these instances, the law must balance “the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.”<sup>54</sup> The Fourth Amendment and general due process considerations require that this consent is neither explicitly nor implicitly coerced. Without this prophylaxis, “no matter how subtly” that coercion was exerted, the “consent” that followed would simply be a pretext for the precise type of unlawful privacy intrusion that the Fourth Amendment is meant to prevent.<sup>55</sup>

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<sup>49</sup> 536 U.S. 194, 207 (2002).

<sup>50</sup> *Id.*

<sup>51</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2069–71 (2016) (Sotomayor, J., dissenting) (“[U]nlawful police stops corrode all our civil liberties and threaten all our lives.”).

<sup>54</sup> *Schneckloth*, 412 U.S. at 227.

<sup>55</sup> *Id.* at 228.

As a result, when law enforcement relies on consent to justify a search, it has the burden to prove that there was a clear, unambiguous, and unequivocal consent “freely and voluntarily given.”<sup>56</sup> A valid consent to search is not given by a defendant’s mere “acquiescence” to police exhortation.<sup>57</sup> “It is not surprising, therefore, that in cases contesting the validity of consent searches,” litigation has generally focused on the issues of coercion and voluntariness.<sup>58</sup> If it is shown that the consent resulted from law enforcement coercion, then the “consent” was involuntary and of no effect, and the search is per se unreasonable.<sup>59</sup>

Importantly, coercion as a general legal matter does not have to mean physical violence.<sup>60</sup> Furthermore, as a practical matter, coercion easily can be experienced without physical force. For example, in *Fikes v. Alabama*,<sup>61</sup> the defendant had been questioned over a period of several days for hours at a time, kept in isolation units, and prevented from seeing family before he ultimately confessed to a crime. Although the defendant was not physically harmed, he was possibly mentally ill before and during the questioning.<sup>62</sup> The Supreme Court found that confession to be improperly coerced.<sup>63</sup> More recently, Professor LaFave has stated that “various psychology experiments have confirmed [that] ‘well-established psychological principles refute the idea that the mere presence or absence of physical coercion determines whether an actor’s decision [to consent to a search] is voluntary.’”<sup>64</sup>

Yet, as discussed above, there may be little a law enforcement officer can do to limit at least a subjective, perceived feeling of coercion that arises from her place in society. Perceived psychological coercion can be determined by the interaction of the speaker’s authority and the

<sup>56</sup> Id. at 222 (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)).

<sup>57</sup> See *Bumper*, 391 U.S. at 548–49; *Amos v. United States*, 255 U.S. 313, 317 (1921).

<sup>58</sup> Jimmie E. Tinsley, Consent to Search Given Under Coercive Circumstances, 26 Am. Jur. Proof of Facts 2d 465, 474 (1981).

<sup>59</sup> *Schneckloth*, 412 U.S. at 225–26 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

<sup>60</sup> Coercion, Black’s Law Dictionary (10th ed. 2014).

<sup>61</sup> 352 U.S. 191 (1957).

<sup>62</sup> Id. at 194–98.

<sup>63</sup> Id. at 198.

<sup>64</sup> 4 LaFave, *supra* note 27, at 111; Adrian J. Barrio, Rethinking *Schneckloth v. Bustamonte*: Incorporating Obedience Theory into the Supreme Court’s Conception of Voluntary Consent, 1997 U. Ill. L. Rev. 215, 233–41 (detailing psychological studies and connecting them to the legal definition of coercion).

speaker's language. Because authorities such as police officers very often direct others, even as traffic cops, a listener will be more likely to conclude that a given statement is actually a command, an order to be obeyed.<sup>65</sup> For example, citizens will likely not understand the phrase "Can I please see your license and registration?"—when spoken by law enforcement—as a genuine question. Rather, it is commonly, implicitly understood as a command. The very fact that it is framed as a suggestion may reinforce the feeling that the statement is a command—the police officer's authority appears even stronger because she does not have to rely on threatening language.<sup>66</sup> Even though basing a determination of coercion on a suspect's subjective feeling is not the correct legal standard, it is telling how easy it is for a citizen to at least believe they have no choice but to acquiesce to an officer's request. This puts the legal doctrine of consent in something of a pickle: most citizens will subjectively experience coercion whenever they interact with a police officer, but that may not matter at all if they manifest voluntary consent to a search.

### III. LOWER COURTS ARE DIVIDED OVER WHICH STANDARD OF REVIEW SHOULD APPLY TO THE VOLUNTARINESS OF A CONSENT TO SEARCH

Despite, or perhaps because of, the popularity of searches among law enforcement, there is conflict in the appellate courts over voluntariness—the *sine qua non* of a consent search. Federal and state courts are openly divided over the appellate standard of review of the voluntariness of a suspect's consent to a search between a deferential clearly erroneous standard and de novo review. This divide stems from conflicting readings of the Supreme Court case *Schneckloth v. Bustamonte*, which in part held the voluntariness of a consent to search as a "question of fact to be determined from the totality of all the circumstances."<sup>67</sup>

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<sup>65</sup> Nadler, *supra* note 2, at 188–89.

<sup>66</sup> *Id.*

<sup>67</sup> 412 U.S. 218, 227. (1973).

*A. Standards of Review Frame How an Appellate Court Makes Its Decision*

Some background into how standards of review are determined is necessary. Appellate judges act “in a world not of their own making.”<sup>68</sup> The first decision on any question of procedure, law, or fact is made by a trial court or a magistrate. If no appeal is filed, the trial court’s order will be the final word on the subject for that case. When an appeal is filed, appellate courts are both constrained and duty bound by standards of review, which serve to allocate decision-making power between trial courts and appellate courts in Article III’s hierarchical judicial system. But the justification for granting, *en masse*, certain types of authority to trial courts is “difficult to find, and therefore too slippery for the appellate courts to handle cleanly.”<sup>69</sup> Thus, rigid and categorical rules may be inappropriate.

A standard of review helps maintain the division of authority between trial and appellate courts: it is the lens through which an appellate court appraises the decision of a court below. Although there are numerous different standards for different situations, this Note will only examine two: the clearly erroneous, or clear error, standard and *de novo* review.<sup>70</sup> Under a clear error standard, a lower court’s decision “will be upheld unless the appellate court is left with the firm conviction that an error has been committed.”<sup>71</sup> *De novo* review is a “court’s nondeferential review of an administrative decision, [usually] through a review of the administrative record plus any additional evidence the parties present.”<sup>72</sup> *De novo* review is occasionally referred to as “plenary,” “independent,” or “free” review.<sup>73</sup> The basic idea is that the appellate court owes no

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<sup>68</sup> Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. Kan. L. Rev. 1, 1 (1991).

<sup>69</sup> *Id.* at 3.

<sup>70</sup> Other standards of review do not apply to the review of suppression motions, which are questions of law—“Does the Fourth Amendment apply to administrative searches?”—and questions of fact—“Did the police announce their presence before entering the house?”

<sup>71</sup> Clearly-Erroneous Standard, *Black’s Law Dictionary* (10th ed. 2014); see, e.g., *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (noting the clearly erroneous standard applies when the reviewing court “is left with the definite and firm conviction that a mistake has been made”).

<sup>72</sup> *Judicial Review*, in *Black’s Law Dictionary*, *supra* note 71.

<sup>73</sup> 1 Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* § 2.14 (3d ed. 1999).

formal deference to the reasoning or results of the court below.<sup>74</sup> This is not to say that the appeals court should not take the lower court's reasoning into account,<sup>75</sup> that it may ignore precedent, or that it is allowed to reexamine a case from top to bottom. Instead, the appellate court provides its own answer to the question under consideration, an answer limited by the principles just listed as well as the evidentiary record.<sup>76</sup> In essence, it is not that the appellate court has unconfined discretion, just that it is not restricted by the lower court's decision on that issue.

There is no single source of law for standards of review. Review of fact finding in federal court can be governed sometimes by court rule, other times by common law. Federal Rule of Civil Procedure 52(a) requires that facts, whether based on oral or other evidence, must not be set aside unless they are "clearly erroneous."<sup>77</sup> Although the Federal Rules of Criminal Procedure have no provision similar to Rule 52(a), the Supreme Court has said that the considerations underlying that rule apply with full force in a criminal context: the same justifications behind Rule 52(a)—the demands of judicial efficiency, the relative expertise of trial judges, and the centrality of firsthand observation—all apply in criminal cases.<sup>78</sup> As a result, the clearly erroneous standard of review has usually been applied to nonguilt findings of fact by district courts in criminal cases.<sup>79</sup> On the other hand, questions of law must be awarded no deference and reviewed *de novo* in nearly every case.<sup>80</sup> It is the province and duty of higher courts to "say what the law is."<sup>81</sup> The lines between law and fact are not clear, to say the least. Much ink has been

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<sup>74</sup> *Id.*

<sup>75</sup> See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991) ("[A]n efficient and sensitive appellate court at least will naturally consider [the lower court's] analysis in undertaking its review.>").

<sup>76</sup> See 1 *Childress & Davis*, *supra* note 71, § 2.14.

<sup>77</sup> Fed. R. Civ. P. 52(a)(6).

<sup>78</sup> See *Maine v. Taylor*, 477 U.S. 131, 145 (1986); *Campbell v. United States*, 373 U.S. 487, 493 (1963).

<sup>79</sup> *Taylor*, 477 U.S. at 145.

<sup>80</sup> *First Options of Chi. v. Kaplan*, 514 U.S. 938, 947–48 (1995).

<sup>81</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).



spilled and many hands waved over the distinction.<sup>82</sup> This Note aims to avoid both.

*B. Schneckloth Helped Decide What Courts Require for Consents to Search*

With that backdrop, the Supreme Court decision of *Schneckloth* labeled voluntariness as a fact. Like so many modern consent searches, *Schneckloth* involved a commonplace traffic stop.<sup>83</sup> On January 31, 1967, three men drove to San Jose to identify individuals who might be willing to aid them in a fraudulent check-cashing scheme.<sup>84</sup> They picked up three additional men around 11 P.M. and tried unsuccessfully over the next few hours to cash the checks at grocery stores, a bar, and a shopping center.<sup>85</sup> A police officer on routine patrol at 2:40 A.M. the next morning observed the vehicle with only one working headlight. He pulled the car over.<sup>86</sup> After learning that the car's driver did not have a driver's license, the officer was told by one of the passengers that he in fact had a license and that his brother owned the car. The officer then asked that passenger for consent to search the car. The passenger gave consent and "actually helped in the search of the car, by opening the trunk and glove compartment."<sup>87</sup> The search uncovered stolen checks eventually used to convict Bustamonte, yet another passenger, of possession of a completed check with intent to defraud.<sup>88</sup> On appeal to the California Court of Appeals, Bustamonte unsuccessfully argued that the trial court improperly refused to grant his motion to suppress because there had been no consent for the search.<sup>89</sup>

Following the denial of Bustamonte's petition for habeas corpus at the district court level, the U.S. Court of Appeals for the Ninth Circuit

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<sup>82</sup> See, e.g., *Thompson v. Keohane*, 516 U.S. 99, 110–11 (1995) (observing that "the proper characterization of a question as one of fact or law is sometimes slippery"). See generally Henry P. Monaghan, *Constitutional Fact Review*, 85 *Colum. L. Rev.* 229, 267 (1985) (noting the "erratic and uncertain" state of the law governing standard of review and the fact/law distinction).

<sup>83</sup> 412 U.S. at 220.

<sup>84</sup> *People v. Bustamonte*, 76 Cal. Rptr. 17, 19 (Ct. App. 1969).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Schneckloth*, 412 U.S. at 220.

<sup>88</sup> *Bustamonte*, 76 Cal. Rptr. at 19.

<sup>89</sup> *Id.* at 20.

considered the state court's denial of his motion to suppress.<sup>90</sup> The Ninth Circuit overturned the conviction and ruled that, because consent to search involved a waiver of one's Fourth Amendment rights, the state had to show more than just an absence of coercion. The state also had to prove that the target of a consent search was informed of his right to refuse it.<sup>91</sup> Thus, a suspect under this rule would have to be warned prior to a consent search, similar to a *Miranda* warning. Ultimately, the Supreme Court reversed the Ninth Circuit's holding and ruled that no single factor, including a target's knowledge of his right to refuse a search, was dispositive to voluntariness. Voluntariness was a fact to be determined in light of all the circumstances.<sup>92</sup> The conviction was reinstated.<sup>93</sup>

*C. Schneckloth Did Not Decide the Proper Standard of Review, and the Lower Courts Are Now Split on the Issue*

But while labeling voluntariness as fact, *Schneckloth* did not decide which standard of review appellate courts should apply to voluntariness: whether trial courts or appellate courts should be allocated the power to decide when pressure becomes coercion.<sup>94</sup> As a result, lower courts have tried to craft their own standards with incompatible results. Subsequent decisions from the Supreme Court reaffirming *Schneckloth* have not clarified the standard of review issue.<sup>95</sup> For example, *Ohio v. Robinette* more or less restated the *Schneckloth* standard without instructing on how courts should apply it on appeal.<sup>96</sup>

Many lower courts—federal circuit courts in some instances but mostly state supreme courts—have held that the voluntariness of a consent to search must be subject to de novo review because of a broad

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<sup>90</sup> *Bustamonte v. Schneckloth*, 448 F.2d 699, 699–700 (9th Cir. 1971).

<sup>91</sup> *Id.* at 700–01.

<sup>92</sup> *Schneckloth*, 412 U.S. at 248–49.

<sup>93</sup> *Id.*

<sup>94</sup> *United States v. Navarro*, 90 F.3d 1245, 1256 n.6 (7th Cir. 1996).

<sup>95</sup> See, e.g., *State v. Weisler*, 35 A.3d 970, 982 (Vt. 2011) (“*Robinette* was no more concerned with standard of review than *Schneckloth*.”) (citing *Ohio v. Robinette*, 519 U.S. 33, 40 (1996)).

<sup>96</sup> 519 U.S. at 39–40.

range of constitutional rights implicated in the grant of consent.<sup>97</sup> It is a valid concern. Consent, which is often only decided based on the testimony of the defendant and the arresting officer, stands in for the reasonableness inquiry of the Fourth Amendment usually satisfied by a warrant. The typical process of obtaining a warrant involves bringing an oath or affirmation before a magistrate, a showing of probable cause, a description with particularity of the persons and things to be searched, and a faithful execution of that warrant.<sup>98</sup> The courts recognize that these procedures are not for naught—they have been carefully crafted over time to ensure that the privacy interests involved are sufficiently protected.

These courts—for example, the Supreme Courts of Vermont and Wisconsin—also analogize and apply the U.S. Supreme Court’s rules and reasoning in a series of criminal law standard-of-review cases.<sup>99</sup> In *Miller v. Fenton*, the Court held that the ultimate question of the

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<sup>97</sup> *United States v. Wade*, 400 F.3d 1019, 1021 (7th Cir. 2005) (“[T]he legal conclusion of whether [the defendant’s] consent [to search] was voluntary and whether he was illegally seized—are reviewed de novo.”); *State v. Nadeau*, 1 A.3d 445, 454 (Me. 2010) (holding that voluntariness of consent to search presents an “analogous issue[] with constitutional import” to the voluntariness of a confession and thus, as in *Miller v. Fenton*, presents a “question that we will review de novo”); *State v. Tyler*, 870 N.W.2d 119, 127 (Neb. 2015) (“[W]hether . . . facts or circumstances constitute[] a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which we review independently of the trial court.” (citing *State v. Hedgcock*, 765 N.W.2d 469, 477 (Neb. 2009) (facts that “trigger or violate Fourth Amendment protections” must be reviewed de novo)); *State v. Stevens*, 806 P.2d 92, 103 (Or. 1991) (en banc) (deciding “anew” the issue of defendant’s consent to search and whether the facts sufficed to meet constitutional standards); *State v. Hansen*, 63 P.3d 650, 663 (Utah 2002) (“While consent is a factual finding, voluntariness is a legal conclusion, which is reviewed for correctness.”); *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993) (holding that, while the trial court’s “underlying factual findings will not be set aside unless . . . clearly erroneous,” appellate court “view[s] the ultimate conclusion that consent [to search] was voluntary or involuntary as a question of law, reviewable for correctness”); *State v. Phillips*, 577 N.W.2d 794, 800–01 (Wis. 1998) (rejecting proposition that the standard of appellate review for “matters of constitutional fact” “turn[s] on whether the underlying determination of the [trial] court was fact-specific”); see also *United States v. Lewis*, 921 F.2d 1294, 1301 (D.C. Cir. 1990) (conducting de novo review of a trial court’s finding of involuntary consent, although deferential review is “generally” provided); *United States v. Garcia*, 890 F.2d 355, 359–60 (11th Cir. 1989) (reviewing trial court’s decision on voluntariness de novo when facts were undisputed).

<sup>98</sup> Ronald Jay Allen et al., *Criminal Procedure: Investigation and Right to Counsel* 421–27 (2d ed. 2011).

<sup>99</sup> See *Weisler*, 35 A.3d at 977–83; *Phillips*, 577 N.W.2d at 798–800.

voluntariness of a confession requires de novo review.<sup>100</sup> In *Thompson v. Keohane*, the Court examined the voluntariness of a defendant's confession and held that the question of whether a suspect is "in custody" and therefore entitled to *Miranda* warnings was "a 'mixed question of law and fact' qualifying for independent review."<sup>101</sup> The lower courts applying de novo review find the same reasoning applies to the voluntariness of consent searches.

These same lower courts also conduct de novo review based on a holding that voluntariness is a constitutional fact.<sup>102</sup> Where "the issue falls somewhere between a pristine legal standard and a simple historical fact," de novo review is favored.<sup>103</sup> This aligns with cases like *Ornelas v. United States*, which required de novo review of findings of reasonable suspicion and probable cause on appeal.<sup>104</sup> There, the Court held that a "policy of sweeping deference would permit, [i]n the absence of any significant difference in the facts, the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause," leading to an "unacceptable" set of varied results.<sup>105</sup>

Other courts, including most federal circuits, have tended to review voluntariness as mere historical fact under the highly deferential clear error standard without much justification.<sup>106</sup> Professor LaFave notes that the standard is most often "attributed to the Supreme Court's assertion in *Schneckloth v. Bustamonte* that 'the question whether a consent to a

<sup>100</sup> 474 U.S. 104, 111 (1985); see also *Davis v. North Carolina*, 384 U.S. 737, 741–42 (1966) ("It is our duty in this case, however, as in all of our prior cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination of the ultimate issue of voluntariness.").

<sup>101</sup> 516 U.S. 99, 112 n.11, 113 (1995) (observing that contrary to the respondents' suggestion, "[t]he 'totality of the circumstances' cast of the 'in custody' determination . . . does not mean deferential review is in order").

<sup>102</sup> See, e.g., *Weisler*, 35 A.3d at 983; *Phillips*, 577 N.W.2d at 798–99.

<sup>103</sup> *Miller*, 474 U.S. at 114.

<sup>104</sup> 517 U.S. 690, 697 (1996).

<sup>105</sup> *Id.* (alteration in original) (internal quotations marks omitted) (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)).

<sup>106</sup> See, e.g., *United States v. Vega*, 585 F. App'x 618, 619 (9th Cir. 2014); *United States v. Jaimez*, 571 F. App'x 935, 936 (11th Cir. 2014); *United States v. Robertson*, 736 F.3d 677, 680 (4th Cir. 2013); *United States v. Jones*, 614 F.3d 423, 425 (7th Cir. 2010); *United States v. Sanders*, 424 F.3d 768, 773 (8th Cir. 2005); *United States v. Forna-Castillo*, 408 F.3d 52, 62 (1st Cir. 2005); *United States v. Grey*, 50 F. App'x 87 (3d Cir. 2002); *United States v. Flores*, 48 F.3d 467, 469 (10th Cir. 1995).

search was in fact “voluntary” or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.”<sup>107</sup>

In allowing deferential review, these courts cite *Schneckloth*’s holding both too narrowly and too broadly. They cite to the word “fact” without examining the rest of the case in its context. They also tend to have not considered specifically the application of de novo review in light of other developments in criminal law—for example, cases such as *Ornelas*, *Miller*, and *Thompson*. Thus, the courts tend to apply the standard in a routinized fashion, rubber-stamping concepts of stare decisis.<sup>108</sup> They apply the *Schneckloth* holding broadly, citing it to determine the standard of review when the Court did not actually decide that issue.

A narrow reading of the word “fact” leads to their result. The argument goes: *Schneckloth* called voluntariness a fact, factual determination are usually given deferential review,<sup>109</sup> therefore voluntariness gets deferential review. It is a neat and tidy syllogism. But the word “fact” is not the end of the inquiry for determining the correct standard of review. Facts can still require de novo review.<sup>110</sup> And that label may not be that meaningful or descriptive. To begin with, fact and law distinctions are murky, as are their standards of review. The Supreme Court has acknowledged that “the appropriate methodology” for distinguishing questions of historical fact from questions of law “has been, to say the least, elusive,” and admitted that it has “not charted an entirely clear course in this area.”<sup>111</sup> Thus, through varying

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<sup>107</sup> 6 LaFave, *supra* note 27, at 449. (footnote omitted) (quoting *Schneckloth*, 412 U.S. at 227).

<sup>108</sup> See *Jaimez*, 571 F. App’x at 936; *Sanders*, 424 F.3d at 773; *Grey*, 50 F. App’x at 87 (applying, based on parties’ consent, a clear error standard to the question of voluntariness); *Flores*, 48 F.3d at 469.

<sup>109</sup> See *Maine v. Taylor*, 477 U.S. 131, 145 (1986); *Campbell v. United States*, 373 U.S. 487, 493 (1963).

<sup>110</sup> *Davis v. North Carolina*, 384 U.S. 737, 741–42 (1966) (applying de novo review to the factual question of a confession’s voluntariness); *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 514 (1984) (applying de novo review to libel’s “actual malice” determination).

<sup>111</sup> *Miller v. Fenton*, 474 U.S. 104, 113 (1985); see also *Thompson v. Keohane*, 516 U.S. 99, 110–11 (1995) (“[T]he proper characterization of a question as one of fact or law is sometimes slippery.”). See generally Monaghan, *supra* note 82, at 267 (noting the “erratic and uncertain” state of the law governing standard of review and the fact/law distinction).

interpretations of *Schneckloth*'s holding, the proper standard of review becomes even more muddled.

Some courts have recognized there are persuasive readings of *Miller* and other Supreme Court cases that would militate towards requiring de novo review.<sup>112</sup> Yet, a lack of clarity and further instruction from the Court has dissuaded them from accepting these “forcefully” made arguments.<sup>113</sup> Clarity from the Supreme Court is necessary to make sure that the law is both unified and correct.

#### IV. THE STANDARD OF REVIEW IS OFTEN THE DETERMINATIVE FACTOR FOR A QUESTION ON APPEAL

One might be tempted to ask here if the game is worth the candle, if a different standard of review would make any difference. The answer has to be yes. Appellate standards of review clearly matter: the Federal Rules of Appellate Procedure state that appellants must include them in every question brought before an appellate court.<sup>114</sup> Indeed, in at least one case the Supreme Court has criticized an appellate court for not explicitly identifying the correct standard when it reviewed findings of fact.<sup>115</sup> And a conflict between standards is “not merely semantic or academic.”<sup>116</sup> One federal appellate judge has written that the standard of review “more often than not determines the outcome” of an appeal.<sup>117</sup> Empirical evidence backs this claim up. Cases on de novo review are fifty to one hundred percent more likely to be overturned as those with deferential standards applied.<sup>118</sup> Achieving a unity of law on the review of consent searches will help guide lower courts to correct results.

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<sup>112</sup> See, e.g., *In re J.M.*, 619 A.2d 497, 500 (D.C. 1992).

<sup>113</sup> *Id.* at 501 (pledging to continue applying the clearly erroneous standard “[u]ntil the Supreme Court signals plainly that the voluntariness of consent for Fourth Amendment purposes is no longer an issue of fact”).

<sup>114</sup> Fed. R. App. P. 28(a)(8)(B).

<sup>115</sup> *Amadeo v. Zant*, 486 U.S. 214, 223–24 (1988) (“Even assuming, somewhat generously, that the Court of Appeals recognized and applied the appropriate standard of review . . .”).

<sup>116</sup> *Gee v. Boyd*, 471 U.S. 1058, 1060 (1985) (White, J., dissenting from denial of certiorari).

<sup>117</sup> Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1391 (1995).

<sup>118</sup> Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 Utah L. Rev. 1, 24 (2012) (identifying a 31.3% reversal rate for de novo review,

Furthermore, the subject matter behind this doctrinal split, the correct standard of review for voluntariness of consent, is of vital constitutional importance. This is not self-indulgent, abstruse quibbling. Constitutional violations carry on without a remedy. Convictions that should not have happened occur. People are in jail who should not be. Any confusion in making a decision that may lead to imprisonment is doubly dangerous, relative to the run-of-the-mill legal error. Indeed, the Supreme Court has labeled inconsistencies in Fourth Amendment legal standards as “unacceptable.”<sup>119</sup> Waiver of any constitutionally protected interest and “acquiescence in the loss of fundamental rights” cannot be presumed,<sup>120</sup> nor may it be lightly inferred.<sup>121</sup> The admission of evidence that should be excluded leads to convictions that should not happen. When imprisonment is the cost of a wrong decision, the stakes cannot be much higher. Beyond that, wrongfully coerced consent invades the “sacred” and “carefully guarded” right of every individual to control his or her own body unless there is “clear and unquestionable authority of law” requiring otherwise.<sup>122</sup>

The failure to exclude evidence can also foil the police behavior-shaping that motivates the exclusionary rule: these are usually the only Fourth Amendment claims brought. Courts will rarely hear cases where consent was withheld or coerced but law enforcement found no evidence of a crime because there is often little incentive for a citizen to bring such a claim. We know that tens of thousands, if not hundreds of thousands, of searches take place when no incriminating evidence is found,<sup>123</sup> but the subjects of those searches may lack the standing to litigate suits—the same suits that the Supreme Court relies on to shape police conduct. The standing rules under the Fourth Amendment are “premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the

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22% reversal rate for clear error review, 19.5% reversal rate for abuse of discretion review, and 14.2% reversal rate when both deferential standards are applied).

<sup>119</sup> *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (“Such varied results would be inconsistent with the idea of a unitary system of law.”).

<sup>120</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Ohio Bell Tel. Co. v. Public Utils. Comm’n*, 301 U.S. 292, 307 (1937)).

<sup>121</sup> *United States v. Gaines*, 441 F.2d 1122, 1123 (2d Cir. 1971).

<sup>122</sup> *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251–52 (1891) (determining whether surgery without a patient’s consent provided a cause of action in tort).

<sup>123</sup> *Durose*, *supra* note 35, at 6; N.J. Office of the Att’y Gen., *supra* note 40.

Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search."<sup>124</sup> As a result, improper police tactics carry on, underdeterred.<sup>125</sup>

De novo review would help solve this problem. Independent review by appellate courts provides useful precedents to "guide future decisions" and "may guide police, unify precedent, and stabilize the law."<sup>126</sup> Such robust appellate review is an essential component of the primary remedy for Fourth Amendment violations: the exclusionary rule, which is "designed to deter police misconduct," and the clear, uniform guidelines that help police make the right decisions in the first instance.<sup>127</sup> Thus, more stringent standards of review in Fourth Amendment cases serve critical functions in accomplishing larger constitutional aims.

Without a unified form of review, different jurisdictions are more likely to reach a different result when confronting the same factual scenario. Two judges with differing interpretations of the Fourth Amendment might each find consent and coercion in the same fact pattern. Deferential review would allow the law in those two jurisdictions to tack away from each other, with the result that the legality of certain police actions or a criminal conviction could be determined by geography rather than law.<sup>128</sup>

Some potential questions on which consent might turn highlight the need for de novo review in instructing law enforcement behavior. Under *Schneckloth v. Bustamonte*, no single factor in the review of voluntariness is dispositive,<sup>129</sup> but that does not mean that all factors should be equally persuasive. For example, in *every* jurisdiction, if an officer asks for consent to search after previously having held the

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<sup>124</sup> *United States v. Calandra*, 414 U.S. 338, 348 (1974).

<sup>125</sup> See *supra* notes 22–24 and accompanying text.

<sup>126</sup> *Thompson v. Keohane*, 516 U.S. 99, 114–15 (1995).

<sup>127</sup> *United States v. Leon*, 468 U.S. 897, 916 (1984).

<sup>128</sup> Doctrinal divergence in other areas of criminal law demonstrates this. For example, even within the city of New York, there is a sharp contrast between how Manhattan and Bronx prosecutors interpret the *Brady* requirement of disclosing exculpatory evidence to defendants. The result is that a conviction might turn on "[whether] the defendant had crossed the Brooklyn Bridge before getting arrested." Dan Svirsky, *The Cost of Strict Discovery: A Comparison of Manhattan and Brooklyn Criminal Cases*, 38 N.Y.U. Rev. L. & Soc. Change 523, 524.

<sup>129</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973).



suspect at gunpoint, should that factor weigh heavily towards coercion?<sup>130</sup> If an officer turns off her body camera when she asks a suspect for consent to search? If a suspect was previously in handcuffs?<sup>131</sup> If an officer does not raise her voice, should that factor always militate towards voluntary consent? Independent appellate review would unify the law on these questions, helping trial courts answer the same questions, the same way, every time.

#### V. A DEFERENTIAL STANDARD OF REVIEW IS INCORRECT: DE NOVO REVIEW IS REQUIRED

Because it is asserting that a suspect has waived her constitutional rights, the government has the burden of proving that consent was valid.<sup>132</sup> The prosecution's burden of proving that the consent was actually freely and voluntarily given "cannot be discharged by showing no more than acquiescence to a claim of lawful authority."<sup>133</sup> Where a clearly erroneous standard will leave most trial court determinations undisturbed, de novo review will more often show this burden was not met. Therefore, a deferential standard of review makes it more difficult for a defendant to show that the government never met its burden of proof. Deference makes it more likely that prosecutors can use evidence from coerced searches.

The Supreme Court has held that "[v]oluntariness is a question of fact to be determined from all the circumstances" when evaluating the validity of a consent to search.<sup>134</sup> While the Court has not specifically decided the standard of review for that determination, it has cautioned that when a claim disputing voluntariness in other contexts is raised, "it is the duty of an appellate court . . . 'to examine the entire record and

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<sup>130</sup> See, e.g., *United States v. Jones*, 614 F.3d 423, 427 (7th Cir. 2010) (finding no clear error in the district court's finding of consent).

<sup>131</sup> See, e.g., *United States v. Lee*, 793 F.3d 680, 685–86 (6th Cir. 2015), cert. denied, 136 S. Ct. 517 (2015) (finding no clear error in the district court's finding of consent).

<sup>132</sup> *United States v. Mendenhall*, 446 U.S. 544, 557 (1980).

<sup>133</sup> *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968) (citing *Johnson v. United States*, 333 U.S. 10, 13 (1948); *Amos v. United States*, 255 U.S. 313, 317 (1921)).

<sup>134</sup> *Schneekloth*, 412 U.S. at 248–49.

make an independent determination of the ultimate issue of voluntariness.”<sup>135</sup>

*A. Courts Keep Misinterpreting Schneckloth As If It Set the Standard of Review*

Many courts use *Schneckloth v. Bustamonte*'s holding that voluntariness is a fact to be decided on “the totality of the circumstances” as a means of deciding the correct standard of review.<sup>136</sup> But *Schneckloth* does not preclude de novo review.<sup>137</sup> It does not weigh against de novo review. In fact, the decision says nothing about the proper standard of review.<sup>138</sup> As a result, courts should look to other relevant Court cases which have determined standards of review to decide the matter. There are plenty of them, luckily.

When deciding the proper appellate standard of review in criminal cases, labeling a decision as one of fact does not demand one standard of review or another. In some instances, it can militate towards de novo review. The Court illustrated this in *Miller v. Fenton*, specifically noting and rejecting the lower court's conclusion that the “case-specific” nature of the “voluntariness” inquiry undermined any basis for independent review of confessions in habeas proceedings.<sup>139</sup> In that holding, the Supreme Court readily acknowledged that the voluntariness question did not lose its “factual character” merely because it involved “an inquiry into state of mind” or “because its resolution is dispositive of the ultimate constitutional question.”<sup>140</sup> Dispensing with reliance on labels, the Court candidly explained that, “[a]t least in those instances in which . . . the issue falls somewhere between a pristine legal standard and a simple historical fact,” deciding the appropriate standard of review turns on the basic “determination that, as a matter of the sound

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<sup>135</sup> *Beckwith v. United States*, 425 U.S. 341, 348 (1976) (quoting *Davis v. North Carolina*, 384 U.S. 737, 741–42 (1966)); see also, *Miller v. Fenton*, 474 U.S. 104, 116 (1985) (finding that the complex nature of voluntariness “militates against treating the question as one of simple historical fact”).

<sup>136</sup> See *supra* Section III.C and accompanying text.

<sup>137</sup> *Schneckloth*, 412 U.S. at 227.

<sup>138</sup> *United States v. Navarro*, 90 F.3d 1245, 1256 n.6 (7th Cir. 1996).

<sup>139</sup> 474 U.S. at 113.

<sup>140</sup> *Id.*

administration of justice, one judicial actor is better positioned than another to decide the issue in question.”<sup>141</sup>

It is axiomatic that trial courts are often better equipped to decide historical timelines and to answer basic factual questions: whether the delivery of goods made it on time or whether the traffic light was green.<sup>142</sup> Appellate courts decide questions of law and “facts” so interwoven with constitutional rights that their determination can change the scope of the rights.<sup>143</sup> If all legal rules could be decided in advance and in exacting detail, this type of decision would be a simple one. But that is not the case. Applying rules to conduct is a “complex psychological process, one that often involves judgment. The more general the rule, the larger the domain for judgment.”<sup>144</sup> As a result, the application of certain types of laws often leads to definition of the laws themselves.

*Schneckloth*’s “totality of the circumstances” language does not require deferential review either. In *Thompson v. Keohane*, the Court addressed and rejected this argument in deciding the standard of review for an “in custody” determination under *Miranda*. The Court stated that, contrary to the government’s suggestion, “[t]he ‘totality of the circumstances’ cast of the ‘in custody’ determination . . . does not mean deferential review is in order.”<sup>145</sup> There is no reason to view the two types of determinations, the voluntariness of a search and the voluntariness of a confession, and their respective standards of review differently.

Appellate review of the voluntariness of confessions is the most important and most analogous body of law to the consent question. Context here is critical, because the standard of review governing the voluntariness of confessions—at the time of *Schneckloth* and since—is generally de novo.<sup>146</sup> The Court has found no inconsistency in deeming

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<sup>141</sup> *Id.* at 114.

<sup>142</sup> See Chad M. Oldfather, *Universal De Novo Review*, 77 *Geo. Wash. L. Rev.* 308, 332 (2009).

<sup>143</sup> See *infra* notes 150–171 and accompanying text.

<sup>144</sup> Monaghan, *supra* note 82, at 236.

<sup>145</sup> *Thompson v. Keohane*, 516 U.S. 99, 112 n.11 (1995).

<sup>146</sup> See *Miller v. Fenton*, 474 U.S. 104, 115 (1985) (declining “to abandon the Court’s longstanding position” that the ultimate question of voluntariness of a confession “is a legal question meriting independent consideration”); *United States v. Tompkins*, 130 F.3d 117, 120

the voluntariness of a confession to be a highly contextual, fact-specific inquiry in the first instance, but still subject to *de novo* review on appeal.<sup>147</sup> Thus, without more, labeling consent to search as a question of fact, even one to be determined from the totality of the circumstances, “does little to advance the standard-of-review analysis.”<sup>148</sup>

Thus, many courts have improperly assumed a Supreme Court holding that does not exist. There is no requirement of deferential review from the Supreme Court, even though voluntariness is a question of fact under *Schneekloth*. Less stringent standards of review lead to fewer reversals of decisions to deny suppression. This has led to and will lead to evidence being admitted that stems from improperly coerced searches by law enforcement.<sup>149</sup> Because the evidence stemming from these illegal searches is not excluded by suppression motions, law enforcement is not properly instructed on the metes and bounds of Fourth Amendment acceptability.

*B. The Supreme Court Has Laid out a Framework for Solving This Problem*

The Supreme Court has developed a robust body of law around standard of review determinations, specifically in criminal law. The law surrounding the voluntariness of confessions and the waiver of other constitutional rights should inform the law of voluntariness of consents to search. The *Schneekloth* decision itself began its own analysis there. In its analysis, the Court stated “[t]he most extensive judicial exposition of the meaning of ‘voluntariness’ has been developed in those cases in which the Court has had to determine the ‘voluntariness’ of a defendant’s confession for purposes of the Fourteenth Amendment.”<sup>150</sup> It stated it would turn “to that body of case law” to find a definition, going on to cite *Miranda v. Arizona*,<sup>151</sup> *Spano v. New York*,<sup>152</sup> and *Brady v.*

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n.10 (5th Cir. 1997) (noting that the “ultimate issue” concerning the voluntariness of confessions “is uniformly held to be subject to *de novo* review”).

<sup>147</sup> *Davis v. North Carolina*, 384 U.S. 737, 741–42 (1966) (requiring *de novo* review even with a record holding conflicting facts based on witness credibility).

<sup>148</sup> *State v. Weisler*, 35 A.3d 970, 977 (Vt. 2011).

<sup>149</sup> *Supra* notes 31–40.

<sup>150</sup> *Schneekloth*, 412 U.S. at 223.

<sup>151</sup> 384 U.S. 436, 507 & n.3 (1966) (Harlan, J., dissenting).

<sup>152</sup> 360 U.S. 315, 321 n.2 (1959).

*United States*<sup>153</sup> as the sources of meaning for voluntariness.<sup>154</sup> *Schneckloth* was not decided in a vacuum. The Court reached its decision by drawing on various doctrines of criminal law, and therefore logically the decision should be interpreted in the greater context of those doctrines. As a result, the Court's approaches to other standards-of-review questions are instructive.

The Supreme Court has refined its approach to standard-of-review issues in a pair of pivotal criminal-procedure rulings, *Thompson v. Keohane* and *Ornelas v. United States*. In *Thompson*, the Court held that independent review was required to answer whether a suspect was “in custody”—a question necessarily asking whether the state has exercised control over a suspect—for purposes of a *Miranda* inquiry.<sup>155</sup> In *Ornelas*, the question was whether trial court findings of reasonable suspicion to stop and probable cause to conduct a warrantless search should be reviewed deferentially, on a clear error standard.<sup>156</sup> The Court ruled that they should be reviewed de novo.<sup>157</sup>

The Court applied parallel factors and reasoning in reaching its conclusion in both cases, indicating that standard of review analysis may be transferrable. First, it noted that “objective” factors inform both decisions. In deciding the in-custody issue, the questions are “what were the circumstances surrounding the interrogation” and “would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.”<sup>158</sup> In *Ornelas*, the Court observed that once the historical facts are established, the decision turns on “whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.”<sup>159</sup> Thus, assessments of demeanor and credibility—the traditional province of the trial judge—while relevant to establishing the underlying facts, were not necessary to the crucial evaluation as to whether those facts

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<sup>153</sup> 397 U.S. 742, 749 (1970).

<sup>154</sup> *Schneckloth*, 412 U.S. at 223–24 & nn.5–6.

<sup>155</sup> 516 U.S. 99, 102 (1995) (holding the “in custody” determination was a mixed question of fact and law).

<sup>156</sup> 517 U.S. 690, 691 (1996).

<sup>157</sup> *Id.*

<sup>158</sup> *Thompson*, 516 U.S. at 112 (“[T]he court must apply an objective test to resolve ‘the ultimate inquiry’ . . .”).

<sup>159</sup> 517 U.S. at 696.

meet the objective test of reasonableness in either case.<sup>160</sup> These types of constitutional facts must be fully tested at the appellate level.

These decisions went on to say *de novo* review should be granted when legal rules acquire content only through application. Where the “relevant legal principle can be given meaning only through its application to the particular circumstances of a case,” the trier of fact’s findings should not enjoy “presumptive force” and thereby “strip a federal appellate court of its primary function as an expositor of law.”<sup>161</sup> This is especially true in Fourth Amendment law. The Court has a “long-established recognition” that undefined standards under the Fourth Amendment “are not susceptible of Procrustean application,” and instead, “[e]ach case is to be decided on its own facts and circumstances.”<sup>162</sup> If the law cannot be fully defined without reference to particular facts, appellate review is favored. This includes such nebulous concepts as probable cause and reasonable suspicion.<sup>163</sup> That means appellate courts must apply *de novo* review when Fourth Amendment law takes “substantive content from the particular contexts in which [its] standards are being assessed.”<sup>164</sup> When the stakes are high, and the law cannot be fully articulated in advance, trial courts cannot be left to stand as the chief architects of the law.<sup>165</sup> This has long been the holding of the Court in reviewing the voluntariness of a defendant’s confession, which reflects the same type of coercion concerns as consent searches, and where the law is also defined by its application to novel factual situations.<sup>166</sup> Thus, increased ability of appellate courts to shape the law as it develops is a critical feature in Fourth Amendment jurisprudence.

Lastly, *de novo* review is favored when courts decide constitutional facts—applying the law to facts in constitutional cases in ways that

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<sup>160</sup> *Id.* at 696–97; *Thompson*, 516 U.S. at 113–15.

<sup>161</sup> *Ornelas*, 517 U.S. at 697 (internal quotation marks omitted) (quoting *Miller*, 474 U.S. at 114).

<sup>162</sup> *Ker v. California*, 374 U.S. 23, 33 (1963) (internal quotation marks omitted) (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)).

<sup>163</sup> *Ornelas*, 517 U.S. at 697.

<sup>164</sup> *Id.* at 696 (citing *Illinois v. Gates*, 462 U.S. 213, 232 (1983); *Terry v. Ohio*, 392 U.S. 1, 29 (1968); *Ker*, 374 U.S. at 33; *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

<sup>165</sup> *Id.* at 696–97.

<sup>166</sup> See *Miller*, 474 U.S. at 115.

define the right itself.<sup>167</sup> This process often “requires consideration of the abstract principles that inform constitutional jurisprudence.”<sup>168</sup> De novo review here is common sense. “The proverbial man from Mars” would ask why a single district judge’s opinion should be preferred over the collectively developed judgment of “distinguished members” of an appellate court, after the issue has been fully ventilated, and if an error was in fact apparent.<sup>169</sup> This is especially true when the stakes are so high that a citizen’s freedom, imprisonment, or life hangs in the balance.

Even when witness credibility is the basis for a decision, de novo review is proper when constitutional facts are at stake.<sup>170</sup> In *Bose Corp. v. Consumers Union*, the Court wrote, “It reflects a deeply held conviction that judges—and particularly Members of [the Supreme Court]—must exercise such [de novo] review in order to preserve the precious liberties established and ordained by the Constitution.”<sup>171</sup> In that instance, the constitutional right was that of free speech that could be chilled by an overbroad rule.

Furthermore, the Supreme Court has invoked the constitutional fact doctrine through the Due Process Clause of the Fifth Amendment. In *Ng Fung Ho v. White*, the Court held that due process required de novo review of facts found in an administrative deportation proceeding.<sup>172</sup> It deemed the personal liberty interests at stake as too important to allow an administrative body alone to determine the facts upon which the interest rested. “To deport one who . . . claims to be a citizen,” wrote Justice Brandeis, “obviously deprives him of liberty . . . . It may result also in loss of both property and life; or of all that makes life worth living.”<sup>173</sup> To safeguard this interest, due process “afford[ed] protection”

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<sup>167</sup> See *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 496–514 (1984) (applying de novo review to the factual question of malice in free speech analysis).

<sup>168</sup> *United States v. Kim*, 105 F.3d 1579, 1580–81 (9th Cir. 1997) (holding that de novo review applies to whether a suspect had authority to consent to a search, and quoting *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir. 1984) (en banc), cert. denied, 469 U.S. 824 (1984)).

<sup>169</sup> Henry J. Friendly, *Indiscretion About Discretion*, 31 *Emory L.J.* 747, 751 (1982).

<sup>170</sup> See *Bose Corp.*, 466 U.S. at 496–514 (holding that Federal Rule of Appellate Procedure 52(a) did not prevent independent review of a trial court’s finding of “actual malice” based on the credibility of a key witness).

<sup>171</sup> *Id.* at 510–11.

<sup>172</sup> 259 U.S. 276 (1922).

<sup>173</sup> *Id.* at 284. (citing *Chin Yow v. United States*, 208 U.S. 8, 13 (1908)).

and required a de novo judicial proceeding.<sup>174</sup> While the same degree of concern would not likely attach to an appellate court giving deference to an Article III judge's determinations, the Supreme Court has described de novo review as a right of due process in certain circumstances. This is relevant, because a consent to search also invokes due process concerns.<sup>175</sup>

*C. Rulings from the Supreme Court Show that De Novo Review on the Voluntariness of a Consent to Search Is Required*

The Court's doctrine shows that de novo review is needed. First of all, since *Schneckloth*, the Supreme Court itself has at least once conducted de novo review of the voluntariness of consent.<sup>176</sup> In *United States v. Drayton*, several police officers boarded a Florida bus "as part of a routine drug and weapons interdiction effort."<sup>177</sup> One officer approached two men, Brown and Drayton, who were seated together. He held up his badge so they could identify him as an officer. He stated that the police were looking for drugs and weapons and asked if Brown and Drayton had any bags. When both of them pointed to a bag overhead, the officer asked if they minded if he checked it. Brown agreed, and a search of the bag revealed no contraband. The officer then asked Brown whether he minded if he checked his person. Brown agreed, and a pat-down revealed hard objects similar to drug packages near his thighs. Brown was arrested. The officer then asked Drayton, "Mind if I check you?" When Drayton agreed, a pat-down revealed objects similar to those found on Brown, and Drayton was arrested. Further searching revealed that the men had taped cocaine between their shorts.<sup>178</sup>

The Court did not defer to the trial court's finding on the "fact" of voluntariness.<sup>179</sup> It did not review the finding for clear error. Instead, the Court applied *Schneckloth* and conducted its own, independent analysis of facts to determine whether consent to search had been voluntarily

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<sup>174</sup> Id. at 284–85.

<sup>175</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("The constitutional question in the present case concerns the definition of 'consent' in this Fourth and Fourteenth Amendment context.").

<sup>176</sup> *United States v. Drayton*, 536 U.S. 194, 206–07 (2002).

<sup>177</sup> Id. at 197.

<sup>178</sup> Id. at 198–99.

<sup>179</sup> Id. at 206–07.



given.<sup>180</sup> It independently examined the officer's statements, looking to see if they "indicated a command."<sup>181</sup> The Court assessed the defendants' reactions to those officers to see if coercion was present, and whether a reasonable person would believe they were "free to refuse" the officer's requests to search.<sup>182</sup> Although the Court did not specifically call this *de novo* review, it clearly was unconstrained by the trial court's decision. This should have informed lower appellate courts what the correct standard of review was.

In addition, a universal *de novo* standard is proper because it will favorably shape police conduct, which is the primary purpose of the Fourth Amendment's only meaningful remedy: the exclusionary rule.<sup>183</sup> "Sunlight is said to be the best of disinfectants,"<sup>184</sup> and the events surrounding consents to search need more sunlight. The *Miller* Court wrote, "[T]he critical events surrounding the taking of a confession almost invariably occur in a secret and inherently more coercive environment" than in open court.<sup>185</sup> Consents to search will also often occur in these types of environments. *De novo* review of voluntariness brings consents to search away from the dark sides of highways and dimly lit front porches where they often occur and into the open light of day. This is especially prescient given that law enforcement oversight bodies themselves have recognized that officers have received "insufficient guidance" on what consent means out in the streets.<sup>186</sup>

There are strong originalist reasons to examine consent searches more closely. The Framers believed that judicially issued warrants were the strongest safeguard against abuses and that "no post-search remedy could adequately restore" the breached privacy and security that existed before it.<sup>187</sup> Thus, tighter review of suppression motions, through which deterrence ensures that the bounds of law enforcement discretion are closely cleaved to, serves the original intent behind the Fourth

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<sup>180</sup> *Id.* (considering the "totality of the circumstances," citing *Schneckloth*, 412 U.S. 218).

<sup>181</sup> *Id.* at 206.

<sup>182</sup> *Id.*

<sup>183</sup> See *United States v. Leon*, 468 U.S. 897, 916 (1984).

<sup>184</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (quoting Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 62 (1933)).

<sup>185</sup> *Miller*, 474 U.S. at 117.

<sup>186</sup> Gov't of D.C., Office of Police Complaints, *supra* note 31, at 2.

<sup>187</sup> *Davies*, *supra* note 43, at 589.

Amendment. From the Framers' view, the fewer warrantless searches the better. The further away law enforcement is from general warrants the better.

The Supreme Court's standard-of-review doctrine demonstrates that de novo review is required. Like probable cause, voluntariness gains its meaning from its circumstances. What may be probable cause in July may not be so in December.<sup>188</sup> And what may be voluntary on a sunny sidewalk in Andy Griffith's Mayberry, North Carolina,<sup>189</sup> may be much more coercive in another small town's darkened back alley. Each permutation of the voluntariness question can change its definition one way or another. Therefore, it is critical that appellate courts have their hands on the wheel and are able to steer the course of the law as the Constitution requires. When the law determines who goes to prison and who does not, and how law enforcement interacts with the citizenry on a daily basis, anything less is unacceptable.

As in *Ornelas*, the circumstantial factors of a consent can be determined at the outset. These could include the use or threat of force, the defendant's knowledge of consent, the time and place of the search, the statements of both parties, and so on. Then, after these facts are decided, appellate courts can apply an objective reasonableness inquiry into voluntariness—would a reasonable person feel she was free to say “no” to the officer's request for a search, or to demands for a confession?

And using the rationale of *Miller*, consents are no less fit for de novo review than confessions. There is little difference in the work done by a fact-finder. Courts have held that “the determination of voluntariness of consent is no more fact-specific or credibility-based” than deciding whether investigators had properly honored a defendant's Sixth Amendment right to silence, or whether a defendant “voluntarily, knowingly, and intelligently entered a guilty plea.”<sup>190</sup> While trial courts may be better equipped to handle such factual questions as a general

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<sup>188</sup> *United States v. Sokolow*, 490 U.S. 1, 9 (1989) (“[S]urely few residents of Honolulu travel from that city for 20 hours to spend 48 hours in Miami during the month of July.”).

<sup>189</sup> See Ken Beck & Jim Clark, *The Andy Griffith Show Book: From Miracle Salve to Kerosene Cucumbers, The Complete Guide to One of Television's Best-Loved Shows* (1985).

<sup>190</sup> *State v. Phillips*, 577 N.W.2d 794, 800 (Wis. 1998).

matter, the importance of the constitutional rights involved renders appellate courts the proper authority here.

In addition, the voluntariness of a consent to search is a constitutional fact, not a purely historical one. Thus, de novo review is required. Similar to a confession's voluntariness, a consent to search implicates "a complex of values . . . [that] militates against treating the question as one of simple historical fact."<sup>191</sup> The language of *Schneckloth v. Bustamonte* itself proves that voluntariness is not a mere historical fact. A decision on voluntariness requires weighing and considering "the complex of values implicated in police questioning of a suspect."<sup>192</sup> And "[t]he notion of voluntariness . . . is itself an amphibian."<sup>193</sup> Questions of historical fact mingle with questions of constitutional law, and vital constitutional protections hang in the balance.

This mix of values in judging voluntariness includes the needs of police investigation.<sup>194</sup> But most importantly, it includes the set of values showing American society's "deeply felt belief that the criminal law cannot be used as an instrument of unfairness," and that the risk of "unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice."<sup>195</sup> In cases involving involuntary confessions, the Supreme Court enforces "the strongly felt attitude of our society" that important constitutional and human values are sacrificed where a government actor, in the pursuit of securing a conviction, "wrings a confession out of an accused against his will."<sup>196</sup> This is because a confession will almost always appear to be the strongest evidence there can be to convict a defendant of a crime. The common-sense question is raised: why would someone confess to a crime he did not commit? De novo review is a safeguard in place that tempers a prosecutor's ability to wield such a powerful weapon.

As with the voluntariness of a confession, the voluntariness of a defendant's consent to search may prove effectively dispositive on

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<sup>191</sup> *Miller*, 474 U.S. at 116 (internal quotation marks and citation omitted) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960)).

<sup>192</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 224–25 (1973).

<sup>193</sup> *Id.* at 224 (internal quotation marks omitted) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 604–05 (1961)).

<sup>194</sup> *Id.* at 224–25.

<sup>195</sup> *Id.* at 225.

<sup>196</sup> *Id.* (internal quotation marks omitted) (quoting *Blackburn*, 361 U.S. at 206–07).

guilt—the toothpaste cannot be put back in the tube. Evidence that should not have been discovered will be revealed. Furthermore, that evidence will be painted with the illusion of a defendant’s resignation to their own guilt. The natural assumption when consent is given and evidence is found is that a defendant knew what the police would find and decided to cooperate for more lenient treatment. Although the consent is literally different than a confession to crime, the analogy is not that far of a leap. Whether in front of a judge or a jury, the decision to grant consent can act as an albatross of apparent confession, hanging around the neck of a defendant. This concern is especially troubling when it may be nearly impossible for a person to consent to a request by law enforcement without some overtones of coercion.<sup>197</sup>

This taint of guilt, founded on coercion, pollutes the truth-seeking mission of trial. In one line of cases, the Tenth Circuit and the California Supreme Court have held that if a defendant attempts to exclude third-party testimony on the basis that the testimony was coerced, the voluntariness of that testimony must be reviewed *de novo*.<sup>198</sup> Although it did not rule on the applicable standard of review to apply, in *LaFrance v. Bohlinger*,<sup>199</sup> the First Circuit analyzed the question of witness coercion and fact-finding in depth. It examined the voluntariness of a prisoner-witness’s statement after the man had been threatened while “he was strung out on drugs, frightened, and willing to say anything to get back to his cell.”<sup>200</sup> The First Circuit found that similar due process concerns behind the review of allegedly coerced confessions lay behind the coercion of witness testimony and ruled for the defendant.<sup>201</sup> The same arguments, albeit in dissent, have come from the Supreme Court. In *Malinski v. New York*, Justice Rutledge wrote, “Due process does not permit one to be convicted upon his own coerced confession. It should

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<sup>197</sup> Nadler, *supra* note 2, at 188–89.

<sup>198</sup> *United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999); *People v. Boyer*, 133 P.3d 581, 605 (Cal. 2006). But not all courts agree that coerced third-party testimony must be excluded in the first place, which would render the voluntariness question moot. For example, *Samuel v. Frank*, 525 F.3d 566, 569 (7th Cir. 2008), wrote, “The Supreme Court has not decided whether the admission of a coerced third-party statement is unconstitutional, and this may seem to doom the petitioner’s case,” and ultimately held in a habeas review that there is no right to exclude the evidence of coerced third parties.

<sup>199</sup> 499 F.2d 29 (1st Cir. 1974).

<sup>200</sup> *Id.* at 31–35.

<sup>201</sup> *Id.*

not allow him to be convicted upon a confession wrung from another by coercion.”<sup>202</sup> As the Court recognized in *Schneckloth*, coerced consent to a search also implicates due process concerns—it gets in the way of reaching the truth.<sup>203</sup> Similar arguments should, therefore, be persuasive where a consent to search can create the inference of a defendant’s guilt. A strict standard of review would reflect the Court’s consistently held view that the admissibility of defendant statements evincing guilt “turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant’s will was in fact overborne.”<sup>204</sup>

By every measure the Court has provided in deciding the proper standard of review in criminal cases, independent, de novo review is clearly required. The stakes are too high for deferential review when deciding if consent to a search was voluntarily given. *Schneckloth* and a whole litany of cases demonstrate this point. De novo review serves the deterrent purposes of the exclusionary rule and of the Constitution’s concern with due process in reviewing events that may incriminate a suspect.

In addition, the way in which a motion to suppress is often decided highlights the need for de novo review: a district court itself may be reviewing consent deferentially after a magistrate judge has made preliminary rulings. A district court may refer to a magistrate judge a motion to suppress evidence. A district court is also authorized and encouraged to rule on a suppression motion based on the magistrate judge’s proposed findings of fact and recommendations.<sup>205</sup> This immediately insulates the ultimate question of voluntariness, even before a defendant has reached appellate review.

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<sup>202</sup> 324 U.S. 401, 430–31 (1945) (Rutledge, J., dissenting in part); see also *Bradford v. Michigan*, 394 U.S. 1022, 1023–24 (1969) (Warren, C. J., dissenting from denial of certiorari); *Hysler v. Florida*, 315 U.S. 411, 423–24 (1942) (Black, J., dissenting).

<sup>203</sup> 412 U.S. at 219.

<sup>204</sup> *Miller*, 474 U.S. at 116 (emphasis omitted).

<sup>205</sup> See, e.g., *United States v. Marshall*, 609 F.2d 152, 156 (5th Cir. 1980) (holding that a district court should accept a magistrate judge’s recommendation or at least consult transcripts of hearings held before the magistrate judge).

While the delegation of such judicial duties to a magistrate judge is constitutional “so long as the ultimate decision is made by the district court,”<sup>206</sup> as discussed in this Note, trial court discretion in reviewing voluntariness is itself a problem. This problem comes into sharper relief when one appreciates that that district judges themselves may not be hearing witnesses for credibility or developing other crucial evidence. Further compounding the problem, police officers themselves likely receive informal deference when questioned in suppression hearings, their testimony achieving a quasi-expert status.<sup>207</sup> These layers of deference create a Russian doll of a decision on consent. Finding the kernel of truth within that doll is necessary to serve the purposes of the exclusionary rule. De novo review pierces through to the heart of the matter to ensure the correct decision was made.

*D. Arguments Against De Novo Review Are Unpersuasive*

Despite the persuasive reasons against it, and for reasons not always clear, courts continue to apply the clearly erroneous standard to voluntariness. Although rarely discussed in the case law, there are general objections to de novo review that focus on several aspects of judicial economy. First is the matter of judicial resources: the idea that de novo review is redundant and wasteful and might encourage frivolous appeals.<sup>208</sup> However, this argument proves too much; it could be applied to any issue of law subject to de novo review, and thus it is no persuasive reason in itself to adopt the clearly erroneous standard. It

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<sup>206</sup> *United States v. Raddatz*, 447 U.S. 667, 683 (1980) (a court’s broad discretion to accept, reject, or modify magistrate judge’s proposed findings includes the discretion to rehear witnesses but does not require de novo hearing).

<sup>207</sup> Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 *Harv. L. Rev.* 1995, 2028–31 (2017) (analogizing trial court deference to police testimony to the deference given to technical experts).

<sup>208</sup> *Anderson v. City of Bessemer*, 470 U.S. 564, 574–75 (1985) (stating that de novo review of the factual determination of intentional discrimination as part of a Title VII claim “would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources”); see also Frank R. Strong, *The Persistent Doctrine of “Constitutional Fact”*, 46 *N.C. L. Rev.* 223, 281 (1968) (expressing concern over the potential proliferation of cases requiring independent review); Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 *Duke L.J.* 1427, 1459 (2001) (citing the worry that an “overly expansive constitutional fact doctrine would . . . overwhelm” the appellate docket).

does not tip the scale one way or another in deciding which particular rulings should be reviewed de novo and which should not.<sup>209</sup>

Another related concern expressed by some commentators is the need to define “effective limiting principle[s] for when constitutional fact review should be applied,” so that every appellate issue with a constitutional dimension does not necessarily acquire de novo status.<sup>210</sup> This would be a valid concern if the Court had not already provided the answer. Beginning with *Miller*, the Supreme Court has defined and applied a “reasonably coherent” standard-of-review jurisprudence: it focuses on the comparative advantages of trial and appellate courts, the need to have unified precedents as guideposts to law enforcement, and weighing of “the nature and relative importance” of the values surrounding the question at issue.<sup>211</sup> In addition, while the Court has decided to extend de novo review to certain areas of law,<sup>212</sup> it has also had no difficulty holding some issues to be more appropriate for deferential review.<sup>213</sup> The Court knows how to draw lines when requiring de novo review and could do so here.

Lastly, there are differing interpretations of authority. Those courts that continue to apply a clearly erroneous standard do so on the basis of precedent. But when that precedent is followed to its end, it relies on *Schneckloth*’s characterization of the question as one of fact comparable

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<sup>209</sup> *State v. Thurman*, 846 P.2d 1256, 1271 (Utah 1993) (“[E]ven if the adoption of the clearly erroneous standard would ensure a more manageable (i.e., smaller) appellate docket, this is no reason in itself to adopt the clearly erroneous standard of review for voluntariness of consent determinations.”); see also Maurice Rosenberg, Appellate Review of Trial Court Discretion, 79 F.R.D. 173, 181 (1978) (rejecting preservation of judicial resources as a persuasive reason for appellate deference because “it is non-discriminating [and] could apply to any and every question”).

<sup>210</sup> Hoffman, *supra* note 208, at 1434; see also Monaghan, *supra* note 82, at 264 (citing the “extraordinary variety of contexts” in which the issue may arise).

<sup>211</sup> See *State v. Weisler*, 35 A.3d 970, 981 (Vt. 2011).

<sup>212</sup> See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (review of Eighth Amendment claim subject to de novo review).

<sup>213</sup> See *Thompson*, 516 U.S. at 111 (reaffirming its earlier decisions in *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam), and *Wainwright v. Witt*, 469 U.S. 412, 429 (1985), and finding that issues of a defendant’s competency to stand trial and juror impartiality, respectively, “depend[] heavily on the trial court’s appraisal of witness credibility and demeanor” and thus merit deferential review); *Minn. v. Olson*, 495 U.S. 91, 100 (1990) (stating that the Court was “not inclined to disagree with [the state court’s] fact-specific” decision as to whether exigent circumstances to prevent either escape or destruction of evidence justified law enforcement’s entry without a warrant).

to confessions.<sup>214</sup> Yet, the voluntariness of a confession that is similarly fact bound and may be determined based on witness credibility, “is uniformly held to be subject to de novo review.”<sup>215</sup> Therefore, distilling a clearly erroneous standard from *Schneckloth*’s holding that the voluntariness of consent is a fact is not only incorrect, but in direct opposition with parallel branches of criminal law. Furthermore, the courts that have decided on a clearly erroneous standard have largely done so without examination, just applying the default rule usually attached to pure historical facts.

#### CONCLUSION

In conclusion, de novo review is required when reviewing a trial court’s determination that a defendant’s consent to search was voluntary. Courts that hold otherwise rely on incorrect and overbroad interpretations of *Schneckloth* and fail to apply the proper tests the Supreme Court has laid out. The determination of voluntariness of consent is no more fact specific or credibility based than determining whether other constitutional violations have occurred, and the constitutional values involved are no less important. De novo review serves the remedial ends of the exclusionary rule and mirrors the Framers’ original understanding concerning warrantless searches. Overly “promiscuous”<sup>216</sup> grants of deference to trial courts allow rampant illegal searches to carry on, against both eventual criminal defendants and the huge numbers of innocent citizens who are subject to them.

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<sup>214</sup> See supra notes 108–111 and accompanying text; see also *United States v. Navarro*, 90 F.3d 1245, 1256 (7th Cir. 1996) (concluding based on *Schneckloth* that the court would “review the question of voluntariness . . . for clear error because it is a question of fact to be determined from the totality of the circumstances” (internal quotation marks and citation omitted) (quoting *Schneckloth*, 412 U.S. at 227)).

<sup>215</sup> *United States v. Tompkins*, 130 F.3d 117, 120 n.10 (5th Cir. 1997).

<sup>216</sup> Rosenberg, supra note 211, at 184.