CONSENT FORMS AND CONSENT FORMALISM

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Law enforcement officers frequently use written consent forms to obtain permission for searches. Consent forms are pervasive—indeed, more than ninety percent of state police departments use them in at least some circumstances. And consent forms are popular—advocates for civil liberties, such as the American Civil Liberties Union, have championed their use. Yet even though consent forms are an integral part of American law enforcement culture, virtually no scholarly literature has examined their use.

This Article is the first to provide an in-depth examination of the use of consent forms. Our analysis is founded on two original empirical data sets. The first is a survey of state police department practices that includes data from forty-four states demonstrating that officers routinely use consent forms. The second is a data set consisting of every published appellate case involving a consent form decided between 2005 and 2009, which reveals that fewer than five percent of defendants prevailed—less than half the rate at which defendants prevail in Fourth Amendment cases overall.

With these novel empirical data as our foundation, we draw three conclusions. First, a signed consent form does not signify that a suspect rendered consent voluntarily. The form does little to improve a suspect's understanding of her rights, particularly when the suspect is poorly educated, frightened, not fluent in English, or otherwise impaired in her ability to understand. Second, consent forms do not prevent coercion. If an officer can use coercion or other psychological tactics to obtain verbal consent, surely she can also do so to obtain a signature on a consent form. And finally, consent forms implicitly discourage courts from closely examining whether consent was voluntary because the forms provide a formalistic illusion of voluntariness. That is, obtaining a signed consent form effectively insulates law enforcement from later invalidation of the search on voluntariness grounds. In light of these problems, we urge that police departments reexamine their use of consent forms and that courts rethink the way in which they evaluate consent forms.

The Article concludes with four proposals to remedy the problems with consent forms. First, courts should explicitly hold that a signed consent form does not automatically indicate that an alleged instance of consent was in fact voluntary. Second, courts should analyze consent forms using a more searching inquiry into voluntariness imported from contract law. Third, rather than advocating the use of consent forms, civil rights organizations should use their resources to educate people about their rights. That way, people need not rely on a consent form to educate themselves after a request to search has already occurred.

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And finally, these organizations should press law enforcement entities to use audio and video recording equipment to create a more accurate and complete account of an instance of alleged consent.

INTRODUCTION

Searches conducted pursuant to an individual's consent provide a valuable law enforcement tool. Indeed, the Supreme Court has stated that in some instances "a search authorized by a valid consent may be the only means of obtaining important and reliable evidence."[1] When police lack the necessary justification for a search under the Fourth Amendment—for example, probable cause and a warrant or an exception to the warrant requirement—they can still undertake a search consistent with constitutional parameters if they are able to obtain consent from the person whose Fourth Amendment rights the search implicates.

While verbal consent is constitutionally sufficient, in recent years police departments have increasingly relied on consent forms as a law enforcement tool. A consent form is a standardized document prepared by a law enforcement entity that requests an individual's signature as an indication of agreement to a police search. Such forms vary considerably from one jurisdiction to the next. Some provide the prospective target of a search with the information about her rights—for example, that she has the right to require a warrant prior to a search of her property, that she

1. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

can refuse consent to a warrantless search, and that she may consult with a lawyer prior to a warrantless search.[2] Others simply provide a blank for the suspect to affirm that she consents to a search of a specified area.[3]

At first glance, consent forms might seem to be an improvement over the prior regime of verbal consent as far as protecting individual rights is concerned. Some forms provide suspects with affirmative information about their rights—notification that is not required under applicable Supreme Court doctrine.[4] Even those that do not provide such affirmative information do at least provide a written record of the consent obtained by the police officer; one might argue that this will reduce the likelihood of later credibility battles between officers and defendants. Indeed, several organizations that advocate for individual rights and liberties have strongly supported the use of consent forms.[5]

This Article argues that—contrary to this received wisdom—consent forms are not an unalloyed good, and, in fact, have substantial negative consequences. First, a consent form may do relatively little to improve a suspect's understanding of her rights, particularly when the suspect is poorly educated, frightened, or otherwise unable to understand the form. Indeed, the form may actually foreclose a better understanding on the part of the suspect by causing an officer to feel as though he has no legal or moral responsibility to help suspects understand their rights.

Second, the existence of a consent form may do relatively little to ensure that consent is rendered voluntarily, or, put another way, to ensure that no coercion is involved in obtaining consent. To the extent that an officer can use coercion or other psychological tactics to obtain verbal consent, surely she can also do so to obtain a signature on a consent form.

Finally, and perhaps most troublingly, when courts examine a consent issue, the existence of a consent form generally determines the issue of whether consent was voluntary. Although courts have not said explicitly that a signed consent form is outcome determinative, our original empirical research reveals that in virtually every case where there is a consent form, courts ultimately find that the consent was voluntary.[6] That is, obtaining a signed consent form essentially insulates

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2. *See, e.g.*, Indiana Consent Form (on file with authors).

3. *See, e.g.*, New Hampshire Consent Form (on file with authors).

4. *Schneckloth*, 412 U.S. at 234.

5. *See, e.g.*, Mannix Porterfield, *ACLU Lauds Approval of New Vehicle Search Law in West Virginia*, REGISTER-HERALD (Apr. 30, 2010), http://www.register-herald.com/local/x1687709507/ACLU-lauds-approval-of-new-vehicle-search-law-in-West-Virginia.

6. *See infra* Part II.C, Appendix B.

law enforcement from later invalidation of the search on voluntariness grounds. This development is particularly troubling given that the use of consent forms is widespread, with twelve states in our data set using them in all circumstances and twenty-eight states using them in at least some circumstances.[7]

In light of these concerns, this Article argues that consent forms should not be viewed as a panacea for the problems associated with consent searches. Instead, it proposes that we treat written notice as one element of a suite of law enforcement innovations designed to ensure that consent is truly knowing and voluntary. And doctrinally, this Article argues that courts should make clear that consent forms do not dispose of the question of voluntariness and that a signed form, in the absence of other evidence, neither indicates voluntariness nor creates a presumption in favor of voluntariness.

In advancing these arguments, this Article proceeds in four parts. Part I provides a foundation for the subsequent discussion by summarizing the law and legal scholarship relating to consent searches. Part II offers a brief history of the use of consent forms. It then presents two original data sets: (1) a survey of the use of consent forms by forty-four state law enforcement entities, and (2) a compilation of every published case presented to the federal courts of appeals during a five-year time period in which a consent issue was litigated and the facts involved a consent form. Part III deploys this empirical data to develop a critique of the use of consent forms on the grounds that they do not enhance suspects' knowledge of their rights, they do not diminish the risk of coercion, and they effectively insulate the consent from subsequent judicial review. In light of these concerns, Part IV proposes that the use of consent forms should be discontinued and instead recommends a suite of best practices for law enforcement officers and doctrinal innovations that courts should employ to ensure that consent is truly knowing and voluntary. These innovations will not unduly hinder law enforcement officers in performing their duties and will better protect individual rights in keeping with the spirit of the Fourth Amendment.

I. AN OVERVIEW OF CONSENT SEARCHES

This Part provides a summary of the existing law and legal scholarship relating to consent. We begin by tracing the history of

7. *See* Appendix A.

consent forms from the seminal case of *Schneckloth v. Bustamonte*[8] to present case law on consent searches. We then summarize the law review literature relating to consent searches. Surprisingly, given how frequently consent forms figure into cases, virtually no scholarly literature has directly examined the use of consent forms in consent searches.

A. Case Law

The Fourth Amendment to the United States Constitution provides in part that "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[9] Courts have interpreted the Fourth Amendment to mean that searches conducted without both probable cause and a warrant are "*per se* unreasonable."[10] Yet courts have also established a number of exceptions to this interpretation.[11] One such exception is a consent search—that is, when an individual agrees to allow a police search, the police no longer need to establish probable cause and obtain a warrant to comply with the Constitution.

Consent searches are not, however, immune from Fourth Amendment scrutiny. The Supreme Court's 1973 decision in *Schneckloth v. Bustamonte* explained that such searches must be "voluntary" and articulated the factors that courts should consider when determining whether a suspect's consent was in fact voluntary.[12] *Schneckloth* held that courts should employ a totality of the circumstances analysis, which takes into consideration both the characteristics of the accused and the details of the interrogation.[13] Relevant characteristics of the accused include her age, her level of education and intelligence, and whether she had any advice regarding her constitutional rights.[14] The aforementioned factors are what later courts have identified as "subjective factors"—that is, they involve viewing the

8. 412 U.S. 218 (1973).

9. U.S. CONST. amend. IV.

10. *Katz v. United States*, 389 U.S. 347, 357 (1967).

11. *See, e.g.*, *Arizona v. Gant*, 556 U.S. 332, 335 (2009) (search incident to arrest exception); *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001) (arrest exception); *California v. Acevedo*, 500 U.S. 565, 579–80 (1991) (automobile exception); *Arizona v. Hicks*, 480 U.S. 321, 325–26 (1987) (plain view exception); *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (exigent circumstances exception).

12. *Schneckloth*, 412 U.S. at 226.

13. *Id.*

14. *Id.*

consent encounter from the suspect's perspective.[15] In examining the details of the interaction, courts should also consider factors such as the length of the detention, the repeated and prolonged nature of the requests for consent, and "the use of physical punishment such as the deprivation of food and sleep."[16] Such factors are considered objective factors.[17] The *Schneckloth* Court emphasized that the analysis must examine the totality of the circumstances, stating that none of its previous decisions "turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances."[18] Notably, the Court overruled the Ninth Circuit's holding, which required proof that the suspect knew of her right to refuse consent as a prerequisite to finding that consent was voluntary—that is, knowledge of one's rights is not required to establish voluntariness.[19] Furthermore, the Court held that the government bears the burden of proving, by a preponderance of the evidence, that the defendant's consent was voluntary.[20]

A year after the Court decided *Schneckloth*, Justices William Douglas and Thurgood Marshall dissented from the Supreme Court's denial of certiorari in *Gentile v. United States*.[21] In the dissent, Justice Douglas distinguished the facts of *Gentile* from those of *Schneckloth* because in the former, the subject of the search was in police custody.[22] The *Schneckloth* Court stated that "warning the subject of his right to refuse would be 'impractical' under the 'informal and unstructured conditions' of a roadside search."[23] In his dissent in *Gentile*, Justice Douglas contended that the same impracticability did not apply to situations in which the subject was in police custody, stating, "the circumstances under which an arrestee in police custody meets with his captors are hardly 'unstructured.'"[24] Because the search is within the control of the police officers, he argued, the officers can control the pace and format of questioning and can inform the subject that he has the right

15. *See, e.g.*, *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011).
16. *Schneckloth*, 412 U.S. at 226.
17. *See id.*
18. *Id.*
19. *Id.* at 229–30.
20. *Id.* at 222.
21. 419 U.S. 979 (1974).
22. *Id.* at 981–82.
23. *Id.* at 981 (quoting *Schneckloth*, 412 U.S. at 231–32).
24. *Id.*

to refuse consenting to a search.[25] Justice Douglas criticized the use of consent forms in lieu of obtaining a warrant, stating:

> By proceeding on the basis of a "consent" form the police circumvent three important protections of the warrant procedure. First, they avoid submitting to a magistrate's independent assessment of probable cause. Second, they are spared the necessity of making a record, in the form of an affidavit sworn to prior to the search, that guards against the possibility that an *ex post facto* justification will be based upon what the search turns up. Finally, to the extent the police use, as they did here, a boilerplate consent form, they are relieved of the particularity requirement of the warrant.[26]

In closing, Justice Douglas wrote that the use of consent forms with people in police custody should be examined "carefully and critically."[27]

Despite Justice Douglas's well-reasoned objections, his views did not carry the day, and the Court has since reaffirmed that the Fourth Amendment does not require notification of one's constitutional rights. *United States v. Drayton*[28] maintained this position, holding that police need not affirmatively advise suspects of their rights.[29] In *Drayton*, the respondents were traveling on a Greyhound bus and, when the bus stopped to refuel, three Tallahassee Police Department officers boarded the bus.[30] The officers were "dressed in plain clothes and carried concealed weapons and visible badges."[31] One officer knelt on the driver's seat facing the passengers in the bus, while the other two officers went to the back of the bus; one officer remained at the back while the other worked his way to the front of the bus, questioning individual passengers about their travel plans and their luggage.[32] When the police officer approached the defendants, he asked for permission to search their bags and their persons.[33] The defendants pointed to their bags and one verbally agreed to let the officer search his bags and his person.[34]

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25. *Id.*
26. *Id.* at 982.
27. *Id.*
28. 536 U.S. 194 (2002).
29. *Id.* at 206–07.
30. *Id.* at 197.
31. *Id.*
32. *Id.* at 197–98.
33. *Id.* at 198–99.
34. *Id.* at 199.

The officer found "hard objects similar to drug packages" strapped to respondent Brown's inner thighs; after Brown was arrested and handcuffed, another officer escorted Brown off the bus.[35] Immediately after, the first officer asked respondent Drayton for his permission to search him.[36] Drayton consented, and when the officer found similar packages as he had found on Brown, Drayton was arrested and escorted from the bus.[37]

The Eleventh Circuit held that it was bound by precedent in *United States v. Washington*[38] and *United States v. Guapi*,[39] which held that "bus passengers do not feel free to disregard police officers' requests to search absent 'some positive indication that consent could have been refused.'"[40] But in a six to three decision, the Supreme Court reversed the Eleventh Circuit and held that the respondents' consent was voluntary.[41] The *Drayton* Court rejected the Eleventh Circuit's holdings that bus passengers, because they are in a confined area with the searching officers, do not feel free to decline giving their consent, and the Court examined the circumstances under the *Schneckloth* totality of the circumstances inquiry.[42] Notably, the Court cited its earlier decision in *Florida v. Bostick*,[43] in which the Court held that the reasonable person test, as applied to Fourth Amendment consent searches, "presupposes an *innocent* person."[44]

The Supreme Court also reemphasized *Schneckloth*'s totality of the circumstances test and the lack of obligation to affirmatively advise suspects of their rights in *Ohio v. Robinette* (*Robinette II*),[45] which dealt with the question of when a legal detention ends and when a consent search begins.[46] There, while on a drug interdiction check, Officer Newsome pulled Robinette over for speeding and did a customary license check.[47] Finding no prior violations, Officer Newsome returned to Robinette's car.[48] Instead of letting Robinette leave with a warning, as

35. *Id.*
36. *Id.*
37. *Id.*
38. 151 F.3d 1354 (11th Cir. 1998).
39. 144 F.3d 1393 (11th Cir. 1998).
40. *Drayton*, 536 U.S. at 200 (quoting *Washington*, 151 F.3d at 1357).
41. *Id.* at 196, 200.
42. *Id.* at 207.
43. 501 U.S. 429 (1991).
44. *Drayton*, 536 U.S. at 201–02 (quoting *Bostick*, 501 U.S. at 437–38).
45. 519 U.S. 33 (1996).
46. *Id.* at 35.
47. *Id.*
48. *Id.*

Newsome testified was his intention when he pulled Robinette over,[49] Newsome asked Robinette to step out of his vehicle.[50] Newsome turned on his video recording device, which was mounted on his police car, and gave Robinette a verbal traffic warning.[51] Newsome then said: "One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"[52] Newsome asked for Robinette's consent to search the car, which Robinette gave, and, upon searching, Newsome found a methamphetamine pill and a small amount of marijuana.[53] Robinette was arrested and charged with criminal offenses for possession of illegal drugs.[54]

The Ohio Supreme Court found that a "'consensual encounter' immediately following a detention is likely to be imbued with the authoritative aura of the detention" and that "[w]ithout a clear break from the detention, the succeeding encounter is not consensual at all."[55] Thus, the court adopted a "bright-line," prophylactic rule stating that officers must clearly inform a person who is stopped for a traffic violation when he is free to go before the officer begins a consent search.[56] The court's intention was to protect the rights of individuals from unwarranted "fishing expeditions" by police officers.[57]

The United States Supreme Court reversed the Ohio Supreme Court's decision, stating that Newsome rightfully stopped Robinette for speeding and that officers can ask a traffic stop detainee to exit his vehicle without violating Fourth Amendment principles.[58] The test, then, ultimately collapsed into the totality of the circumstances test applicable to consent searches. Again rejecting the use of bright-line rules with regard to consent searches, the Court held that, under *Schneckloth*, police officers are not required to inform detainees of their right to refuse consent and courts must apply the totality of the circumstances test in evaluating the constitutionality of the consent.[59]

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49. *State v. Robinette* (*Robinette I*), 653 N.E.2d 695, 697 (Ohio 1995).
50. *Id.*
51. *Id.*
52. *Id.* at 696.
53. *Id.*
54. *Id.*
55. *Id.* at 699.
56. *Id.*
57. *Id.*
58. *Robinette II*, 519 U.S. 33, 38 (1996).
59. *Id.* at 39.

As *Schneckloth* and its progeny demonstrate, courts have set an extraordinarily high threshold for finding a suspect's consent involuntary. Indeed, a case in which a court *did* find consent involuntary reveals how much is necessary to reach that holding. In *United States v. Nuyens*,[60] the Middle District of Florida found that Nuyens's consent, even where he signed a consent form, was involuntary.[61] There, at least five police officers entered Nuyens's home with their guns drawn, announced they were going to conduct a protective sweep, and asked Nuyens to sign the consent form.[62] Although the officers told Nuyens that he did not need to consent, they also told him that they already had a search warrant.[63] Moreover, Nuyens testified that the officers had him sign the form hours after the search was completed.[64] On appeal, the case was affirmed without opinion.[65]

A final milestone in consent jurisprudence is *United States v. Mendenhall*.[66] There, the Supreme Court applied the *Schneckloth* subjective factors in a case involving a young African American female, explicitly considering the fact that she might have felt threatened by the white police officers.[67] Despite the Court's evaluation of subjective factors, the Court found that under the totality of the circumstances, the woman's consent was still voluntary.[68] The Court placed great weight on the fact that Mendenhall was twice informed that she was free to refuse consent.[69] Although the Court found that consent was voluntary, *Mendenhall* was significant because it was the last Supreme Court decision to consider the subjective factors.[70] Following *Mendenhall*, the Supreme Court suggested in a number of cases that the court should determine whether an officer's actions were reasonable from an objective standpoint, rather than a subjective one.[71] These holdings further gave police officers—and took away from search subjects—the benefit of the

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60. 17 F. Supp. 2d 1303 (M.D. Fla. 1998), *aff'd*, 204 F.3d 1120 (11th Cir. 1999).

61. *Id.* at 1310.

62. *Id.*

63. *Id.*

64. *Id.* at 1309.

65. *United States v. Nuyens*, 204 F.3d 1120 (11th Cir. 1999).

66. 446 U.S. 544 (1980).

67. *Id.* at 558.

68. *Id.* at 559–60.

69. *Id.* at 559.

70. Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 781 (2005).

71. *Florida v. Jimeno*, 500 U.S. 248, 249 (1991); *Illinois v. Rodriguez*, 497 U.S. 177, 183–84 (1990); *Mendenhall*, 446 U.S. at 551–52.

doubt with regard to consent searches. The Court has not, however, explicitly overruled *Schneckloth*, leaving doubt regarding the extent to which consent searches should take subjective factors into account.

B. Law Review Literature

In this Section, we survey the existing literature on consent searches under the Fourth Amendment. The existing literature on consent searches deals primarily with three issues: voluntariness, scope, and authority. Scholars have also examined how consent intersects with other Fourth Amendment doctrines and how it fits into law enforcement practices more generally. While consent forms potentially implicate all of these important issues, the literature is virtually devoid of reference to consent forms.

Perhaps the most generous assessment of the voluntariness standard is that it is vague. For example, Marcy Strauss observes that it does not provide a uniform standard for courts, litigants, or police officers to apply.[72] The *Schneckloth* totality of the circumstances test does not draw any bright line rules, and further, it offers little guidance as to what a court will find as voluntary consent. Because of the vagueness of the test, courts are reluctant to consider subjective factors and are even more unwilling to suppress "highly probative and reliable evidence," and accordingly, "judges place a finger on that part of the scale that emphasizes society's interest in promoting unfettered police investigation."[73]

More central to most articles examining consent searches is the notion of voluntariness and, relatedly, the concept of coercion. Many scholars and "even judges have made the very basic observation that most people would not feel free to deny a request by a police officer."[74] As Richard Uviller explains, a police request for consent, "however gently phrased, is likely to be taken by even the toughest citizen as a command."[75] Strauss concurs: "current caselaw fails to consider the reality that most people will feel compelled to allow the police to search,

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72. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 221 (2002); *see also* Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1847 n.17 (2004); Jeremy R. Jehangiri, Note, United States v. Drayton*: "Attention Passengers, All Carry-On Baggage and Constitutional Protections Are Checked in the Terminal*," 48 S.D. L. REV. 104, 107–09 (2003).

73. Strauss, *supra* note 72, at 228.

74. *Id.* at 236.

75. H. RICHARD UVILLER, TEMPERED ZEAL 81 (1988).

no matter how politely the request is phrased."[76] To buttress these intuitions, Dorothy Kagehiro helpfully deploys insights from psychology to reveal the dichotomy between a suspect's perception of coercion during a consent search and an objective observer's perception.[77] While a suspect may perceive the police officer's request for consent to search as coercive, an objective observer such as a judge is much more likely to perceive that the suspect had a true choice in denying consent, revoking consent, and delineating the scope of the search.[78]

Stanley Milgram and Leonard Bickman, among others, have revealed through a renowned series of psychology experiments that "obedience to authority is deeply ingrained" in our society and that "people will obey authority even when it is not in their own best interest to do so."[79] Milgram's experiments showed that individuals had such a high propensity for obeying authority figures that the individuals would cause pain to another person, via electric shocks, when so ordered.[80] Bickman's experiments showed that people obeyed others in uniform at a statistically higher rate than others not in uniform.[81] Eighty-two percent of the subjects picked up trash when ordered by an actor in a "guard" uniform, and sixty-four percent of people complied when ordered by an actor in a "milkman" uniform. In contrast, only thirty-six percent of people complied when a civilian wearing a sports jacket and tie commanded them to do so.[82] A number of legal scholars have examined Milgram and Bickman's research in the context of consent searches, and they have found their insights applicable because a request for consent to search represents a classic instance of a situation in which individuals are likely simply to obey a uniformed authority figure such as a police officer.[83]

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76. Strauss, *supra* note 72, at 213.

77. Dorothy K. Kagehiro, *Perceived Voluntariness of Consent to Warrantless Police Searches*, 18 J. APPLIED SOC. PSYCHOL. 38, 39–40 (1988) [hereinafter *Perceived Voluntariness of Consent*]; Dorothy K. Kagehiro, *Psycholegal Research on the Fourth Amendment*, 1 PSYCHOL. SCI. 187, 188–89 (1990) [hereinafter *Psycholegal Research on the Fourth Amendment*].

78. *Psycholegal Research on the Fourth Amendment*, *supra* note 77, at 189.

79. Strauss, *supra* note 72, at 236.

80. *Id.* at 237.

81. *Id.* at 238.

82. *Id.*

83. *See, e.g.*, David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 62–64 (2009); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 175–77; Matthew Phillips, *Effective Warnings before Consent Searches: Practical, Necessary, and Desirable*, 45 AM. CRIM. L. REV. 1185, 1207–09 (2008); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175,

In the same vein, scholars have argued that voluntariness is a legal fiction—that is, courts' analysis of the concept of voluntariness has little to do with whether the suspect does, in fact, wish to give permission for a search to take place.[84] Tracey Maclin observes that "there is a surreal quality about the Court's consent search jurisprudence,"[85] one that has little to do with the actual grant of consent or lack thereof. While a range of factors prevent a true inquiry into voluntariness, scholars particularly emphasize that, despite *Schneckloth*'s holding, courts rarely consider the *Schneckloth* subjective factors.[86] In her research, Strauss read every published consent case for the three years preceding her article and found that, "[i]n case after case . . . the court simply recited a paragraph on what constituted voluntariness and on the state's burden to demonstrate that the consent was voluntary"; out of hundreds of decisions, only a few courts examined a suspect's particular subjective factors.[87] Scholars observe that this situation is particularly problematic with respect to racial and ethnic minorities, immigrants, and nonnative English speakers, who may be subjectively more vulnerable to coercion.[88]

Scholars also note—largely with concern—the effect of consent searches on law enforcement practices. The consensus is, as Maclin puts it, that "law enforcement officers highly favor consent searches," and that such searches offer many advantages to law enforcement.[89] These

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188 (1991); Adrian J. Barrio, Note, *Rethinking* Schneckloth v. Bustamonte*: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 240; Andrew Eppich, Note, *Wolf at the Door: Issues of Place and Race in the Use of the "Knock and Talk" Policing Technique*, 32 B.C. J.L. & SOC. JUST. 119, 140 (2012); Joshua Fitch, Comment, United States v. Drayton*: Reasonableness & Objectivity – A Discussion of Race, Class, and the Fourth Amendment*, 38 NEW ENG. L. REV. 97, 117–19 (2003).

84. Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 125 (2011); Russell L. Weaver, *The Myth of "Consent,"* 39 TEX. TECH L. REV. 1195, 1199–1200 (2007).

85. Tracey Maclin, *The Good and Bad News about Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 27 (2008).

86. *Id.* at 67; Josephine Ross, *Blaming the Victim: 'Consent' within the Fourth Amendment and Rape Law*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 1, 15–24 (2010); Strauss, *supra* note 72, at 225–28.

87. Strauss, *supra* note 72, at 222.

88. José Felipé Anderson, *Accountability Solutions in the Consent Search and Seizure Wasteland*, 79 NEB. L. REV. 711, 741–47 (2000); Strauss, *supra* note 72, at 236; George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525 (2003); Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 HOW. L.J. 239 (1993); Eppich, *supra* note 83, at 130–34; Fitch, *supra* note 83, at 121–26.

89. Maclin, *supra* note 85, at 31.

advantages include, but are not limited to, the fact that consent searches are easy, that a police officer need not have any suspicion of criminal activity to conduct a consent search, that consent searches circumvent the administrative obstacles inherent in obtaining a warrant, and that police view consent searches as the most reliable way to minimize the risk that evidence will be excluded.[90] Furthermore, a consent search may allow the police to search an even broader area than would a warrant if a suspect gives affirmative consent to a question asking for "permission to search." Lastly, Maclin notes that "consent searches are popular because they allow police to exercise their discretion and power in contexts that affect literally hundreds of thousands of persons where the target is unlikely to say 'no' to a request for a consent search."[91]

In light of these advantages to the police, scholars largely conclude that current consent doctrine provides a check only on the most extreme forms of police coercion. Strauss generalizes that "[o]nly if the police behave with some extreme degree of coercion beyond that inherent in the police-citizen confrontation will a court vitiate the consent."[92] Maclin agrees with her conclusion and finds particularly problematic the notion that police may ask *repeatedly* for consent to search without violating the Fourth Amendment.[93] Although *Schneckloth* does not require verbal warnings, even if such warnings were required, they would not completely cure the coercive relationship between officer and individual: "[i]f a person rejects a search request (or believes that he or she did) and the police officer ignores that rejection by continuing to request permission or wear down the person's will, the suspect may become convinced that his or her wishes will not be respected, regardless of the warning."[94] In sum, consent doctrine fails to provide a meaningful check on police behavior, and a nonmandatory warning that the search is impermissible would be unlikely to cure the deficiency.

Paradoxically, although consent doctrine fails to provide a meaningful check on police behavior, judicial analysis tends to focus on police conduct. For example, based on her reading of three years of cases, Strauss attests to "the overwhelming attention to police behavior

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90. *Id.*

91. *Id.*

92. Strauss, *supra* note 72, at 212.

93. Maclin, *supra* note 85, at 80–81; *see also* Strauss, *supra* note 72, at 254 ("[B]ecause the police are allowed to try to persuade a suspect to consent, even after an initial rejection of permission, it is questionable whether suspects will believe that the officer is truly prepared to honor their wishes.").

94. Strauss, *supra* note 72, at 255.

and the virtual inattention paid to the defendant's subjective factors."[95] And quantitatively, empirical research in a student note by Brian Sutherland suggests that "the best explanation for [overwhelming findings of voluntariness] is that courts find consent voluntary if the evidence does not show police misconduct."[96] A doctrine that both offers officers broad discretion and tends to resolve the case on the basis of their behavior is one under which defendants are unlikely to prevail.[97]

Scholars have also examined the way that consent doctrine extends to other police-individual interactions and permeates Fourth Amendment doctrine. In assessing voluntariness, scholars have discussed the reasonable person standard as applied to consent searches,[98] argued that consent searches are inherently unreasonable under the Fourth Amendment,[99] and contended that the doctrine of consent searches creates tension with the doctrine of plain view searches.[100] Others have examined the issue of third-party consent,[101] considered consent in the context of the *Ohio v. Robinette* issue of when a detention ends and when a consensual encounter begins,[102] surveyed consent cases before state courts,[103] and situated consent in relation to coercive police tactics more generally.[104]

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95. *Id.* at 227.

96. Brian A. Sutherland, Note, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors That Predict the Suppression Rulings of the Federal Circuit Courts*, 81 N.Y.U. L. REV. 2192, 2195 (2006).

97. Available empirical evidence supports this conclusion. Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 422–26 (2012).

98. Maclin, *supra* note 85, at 56–63; Nadler, *supra* note 83, at 165–68; Fitch, *supra* note 83, at 113–15.

99. John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109 (2007); Rotenberg, *supra* note 83.

100. Michael J. Friedman, *Another Stab at* Schneckloth*: The Problem of Limited Consent Searches and Plain View Seizures*, 89 J. CRIM. L. & CRIMINOLOGY 313 (1998).

101. *See, e.g.*, GEORGETOWN LAW JOURNAL, FORTIETH ANNUAL REVIEW OF CRIMINAL PROCEDURE 102–05 (2011); Christo Lassiter, *Consent to Search by Ignorant People*, 39 TEX. TECH. L. REV. 1171, 1179–80, n.68 (2007); Matthew W.J. Webb, Note, *Third-Party Consent Searches after* Randolph*: The Circuit Split over Police Removal of an Objecting Tenant*, 77 FORDHAM L. REV. 3371 (2009); Jason E. Zakai, Note, *You Say Yes, but Can I Say No? The Future of Third-Party Consent Searches after* Georgia v. Randolph, 73 BROOK. L. REV. 421 (2007).

102. *See, e.g.*, Charles W. Chotvacs, *The Fourth Amendment Warrant Requirement: Constitutional Protection or Legal Fiction? Noted Exceptions Recognized by the Tenth Circuit*, 79 DENV. U.L. REV. 331, 332–38 (2002); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79 (1998).

103. *See, e.g.*, Michael E. Postma, State v. Arroyo*: Consent Searches Following Illegal Police Conduct—Removing the Taint from the Fruit of the Poisonous Tree*, 18 J.

The general scholarly consensus is that consent doctrine is deeply flawed and requires reform. Some have developed pragmatic solutions for what they perceive to be deficiencies in the present doctrine.[105] Others have called for the Supreme Court to overrule *Schneckloth* completely.[106] Of course, we would be remiss in failing to acknowledge that a few scholars have argued in favor of consent searches and emphasized the merits of the consent doctrine.[107] But, by and large, the scholarly consensus is that consent doctrine is badly in need of overhaul.

Given this extensive backdrop of scholarly examination of consent doctrine, consent forms are remarkably understudied. To the best of our knowledge, existing research on consent forms consists of a few paragraphs in two student notes. Sutherland's note statistically analyzes consent forms as one of seven factors that might affect the outcome of a motion to suppress.[108] He hypothesizes that courts weigh the presence of a signed consent form against granting a motion to suppress.[109] Sutherland further notes that "police may coerce a suspect into signing a consent form, just as they might coerce his oral consent,"[110] and suggests that "[t]he consent form may shift the voluntariness equation such that a

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CONTEMP. L. 107, 111–13, 115–16, 125 (1992) (discussing Utah state court consent cases); Brendan W. Williams, *Horizontal Federalism Inches Along: New Jersey's Experiment in State Constitutionalism and Consent Searches Finally Finds Company*, 5 TEX. F. ON C.L. & C.R. 1, 8–19 (2000).

104. *See, e.g.*, Craig M. Bradley, *"Knock and Talk" and the Fourth Amendment*, 84 IND. L.J. 1099 (2009) (proposing solutions to intrusive "knock and talk" techniques that police might use); Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 451–55 (2004) (exploring empirical research on consent searches and the fear of police reprisal); Nadler, *supra* note 83 (arguing psychological studies show that judicial intuition created a fiction of consensual searches).

105. *E.g.*, David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941, 954–56 (1997) (arguing that courts must consider the defendant's subjective perspective in determining consent); Simmons, *supra* note 70 (offering a new paradigm that focuses solely on the behavior of the law enforcement official, the degree of compulsion, and the kind of compulsion).

106. *E.g.*, Brian R. Gallini, Schneckloth v. Bustamonte*: History's Unspoken Fourth Amendment Anomaly*, 79 TENN. L. REV. 233, 268–87 (2012).

107. *See, e.g.*, Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69, 91–94 (2007) (responding to articles critiquing consent as a true "voluntariness" inquiry); Case Comment, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2197 (2006) (arguing that consent search "returns to individuals the power to stand up for own their rights").

108. Sutherland, *supra* note 96, at 2220.

109. *Id.* at 2209. These hypotheses are consistent with our own findings. *See infra* Part II.C.

110. Sutherland, *supra* note 96, at 2220.

greater showing of coercion by police is needed in order to find consent involuntary."[111] Although signing a form is an affirmative act that has the potential of alerting a defendant to the import of giving consent, courts allow the consent form to "shift the voluntariness equation" so much that the presence of a form is a virtually dispositive factor in favor of voluntariness. While the affirmative act of signing a form might be useful for defendants, any benefit is far outweighed by courts' deference to signed consent forms, in light of the fact that police officers can still coerce a person into signing a form.[112]

Sutherland's research ultimately yielded no statistically significant finding with respect to consent forms—that is, he did not have sufficient information to conclude that they were significantly correlated with either defendants' success or failure on suppression motions.[113] This lack of significance may be attributed to his relatively small sample of federal district court cases involving a consent search.[114] While Sutherland's research is an important first step, his findings are also limited by his decision to focus on district court cases,[115] where judges have wide discretion whether to write decisions and whose exercise of such discretion may influence his results.

One student note also briefly discusses the merit of consent forms as a way of preempting a swearing match between the police officer and the suspect. The note recognizes that forms do not tell the whole story: "[t]he problem with consent forms . . . is that such forms do not record the intensity of an individual's previous refusals to consent, or the fact that an individual may vigorously have sought to stand up for her own rights before deciding it was a futile endeavor."[116] But the discussion of consent forms is limited to this brief statement.

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111. *Id.* Although Sutherland's view of consent forms is generally aligned with our own, his thinking also shows the influence of the conventional wisdom surrounding consent forms. For example, he notes that "[t]he act of signing the form is an affirmative one . . . and suggests more than mere acquiescence" and that "the written form gives the suspect notice of the import of giving consent and alerts the defendant that he is actually negotiating with police." *Id.*

112. *See infra* Parts II.C., III.A.

113. Sutherland, *supra* note 96, at 2220.

114. The sample included only 142 cases gathered over a two and a half year period. *Id.* at 2214. We note that while our own sample of cases is smaller, it also reflects a longer time period—five years—and, much more importantly, represents a complete census of the cases involving consent forms decided during that period. *See infra* Part II.C.

115. Sutherland, *supra* note 96, at 2201.

116. Case Comment, *supra* note 107, at 2207 (emphasis omitted).

Ultimately, this isolated treatment of consent forms in legal scholarship highlights the need for more nuanced examination and analysis. We enrich the current understanding by providing original empirical data in the next Part.

II. THE USE OF CONSENT FORMS

This Part first briefly recounts the history of the use of consent forms and explains the factors that led to the increase in their use. It then presents two original empirical data sets. The first consists of qualitative interviews with a representative of the state police entity in forty-four of the fifty states. The interviews were designed to elicit that entity's policies regarding consent forms. The second is a quantitative and qualitative analysis of every published federal appellate decision involving consent forms during a five-year time span.

A. History of Consent Forms

Not long after the Supreme Court decided *Miranda v. Arizona*,[117] written waivers of constitutional rights became a standard part of law enforcement practice.[118] Today, waiver forms are common in the context of custodial interrogations. Most police departments use them,[119] and the United States Supreme Court largely treats their use as unremarkable.[120] When courts do hold that a Fifth Amendment violation occurred despite the presence of a signed waiver form, the circumstances surrounding the waiver are generally unusual and raise concerns of coercion.[121] Judging by the widespread use of waivers, law enforcement views such waivers as useful and valuable.

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117. 384 U.S. 436 (1966).

118. Approximately one hundred federal and state cases mentioned written *Miranda* waivers in the five years after that case was decided, generally treating the existence of such forms as unremarkable. We arrived at the number of cases by running the Westlaw search "da(bef 06/13/1971 & (signed /20 (form waiver) /20 miranda)." *Miranda* was decided on June 13, 1966. *Id.* at 436.

119. *See, e.g.*, Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 72 (2006) (reproducing standard *Miranda* waiver form for St. Paul Police Department).

120. *See Bobby v. Dixon*, 132 S. Ct. 26, 30–32 (2011); *Duckworth v. Eagan*, 492 U.S. 195, 197–202 (1989); *Connecticut v. Barrett*, 479 U.S. 523, 532 (1987).

121. *See, e.g.*, *Missouri v. Siebert*, 542 U.S. 600 (2004) (invalidating confession in case involving written waiver when suspect was questioned for thirty to forty minutes without *Miranda* warnings, then asked to sign a waiver and to repeat her confession).

By the time *Schneckloth* was decided in 1973, written waivers had already become an integral part of police culture.[122] *Schneckloth* teaches that—unlike interrogation subjects guaranteed the mandatory quadripartite warning imposed by *Miranda*—individuals asked for consent to search are not entitled to affirmative information about their rights.[123] Although consent doctrine therefore imposes no affirmative obligation to warn, waivers were already part of police culture and were logically used in a situation where a suspect gave up constitutional rights. Unsurprisingly, then, waiver forms gradually migrated from interrogations to searches.

The process leading to adoption of consent forms varies from state to state; much of it is a matter of institutional memory and has been lost to history. In a few instances we do have more information. In New Jersey, for example, the judiciary motivated the institutionalization of consent forms. That state's supreme court held that, despite *Schneckloth*'s ruling, "any consent given by an individual to a police officer to conduct a warrantless search must be given knowingly and voluntarily," and the state bears the burden of showing that the suspect knew she had a choice to refuse consent.[124] In response to the court's holding, the New Jersey State Police developed a "Consent to Search" form, which "authorizes a trooper to conduct a 'complete search' of a motor vehicle or other premises as described by the officer on the face of the form."[125] New Jersey, however, is an outlier: it is one of only four states included in our survey that has ratcheted up the standard for consent searches—requiring that suspects know of their choice to refuse consent in addition to giving their consent voluntarily.[126] In most jurisdictions, consent forms appear to have emerged gradually and organically.

One reason that law enforcement officers began to use consent forms is that courts are highly amenable to the forms.[127] In a few cases, courts have been quite explicit about the import of the form. In *United States v. Price*,[128] for example, the court explained that, had the defendant signed the consent form, that fact would have indicated that the consent was voluntary and would therefore have been dispositive of

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122. *See supra* note 118.

123. *See supra* Part I.A.

124. *State v. Carty*, 790 A.2d 903, 907 (N.J. 2002) (citing *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975)).

125. *Id.*

126. *See generally infra* Part II.B.

127. *See infra* Part II.C.

128. 558 F.3d 270 (3d Cir. 2009).

the question of constitutionality.[129] Police reference materials likewise indicate that consent forms are good practice. One popular treatise, originally targeted at law enforcement officers, explains: "[a]s the burden of proof is on the prosecution to show that the consent was given voluntarily, this consent should be obtained in writing when possible and should be witnessed by more than one person. If forms are used, they should be readily available at all times."[130] Evidence of generally held beliefs reveals that this preference for written consent carries more weight—as one officer noted, "paper is tangible and that's what people want."[131] Another officer, in response to a question as to why anyone would ever sign a consent form, thereby waiving his right to a warrant search, said: "no one ever said criminals were smart. But whatever the case may be, I'm glad they consent to searches [by signing forms] so often. Makes my job more productive."[132] Yet another officer stated, "if you can get verbal consent, you can get written consent."[133]

Yet surprisingly, even though police officers appear to be more than amenable to consent forms, civil rights organizations also promote their virtues. This agreement has likely contributed to the forms' spread. The American Civil Liberties Union, for example, has advocated for their use,[134] and in settlement agreements, has even made a point of obtaining

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129. *See id.* at 277–79.

130. JOHN C. KLOTTER & JACQUELINE R. KANOVITZ, CONSTITUTIONAL LAW 231 (7th ed. 1995). This reference was originally titled *Constitutional Law for Police*, apparently reflecting its intended audience. JOHN C. KLOTTER & JACQUELINE R. KANOVITZ, CONSTITUTIONAL LAW FOR POLICE (1968).

131. JWelch, Comment to *Consent to Search Form Thread*, OFFICER.COM (Jan. 21, 2002, 1:01 AM), http://forums.officer.com/t6073/; *see also* Robert T. Thetford, Should Officers Use Written Consent to Search Forms? (Jan. 27, 2007) (unpublished manuscript) (on file with author) ("The use of the form is not a legal requirement, but is a matter of proof. We are living in times where the police officer's word, which once was accepted as truth merely because of the position, no longer enjoys that status. The fact that the witness is employed as a law enforcement officer does not necessarily cloak the officer with a mantle of believability. For this reason, officers need an edge. One way to obtain this edge in the courtroom is to produce written evidence of the subject's consent. This often can make the difference between winning and losing a case.").

132. THE BRONZE, Comment to *Consent to Search Form Thread*, OFFICER.COM (Jan. 21, 2002, 1:01 AM), http://forums.officer.com/t6073/.

133. Interview with a Denver Police Sergeant (Nov. 14, 2012).

134. *See, e.g.*, Porterfield, *supra* note 5. *Cf.* Rocco Parascandola, *'Consent to Search' Forms, Now Available in Seven Languages, Allow Police to Bypass Warrant Process*, N.Y. DAILY NEWS (Oct. 1, 2011, 4:00 AM), http://articles.nydailynews.com/2011-10-01/news/30247888_1_language-line-consent-brooklyn-cop (describing the New York Civil Liberties Union's general approval of mechanisms for informing people of their rights, while reserving concern, in context of non-English forms, that forms will be used to "paper over coercive searches where there is no real consent").

agreement from law enforcement entities to use consent forms.[135] Commentators likewise posit the forms as a vast improvement in the civil rights context. The § 501(c)(3) educational nonprofit Flex Your Rights—whose "mission is to educate the public about how basic Bill of Rights protections apply during encounters with law enforcement" and which is generally highly skeptical of police policies—announced that it supported the New York Police Department's use of consent forms, concluding that "[w]ritten consent policies are a win-win situation for police and the public."[136] It explained:

> When consent is given in writing, police have an easier time demonstrating in court that consent was given voluntarily. . . . For the citizen, written consent provides a quick reminder that permitting searches is optional, while simultaneously creating an added layer of protection in disputes over whether consent was given voluntarily.[137]

Other commentators concerned with protecting Fourth Amendment rights express similar views.[138]

The history of consent forms is therefore complex, with no single factor providing a complete explanation. One critical piece of the story is that a range of stakeholders support the use of consent forms. But for present purposes, the more important point is the pervasiveness of the forms, which we document in the next Section.

B. How Law Enforcement Officers Use Consent Forms

To study police departments' use of consent forms in consent searches, we conducted a survey of state police departments in all fifty states.[139] We chose to examine the state police entity in each state for purposes of uniformity so that we could compare the analogous law

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135. *See, e.g.*, Settlement Agreement at 9, *Arnold v. Arizona Dept. of Pub. Safety*, 233 F.R.D. 537 (D. Ariz. 2005) (No. 01-01463 PCT-JAT).

136. Scott, *We Support NYPD's Plan to Use Written Consent Forms*, FLEX YOUR RIGHTS (July 1, 2008), http://www.flexyourrights.org/we-support-nypds-plan-to-use-written-consent-forms.

137. *Id.*

138. *See, e.g.*, Myron Pitts, *Consent Searches Are Back, but with Consent Forms*, FAYOBSERVER.COM (Mar. 2, 2012, 1:19 PM), http://blogs.fayobserver.com/myronpitts/March-2012/Consent-Searches-Are-Back,-but-With-Consent-Forms.

139. Depending on the state, the state police departments have differing titles, such as the state police, state patrol, or highway patrol. For the purposes of this Article, we will refer to each state's department as the "state police."

enforcement entity in each state.[140] Furthermore, the comparison of the state police departments gave us a broad survey of consent search practices across the country.

In order to standardize the manner in which we obtained our information, we began by calling the state police departments of each state.[141] We found the contact information of the state police departments through Google searches and explained to the operator that we were doing research for a law review article and requested to speak to a trooper or officer about the state police's use of consent forms prior to searches.

This methodology provided several advantages. First, engaging in phone conversations rather than reviewing written sources such as manuals and rulebooks allowed for a broader sample of states, since many states do not make these materials publicly available or do not address consent forms in their materials. Moreover, conducting interviews by phone allowed us to speak directly with a trooper or officer, which provided the insight of an individual who implements department policy on consent searches in practice on a daily basis. Finally, the interviews allowed us to engage in dialogue with officers when necessary in order to clarify our understanding of their policy with respect to the use of consent forms.

Within the course of each interview, we sought to gather the following information: Did the state police entity use consent forms? If so, in what circumstances? What information did the consent form contain? And finally, could the entity provide us with a copy of the standard form? In order to allow the conversation to flow naturally, we did not always ask the questions in precisely the same order, but we sought to ensure that each interview covered this information. Some officers also volunteered other interesting information, which we include here as well. Our findings are summarized in Graph 1 below.

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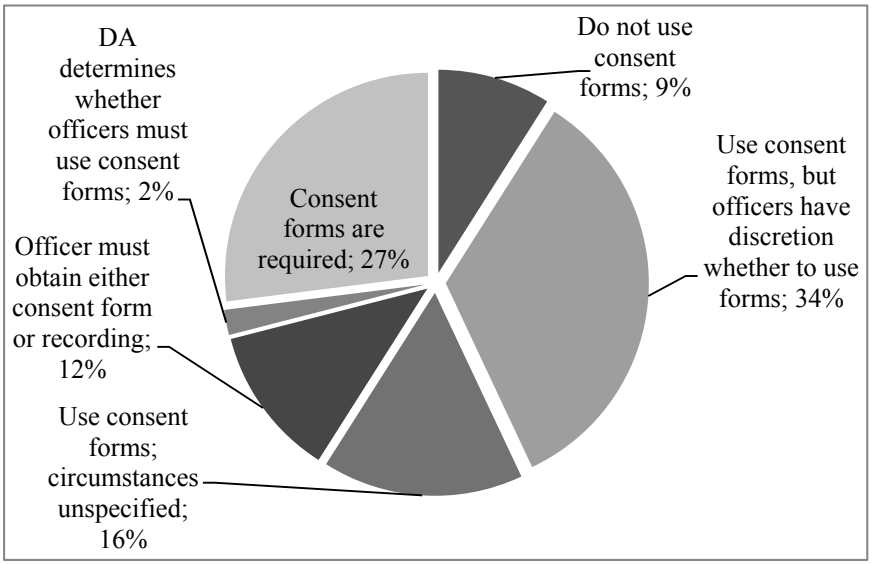
140. Future work might profitably compare various municipalities or other law enforcement entities, whose practices regarding consent forms would undoubtedly shed further light on the use of consent forms.

141. As a precursor to the phone survey, we engaged in Google and Westlaw research to get a general sense of the way that different jurisdictions use consent forms. These searches yielded interesting anecdotal information and provided us with useful background for our subsequent interviews with law enforcement officers.

GRAPH 1
STATE POLICE USE OF CONSENT FORMS



Our methodology has a significant limitation. It does not necessarily provide a particular state police department's authoritative policy with respect to the forms—it is merely one officer's understanding of it.[142] Yet the interview methodology also provides significant advantages in the form of information that could not be gained from obtaining the official written policies. Many departments use consent forms on a less formal basis and do not provide authoritative written guidance on the use of the forms in their written materials. Thus, talking to a representative of the department—as we did—is ultimately the only way to learn about how the forms are used within that jurisdiction. Accordingly, while our methodology does not provide a comprehensive account of the way that consent forms are used in any individual jurisdiction, it does provide a window into each department's practices according to the understanding of the person with whom we spoke. We emphasize, then, that our findings should be read as a snapshot of each department rather than as an authoritative statement; moreover, the interviews offer a journalistic contribution via the specific comments the officials gave us.

142. In future work, the policies might, of course, be gathered via Freedom of Information Act requests. This might provide a somewhat different and complementary picture of the use of consent forms, although we do not necessarily think it would be a more accurate one, given that discrepancies often arise between official policies and their implementation.

In total, we spoke with representatives from forty-four departments. Our interviews with state police departments reveal that the use of consent forms divides roughly into the following six main categories:

> (1) The state police do not use consent forms, and in consent search situations verbal consent is sufficient.
> (2) The state police use consent forms, but departments ultimately give individual officers discretion whether to use a consent form or to rely on verbal consent.
> (3) The district attorney decides whether officers must use consent forms.
> (4) The state police use consent forms, but we were unable to ascertain the exact circumstances under which such forms were used.
> (5) In order to perform a consent search, the officer must obtain either a consent form or an audio or video recording of the consent.
> (6) The state police require consent forms and verbal consent is not sufficient as a matter of police protocol.

Category 1. In four states, Massachusetts, Georgia, Wyoming, and Michigan, state police do not use consent forms but rather rely on verbal consent. In Massachusetts, our interviewee specified that police officers are allowed to search the passenger part of the vehicle within the officer's reach without asking, pursuant to concerns regarding officer safety.[143] If, during the course of that search, the officer encounters a locked container, then the police officer will ask for verbal consent to search. If the police officer wishes to search anything beyond arms' reach or to search a locked container, Massachusetts practice is for the police officer to then obtain a search warrant.[144] In Georgia, the state police do not use consent forms and only rely on verbal consent. In Wyoming, while officers do not use consent forms signed by the subject of the search, when an officer receives verbal consent, she must make a note of the consent on a specific police form.

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143. We note that this is an imperfect statement of what is allowed under the Supreme Court's jurisprudence. Under that body of law, an officer may search a vehicle in the manner described only if he can point to specific, articulable facts that justify the search. *Michigan v. Long*, 463 U.S. 1032, 1049–50 (1983); *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

144. Presumably our interviewee means that the officer must obtain a warrant in the absence of any exceptions to the warrant requirement, such as exigency or searching incident to arrest. *See generally supra* note 11.

Category 2. In fifteen states—New York, Virginia, North Carolina, Indiana, Nebraska, Utah, Kansas, North Dakota, Illinois, Montana, Alabama, Pennsylvania, Connecticut, New Mexico, and Minnesota[145]—the state police use consent forms, and while the departments encourage officers to use consent forms in order to have documentation, the decision whether to use a consent form or to rely on verbal consent ultimately lies with the officer. Our conversations yielded a range of answers as to how that discretion was exercised. For example, the New York officer noted that while the department encourages consent forms for purposes of proof, they do not want to make a blanket rule in case an officer does not have a consent form on hand and can get verbal consent to proceed with the search. Similarly, the Nebraska officer with whom we spoke mentioned that if the officer thinks a consent form might have a chilling effect on the suspect's willingness to consent, then that officer can just ask for verbal consent. This approach exemplifies a recurring theme we noticed of officers deploying consent forms strategically when given discretion to do so. And the Kansas officer pithily summarized: "like a bullet proof vest, consent forms are available but not required."

Other officers offered a range of scenarios in which officers might exercise discretion. The North Dakota officer noted that while they try to use consent forms whenever possible, pragmatic considerations such as inclement weather might result in the officer asking the suspect to sign the form after the fact. The Virginia, Utah, and Illinois state police officers noted that because the consent encounter is often audio or video recorded, the officer may exercise discretion as to whether to use a consent form; in Utah, the norm is to rely on the video rather than using

145. The *Washington Post* previously reported that Minnesota, Rhode Island, Hawaii, and New Jersey banned the use of consent searches. *See* Case Comment, *supra* note 107, at 2187–88 (citing Sylvia Moreno, *Race a Factor in Texas Stops*, WASH. POST, Feb. 25, 2005, at A3). Our conversations with officers from these states, however, show that Minnesota and Rhode Island have consent forms available with Minnesota using forms most of the time in consent searches, while Rhode Island refused to give us further detail as to when an officer uses verbal consent as opposed to a consent form. Hawaii and New Jersey require the use of consent forms in all consent searches. This discrepancy can be explained for New Jersey, Hawaii, and Minnesota because the respective state supreme courts held that an officer must have a "reasonable and articulable suspicion" before asking a person's consent to search, which explains the state police's continued use of consent forms. *State v. Quino*, 840 P.2d 358, 364–65 (Haw. 1992); *State v. Naji Fort*, 660 N.W.2d 415, 416–17 (Minn. 2003); *State v. Carty*, 790 A.2d 903, 910 (N.J. 2002). It is worth noting that none of the police officers with whom we spoke in Hawaii, Minnesota, and New Jersey mentioned the "reasonable and articulable suspicion" standard to us. In 2004, Rhode Island passed a consent search ban that stated that an officer must have a reasonable suspicion or probable cause in order to ask for consent to search. R.I. GEN. LAWS § 31-21.2–5 (2005).

the consent form. The North Carolina officer noted that the duration of the search might be a determining factor in whether the officer will use a consent form—if the officer anticipates that the search will be quick, then verbal consent will suffice, but if the officer anticipates a longer search, then she will ask the person to sign a consent form. The Alabama officer stated that while consent forms are sometimes used, if the police officer smells a commonly known substance such as alcohol or marijuana, he need not use a consent form. And the Minnesota officer stated simply that the standard practice is to use a consent form, but the officers use verbal consent "from time to time."

Some departments specifically noted that their policy was to use consent forms in a way that (at least attempted to) protect suspects' rights. The Pennsylvania officer stated that officers cannot ask to search the vehicle until the officer has handed back to the driver her driver's license, registration, and insurance. The officer can then ask for permission to search. It is up to the discretion of the officer whether to use a consent form, but if the officer thinks it will be a comprehensive search, he will get a consent form. Notably, in Pennsylvania, consent can be revoked at any time, even with a consent form. In Connecticut, the officer said that the state police use a consent form "99.9% of the time"—the only reason they would not use a form is if the suspect said, "I won't sign a form but go ahead and do your search." In New Mexico, the officer stated that if an officer knows he wants to search the vehicle, he will ask for verbal consent. If the suspect seems doubtful about giving his consent, however, and if the officer thinks the suspect might be feeling intimidated into giving his consent, then the officer will use a form. The officer concluded by stating that in New Mexico, everything is audio and video recorded anyway, so a recording is better evidence than a form.

Category 3. One state, Texas, applies a unique approach to the discretionary use of forms. There, whether an officer must use a consent form is up to the county district attorney. Most district attorneys do not require consent forms, and so officers do not use them very often, but some district attorneys do require them, in which case officers must use them.

Category 4. In seven states, officers use consent forms, but the officers did not articulate precisely when they use consent forms and when they rely on verbal consent. These states are New Hampshire, Mississippi, Florida, South Carolina, Oregon, Arkansas, and Rhode Island. For the Rhode Island state police, the person with whom we spoke stated that they use consent forms, but he refused to give us any further information.

Category 5. In five states, the officer must obtain either a consent form or an audio or video recording. In West Virginia and Idaho, the

troopers must ensure that there is some type of documentation—either a consent form or an audio or video recording—of the consent. The West Virginia officer noted that the officer will review the consent form with the suspect before having her sign it. In Idaho, all traffic stops are recorded, so the consent will likely be recorded, but the state police still encourages officers to use consent forms. Likewise, in Nevada and South Dakota, state police cars have digital recording devices that record every traffic stop, and thus if verbal consent is given, it will be recorded. Accordingly, in South Dakota, consent forms are rarely used. In Oklahoma, all officers use audio or video recording devices, but if the device is not working, then the officer will have the suspect sign a consent form.

Category 6. Finally, twelve states require the use of a consent form; verbal consent is insufficient as a matter of police protocol. New Jersey, Ohio, Louisiana, Colorado, Washington, California, Hawaii, Arizona, Maryland, Vermont, Iowa, and Arkansas's state police all require consent forms for consent searches. Louisiana's state police has an additional requirement: there must be two troopers present for a consent search.

The most important takeaway from the data we gathered is that consent forms are widely used, even in states where they are not required. Only four states do not use consent forms and rely only on verbal consent. In all other states, consent forms are used in at least some circumstances. In fifteen states, the state police encourage officers to use consent forms in order to have documentation of the consent, but ultimately the officer decides whether to use a consent form or whether to obtain verbal consent. In one state, whether officers must use consent forms is a decision made by the county district attorney. In seven states, state police use consent forms, but the police officers with whom we spoke did not explain when officers use consent forms and when they rely on verbal consent. In five states, while consent forms are not required, there must be some sort of documentation, either a consent form or a recording of the consent. Finally, twelve states require state police to use consent forms, and verbal consent must be supplemented with a consent form.

Our general sense was that police officers, or at least state police in general, as espoused through the individuals with whom we spoke, had a favorable view of consent forms because they are tangible documentation should the question of consent go to court. Although some officers mentioned that they had discretion of when to use a form or not, none of the officers with whom we spoke relayed negative impressions about the forms—instead, they would simply mention that an officer might choose not to bother with the form for a variety of

reasons, including possible chilling effects, not having a form on hand, or not wanting to deal with a form in inclement weather.

In sum, although we cannot know exactly how frequently consent forms are used, it is clear that—like the broader category of consent searches—they have become an integral part of law enforcement practice in most jurisdictions, and their use is therefore worthy of careful scrutiny.

C. How Courts Evaluate Consent Forms

In this Section, we present quantitative data suggesting that the presence of a signed consent form influences courts' determinations of whether an instance of consent was voluntary. We then examine a number of cases qualitatively, developing a narrative that complements our quantitative data by demonstrating that most courts engage in, at most, a cursory totality of the circumstances analysis when the defendant has signed a consent form.

In previous work, one of us created an empirical database that contains every published federal appellate case decided between 2005 and 2009 (inclusive) that articulated a Fourth Amendment principle—a total of 1297 claims.[146] Of these claims, 359 were adjudicated in civil damages actions under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[147] 926 arose in suppression hearings in criminal proceedings, and twelve cases arose in other types of proceedings.[148]

Of the overall set of 1297 claims, 148 involved the issue of whether a particular instance of consent was constitutionally sufficient under the Fourth Amendment. Of those 148 claims involving a consent issue, forty-four involved a consent form.[149] Forty-two of the forty-four claims arose in criminal proceedings, and only two defendants (5%) prevailed.[150]

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146. Leong, *supra* note 97, at 422. Some cases involved more than one Fourth Amendment claim, so the number of claims exceeded the number of cases.

147. 403 U.S. 388 (1971).

148. Leong, *supra* note 97, at 422–23. These proceedings included claims under 18 U.S.C. § 242, civil forfeiture proceedings, and habeas corpus statutes. *Id.* at 423 n.86.

149. *See* Appendix B. A number of cases that did not involve a consent issue also mentioned that the police had used a consent form. We did not include them in the data set because in those cases the consent issue was not adjudicated by the courts and therefore we were unable to assess the impact of the consent form.

150. *See* Appendix B. The other two cases arose in civil damages actions under 42 U.S.C. § 1983, and the plaintiff prevailed in one of the two cases. *Id.*

Defendants' win rate on consent claims is less than half the rate on suppression motions overall, where defendants prevail on approximately 10% of all suppression motions in published federal appellate decisions. More telling, however, is the disparity between defendants' win rate on a consent claim when a consent form is present and when one is not present: when a consent form is not present, defendants win on consent claims approximately 9% of the time, while when a consent form is present defendants win only 5% of the time.[151]

While these numbers are suggestive, they do not prove causation. Other factors might, of course, have affected our results, and we do not seek here to eliminate every alternative explanation. Moreover, an examination solely of federal appellate cases does not provide a random sample of all instances in which a court confronts a consent form. But a qualitative examination of the cases is consistent with the quantitative information we have presented—that is, the presence of a signed consent form influences courts' decision-making.

In general, written notification of rights weighs heavily or even dispositively in favor of a finding of voluntary consent. This reasoning emerges throughout decisions involving consent forms, and contrasts markedly to courts' more holistic examination of voluntariness when consent forms are not present.[152] Courts frequently discuss the fact that a defendant signed a consent form as an important indication that the defendant's consent was voluntary. For example, in *United States v. Sandoval-Vasquez*,[153] the Seventh Circuit held that the suspect was not coerced despite the suspect's claim that the officer threatened that his family would be taken away if he did not consent.[154] With only a brief discussion of the other *Schneckloth* factors, the court assigned considerable weight to the fact that the suspect signed the form and that

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151. We did not include cases arising outside of criminal proceedings (§ 1983 cases and a single board of immigration appeals case) in the percentages we have reported here because the number of such cases is quite small. When those cases are included, however, the difference between cases in which consent forms were and were not used is even more striking. In cases in which consent forms were used, three out of forty-four, or 7%, of individual defendants or plaintiffs prevailed, while in cases in which consent forms were not used, thirteen out of 104, or 13%, of individual defendants or plaintiffs prevailed.

152. *See, e.g.*, *United States v. McMullin*, 576 F.3d 810, 814–16 (8th Cir. 2009) (undertaking detailed analysis of factors influencing consent); *United States v. Castellanos*, 518 F.3d 965, 970–71 (8th Cir. 2008) (same); *United States v. Ruiz*, 428 F.3d 877, 882 (9th Cir. 2005) (same). In general, we found that every case in which a court undertook a detailed analysis of the factors surrounding voluntariness was a case that did not involve a consent form.

153. 435 F.3d 739 (7th Cir. 2006).

154. *Id.* at 744.

the suspect assisted the officers in opening a compartment, while ignoring the other factors that weighed in the suspect's favor.[155] The form, therefore, appeared to negate a serious threat that, without the form, might have been held to indicate coercion.

Subsequently, in *United States v. Budd*,[156] the Seventh Circuit placed even greater emphasis on the suspect's verbal and written consent.[157] The court stated that the suspect did not assert that he was threatened, but the court did not address any of the other *Schneckloth* factors.[158] Nonetheless, the court ruled in favor of the government and held that consent was rendered voluntarily.[159] Such analysis assigns virtually dispositive significance to consent forms.

Where the police offer a suspect an explanation of the form, courts are particularly unlikely to rule in favor of the suspect. In *United States v. Ramos*,[160] the Eighth Circuit examined such a situation. There, the officer told Ramos both in writing and orally that he had a right to refuse to sign the consent form.[161] Ramos, however, still proceeded to sign the form.[162] The court held that Ramos's consent was voluntary because the police officer took measures—indeed, measures beyond what was required by law under *Schneckloth*[163]—to notify Ramos of his rights.[164] It concluded: "[i]t was an affirmative waiver of Salvador Ramos's Fourth Amendment right to prevent a search of his vehicle."[165]

And in a number of cases, federal appellate courts confronted with signed consent forms have conducted little analysis beyond the presence of the form. In *United States v. Glover*,[166] the Tenth Circuit held that the suspects' consent was voluntary because the suspects had signed forms.[167] Although the court acknowledged that the suspects were police officers, the court placed considerable weight on the fact that the suspects gave both oral and written consent, and the court declined to

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155. *Id.* at 744–45.
156. 549 F.3d 1140 (7th Cir. 2008).
157. *Id.* at 1146–47.
158. *Id.*
159. *Id.* at 1147.
160. 42 F.3d 1160 (8th Cir. 1994).
161. *Id.* at 1162.
162. *Id.*
163. *See supra* note 12 and accompanying text.
164. *Ramos*, 42 F.3d at 1164.
165. *Id.*
166. 104 F.3d 1570 (10th Cir. 1997), *abrogated on other grounds*, *Corley v. United States*, 556 U.S. 303 (2009).
167. *Id.* at 1584.

find that the suspects' consent was involuntary.[168] Likewise, in *United States v. Comstock*,[169] the Eighth Circuit conducted a detailed analysis of the *Schneckloth* factors after the district court found that consent was voluntary "without making detailed findings."[170] Although the Eighth Circuit held that there was no clear error, the Eighth Circuit's standard of review of clear error is a high threshold to overcome, even though the court acknowledged the district court's lack of analysis.[171] In *United States v. Coleman*,[172] the Fourth Circuit stated that "written consent to a search 'supports a finding that the consent was voluntary.'"[173] The Seventh Circuit, in *United States v. Navarro*,[174] similarly stated, "[t]his signed statement, under these circumstances, is clear evidence of the voluntariness of [the defendant's] consent."[175]

Commendably, a few courts have cautioned that a signed consent form is not dispositive evidence of voluntariness. In *United States v. Recalde*,[176] for example—a case from 1985 since overruled on other grounds—the Tenth Circuit held that a signed consent form containing a provision that the defendant could refuse consent was "certainly probative . . . [but] not dispositive on the issue of voluntariness."[177] A few state courts have made similar pronouncements,[178] as have a few unpublished decisions in various jurisdictions.[179] Yet these scattered decisions are hardly an overwhelming caution to police as to how they use consent forms—indeed, they are far outnumbered by cases such as those we have described above. Moreover, simply because a court *says* that a consent form is not dispositive does not mean that—on some level—the presence of the consent form does not affect the court's

168. *Id.*

169. 531 F.3d 667 (8th Cir. 2008).

170. *Id.* at 674.

171. *Id.* at 678.

172. 588 F.3d 816 (4th Cir. 2009).

173. *Id.* at 819 (quoting *United States v. Boone*, 245 F.3d 352, 362 (4th Cir. 2001)).

174. 90 F.3d 1245 (7th Cir. 1996).

175. *Id.* at 1257.

176. 761 F.2d 1448 (10th Cir. 1985), *overruled on other grounds*, *United States v. Price*, 925 F.2d 1268 (10th Cir. 1991).

177. *Id.* at 1458.

178. *People v. Graf*, 638 N.E.2d 1181, 1184 (Ill. App. Ct. 1994); *Jackson v. State*, 77 S.W.3d 921, 929 n.2 (Tex. Crim. App. 2002).

179. *See, e.g.*, *United States v. Lowe*, No. 3:09-CR-110, 2010 WL 1491419, at *8 (E.D. Tenn. Mar. 4, 2010); *Carter v. State*, No. 01-02-00049-CR, 2003 WL 568095, at *2 n.1 (Tex. Crim. App. Feb. 27, 2003).

analysis.[180] The fact that only a few courts have even given lip service to an analysis that looks beyond the consent form thus strongly suggests that the judiciary accords the forms considerable weight.

III. CONSENT FORMALISM

This Part examines the troubling consequences of the widespread use of consent forms. Although many civil liberties organizations have advocated forcefully for consent forms, we argue that—contrary to the accepted wisdom—the widespread use of consent forms tends to impair suspects' constitutional rights. First, consent forms do not increase the likelihood that a suspect's consent will be voluntary. Second, consent forms lead to formalistic judicial analysis of consent—that is, a consent form is nearly always treated as dispositive of the question of whether a suspect consented. And finally, consent forms are susceptible to law enforcement abuse.

A. Unaddressed Involuntariness

The use of a consent form does not mitigate concerns regarding voluntariness and coercion that many commentators have raised regarding *Schneckloth* and its progeny. A suspect who is coerced into issuing verbal consent to search her person or property may be similarly coerced into signing a form.[181] Indeed, in some instances, it may be just as easy to induce a suspect to sign a form as it is to obtain verbal consent—with the added advantage that a written record of the "consent" then exists.[182] We are accustomed to signing paperwork presented to us by authorities,[183] and the very existence of a form gives the interaction an

180. Like ordinary people, judges are susceptible to a wide range of cognitive biases that operate at a subconscious level. *See, e.g.*, Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 9 (2007) (positing judges as "ordinary people who tend to make intuitive . . . decisions" susceptible to influence by various heuristics).

181. *See supra* Part II.C.

182. Of course, the opposite might conceivably be true—that is, a suspect may (mistakenly) believe that he or she is reserving some right by refusing to sign the consent form. *See, e.g.*, *United States v. King*, 627 F.3d 641, 648 (7th Cir. 2010); *United States v. Price*, 558 F.3d 270, 278 (3d Cir. 2009).

183. *See, e.g.*, Allison Dyan Redlich, False Confessions: The Influence of Age, Suggestibility, and Maturity 79 (1999) (unpublished Ph.D. dissertation, University of California, Davis) (on file with author) (discussing the effects of obedience to authority on test subjects' willingness to sign false confessions).

aura of legitimacy[184] and suggests that the search is a foregone conclusion.[185] It suggests that a process is already in place that provides for the search, that the suspect has no real choice in the matter, and that the search is inevitable. Our empirical research bolsters this account: the New Mexico police officer that we spoke with stated that when a suspect is doubtful about giving verbal consent, and the officer feels that the person might be feeling coerced, he presents the suspect with a consent form.[186] Although his intention may be for the form to explain the consent search, given existing research on obedience,[187] the official nature of the form is unlikely to reassure the suspect or to encourage him to exercise his rights.

Moreover, practices common during a request for consent may increase the likelihood of consent when a form is involved. Maclin, among others, describes the corrosive effect of repeated requests on a suspect's will.[188] Such requests are even more forceful when some involve signing a form. That is, the police can ask for consent in more different ways when a form is present. Some suspects may respond to requests for verbal consent, others to requests to sign a form, and others to the combination of the two. Put another way, the form provides an additional tool to get the suspect to give in.[189]

Contract law—as codified in the *Uniform Commercial Code* (UCC) and enshrined in the *Restatement of Contracts (Second)* ("*The Restatement*")—provides a well-established framework that highlights the concerns regarding voluntariness and coercion that consent forms raise.[190] Of course, the UCC governs transactions of goods and therefore

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184. *See, e.g.*, *Robinette I*, 653 N.E.2d 695, 699 (Ohio 1995) (stating that a "'consensual encounter' immediately following a detention is likely to be imbued with the authoritative aura of the detention"). A similar "authoritative aura" exists when a suspect is presented with a consent form.

185. *See* ACLU, *Know Your Rights When Encountering Law Enforcement* 8–10, http://www.aclu.org/files/kyr/kyr_english.pdf (last visited Apr. 20, 2012) (explaining the difference between a warrant search and a consent search but failing to mention consent forms, which could lead to individuals thinking that when presented with an official piece of paper—the consent form—that in fact it is a warrant or warrant-like document).

186. *See* Appendix A.

187. *See supra* notes 79–83 and accompanying text.

188. Maclin, *supra* note 85, at 79–80.

189. *See, e.g.*, *United States v. Flores*, No. 4:08CR3059, 2008 WL 4104136, at *1–2 (D. Neb. Aug. 28, 2008) (agreeing with the magistrate judge's recommendation that consent was voluntary even when the police officer "read the consent-to-search form quickly and did not inquire whether [the suspect] understood difficult words such as 'voluntarily,' 'authorize,' and 'assistance' or whether he could read English" because the suspect's verbal consent was voluntary).

190. Of course there are many differences between contracts and consent forms.

does not directly apply to consent forms. Still, the principles it manifests provide insight into our normal expectations surrounding signed writings, thereby making the current treatment of consent forms all the more notable in its divergence. While the analogy is not precise, the form is, in a sense, a contract—that is, the suspect agrees to allow the police to conduct a specified search in exchange for a perceived benefit ranging from permission to leave to hope of lenient treatment for criminal activity. That the police are not, actually, agreeing to the benefit does not change the fact that, from the suspect's perspective, the situation has the ambience of a contractual agreement. And it is worth pointing out that nothing prevents the police from orally presenting the form more explicitly as a contract: "sign this, let us search, and we'll let you go."[191]

Both the UCC and *The Restatement* hold that contracts are unenforceable when unconscionable. The UCC explains that extremely one-sided contracts are unenforceable and explains that "[t]he principle is one of the prevention of oppression and unfair surprise."[192] *The Restatement* echoes these concerns, stating that unconscionability has generally been recognized to include an absence of meaningful choice on the part of one party due to an inequity in bargaining power.[193] These concerns are clearly present in the context of signed consent forms. The police have far greater power than does the individual—thereby rendering the "agreement" one-sided—and the individual may experience the feeling that he or she has no real choice but to consent.

The Restatement also reflects the practice of invalidating contracts in situations involving misrepresentation—that is, when a person makes "an assertion that is not in accord with the facts,"[194] and notes that "[a]ction intended or known to be likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist."[195] More pertinent to the context of consent forms, the UCC explains that "[a] misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent."[196] Thus, the UCC contemplates a searching inquiry into the possibility that someone might be induced into

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191. *See Perceived Voluntariness of Consent*, *supra* note 77, at 40–41 (discussing possible coerciveness in the phrasing of the police request to conduct a warrantless search).

192. U.C.C. § 2-302 cmt. 1 (1978).

193. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1979); *see also Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. Cir. 1964); *Toker v. Westerman*, 274 A.2d 78, 81 (N.J. Union County Ct. 1970); *FrostiFresh Corp. v. Reynoso*, 274 N.Y.S.2d 757, 759 (Dist. Ct. 1966).

194. RESTATEMENT (SECOND) OF CONTRACTS § 159.

195. § 160.

196. § 162.

offering consent without fully understanding the circumstances of that consent. True, case law does not always evince this searching inquiry.[197] Still, the fact that the concern is enshrined in *The Restatement* and that some cases do turn on that concern reflects a degree of solicitude for informed contracting—and, by extension, informed consent—not evident in courts' current approach to consent searches.

These concerns resonate in the context of consent forms. When courts contemplating a signed consent form undertake a cursory and formalistic analysis of voluntariness, they fail to acknowledge the possibility of police misrepresentation of the significance of the form. Police might engage in a wide variety of such misrepresentations, including implying that signing the form is a mere formality, that signing the form is mandatory, and that signing the form guarantees leniency for any evidence found. As we have shown, even when such circumstances are present and the defendant tries to assert these facts, courts generally accord them little weight. Still, to simply ignore the possibility of misrepresentation is in sharp tension with the concerns generally applicable to signed writings.

Contract law acknowledges two other factors that resonate with the consent form context. First, it regulates contracts made under threat.[198] Specifically, *The Restatement* states:

> A threat is improper if the resulting exchange is not on fair terms, and (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat, (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or (c) what is threatened is otherwise a use of power for illegitimate ends.[199]

These stipulations reveal a special concern for contracting that takes place in situations where the threat would harm the recipient and when there is a power imbalance between the two.

Secondly and relatedly, contract law expresses concern for "undue influence," defined as "unfair persuasion of a party who is under the

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197. *See, e.g.*, Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 325 (2010) (explaining that unconscionability is underenforced); Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 185–86 (2009) (arguing that courts do not fully address problems of unconscionability, duress, and misrepresentation in contracting).

198. § 176.

199. § 176 (2).

domination of the person exercising the persuasion."[200] The relevance to the consent form situation is likewise evident. Contract law is concerned with situations in which people make agreements while under pressure. This precisely describes the situation in which consent forms are signed: an individual, virtually always without legal representation, is confronted with a consent form by an officer of the law. As the result of media exposure and personal experience, individuals may have quite mixed feelings about the police: they may view them as either protectors or antagonists, or even both simultaneously.

Ultimately, this examination reveals that the analysis of voluntariness that accompanies consent forms is fundamentally at odds with well-established principles of contract law. In turn, this comparison reveals that courts' analysis of consent forms does virtually nothing to reveal whether a signed form truly reflects voluntary consent. While consent forms are not contracts, the fact that a noncontractual signed writing has arguably graver consequences, insofar as it waives civil rights and may result in criminal prosecution, seems perverse and troubling. Our existing principles of contract law express concern for people who contract without full information, for contracts made under threat, and for contracts made in the face of power imbalances. Consent forms are signed under precisely these circumstances, yet courts explicitly do not take any of these things into account.[201]

B. Predetermined Case Outcomes

Another concern with consent forms is that of judicial interpretation. The quantitative and qualitative data presented in Part II.C indicate that once the form has been signed, its existence generally precludes the suspect from prevailing on a claim that her Fourth Amendment rights were violated. Courts do not look deeply into the circumstances surrounding the signing of the form; instead, they choose to accept it as prima facie evidence of voluntary consent. Put another way: consent forms lead to consent formalism.

Part of the explanation for such formalism is that the form dominates judges' perceptual fields.[202] Strauss observes that even with verbal consent a subsequent recounting of the interaction cannot fully capture the emotion of the situation: "[g]one are the nuances, the

200. § 177.

201. *See supra* Part I.A.

202. *See Perceived Voluntariness of Consent*, *supra* note 77, at 39–40 (discussing the court's role as an observer which attributes voluntariness to the suspect, which may not have been present in the actual encounter).

hesitation, the body language."[203] The form further obscures the human interaction by dwarfing other factors. When there is a signed form, courts are less likely to look closely for signs of coercion or small inconsistencies in an officer's testimony. Moreover, the form provides a reason—and an opportunity—for a court to simply disengage from a swearing contest between officer and defendant: a form was signed, and the court need not look deeper.

These concerns are particularly salient given that consent is almost always litigated in criminal settings rather than in civil proceedings under 42 U.S.C. § 1983.[204] Given the forum in which consent litigation occurs, courts are particularly unlikely to find that consent was involuntary in the face of a consent form. Were consent litigated more frequently in civil suits, courts might more easily import the principles of unconscionability and other tools of contractual analysis that we discussed in the previous section.[205] In the criminal context, such concepts are far more foreign, and thus consent forms are treated more like authoritative statements of intent as opposed to memorializations of human encounters. By stripping away the human element behind the form, courts reduce the consent inquiry to a sanitized and formalistic inquiry.

Relatedly, another reason that judges tend not to look behind the face of the consent form is that it allows them to avoid the muddled voluntariness analysis that currently dominates Fourth Amendment jurisprudence. Given the confusion created by the Supreme Court's decision in *Schneckloth*, indicating that subjective factors are relevant, and some of its subsequent decisions, which do not consider those factors,[206] courts may prefer not to grapple with the Court's lack of clarity. Rather, they can point to the form as a clear indication of the suspect's intent to allow a search, thereby addressing—at least nominally—both subjective and objective factors at the same time.

Consent formalism is often the easy way out. But such formalism within the judiciary raises ethical concerns. The loss of judicial integrity to which Strauss attests is magnified when a consent form is present.[207] As currently used, the form offers an opportunity for the judiciary to essentially rubber stamp police behavior without looking behind the form for coercion or manipulation—an opportunity that our research (particularly our qualitative analyses) suggests that many judges take. As

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203. Strauss, *supra* note 72, at 252.
204. Leong, *supra* note 97, at 426.
205. *See supra* notes 191–201 and accompanying text.
206. *See supra* Part I.A.
207. Strauss, *supra* note 72, at 244–46.

a result, the form impairs judicial credibility and diminishes public confidence in the courts' independent assessments of the form's value.

C. Law Enforcement Abuse

Consent forms create opportunities for police officers to abuse suspects' rights and to abuse the judicial system, and there are incentives for police officers to do so. Potential abuse by police officers can consist of perjury about the conversations leading up to signing the form, the application of coercion in signing the form, or the fact that a form might cause police officers to be more passive in helping suspects understand their rights.

Many commentators have expressed concern for police perjury,[208] and the form so dominates judges' perception that they may be even less likely to follow up on suspicions of police perjury. This is particularly true when the defendant is a member of a group vulnerable to stereotypes of criminality and dishonesty, such as the poor or racial minorities.[209] The consent form thus enhances the risk that some of the most vulnerable groups in our society will not only be coerced into signing consent forms involuntarily, but will then be bound by those forms in court even if they testify truthfully about that coercion because judges will be more likely to believe the officer.[210]

Moreover, the form not only enables perjury, but also enhances the likelihood that an officer will engage in coercive behavior that he might later wish to conceal. As we have discussed, a police officer can coerce a suspect to sign a form just as a police officer can coerce a suspect to give her verbal consent.[211] When the police have at their disposal a tool that they know will not be scrutinized closely by the courts—a tool that may be used with relative ease to obtain consent to search—they are more likely to employ coercive tactics in the first place. Police officers readily

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208. *See, e.g.*, Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 694 (1996) ("[T]he available evidence strongly indicates that police perjury is a widespread phenomenon."); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1051 (1987) ("Virtually all of the officers admit that the police commit perjury, if infrequently, at suppression hearings."); Christopher Slobogin, *Testilying: Police Perjury and What to Do about It*, 67 U. COLO. L. REV. 1037, 1039–40 (1996) (acknowledging pervasiveness of perjury).

209. *See, e.g.*, Lassiter, *supra* note 102, at 81.

210. *See, e.g.*, Parascandola, *supra* note 134.

211. *See supra* Part III.A.

admit that getting suspects to sign forms is not difficult.[212] And once the suspect has signed the form, the officer can conduct the search and runs little risk of invalidation by the court as long as any coercion remains undocumented.[213]

Additionally, an officer may feel that a consent form absolves her of any obligation—legal, ethical, or otherwise—to explain the consent search procedure to a suspect. Although under *Schneckloth*, officers do not have the duty to inform suspects that they have the right to refuse consent, some state police departments and police officers may choose to explain the procedure to suspects,[214] and the presence of a form may replace this verbal explanation. As we discussed above, the New Mexico State Police officer stated, "[i]f the person is doubtful about giving consent, like the officer thinks they might be feeling intimidated into consenting, then that's when they would use a form."[215] The officer's use of the form—although apparently well-intended—replaces an explanation of the search process to the suspect. Moreover, the form does not facilitate interaction and clarification: once the suspect has been given the form, the inclination is merely to read it rather than to engage in a dialogue with the officer designed to clarify the meaning of the form.

Police officers desire to get a person to consent to a search, regardless of whether the officer seeks verbal or written consent. With a consent form, however, officers have an easier time proving the suspect's consent in court, which creates incentives for officers to commit perjury regarding the circumstances leading up to signing the form. Conversely, even if an officer wishes to inform a person of her rights, the officer may view the form as a substitute for his own verbal explanation. And because courts view consent forms as such compelling evidence of consent, this creates additional inducement for officers to coerce suspects into signing the form. In light of the problems we have outlined in this Part, the status quo regarding consent forms is badly in need of revision. In Part IV, we offer four proposals for reform.

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212. *See, e.g.*, THE BRONZE, *supra* note 132 ("[N]o one ever said criminals were smart. But whatever the case may be, I'm glad they consent to searches [by signing a form] so often. Makes my job more productive."); Interview with a Denver Police Sergeant, *supra* note 133 ("[I]f you can get verbal consent, you can get written consent.").

213. Scott, *supra* note 136; *see also supra* Part II.C.

214. *See* Appendix A. Four states affirmatively require explanation that the suspect has the right to refuse consent. *Id.* And the West Virginia State Police officer we spoke with stated: "[i]f a trooper is going to do a vehicle search he will go over the consent form and have the person sign the consent form." *Id.*

215. *Id.*

IV. PROPOSALS FOR REFORM

We have been critical of consent forms. While we do not advocate that law enforcement discontinue consent forms entirely, the current use of consent forms is problematic.[216] The forms have an essentially dispositive effect on courts' determination of voluntariness,[217] yet in reality they are no better a guarantee of voluntariness than oral warnings.[218] In light of this conundrum, we propose a suite of doctrinal and practical interventions.

First, many scholars have suggested that in order to diminish the power imbalance inherent in consent searches, at a minimum, police officers must be required to inform a suspect of her right to refuse giving her consent.[219] Strauss, for instance, agrees that police should be required to offer such warnings.[220] She states, however, "I disagree . . . that these warnings are much of a panacea, and do not solve all of the problems with the consent doctrine."[221] As noted above, a number of other scholars have proposed that the Supreme Court overrule *Schneckloth* completely.[222]

Even within the existing framework of *Schneckloth*, however, much can be done to increase the degree to which we assure that individuals issue truly informed consent and that courts provide meaningful evaluation of such consent. Toward that end, we propose four reforms.

Our first two reforms relate to the judicial process. Courts should explicitly disclaim that signing a consent form is binding and should view the form as only one factor in a totality of the circumstances

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216. Scott H. Greenfield, *Consent to Search—Writing Required?*, SIMPLE JUST.: N.Y. CRIM. DEF. BLOG (July 2, 2008, 6:44 AM), http://blog.simplejustice.us/2008/07/02/consent-to-search—writing-required.aspx ("It's not that obtaining consent to search is necessarily a bad thing, but that it falls into that group of simple solutions to complex problems that often brings to the fore as many problems as it cures. Always be suspect of magic bullets, which tend to be the ones that strike you in the butt.").

217. *See supra* Part II.C.

218. *See supra* Part III.A.

219. *See, e.g.*, Barrio, *supra* note 83, at 251; Rebecca A. Stack, Note, *Airport Drug Searches: Giving Consent to the Concept of Free and Voluntary Consent*, 77 VA. L. REV. 183, 205–08 (1991). *See generally* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1, 8.1(a)(1–5) (1996) (listing articles in support of this proposition).

220. Strauss, *supra* note 72, at 254.

221. *Id.*

222. *See supra* note 106 and accompanying text.

analysis.[223] This approach is supported by current doctrine.[224] This will allow police departments to continue using forms, should they so choose, but it will provide additional protection for suspects who are coerced into signing consent forms. In particular, courts should truly consider, rather than merely paying lip service to, the subjective factors that might bear on a suspect's vulnerability to be coerced to sign a form—for example, inability to read English well.[225] Additionally, courts should explicitly give consent forms no more weight than oral consent, since written consent can be coerced just as easily, or even more easily, than can oral consent.[226]

Relatedly, courts should also import into the voluntariness analysis a searching inquiry into coercion borrowed from contract law. As we have explained, contract law does not always implement a truly searching inquiry in practice. But it does explicitly authorize courts to look beyond the four corners of the contract and to determine whether the contract was signed with the knowledge of both parties. Within this rubric, courts also consider asymmetries of power and information—asymmetries that are more present in interactions between individuals and law enforcement officers than they are in most contractual agreements. Recognizing these asymmetries and acknowledging them doctrinally would both harmonize the analysis of consent forms with analysis of other documents in other doctrinal areas and would provide a more realistic recognition of the relationship between officers and individuals. Moreover, courts should import principles from contract law relating to unconscionability and threats. The underlying principles in contract law of protecting disenfranchised parties applies here, and arguably, are even more important since what is at stake here are individuals' civil rights.

Our third reform turns from the judicial reform to extrajudicial education. Through community outreach, law enforcement entities should improve individuals' understanding of their rights so that they need not rely on a consent form to educate them after a situation has already arisen. Although skeptics may claim that law enforcement

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223. For example, courts view a signed *Miranda* waiver as only one factor in a totality of the circumstances inquiry. *See, e.g.*, *United States v. Simmons*, 526 F. Supp. 2d 557, 572 (E.D.N.C. 2007).

224. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

225. *E.g.*, *Valdez v. Ward*, 219 F.3d 1222, 1231–33 (10th Cir. 2000) (recounting facts in which Mexican immigrant stated, of a *Miranda* waiver form: "[y]es, I understand it a little bit and I sign it because I understand it something about a lawyer and he want to ask me questions and that's what I'm looking for a lawyer").

226. *See supra* Part III.A.

agencies will be unwilling to undertake such reforms, experience teaches that, in many instances, governmental organizations do voluntarily undertake reforms that superficially appear to run counter to their interests.[227]

In keeping with this effort, civil liberties organizations should use their resources to organize programs to enhance such education programs rather than advocating for the use of consent forms. If suspects are aware of their rights, particularly their right to refuse giving consent, then this will reduce at least some instances of involuntary coercion, and it will empower individuals in their encounters with law enforcement officials. The ACLU's "Know Your Rights When Encountering Law Enforcement" booklet specifically states that a person should deny giving police officers her consent to search when the officers do not have a warrant.[228] Notably, the booklet does not mention consent forms at all—it only discusses consent in general terms, thereby leaving a gap in the information and in turn exposing the reader to the risk of being confronted with a consent form and not knowing whether she can also refuse to sign the form.[229] In fact, this particular booklet's emphasis on the particulars of a search warrant risks one of the consequences about which we are particularly concerned—that is, an individual confusing the formality of a warrant with the presumed formality of a consent form.[230] Other informational websites also fail to specifically mention consent forms and do not explain that a person has the same rights to refuse consent when presented with a form.[231]

Fourth and finally, rather than focusing their energy on increasing the use of consent forms, in addition to promoting education programs, civil liberties organizations should instead press law enforcement entities to use audio and video recording equipment to create a more accurate and complete account of consent searches. As our empirical research has shown, eight states currently use audio or visual recording devices, and,

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227. One powerful example is that of the various freedom of information laws passed at the federal level and in every state.

228. *See* ACLU, *supra* note 185, at 8–10.

229. *Id.*

230. *Id.*

231. *See, e.g.*, *Police at My Door: What Should I Do?*, FLEX YOUR RIGHTS, http://www.flexyourrights.org/faqs/police-at-my-door-what-should-i-do/ (last visited Mar. 11, 2013); *When Can Police Search Your Car?*, FLEX YOUR RIGHTS, http://www.flexyourrights.org/faqs/when-can-police-search-your-car/ (last visited Mar. 11, 2013). This website is even more detailed than the ACLU booklet, yet it still fails to mention consent forms. *See also* Hanni Fakhoury, *Know Your Rights!*, ELECTRONIC FRONTIER FOUND. (June 27, 2011), https://www.eff.org/wp/know-your-rights (omitting discussion of consent forms).

with the advancement of technology and decreasing costs, we expect that police departments are moving toward adopting these devices across the board. We propose that state police across the country follow this trend and employ recording devices, which although imperfect, are a much more accurate portrayal of the police-suspect encounter than is verbal consent or consent forms.

Accordingly, there are numerous avenues that can supplement consent forms in providing protection for criminal suspects. Civil liberties organizations and police departments should work together to promote protection for suspects rather than creating systems which deprive suspects of rights and allow courts to give deference to the police.

CONCLUSION

Against the troubled background of consent searches, the use of consent forms raises particular concerns for those who wish to protect civil rights. Our hope is that our original qualitative and quantitative research relating to consent forms highlights the specific problems with the use of such forms. As our research reveals, the forms do nothing to reduce the risk of coercion—yet problematically, courts largely treat a signed consent form as dispositive of the issue of consent.

The reforms we propose will help to ameliorate the problems with consent forms. Still, we emphasize that the larger problem—that is, the deficiency with consent doctrine itself—remains. Our hope, then, is that our discussion of the problems with consent forms illuminates the larger problem of consent formalism, and, ultimately, encourages doctrinal movement toward a truly searching inquiry into the question of voluntariness.

APPENDIX A

State	Law enforcement authority	Use consent forms?	If so, in what situations?	Consent form on file?
Do not use consent forms				
Mass.	Mass. State Police	No	Police officers allowed to search passenger part of vehicle within reach without asking for officer safety. If locked container, officer asks for verbal consent. For anything more serious, the officer will obtain search warrant.	No
Ga.	Ga. State Patrol	No	Officers do not use forms, they just get verbal consent.	No
Wyo.	Wyo. Highway Patrol	No	Do not have suspects sign consent form. Officers just get verbal consent, but officers note consent in their own records.	No
Mich.	Mich. State Police	No		No
Use consent forms, but officer discretion whether to use form				
N.Y.	N.Y. State Police	Yes	Encourage officers to get a consent form signed because then they have proof. Do not want to make a blanket rule: if they get verbal consent and do not have a form on hand, they want to be able to proceed with the search.	No
Va.	Va. State Police	Yes	Up to each officer to use discretion whether to use consent form or verbal consent; many times have audio or video recording.	Yes
N.C.	N.C. State Highway Patrol	Yes	Sometimes ask for verbal consent. For longer duration searches, then ask for person to sign consent form.	No

Ind.	Ind. State Police	Yes	No specific requirement that officer uses consent form rather than just getting verbal consent, but they prefer form for tangible evidence.	No
Neb.	Neb. State Patrol	Yes	Officer has discretion. If he thinks form might have chilling effect he does not need to use it and can rely on verbal consent, but officers are encouraged to use forms because it makes it easier in the motions to suppress.	Yes
Utah	Utah Highway Patrol	Yes	Consent forms are encouraged, but the norm is that officers get consent recorded on video. So consent forms exist but whether to use a form or not is left up to the officer.	Yes
Kan.	Kan. Highway Patrol	Yes	Depends on the officer. Consent forms are good to have, but usually officers just get verbal consent. Consent forms are not required. Similar to bulletproof vests in that they are available but not required.	No
N.D.	N.D. State Highway Patrol	Yes	Consent forms are available depending on the need at the time. They are encouraged to use them. The officers have them readily available. If they are outside or the weather is inclement, the forms might be used afterward. Use it whenever possible. Officers make the call keeping their own safety as the number one priority.	No
Ill.	Ill. State Police	Yes	Forms available but usually use verbal consent. All consent is audio and video recorded. There are certain situations when a consent form is used. Usually consent is verbal.	No

Mont.	Mont. Highway Patrol	Yes	Officer discretion. Officer decides when to use consent form or just get verbal consent depending on situation.	Yes
Ala.	Ala. State Police	Yes	Forms available and used when there is no probable cause. Officers do not have to use the form when there is other evidence such as smell of marijuana or alcohol, or if they fear for their own safety. Officers use consent form when someone is pulled over for traffic offense and acting suspicious—for example, really nervous or sweaty.	No
Pa.	Pa. State Police	Yes	Forms used at discretion of officer. Officer cannot ask to search the vehicle until officer has handed back to the driver the license, registration, and insurance. The officer can then ask for permission to search. It is up to the discretion of the officer whether to use the search form. If they think it will be a comprehensive search, they will get a consent form. In Pa., consent can be revoked at any time, even with a consent form.	No
Conn.	Conn. State Police	Yes	Use a consent form in every situation that they can. Only time they would not use a consent form would be when someone says "I'm not signing anything, but go ahead and do your search." Use a consent form 99.9% of the time.	No

N.M.	N.M. State Police	Yes	If they know they want to search the vehicle they get verbal consent. If the person is doubtful about giving consent, like the officer thinks they might be feeling intimidated into consenting, then that is when they would use a form. Everything is audio and video recorded anyway, so the officer said that that is even better than a consent form.	No
Minn.	Minn. State Patrol	Yes	When asking for consent to search vehicle. Standard practice is to use form, but verbal consent is used from time to time.	Yes
District Attorney determines whether officers must use consent forms				
Tex.	Tex. Dept. of Public Safety - State Troopers	Yes	If the DA requires it in that county or if the suspect wants to see the form, then they will use a consent form. Most DAs do not require it, so they do not use consent forms that often.	Yes
Use consent forms; circumstances unspecified				
N.H.	N.H. Division of State Police	Yes	State police use forms when a trooper has a suspicion and hopes to gain consent—usually applies to vehicles and residences but can extend to other forms of property, such as backpacks.	Yes
Miss.	Miss. State Police	Yes	Officers sometimes ask for verbal consent but sometimes have suspect sign a consent form.	No
Fla.	Fla. Highway Patrol	Yes	Officers sometimes ask for verbal consent and sometimes have the suspect sign a form. When asked about when they use form or just get verbal consent, lieutenant did not really answer the question.	No

S.C.	S.C. State Police	Yes	Consent forms are used when the officer deems that there is probable cause. Typically, they use consent forms when they deem a search needs to happen. The officer gets the consent form signed when a person consents to a search.	No
Or.	Or. State Police	Yes	Anytime the officer has reasonable suspicion relating to illegal drug activity or illegal firearms or things like that.	Yes
Ark.	Ark. State Police	Yes	Use consent forms when there is no probable cause. If there is probable cause or vehicle inventory, then there is no need for a consent form, but if there is no probable cause, then they do use consent forms.	No
R.I.	R.I. State Police	Yes	No further information provided.	No
Officer must obtain some tangible evidence of consent: either consent form or recording				
W. Va.	W. Va. State Police	Yes	If a trooper is going to do a vehicle search, he will go over the consent form and have the person sign the consent form; in exigent circumstances, the trooper might ask someone to sign the consent form to search the house or person. If there is time, the trooper will obtain a search warrant. A person can give oral consent, but the troopers always make sure there is some kind of documentation like a recording.	No
Idaho	Idaho State Police	Yes	Sometimes officers get verbal consent and sometimes they use a consent form. It is up to the officer, but everything the state police does is recorded in some way or another so verbal consent	Yes

			is recorded, but a consent form is still recommended.	
Nev.	Nev. State Police	Yes	Verbal consent is used, but officers use the L3 video camera system that digitally records every traffic stop.	Yes
S.D.	S.D. State Police	Yes	Officers are not required to use consent forms and not many officers use them because all cars are equipped with video and audio recording devices.	No
Okla.	Okla. Highway Patrol	Yes	Troopers have patrol cars that are equipped with audio and video recording devices. They use those for consent recording purposes. If a trooper's recording devices are not operable, then the written request form is used.	No
Consent forms are required				
N.J.	N.J. State Police	Yes	Need consent in writing; verbal consent is not sufficient as a matter of police protocol.	No
Ohio	Ohio State Highway Patrol	Yes	Anytime that a trooper is going to ask for a consent search (usually searching someone's vehicle), the policy is that they have the individual read and sign the consent form.	Yes
La.	La. State Police	Yes	Anytime an officer wants to search a vehicle there must be two troopers present, and they must have the suspect sign a form. They never use verbal consent—always use a form.	No
Colo.	Colo. State Patrol	Yes	Use consent forms when there is not probable cause but still want to search; some officers like to get verbal consent on top of probable cause.	No
Wash.	Wash. State Police	Yes	Use consent forms for consent searches; based on protocol, have suspect sign form.	Yes

Cal.	Cal. Highway Patrol	Yes	Use consent forms any time they do not have a warrant. They always use a consent form instead of just getting verbal consent.	No
Haw.	Sheriff Division Haw. Dept. of Public Safety	Yes	Always use a written consent form even if the person gives verbal consent.	Yes
Ariz.	Ariz. Highway Patrol	Yes	For probable cause or warrant searches, they do not ask for consent, but if it is a consent search then they do use a consent form.	No
Md.	Md. State Police	Yes	For a vehicle stop, if a trooper wants to search a vehicle, he will ask the person to sign a consent form.	Yes
Vt.	Vt. State Police	Yes	Always use a written consent form. Do not only get verbal consent anymore.	No
Iowa	Iowa State Police	Yes	For consent searches, officers need to get consent forms signed, not just verbal consent.	Yes
Ark.	Ark. State Police	Yes	Use consent forms when there is no probable cause. If probable cause or vehicle inventory, then no need for consent form, but if there is no probable cause, then they do use consent forms.	No

APPENDIX B

Name	Cite	Cir.	Year	Proceeding[232]	Who won?[233]	Consent Form?
Consent Form Present						
United States v. Waller	426 F.3d 838	6	2005	Suppression	D	Y
United States v. Murphy	516 F.3d 1117	9	2008	Suppression	D[234]	Y
United States v. Breit	429 F.3d 725	7	2005	Suppression	G	Y
United States v. Fleck	413 F.3d 883	8	2005	Suppression	G	Y
United States v. Grap	403 F.3d 439	7	2005	Suppression	G	Y
United States v. Hernandez	418 F.3d 1206	11	2005	Suppression	G	Y
United States v. Mendez	431 F.3d 420	5	2005	Suppression	G	Y
United States v. Ruiz	412 F.3d 871	8	2005	Suppression	G	Y

232. The proceedings in this appendix are of three types: (1) motion to suppress evidence proceedings ("Suppression"), (2) civil damages actions under 42 U.S.C. § 1983 ("1983"), and (3) board of immigration appeals ("BIA").

233. Defendants are indicated with the letter "D," the government is indicated with the letter "G," plaintiffs are indicated with the letter "P," and when police officers prevailed, this is indicated with the letter "O."

234. Although the voluntariness of the consent form was not the main issue here, we are including this case because we think it is of marginal value, and we are attempting to construe the data in the light least favorable to our own conclusions. Thus, including this case, there are only two cases out of forty-four in which the defendant prevails.

United States v. Spence	397 F.3d 1280	10	2005	Suppression	G	Y
United States v. Williams	431 F.3d 296	8	2005	Suppression	G	Y
United States v. DiModica	468 F.3d 495	7	2006	Suppression	G	Y
United States v. Elam	441 F.3d 601	8	2006	Suppression	G	Y
United States v. Hinkle	456 F.3d 836	8	2006	Suppression	G	Y
United States v. Hudspeth	459 F.3d 922[235]	8	2006	Suppression	G	Y
United States v. Lopez-Vargas	457 F.3d 828	8	2006	Suppression	G	Y
United States v. Morgan	435 F.3d 660	6	2006	Suppression	G	Y
United States v. Sandoval-Vasquez	435 F.3d 739	7	2006	Suppression	G	Y
United States v. Sawyer	441 F.3d 890	10	2006	Suppression	G	Y
United States v. Andrus	483 F.3d 711	10	2007	Suppression	G	Y
United States v. Ayoub	498 F.3d 532	6	2007	Suppression	G	Y

235. The Eighth Circuit granted the government's petition for rehearing en banc, but the rehearing en banc did not change the outcome of the consent form issues relevant to this Article. *United States v. Hudspeth*, 518 F.3d 954 (8th. Cir. 2008).

United States v. Delancy	502 F.3d 1297	11	2007	Suppression	G	Y
United States v. Ferrer-Montoya	483 F.3d 565	8	2007	Suppression	G	Y
United States v. Johnson	495 F.3d 536	7	2007	Suppression	G	Y
United States v. Biggs	491 F.3d 616	7	2007	Suppression	G	Y
United States v. Crapser	472 F.3d 1141	9	2007	Suppression	G	Y
United States v. Grajeda	497 F.3d 879	8	2007	Suppression	G	Y
United States v. McKerrell	491 F.3d 1221	10	2007	Suppression	G	Y
United States v. Almeida-Perez	549 F.3d 1162	8	2008	Suppression	G	Y
United States v. Budd	549 F.3d 1140	7	2008	Suppression	G	Y
United States v. Caldwell	518 F.3d 426	6	2008	Suppression	G	Y
United States v. Comstock	531 F.3d 667	8	2008	Suppression	G	Y
United States v. Groves	530 F.3d 506	7	2008	Suppression	G	Y
United States v. Henderson	536 F.3d 776	7	2008	Suppression	G	Y
United States v. Reed	539 F.3d 595	7	2008	Suppression	G	Y

United States v. Ryerson	545 F.3d 483	7	2008	Suppression	G	Y
United States v. Starr	533 F.3d 985	8	2008	Suppression	G	Y
United States v. Mata	517 F.3d 279	5	2008	Suppression	G	Y
United States v. Alexander	573 F.3d 465	7	2009	Suppression	G	Y
United States v. Arciniega	569 F.3d 394	8	2009	Suppression	G	Y
United States v. Coleman	588 F.3d 816	4	2009	Suppression	G	Y
United States v. Luken	560 F.3d 741	8	2009	Suppression	G	Y
United States v. Penney	576 F.3d 297	6	2009	Suppression	G	Y
Davis v. Novy	433 F.3d 926	7	2006	1983	O	Y
Eidson v. Owens	515 F.3d 1139	10	2008	1983	P[236]	Y
No Consent Form						
United States v. Henry	429 F.3d 603	6	2005	Suppression	D	N

236. The Tenth Circuit found that the plaintiffs' consents were invalid despite the fact that the plaintiffs signed consent forms because the officer had advised the plaintiffs that withholding consent would "result in detention and a judicial penalty." *Eidson v. Owens*, 515 F.3d 1139, 1147–48 (10th Cir. 2008).

United States v. Johnson	427 F.3d 1053	7	2005	Suppression	D	N
United States v. Sanders	424 F.3d 768	8	2005	Suppression	D	N
United States v. Lakoskey	462 F.3d 965	8	2006	Suppression	D	N
United States v. Cos	498 F.3d 1115	10	2007	Suppression	D	N
United States v. Hardin	539 F.3d 404	6	2008	Suppression	D	N
United States v. Castellanos	518 F.3d 965	8	2008	Suppression	D	N
United States v. Purcell	526 F.3d 953	6	2008	Suppression	D	N
United States v. McMullin	576 F.3d 810	8	2009	Suppression	D	N
United States v. Clark	409 F.3d 1039	8	2005	Suppression	G	N
United States v. Esquivias	416 F.3d 696	8	2005	Suppression	G	N
United States v. Gregoire	425 F.3d 872	10	2005	Suppression	G	N
United States v. Hunyady	409 F.3d 297	6	2005	Suppression	G	N
United States v. Jimenez	419 F.3d 34	1	2005	Suppression	G	N
United States v. Lopez-Rodriguez	396 F.3d 956	8	2005	Suppression	G	N
United States v. Meada	408 F.3d 14	1	2005	Suppression	G	N

United States v. Meikle	407 F.3d 670	4	2005	Suppression	G	N
United States v. Meza-Gonzalez	394 F.3d 587	8	2005	Suppression	G	N
United States v. Parker	412 F.3d 1000	8	2005	Suppression	G	N
United States v. Rodriguez-Preciado	399 F.3d 1118	9	2005	Suppression	G	N
United States v. Ruiz	428 F.3d 877	9	2005	Suppression	G	N
United States v. Thompson	403 F.3d 533	8	2005	Suppression	G	N
United States v. Thompson	408 F.3d 994	8	2005	Suppression	G	N
United States v. Urbina	431 F.3d 305	8	2005	Suppression	G	N
United States v. Va Lerie	424 F.3d 694	8	2005	Suppression	G	N
United States v. Wade	400 F.3d 1019	7	2005	Suppression	G	N
United States v. Wallace	429 F.3d 969	10	2005	Suppression	G	N
United States v. Wilson	413 F.3d 382	3	2005	Suppression	G	N
United States v. Yoon	398 F.3d 802	6	2005	Suppression	G	N
United States v. Zavala	427 F.3d 562	8	2005	Suppression	G	N

United States v. Aukai	440 F.3d 1168	9	2006	Suppression	G	N
United States v. Bueno	443 F.3d 1017	8	2006	Suppression	G	N
United States v. Chavira	467 F.3d 1286	10	2006	Suppression	G	N
United States v. Coleman	458 F.3d 453	6	2006	Suppression	G	N
United States v. Coney	456 F.3d 850	8	2006	Suppression	G	N
United States v. Cruz-Mendez	467 F.3d 1260	10	2006	Suppression	G	N
United States v. Goins	437 F.3d 644	7	2006	Suppression	G	N
United States v. Guerrero-Espinoza	462 F.3d 1302	10	2006	Suppression	G	N
United States v. Jaime	473 F.3d 178	5	2006	Suppression	G	N
United States v. Moreland	437 F.3d 424	4	2006	Suppression	G	N
United States v. Parker	469 F.3d 1074	7	2006	Suppression	G	N
United States v. Salazar	454 F.3d 843	8	2006	Suppression	G	N
United States v. Siwek	453 F.3d 1079	8	2006	Suppression	G	N
United States v. Snype	441 F.3d 119	2	2006	Suppression	G	N

United States v. West	458 F.3d 1	D.C.	2006	Suppression	G	N
United States v. Weston	443 F.3d 661	8	2006	Suppression	G	N
United States v. Willie	462 F.3d 892	8	2006	Suppression	G	N
United States v. Winston	444 F.3d 115	1	2006	Suppression	G	N
United States v. Aldaco	477 F.3d 1008	8	2007	Suppression	G	N
United States v. Contreras	506 F.3d 1031	10	2007	Suppression	G	N
United States v. Dilley	480 F.3d 747	5	2007	Suppression	G	N
United States v. Esquivel	507 F.3d 1154	8	2007	Suppression	G	N
United States v. Freeman	482 F.3d 829	5	2007	Suppression	G	N
United States v. Garcia-Jaimes	484 F.3d 1311	11	2007	Suppression	G	N
United States v. Guerrero	472 F.3d 784	10	2007	Suppression	G	N
United States v. Guzman	507 F.3d 681	8	2007	Suppression	G	N
United States v. Herrera-Gonzalez	474 F.3d 1105	8	2007	Suppression	G	N
United States v. Stevens	487 F.3d 232	5	2007	Suppression	G	N

United States v. Trotter	483 F.3d 694	10	2007	Suppression	G	N
United States v. Wilburn	473 F.3d 742	7	2007	Suppression	G	N
United States v. Ziegler	474 F.3d 1184	9	2007	Suppression	G	N
United States v. Buckner	473 F.3d 551	4	2007	Suppression	G	N
United States v. Figueroa-Espana	511 F.3d 696	7	2007	Suppression	G	N
United States v. Flores	474 F.3d 1100	8	2007	Suppression	G	N
United States v. Gallardo	495 F.3d 982	8	2007	Suppression	G	N
United States v. Hilliard	490 F.3d 635	8	2007	Suppression	G	N
United States v. Jeremiah	493 F.3d 1042	9	2007	Suppression	G	N
United States v. Lyons	510 F.3d 1225	10	2007	Suppression	G	N
United States v. Washington	490 F.3d 765	9	2007	Suppression	G	N
Rodriguez v. United States	542 F.3d 704	9	2008	Suppression	G	N
United States v. Becker	534 F.3d 952	8	2008	Suppression	G	N
United States v. Carrasco	540 F.3d 43	1	2008	Suppression	G	N

United States v. Hudspeth	518 F.3d 954	8	2008	Suppression	G	N
United States v. Jones	523 F.3d 31	1	2008	Suppression	G	N
United States v. Law	528 F.3d 888	D.C.	2008	Suppression	G	N
United States v. Lopez	547 F.3d 397	2	2008	Suppression	G	N
United States v. McCauley	548 F.3d 440	6	2008	Suppression	G	N
United States v. Mercer	541 F.3d 1070	11	2008	Suppression	G	N
United States v. Moon	513 F.3d 527	6	2008	Suppression	G	N
United States v. Pikyavit	527 F.3d 1126	10	2008	Suppression	G	N
United States v. Thompson	524 F.3d 1126	10	2008	Suppression	G	N
United States v. Cantrell	530 F.3d 684	8	2008	Suppression	G	N
United States v. Carter	511 F.3d 1264	10	2008	Suppression	G	N
United States v. Chavez Loya	528 F.3d 546	8	2008	Suppression	G	N
United States v. Farrior	535 F.3d 210	4	2008	Suppression	G	N
United States v. Harris	526 F.3d 1334	11	2008	Suppression	G	N

United States v. Williams	521 F.3d 902	8	2008	Suppression	G	N
United States v. Adams	583 F.3d 457	6	2009	Suppression	G	N
United States v. Canipe	569 F.3d 597	6	2009	Suppression	G	N
United States v. James	571 F.3d 707	7	2009	Suppression	G	N
United States v. McGee	564 F.3d 136	2	2009	Suppression	G	N
United States v. Barnum	564 F.3d 964	8	2009	Suppression	G	N
United States v. Brewer	588 F.3d 1165	8	2009	Suppression	G	N
United States v. Brown	563 F.3d 410	9	2009	Suppression	G	N
United States v. Carbajal-Iriarte	586 F.3d 795	10	2009	Suppression	G	N
United States v. Crowder	588 F.3d 929	7	2009	Suppression	G	N
United States v. Dunbar	553 F.3d 48	1	2009	Suppression	G	N
United States v. Villa	589 F.3d 1334	10	2009	Suppression	G	N
United States v. Price	558 F.3d 270	3	2009	Suppression	G	N
Callahan v. Millard County	494 F.3d 891	10	2007	1983	P	N

Johnston v. Tampa Sports Authority	490 F.3d 820	11	2007	1983	O	N
Moore v. Andreno	505 F.3d 203	2	2007	1983	P	N
Lopez-Rodriguez v. Mukasey	536 F.3d 1012	9	2008	BIA	P	N
Manzanares v. Higdon	575 F.3d 1135	10	2009	1983	P	N