

INCAPACITY TO REFUSE CONSENT: FOURTH AMENDMENT OFFENSES IN SENSUAL SEARCHES OF INDIVIDUALS WITH MENTAL ILLNESS

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ABSTRACT

Searches conducted upon voluntary consent are a permissible exception to the Fourth Amendment's search warrant requirement. This Article identifies and discusses several problems with consensual search doctrines and the particularly harmful effect on individuals with mental illness. Requests from law enforcement officers have been found to be inherently coercive, and those with mental illness are especially prone to comply with authority figures and to unknowingly waiving their rights. Courts have repeatedly failed to consider the effect that mental illness can have on one's capacity to give voluntary consent, and law enforcement officers consequently take advantage of this tactic to circumvent the warrant requirement. This Article proposes solutions so that consensual searches can be conducted in accordance with Fourth Amendment principles, including that officers should be required to inform individuals of the right to refuse consent, that any consent given by an individual exhibiting signs of mental illness at the scene should be discredited by officers, and that evidence obtained through invalid consent be inadmissible at trial.

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I. INTRODUCTION

The United States criminal justice system functions and relies significantly on law enforcement officers’ ability to ask individuals for permission to search their person, bags, homes, cars, and other possessions for evidence of criminal activity.¹ Under current Fourth Amendment doctrine, the inquiring officer is not required to inform the suspect of his right to refuse to consent to the search.² As a result, hundreds of thousands

¹ See *infra* text accompanying notes 14–18.

² *United States v. Drayton*, 536 U.S. 194, 206 (2002); *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996); *Schneekloth v. Bustamonte*, 412 U.S. 218, 227, 232–33, 235–47 (1973) (finding that whether one knows of his right to refuse to consent to a search is just one factor of many in determining whether a consensual search was valid under the “totality of the circumstances”

of Americans undergo consensual searches each year.³

This Article explores the laws, policies, and practices of consensual searches in the United States and the ethical and constitutional flaws therein. It focuses specifically on the effect of these policies on individuals with mental illness, who are much less likely to decline officers' requests to search. This Article presents the argument that the absence of a requirement that individuals be informed of their right to refuse to consent to the search allows law enforcement officers and agencies to wrongfully take advantage of the public, especially those with mental illness, and that thus, this practice is unconstitutional under the Fourth Amendment.

Part II provides a legal background to Fourth Amendment searches, the warrant requirement, and the exception thereto where an individual consents to a search.

Part III discusses the legal standards for valid, "voluntary" consensual searches in terms of the requisite mental state of the consentor and examines how courts require proof of significant officer misconduct to invalidate a search, even where consent was given involuntarily. Part III also contrasts the lack of a requirement that officers warn an individual of his right to decline the search to other areas of criminal procedural law with warning requirements, such as the *Miranda* rights warnings given before custodial interrogations. Part III ultimately shows that in failing to assess the validity of a consensual search upon one's actual capacity to consent voluntarily, and by ignoring the inherent difficulty in refusing to comply with officers' requests, consensual searches are inherently coercive. This law enforcement tactic creates an avenue for officers and agencies to evade the constitutional requirement that searches be

test); *United States v. Hall*, 969 F.2d 1102, 1105 (D.C. Cir. 1992); David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941, 950 (1997). For purposes of clarity and space, all pronouns in this Article will be in the masculine form. This can be assumed to substitute a gender-neutral pronoun, as the laws and principles discussed herein pertain and relate to law enforcement officers, consenters, and individuals with mental illness of all genders.

³ Concrete data on the frequency of consensual searches is not available. See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 209 (2002); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 214 (2001). The only data supplied by the U.S. government regarding consensual searches is only as recent as 2008 and is limited to consensual searches conducted at traffic stops by federal law enforcement officers. See CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, NO. NCJ 234599, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008 10 (2011), available at <http://www.bjs.gov/content/pub/pdf/cpp08.pdf> (estimating that nearly half a million consensual searches were conducted in 2008). However, given the fact that consensual searches of persons and effects conducted outside of traffic stops were not considered, the number is likely much greater for the nationwide figures of annual consensual searches.

conducted pursuant to a valid warrant.

Part IV examines how the problems in Part III particularly harm individuals with mental illness. Subpart A shows how individuals with mental illness are more likely to cooperate and comply with authority figures, such as by responding in the affirmative even when they do not understand the question or the circumstances under which it is asked. Thus, people with mental illness are particularly prone to consenting to even polite requests to search from law enforcement officers, resulting in the waiver of their rights against government intrusions without even knowing it. Subpart B discusses how the criminal justice system gives little weight to a consentor's mental health or capacity to consent voluntarily and how this deprives individuals with mental illness of an honest evaluation of the validity of the consensual search.

Subpart C shows how assessing the validity of a search based upon the officer's perception of the consentor's mental capacity, rather than considering his actual mental capacity at the time, gives officers and courts an unreasonable amount of discretion and often leads to erroneous determinations. Subpart D provides examples of cases in which the problems discussed in Part IV have led to flawed and unethical determinations of the validity of consensual searches of individuals with mental illness. The last subpart, Subpart E, discusses the resulting over-criminalization of people with mental illness due to the problems outlined above and other aspects of the criminal justice system.

Part V proposes a series of solutions to many of the problems described above. Subpart A argues that the government should make more effort to inform the public of its Fourth Amendment rights, including instructing high school students of their right to decline consent to requested searches. Subpart B proposes three things that law enforcement officers should be required to do at the scene of a potential consensual search: (1) when asking to search, the officer must inform the individual of his right to refuse; (2) the standard for valid consensual searches should be changed to require that consent be made both knowingly and voluntarily, meaning that the consentor must have had sufficient mental capacity to do so; and (3) where officers have any doubt as to the consentor's mental capacity to knowingly and voluntarily consent, they should refrain from searching without first obtaining a valid warrant.

Subpart C proposes changes that should take place at judicial proceedings involving a defendant who was subject to a consensual search. First, courts should assess the validity of the consent based on the consentor's actual mental capacity to consent knowingly and voluntarily at

the time, as determined by medical and expert evidence, and not based on the officer's belief at the time. Second, where it is proven in court that the consenter was in fact incapable of validly consenting, all incriminating evidence obtained as a result of the consensual search should be inadmissible at trial, in accordance with the deterrence rationale of the evidence exclusionary rule. Subpart D debunks some of the counterarguments to the proposals addressed above.

Finally, Part VI summarizes the Article and concludes.

II. BACKGROUND OF GOVERNMENT SEARCHES UNDER THE FOURTH AMENDMENT AND THE CONSENSUAL SEARCH EXCEPTION

The Fourth Amendment guarantees individuals the right to be free from government intrusion, including warrantless searches.⁴ This Amendment is the predominant source of authority over government searches of individuals and their effects.⁵ It states that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁶

A search under the Fourth Amendment includes any circumstance in which the government either intrudes in a constitutionally protected area⁷ or in an area where one has a reasonable expectation of privacy.⁸ Searches are permissible once a judge issues a warrant based upon a finding that probable cause exists to authorize the search.⁹ This warrant requirement is subject to a lengthy list of exceptions, however, including where an individual consents to a government officer's request to search the individual or his effects.¹⁰

⁴ See U.S. CONST. amend. IV.

⁵ See 68 AM. JUR. 2D *Searches and Seizures* § 5 (2013).

⁶ U.S. CONST. amend. IV.

⁷ *United States v. Jones*, 132 S. Ct. 945, 950 n.3 (2012).

⁸ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

⁹ FED. R. CRIM. P. 41(d)(1).

¹⁰ *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Katz*, 389 U.S. at 357; *Davis v. United States*, 328 U.S. 582, 593–94 (1946); *United States v. Hall*, 969 F.2d 1102, 1106 (D.C. Cir. 1992). These exceptions also include searches incident to a lawful arrest, searches under exigent circumstances, searches conducted in foreign countries, and automobile searches. See generally WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH*

Probable cause exists when the totality of the circumstances and any reasonable inferences made by the officer or judge¹¹ lead to a “fair probability” that a search will produce evidence of criminal activity.¹² Despite the relative ease in meeting this standard, an officer can even more easily request to search the individual—for which he need not have any suspicion whatsoever of any criminal activity.¹³ The only requirements for a valid consensual search are that the consent be made voluntarily and not as a result of any officer coercion.

Consequently, officers exercise this tactic liberally, preferring it to obtaining a warrant because of the lower standard of suspicion necessary, the fact that the officer is more likely to receive a broader scope to search than he would under a search warrant, and the ease in getting an individual to consent.¹⁴ As a result, the vast majority of warrantless searches are conducted per the consensual search exception.¹⁵ This is largely because officers are not required to inform an individual that he can, in fact, refuse to allow the search.¹⁶

The Supreme Court has also expressed its overall preference for consensual searches, stating even that requesting and granting consent

AMENDMENT § 4.1(b) (5th ed. 2012) (discussing the exigent circumstances exception). It should be noted that the searches referred to and discussed in this Article, as well as the relating arguments and theories, apply to noncustodial searches, or searches that occur before the individual is arrested. Consensual searches of arrestees are subject to different standards of permissibility, which are outside the scope of this Article.

¹¹ LAFAVE, *supra* note 10, at § 3.2(d).

¹² *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

¹³ *See United States v. Drayton*, 536 U.S. 194, 200–01 (2002) (“Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means.”); *McIntosh v. State*, 753 S.W.2d 273, 274 (Ark. 1988) (holding that an officer did not need reasonable suspicion to search a van because he had the driver’s consent); *People v. Rivera*, 159 P.3d 60, 61–62 (Cal. 2007) (holding that law enforcement officers did not have to corroborate an anonymous tip before obtaining a homeowner’s consent to search her residence); *State v. Carbo*, 864 A.2d 344, 345 (N.H. 2004) (holding that law enforcement officers did not need reasonable suspicion to ask for consent to search a vehicle after arrest).

¹⁴ LAFAVE, *supra* note 10, at § 8.1(a); *see infra* Part III.C (discussing the inherent difficulty people have in refusing to consent to officers).

¹⁵ Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69, 69 n.2 (2007) (noting that as many as ninety-eight percent of warrantless searches are conducted pursuant to the consensual search exception (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 275 (3d ed. 2002))); Rebecca Strauss, Note, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868, 871 (2002).

¹⁶ *See* sources cited *supra* note 2.

“dispels inferences of coercion.”¹⁷ However, the Court does not acknowledge that consensual searches often allow officers to take advantage of individuals who do not know that they have the right to refuse those searches. As the following part shows, however, the ease and frequency of courts and officers finding that a searchee voluntarily consented—despite his not having known of his right to decline—shows that such searches are inherently coercive and that the nominal request might as well be compulsory.

III. THE ROLE OF THE CONSENTER’S MENTAL STATE IN ASSESSING THE VALIDITY OF A CONSENSUAL SEARCH

This part shifts to the requisite mental state a consentor must have had at the time he consented to the search in order for the search to be deemed valid by a reviewing court. To reiterate, this Article aims to show how the extant jurisprudence governing consensual searches—and in particular, where an individual is impaired from declining consent as a result of his mental illness—constitutes an unreasonable search in violation of the Fourth Amendment. This part discusses the ethical and legal problems in the ways courts consider the searchee’s mental state when assessing whether a consensual search was validly conducted, and in the tactics that law enforcement officers use to obtain consent.

The U.S. Supreme Court case of *Schneckloth v. Bustamonte* established the extant standard for validly-given consent,¹⁸ which, at least in theory, still applies today. The Court held that to pass constitutional muster, courts must assess the totality of the circumstances to find that the consent was made voluntarily.¹⁹ In doing so, the *Schneckloth* Court set out

¹⁷ *Drayton*, 536 U.S. at 207.

¹⁸ *Schneckloth v. Bustamonte*, 412 U.S. 218, 226–29 (1973).

¹⁹ *Id.* at 226, 248–49; *see, e.g.*, *United States v. Grap*, 403 F.3d 439, 443 (7th Cir. 2005) (holding that consent of the defendant’s mother was voluntary despite her history of psychosis because the totality of the circumstances indicated that she understood the officer’s search request and its consequences); *United States v. Santiago*, 428 F.3d 699, 704–05 (7th Cir. 2005) (holding that the defendant’s consent was voluntary because the law enforcement officers behaved “very professionally,” did not badger or harass the defendant or his family, and conducted the search for only fifteen or twenty minutes); *United States v. Mendez*, 431 F.3d 420, 429 (5th Cir. 2005) (upholding the district court’s finding of voluntary consent based on the totality of the circumstances, which included “determinations that there was no police coercion, that Mendez cooperated with the police, that Mendez was aware of his right to refuse consent, and that Mendez probably believed that no incriminating evidence would be found”); *State v. Cox*, 171 S.W.3d 174, 185–86 (Tenn. 2005) (holding that the defendant’s consent was voluntary based on the totality of the circumstances, which suggested that she “eagerly cooperated” with officers’ search request).

a series of factors that courts should consider, including “the possibly vulnerable subjective state of the person who consents,”²⁰ which should be assessed by his age, level of education, intelligence, maturity and sophistication, prior experience and contact with law enforcement, and whether the searchee knew of his right to refuse the search at the time.²¹

In the years since *Schneckloth*, courts’ use of such a wide array of factors has created a flimsy and meaningless standard in which courts have wide discretion to “inject their own values into the decision process.”²² This part discusses the ways in which *Schneckloth* and subsequent court decisions have caused consensual searches to be evaluated virtually without consideration of the consentor’s mental state at the time, and the legal, ethical, and constitutional problems within these standards.

As the *Schneckloth* factors indicate, the fact that a consentor did not know or was not informed of his right to decline the search is not dispositive of an improper consensual search.²³ Subpart A contrasts this to other areas of criminal procedural law in which failing to inform an individual of his rights is constitutionally prohibited, and discusses the flaws in the Supreme Court’s rationale for refusing to apply this same standard to consensual searches and refusing to suppress evidence obtained in consensual searches that are ultimately deemed invalid.

Subpart B demonstrates how courts have specified that, in order for a consensual search to be invalid, there must be proof of officer coercion, a

²⁰ *Schneckloth*, 412 U.S. at 229.

²¹ *Id.* at 226–27; LAFAVE, *supra* note 10, § 8.2(d)–(e); *cf.* *Davis v. North Carolina*, 384 U.S. 737, 739–52 (1966) (holding that a petitioner with a criminal record was coerced into confessing because he was interrogated over a period of sixteen days and not advised of any rights until after he confessed); *Payne v. Arkansas*, 356 U.S. 560, 566–67 (1958) (holding that the confession of a “mentally dull 19-year-old youth” was coerced because he was arrested without a warrant, denied a hearing, denied notice of his right to remain silent and right to counsel, deprived of food, held incommunicado, and made to believe that “there would be 30 or 40 people there in a few minutes that wanted to get him”); *Fikes v. Alabama*, 352 U.S. 191, 194–96 (1957) (holding that the confession of “a schizophrenic and highly suggestible” petitioner was not voluntary because he was interrogated for several hours a day over the course of seven days); *Haley v. Ohio*, 332 U.S. 596, 599–601 (1948) (holding that the confession of a fifteen-year-old boy was coerced because he was not advised of his right to counsel, was questioned for five hours beginning at midnight, and was not allowed to see his mother or counsel).

²² LAFAVE, *supra* note 10, at § 8.2.

²³ *Schneckloth*, 412 U.S. at 227 (“While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.”); LAFAVE, *supra* note 10, § 8.2(i); *see also supra* note 2 (listing cases in which the Supreme Court has held that law enforcement officers do not have to inform individuals of their right to refuse in order for a consensual search to be valid).

requirement that has effectively done away with any evaluation of the consentor's mental state when determining voluntariness. Further, this subpart demonstrates the difficulty in proving that an officer's conduct was coercive, as courts have found that even the most egregious conduct does not suggest that the consent was given involuntarily.

Subpart C discusses how several studies conducted by legal and mental health experts have demonstrated the inherent difficulty that people have in refusing to comply with and consent to any requests from law enforcement officers, and that this alone makes consensual searches coercive. Subpart D discusses how the inherent coercion in consensual searches renders this practice unconstitutional by allowing officers to circumvent the protections of the Fourth Amendment.

Before proceeding, it should be made clear that though this Article puts forth the argument that any evidence obtained through the involuntary consent of the searchee should be inadmissible at judicial proceedings, it does not condone the actual or alleged criminal conduct of the defendants discussed herein, nor oppose any eventual convictions that would have resulted solely from evidence obtained legally and ethically.

A. WARNING REQUIREMENTS IN CRIMINAL PROCEDURE AND THE BASELESS EXCEPTION FOR CONSENSUAL SEARCHES

The lack of a requirement that individuals be informed of their right to decline to consent to law enforcement searches is relatively unique when compared to other criminal procedural safeguards. For example, before a defendant waives his right to a jury trial, he must be informed of, comprehend, and appreciate the consequences of doing so.²⁴ Similarly, judges must read defendants who choose to plead guilty a lengthy list of the rights they waive in doing so, such as their right to appeal.²⁵ Finally, as Professor David Kaplan explains, the Supreme Court has held numerous times that

once the Sixth Amendment right to counsel has attached, an effective waiver of that right, whether it occurs in a courtroom, a patrol car, or in any other location, must be an "intentional relinquishment of a known right"; the waiver must be knowing, intelligent, and voluntary. [This] reflect[s] the Court's concern with police overreaching and procedural

²⁴ Allison D. Redlich, *Voluntary, But Knowing and Intelligent? Comprehension in Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 605, 608 (2005).

²⁵ FED. R. CRIM. P. 11(b)(1) (requiring a judge to read the defendant his rights before pleading guilty and to determine that the defendant understands these rights).

fairness to defendants, especially those defendants who may be vulnerable to such overreaching by virtue of diminished mental abilities, a lack of education, or some other factor related to background or experience. Finally, the Court acknowledged the fact that a layperson's unfamiliarity with legal procedure may prejudice his ability to preserve his rights at trial.²⁶

With regard to waiving one's right to counsel, the Court recognized the particular vulnerability that an individual with mental illness may experience when facing officers' attempts to solicit a confession, and found that preserving the individual's procedural rights outweighed the value of any evidence that would be obtained. For whatever reason, however, the Court has held that the same rights do not extend to those who unwillingly consent to requests to search. The remainder of this subpart discusses the Court's flawed rationale for refusing to apply the warning requirement and the exclusionary rule of evidence to cases involving consensual searches, in contrast to cases involving the waiver of one's *Miranda* rights.²⁷

1. Refusing to Extend the Warning Requirement to Consensual Searches

In holding that consenting searchees do not have to be informed of their right to decline officers' requests to search, the *Schneckloth* Court distinguished consensual searches from the warning requirement in custodial interrogations: the Court explained that because coercion is inherent to a custodial setting, the warning requirement attached to the relinquishment of one's *Miranda* rights, but that consensual searches occur "under informal and unstructured conditions" and thus, do not need a pre-waiver warning.²⁸ This logic is baseless and unjustifiable, as it is clear that officers can and do use coercive tactics with individuals both in and out of custody.²⁹

The Court went on to explain that the greater constitutional protection afforded to the waiver of one's *Miranda* rights applies only to those rights that "preserve a fair trial"—under this logic, these include one's right to

²⁶ Kaplan et al., *supra* note 2, at 944–45.

²⁷ *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (holding that an individual in custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires").

²⁸ *Schneckloth*, 412 U.S. at 231–33, 240.

²⁹ See, e.g., *infra* Part III.B.

know that he can refuse to speak or confess while in police custody.³⁰ However, being aware of one's right to refuse a request to search also preserves a fair criminal trial. Whether evidence is obtained before or after an arrest, or while one is at home or at a police station, does not affect the nature of the evidence, nor its impact on the fairness of a trial. Thus, constitutional protections should be afforded to defendants in both circumstances.

Some have claimed that the *Schneckloth* Court refused to extend warning rights to consensual searches because of its fear of the consequences it would have on the criminal investigative process.³¹ The Court recognized that the extant policies relating to consensual searches were necessary "for the effective enforcement of criminal laws."³² In doing so, the Court valued retaining the potency of the criminal justice system over protecting defendants' Fourth Amendment rights.

2. Failing to Apply the Exclusionary Rule to Evidence Obtained in Illegal Consensual Searches

Courts have relied on the deterrence theory in the exclusionary rule³³ to justify admitting evidence at trial that was obtained from an invalid consensual search, such as where the defendant consented involuntarily.³⁴ Evidence obtained in violation of *Miranda*, for example, must be excluded from consideration at trial, subject to certain exceptions, such as the ability to use non-compelled statements obtained without a proper warning for impeachment purposes.³⁵ Courts have reasoned that if evidence wrongfully

³⁰ *Schneckloth*, 412 U.S. at 237.

³¹ E.g., Brian S. Love, Comment, *Beyond Police Conduct: Analyzing Voluntary Consent to Warrantless Searches by the Mentally Ill and Disabled*, 48 ST. LOUIS U. L.J. 1469, 1493 (2004) ("[T]he definition the [*Schneckloth*] Court created for voluntary consent is a legal fiction, essentially a public policy compromise between the needs of law enforcement and the need for public perception of the criminal justice system as fair." (citing Kaplan et al., *supra* note 2)).

³² *Schneckloth*, 412 U.S. at 224–25.

³³ The exclusionary rule in federal evidence law provides that evidence that is wrongfully obtained by law enforcement officers should be inadmissible at trial in order to deter officers from using these same tactics in the future. The exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." *United States v. Calandra*, 414 U.S. 338, 338–39, 347–48 (1974).

³⁴ See, e.g., *United States v. Drayton*, 536 U.S. 194, 203 (2002) (refusing to "suppress any evidence obtained during suspicionless . . . [searches] aboard buses in the absence of a warning that passengers may refuse to cooperate"); *Schneckloth*, 412 U.S. at 225, 240–42 (declining to require "[a] strict standard of waiver" to render consensual searches valid); LAFAVE, *supra* note 10, § 8.2(i).

³⁵ *United States v. Patane*, 542 U.S. 630, 639 (2004).

obtained during a custodial interrogation were not excluded, law enforcement officers would not be deterred from continuing to use this tactic.³⁶ In contrast, courts reason that any evidence obtained from an involuntary consentor should not be excluded because officers cannot be deterred from making inferences that they believe to be reasonable at the time.³⁷ This rationale is deeply flawed: if officers know that their perception of a consentor's competency will not affect the admissibility of any evidence obtained,³⁸ there would be little incentive for them to make any sort of inquiry about or investigation of the consentor's mental state. Rather, it would be in the officer's interest to request the search and then begin searching immediately, because the more time that passes, the greater the chance that the officer would acquire more information about the consentor's capacity to consent, which ultimately would be considered at trial to determine whether the officer's belief was reasonable. Thus, officers would be taking advantage of consentors who do not actually consent voluntarily.

Applying the exclusionary rule to invalid consensual searches would have a significant deterrent effect because officers would have to make an effort to fairly and more thoroughly assess the voluntariness of the individual's consent at the scene. In the interest of justice, the mere fact that evidence was obtained wrongfully by an officer, under any circumstance, should provide a sufficient basis to exclude it—at least if we are to preserve a defendant's right to a fair and ethical trial.

B. COURTS REQUIRE PROOF OF OFFICER MISCONDUCT TO INVALIDATE A CONSENSUAL SEARCH (AND SUCH MISCONDUCT IS DIFFICULT TO PROVE)

In 2002, the Supreme Court upheld a consensual search without

³⁶ *See id.*

³⁷ *See* United States v. Leon, 468 U.S. 897, 918–19 (1984) (“[E]ven assuming that the rule effectively deters some law enforcement misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.”); United States v. Janis, 428 U.S. 433, 449–54, 450 n.22 (1976) (noting that studies of the exclusionary rule's deterrent effect are generally inconclusive, and declining to extend the rule to evidence discovered during an unlawful search); United States v. Grap, 403 F.3d 439, 444–45 (7th Cir. 2005) (declining to apply the exclusionary rule to circumstances in which deterrence would be unlikely, such as when officers reasonably believe that they obtained consent to search based on “objective facts” but are unaware of the consentor's mental capacity).

³⁸ The validity of the consent to a search request is assessed at trial based on the requesting officer's perception of the consentor's capacity to voluntarily consent, rather than based on the consentor's actual mental capacity as determined by medical and psychology experts. *See infra* Part IV.C.

referencing or considering the subjective characteristics of the consentor, basing its analysis almost entirely on the absence of unreasonable police misconduct when asking to and conducting the search.³⁹ In doing so, the Court strayed from the *Schneckloth* holding that the subjectivity of the consentor should be considered when assessing the validity of a consensual search,⁴⁰ and since then, courts have increasingly found that officer misconduct is a condition precedent to deeming a consensual search invalid.⁴¹ Thus, instead of assessing the personal perspective and mental state of the consentor—which one would assume would form the basis for whether he consented voluntarily—courts look only to the conduct of the law enforcement officers at the time. As such, courts can and do uphold searches in which the officer acted lawfully, even though the searchee did not, in fact, voluntarily consent. This occurs, for example, where a consentor has a mental illness that makes him especially prone to involuntarily consenting to authority figures, as discussed in Part IV.A. Other examples include where an officer is working undercover—here, the

³⁹ *Drayton*, 536 U.S. at 204, 206–07 (holding that consent was voluntarily given because “there was nothing coercive [or] confrontational’ about the encounter. There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice.”); Nadler, *supra* note 3, at 163 (“Having been satisfied implicitly that the police did not engage in abusive conduct [in *Drayton*], the Court then directly concluded that there must have been no seizure and no unconsented search.”).

⁴⁰ See *supra* text accompanying notes 20–21. The standard for coercion set out by the *Schneckloth* Court included that even “subtly coercive police questions” could constitute sufficient misconduct to invalidate a search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973).

⁴¹ E.g., *United States v. Rosario-Diaz*, 202 F.3d 54, 69–70 (1st Cir. 2000) (upholding a consensual search as constitutional and emphasizing that the absence of coercive conduct, either physical or psychological, rendered the consent voluntary); *United States v. Espinosa-Orlando*, 704 F.2d 507, 512–13 (11th Cir. 1983) (holding that a consensual search was voluntary even though the district court ignored the existence of “one circumstance to be weighed in favor of involuntariness,” because “no abusive language or physical threats were at any time directed at Espinosa, who had not been handcuffed, placed within a police vehicle, or transported away from the location of the stop”); *Reynolds v. State*, 592 So. 2d 1082, 1085–87 (Fla. 1992) (holding that handcuffing constituted physical coercion under the circumstances, rendering the search and seizure illegal); *State v. Sakezeles*, 778 So. 2d 432, 435 (Fla. Dist. Ct. App. 2001) (“[A] consent will be found voluntary only if there is clear and convincing evidence that the consent was not a product of the illegal police action”); *State v. Fincher*, 305 S.E.2d 685, 689–91 (N.C. 1983) (holding that a consensual search was valid despite the defendant’s “lack of intelligence and comprehensive ability” because “no force or coercion was used against him”); Strauss, *supra* note 3, at 212, 225 (noting that courts will usually find consensual searches valid unless there was extreme officer misconduct). See generally *State v. Johnson*, 16 P.3d 680 (Wash. Ct. App. 2001) (neglecting to explain why or upon what facts the court concluded that the consentor “understood” enough about his rights relating to the search to uphold the search as voluntary).

searchee consents only to the entry of a particular person, but does not voluntarily consent to a government search.⁴² Further complicating the notion of a voluntary search is that an individual may imply his consent through his actions or words, which allows courts to find that the individual voluntarily consented to a search without even knowing he did so.⁴³

An additional problem with courts requiring officer misconduct to invalidate a search is that courts are reluctant to find that coercive conduct actually took place. For example, courts have found that so long as the officer phrases the request in the form of a question, his conduct at the

⁴² *E.g.*, *Hoffa v. United States*, 385 U.S. 293, 300 (1966) (rejecting the claim that the requester's "failure to disclose his role as a government informer vitiated the consent that the petitioner gave to [the informer's] repeated entries"); *Lewis v. United States*, 385 U.S. 206, 207 (1966) (explaining how a federal narcotics agent, by misrepresenting his identity and expressing a willingness to purchase narcotics, was voluntarily invited into the defendant's home); *O'Neill v. Louisville/Jefferson Cnty. Metro Gov't*, 662 F.3d 723, 731 (6th Cir. 2011) (describing how undercover agents posed as prospective buyers of puppies advertised for sale, and did not intrude "any more than permitted or any more than any other person who responded to the ad"); *United States v. Bramble*, 103 F.3d 1475, 1477-78 (9th Cir. 1996) (holding that the defendant's voluntary consent to undercover agents to search his home was not vitiated even though the agents denied that they were law enforcement officers); *State v. Garrow*, 480 N.W.2d 256, 257 (Iowa 1992) (holding that defendant's consent to allow an undercover officer to make a warrantless entry into his home during a sting operation to buy drugs was valid consent); *Bradley v. State*, 562 So. 2d 1276, 1278-81 (Miss. 1990) (holding that an undercover officer did not violate the defendant's Fourth Amendment rights by making a warrantless entry); *State v. Graham*, 614 N.W.2d 266, 270-71 (Neb. 2000) (denying the defendant's motion to suppress evidence collected by an undercover agent who the defendant voluntarily invited into his home); *State v. Posey*, 534 N.E.2d 61, 66-69 (Ohio 1988) (denying the defendant's motion to suppress evidence gathered when members of a nonprofit organization voluntarily consented to a sheriff's entry into a lodge where there was illegal gambling); *State v. Zaccaro*, 574 A.2d 1256, 1258-61 (Vt. 1990) (upholding an undercover officer's warrantless entry while posing as a drug buyer); *State v. Hastings*, 830 P.2d 658, 659-61 (Wash. 1992) (holding that the defendant had no reasonable expectation of privacy in his home where an undercover agent was voluntarily invited to buy drugs); *see also* LAFAVE, *supra* note 10, § 8.2(m) (explaining that undercover officers' deception as to their identity is rarely sufficient to invalidate a consensual search).

⁴³ *See, e.g.*, *United States v. Reynolds*, 646 F.3d 63, 68, 72 (1st Cir. 2011) (holding that even though the defendant was committed to a mental health institution one month prior to consenting to a search request, the defendant's consent was voluntary because it was reasonably implied from her response to the officer's search request); *United States v. Scroggins*, 599 F.3d 433, 441-42 (5th Cir. 2010) (holding that when a defendant asked to be allowed to enter her house to put on more appropriate clothing and the officer said she could not enter unless he accompanied her, her subsequent entry constituted valid "implied consent" for the officer to enter); *Brown v. United States*, 983 A.2d 1023, 1027 (D.C. 2009) (holding that the defendant voluntarily consented to a search of the inside of her pill bottle because even though the defendant "did not give explicit, verbal permission, she nonetheless impliedly consented to the search by handing the bottle to [the officer] in response to a question about whether she had any 'guns, drugs, or narcotics'").

scene does not constitute coercion.⁴⁴ However, numerous psychological studies have found that the mere presence or absence of coercion does not indicate whether consent was given voluntarily.⁴⁵

Even if one believes that voluntariness and coercion are exact antonyms and that thus, the absence of coercion should automatically conclude that the consent was voluntary, a problem still lies in the fact that courts recognize coercion to be only the most egregious of officer conduct.⁴⁶ For example, federal and state trial and appellate courts across the country have upheld consensual searches where the officers requested the search by locking the searchee out of his house,⁴⁷ or by threatening that if consent was not given, the officer would call social services to come and take the searchee's children.⁴⁸ In one case, the request to search occurred

⁴⁴ LAFAVE, *supra* note 10, at § 8.2 (quoting William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064 (1995)); *e.g.*, *United States v. Drayton*, 536 U.S. 194, 206 (2002) (noting that there was no coercion in a consensual search because when the defendants informed the officer "that they had a bag on the bus, he asked for their permission to check it. And when [the officer] requested to search [their] persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse.").

⁴⁵ See LAFAVE, *supra* note 10, § 8.1(a) (stating that coercion and voluntariness "are two different matters; a person might surrender his privacy in full knowledge of his Fourth Amendment rights but yet in response to overwhelming police pressure, or might give up his privacy without the slightest pressure but because of unawareness of his right to decline a police request to search"); *infra* Part III.C. (analyzing the inherent difficulty people have in denying requests from law enforcement officers).

⁴⁶ *E.g.*, *United States v. Barnett*, 989 F.2d 546, 555–56 (1st Cir. 1993) (holding that the defendant's consent was voluntary because "there was no evidence of overt or covert threats or pressure to exact Barnett's consent," even though "seven or eight" officers arrived at the defendant's home with their guns drawn); *United States v. Major*, 912 F. Supp. 90, 97 (S.D.N.Y. 1996) (finding the defendant's consent valid despite his testimony that "the agents never asked permission to search but rather asked questions and demanded Major open his filing cabinet"); *Commonwealth v. Paredes-Rosaria*, 700 A.2d 1296, 1300–01 (Pa. Super. Ct. 1997) (holding that there was no coercion when an officer informed the defendant that he would obtain a search warrant if the defendant did not comply with his search request); *cf.* *United States v. Espinosa-Orlando*, 704 F.2d 507, 513 (11th Cir. 1983) (holding that the search request was not coercive because the officers did not use "tactics that would augment the degree of the coercion that is inherent in any arrest," even though several officers had their guns drawn and the consenter was forced to lie on the ground).

⁴⁷ *United States v. Eggers*, 21 F. Supp. 2d 261, 270–71 (S.D.N.Y. 1998).

⁴⁸ *United States v. Ivy*, 165 F.3d 397, 400–02 (6th Cir. 1998); *United States v. Tibbs*, 49 F. Supp. 2d 47, 48–53 (D. Mass. 1999); *see also, e.g.*, *United States v. Ansaldi*, 372 F.3d 118, 129 (2d Cir. 2004) (citing *United States v. Kon Yu-Leung*, 910 F.2d 33, 41 (2d Cir. 1990)); *United States v. Crespo*, 834 F.2d 267, 271 (2d Cir. 1987)) (finding that a defendant who was both handcuffed and facing the officers' drawn weapons was not coerced into consenting to the search); *Espinosa-Orlando*, 704 F.2d at 513 (holding that the search request was not coercive because the officers did not use "tactics that would augment the degree of the coercion that is inherent in any arrest," even though several officers had their guns drawn and the consenter was forced to lie on the ground); *State v. Fincher*, 305 S.E.2d 685, 689–91 (N.C. 1983) (holding that

while eleven officers had their guns drawn and had already begun to round up the consenter's fiancé and children.⁴⁹ Thus, courts have established a high standard for officer coercion, making it evermore difficult to prove that consent was given involuntarily.

C. THE INHERENT DIFFICULTY IN DENYING REQUESTS FROM LAW ENFORCEMENT OFFICERS

Another problem with courts' requiring the presence of officer misconduct to invalidate a consensual search is that people inherently feel compelled to comply with authority figures, even where the requester is polite and noncoercive.⁵⁰ Countless studies conducted by legal and mental health experts have concluded that in general, people tend to be fearful of and hesitant to decline requests from law enforcement officers in any circumstance, even when they want to.⁵¹ Police officers are institutions of protection, which implies trustworthiness; their badges indicate authority, and their weapons indicate compulsion and suggest that noncompliance will be followed by punishment.⁵²

Even if officers were to warn an individual that he could decline the

the defendant's consent was voluntary and that there was no police coercion, even though ten police officers were present at the time of the search request and the defendant was suffering from mental retardation and hallucinogenic schizophrenia).

⁴⁹ United States v. Hurston, 12 F. Supp. 2d 630, 637 (E.D. Mich. 1998).

⁵⁰ 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, 215-16, 236-38, 242 (1997) (quoting the Ninth Circuit's opinion in *Schneckloth*, which observed that it is likely that a suspect views the officer's search request as "the courteous expression of demand backed by force of law"); John Sabini & Maury Silver, *Dispositional vs. Situational Interpretations of Milgram's Obedience Experiments: "The Fundamental Attribution Error,"* 13(2) J. THEORY SOC. BEHAV. 147, 150-51 (1983).

⁵¹ Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47, 49-50, 51 tbl.1 (1974) (finding that in a controlled experiment, seventy-five percent of individuals consented to a request by a "guard," analogous to an officer); see Barrio, *supra* note 50, at 233-41 (discussing various psychological studies on individuals' tendency to obey authority figures); Kaplan et al., *supra* note 2, at 953-54 (arguing that interactions with law enforcement often include some pressure to cooperate despite the Supreme Court's determination that Fourth Amendment searches are not presumptively coercive); Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. REL. 57, 74-75 (1965); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 177 (1991) (arguing that consensual searches involve no real consent at all); Sabini et al., *supra* note 50 (explaining that situational factors, even without physical coercion, can compel individuals to act contrary to their beliefs or desires); *infra* note 53 (listing articles that discuss individuals' tendencies to interpret requests from law enforcement officers as commands).

⁵² See Barrio, *supra* note 50, at 241; Bickman, *supra* note 51, at 48; Rotenberg, *supra* note 51, at 189.

request to search, scholars have found that merely knowing that one may theoretically refuse an officer's request does not cause the average person to exercise that right.⁵³ Further, the idea that one can reject an officer's request to search is downright nonsensical when considering the other tactics that officers can and do legally use to persuade individuals to consent. In addition to the more overtly coercive tactics discussed in the previous subpart, officers frequently ask an individual to search multiple times,⁵⁴ even after he has already refused. They can also assure him that consenting will benefit him in the long run, such as in future criminal proceedings,⁵⁵ or will ask leading questions such as, "you don't mind if I look around, right?,"⁵⁶ which appears to do away with any possibility of refusal. Finally, officers will sometimes request to search by claiming that

⁵³ David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 53–54 (2009) ("[E]ven [individuals] who know they have the right not to talk to a police officer would not feel free to terminate such encounters."); Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535, 555 (2002) ("[M]ost [individuals] who have been stopped understand that they are not free to leave until the police officer tells them so."); Tracey Maclin, "Black and Blue Encounters" *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 249 (1991), available at <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=2137&context=vulr> ("The average, reasonable individual -- whether he or she be found on the street, in an airport lobby, inside a factory, or seated on a bus or train -- will not feel free to walk away from a typical police confrontation."); Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 28 (2008) ("[A] police 'request' to search a bag or automobile is understood by most persons as a 'command.'"); Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 136–37 (2003) ("Federal agents enter [a reasonable individual's] place of work with badges, guns and walkie-talkies . . . Would any reasonable worker feel free to leave under these circumstances? In the world in which most [individuals] live, the answer is no.").

⁵⁴ LAFAVE, *supra* note 10, § 8.2(f); e.g., *United States v. Hicks*, 539 F.3d 566, 570–71 (7th Cir. 2008); *United States v. Cedano-Medina*, 366 F.3d 682, 682–87 (8th Cir. 2004); *United States v. Pulvano*, 629 F.2d 1151, 1157–58 (5th Cir. 1980); cf. *United States v. Flores*, 48 F.3d 467, 469 (10th Cir. 1995) (holding that the defendant indicated voluntary consent to search when she opened the trunk of her car after refusing to consent earlier).

⁵⁵ E.g., *United States v. Major*, 912 F. Supp. 90, 93 (S.D.N.Y. 1996) (holding that the defendant's consent was given voluntarily even though a law enforcement agent told him that "cooperation would be to his benefit" and suggested that if he told them him about his activities, "the agents would inform the prosecutor and the sentencing court of his cooperation"); *State v. Williams*, 333 S.E.2d 708, 716 (N.C. 1985) ("[T]he promise by Officer Cole, that the District Attorney would be informed of any cooperation, was not such an inducement as to render defendant's statements and his consent to have his automobile searched involuntary.").

⁵⁶ See, e.g., *United States v. Badru*, 97 F.3d 1471, 1475 (D.C. Cir. 1996) (holding that when an officer "posed a series of questions to [the defendant], each intended to elicit a negative response," and followed with a "final question" of "You don't mind if we search your car, do you?", to which [the defendant] answered, 'no,'" no coercion occurred, and the search was valid).

they already possess a search warrant.⁵⁷ This is irrefutably coercive, as the entire concept of an inquiry is eliminated.

Some courts have even conceded that consensual searches are inherently coercive,⁵⁸ and that this is especially so where the consentor is unaware of his right to refuse or is subject to any of the coercive tactics described in this and the preceding subparts.⁵⁹ Other than coercion, what would lead to ninety-eight percent of warrantless searches occurring as a result of the searchee having given his consent, especially when so many of these searches result in the discovery of incriminating evidence?⁶⁰ It is a virtual certainty that more of the public, when given the option to decline, would value their privacy and freedom from government intrusion over complying with an officer and risking their incrimination.

In sum, the idea that it is optional for one to consent to an officer's request to search is a farce.⁶¹ Due to the inherent coercion in police interactions, the question mark at the end of a request to search is purely nominal.

D. THE UNCONSTITUTIONALITY OF CONSENSUAL SEARCH DOCTRINES AND PRACTICES

Consensual search doctrines, and the resulting officer conduct they facilitate, contradict the principles and protections of the Fourth Amendment. Consensual searches are inherently coercive as most people who are subject to a requested search do not consent willingly, but instead allow it because they do not believe that they have another option or because the officer tricks them into complying.⁶² As such, consensual searches allow law enforcement officers and agencies to take advantage of the relative ease of forcing an individual to agree to a search.⁶³ Officers know that their requests for compliance are compelling, that courts will later assess the validity of the search based upon their own perspective of the consentor's voluntariness, regardless of what the consentor actually

⁵⁷ LAFAVE, *supra* note 10, at § 8.2(n).

⁵⁸ *E.g.*, *Bustamonte v. Schneckloth*, 448 F.2d 699, 701 (9th Cir. 1971) (stating how officer requests are "the courteous expression of demand backed by force of law"); *United States v. Hall*, 969 F.2d 1102, 1107 (D.C. Cir. 1992) ("There is inevitably some pressure or apprehension on the part of an individual whenever the police approach and begin asking questions.").

⁵⁹ *See Barrio, supra* note 50, at 247.

⁶⁰ *See Strauss, supra* note 3, at 211–12; *see supra* note 15 and accompanying text.

⁶¹ *See Barrio, supra* note 50, at 242.

⁶² *See supra* notes 43, 45, 54–57 and accompanying text.

⁶³ *See supra* Part III.C.

believed at the time,⁶⁴ and that the standard for misconduct is high.⁶⁵ Given the benefits that officers receive when conducting a search consensually rather than by obtaining a warrant,⁶⁶ officers may sidestep the warrant requirement, which is justified as constitutional only because of its usefulness to the criminal investigation process.⁶⁷ The fact that almost all warrantless searches are consensual suggests that officers use this tactic as an effectual way to circumvent the protections of the Fourth Amendment.

Moreover, the nonexistence of a mandate that officers inform individuals of their right to decline consent is exceptionally coercive, as well as inconsistent with the constitutional prohibition of unreasonable searches under the Fourth Amendment. In *Katz v. United States*, the Supreme Court expressed the importance of an individual being “entitled to know that he will remain free from unreasonable searches and seizures.”⁶⁸ The importance of one’s awareness of his constitutional rights has since evaporated in terms of consensual searches, however. These searches allow law enforcement officers to take advantage of people’s ignorance, who are ignorant precisely because officers withhold such information.

IV. PROBLEMS AND CONSEQUENCES OF CONSENSUAL SEARCHES FOR PEOPLE WITH MENTAL ILLNESS

This part discusses the ways in which the laws and tactics employed by courts and law enforcement agencies particularly disadvantage consenters with mental illness. Subpart A discusses the reasons why people with mental illness are particularly prone to consenting to requests from law enforcement officers. Subpart B examines how the extant policy of upholding consensual searches only because the officer did not act with coercion fails to consider the fact that a consenter’s mental illness itself might render the consent involuntary.

Subpart C discusses an additional problem with the manner in which courts evaluate the constitutionality of a consensual search: in assessing voluntariness, courts rely upon the officer’s perception of the consenter’s mental state and capacity at the time, as opposed to what is later

⁶⁴ See *supra* note 38 and accompanying text; *infra* Part IV.C.

⁶⁵ See *supra* Part III.B.

⁶⁶ See *supra* note 14 and accompanying text.

⁶⁷ See *supra* Part III.A.1.

⁶⁸ *Katz v. United States*, 389 U.S. 347, 359 (1967).

scientifically determined to be his actual mental state at the time of the search. This is problematic in part because law enforcement officers are not experts, and are often not even familiar with the characteristics and conduct that people with mental illness may exhibit.

Subpart D provides examples of cases in which the problems discussed above have led to flawed and unethical determinations of the validity of consensual searches of individuals with mental illness. Even when it is proven that these individuals were incapable of declining officers' requests to search, courts have upheld the validity of the consent and refused to suppress any evidence that was obtained as a result. Finally, Subpart E discusses the over-criminalization of people with mental illness that results from consensual search doctrines and other aspects of the criminal justice system.

A. THE PARTICULAR DIFFICULTY FOR PEOPLE WITH MENTAL ILLNESS TO DECLINE TO CONSENT TO OFFICERS' REQUESTS

Numerous legal and mental health professionals have concluded that individuals with mental illness are especially prone to unwillingly comply with officers' requests. First, individuals with mental illness are typically accustomed to complying with authority figures because they have usually lived under the guidance or supervision of some type of authority figure.⁶⁹ Additionally, individuals with mental retardation are more prone to have the desire to please others, especially authority figures, and to tell them what they want to hear.⁷⁰ These individuals are also more likely to answer "yes" to any question, regardless of what is being asked and without considering the consequences or significance of their response.⁷¹ "Yes"

⁶⁹ W.M.L. Finlay & E. Lyons, *Acquiescence in Interviews with People Who Have Mental Retardation*, 40 MENTAL RETARDATION 14, 18 (2002) (noting that other researchers have "suggested that [individuals] with [intellectual disabilities] tend to agree with authority figures because they have multiple workers in authority over them" and that this explanation "seems plausible," but is unsubstantiated).

⁷⁰ Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 213 (1999); J. A. Shaw & E. D. Budd, *Determinants of Acquiescence and Nay Saying of Mentally Retarded Persons*, 87 AM. J. MENTAL DEFICIENCY 108, 108 (1982).

⁷¹ See Everington et al., *supra* note 70 (determining that individuals with intellectual disabilities have a "strong desire to please others, particularly those in authority"); Shaw et al., *supra* note 70; C.K. Sigelman, J.L. Winer & C.J. Schoenrock, *The Responsiveness of Mentally Retarded Persons to Questions*, 17 EDUC. & TRAINING MENTAL RETARDATION 120, 124 (1982); C.K. Sigelman, E.C. Budd, C.L. Spanhel & C.J. Schoenrock, *When in Doubt Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53, 57 (1981).

can also be the default response that many individuals with mental retardation use when they do not understand the question or do not know what the appropriate answer should be.⁷²

Given the difficulty that any person will experience in refusing an officer's request to search, individuals with mental illness are especially harmed by the inherent coercion and deception in consensual search doctrines and law enforcement tactics. For example, individuals with mental retardation are much more likely to change their answers when the inquirer indicates even mild disapproval of the original answer.⁷³ Thus, if an officer reacts disappointedly when one refuses to consent to a search or if the officer continues to ask, as is not uncommon,⁷⁴ the individual would be much more likely to issue his consent.⁷⁵ As a result of all of the above, individuals with mental illness are disproportionately over-criminalized as they fall subject to the consensual search trap.⁷⁶

B. REQUIRING POLICE COERCION TO INVALIDATE A CONSENSUAL SEARCH IGNORES THE EFFECT OF MENTAL ILLNESS ON THE VOLUNTARINESS OF CONSENT

Where a court finds that an officer did not act coercively when asking an individual to search his person or effects, the consentor is deemed to have voluntarily consented—notwithstanding there being other possible reasons that one might unwillingly consent, such as a result of one's mental illness.⁷⁷ By considering only whether coercion existed, courts discount the impact that the consentor's mental state and health may have had on the voluntariness of his consent. The consentor's intelligence and other aspects of his mental capacity are no longer evaluated, as required by *Schneckloth*.⁷⁸

⁷² See Everington et al., *supra* note 70.

⁷³ See *id.* at 218.

⁷⁴ See sources cited *supra* note 54 and accompanying text.

⁷⁵ Everington et al., *supra* note 70, at 218.

⁷⁶ See *infra* Part IV.E.

⁷⁷ See, e.g., sources cited *infra* Part IV.D and accompanying text.

⁷⁸ See *supra* text accompanying note 20–22.

C. PROBLEMS WITH ASSESSING VOLUNTARINESS THROUGH THE REQUESTING OFFICER'S BELIEF INSTEAD OF THE CONSENTER'S ACTUAL VOLUNTARINESS

The Supreme Court has held that when it is later discovered or alleged that a defendant was incapable of validly consenting to a request to search, the search's validity should be assessed by asking whether a reasonable officer would have believed that the searchee was capable of voluntarily consenting, given the information the officer possessed at the time.⁷⁹ This is so even when it is conclusively proven at trial that the consenter's mental illness rendered him incapable of voluntarily consenting.⁸⁰

There are several significant problems with this policy. The first is that law enforcement officers are not experts in identifying mental health disorders, or at least do not possess the same level of expertise that mental health professionals who assess the consenter before or after the search, and who testify at trial, would have.⁸¹ Thus, the standard for a reasonable officer is unfairly easy to satisfy. Second, even if an officer is sufficiently trained in spotting signs of mental illness, a significant amount of illnesses do not produce symptoms that would be readily apparent or identifiable at the scene of a search.⁸² A third problem is that triers of fact are also not

⁷⁹ *Florida v. Jimeno*, 500 U.S. 248, 249–51 (1991); *Illinois v. Rodriguez*, 497 U.S. 177, 182–85 (1990); *cf. United States v. Guerrero*, 374 F.3d 584, 588 (8th Cir. 2004) (“The focus is not whether [the defendant] subjectively consented, but rather, whether a reasonable officer would believe consent was given and can be inferred from words, gestures, or other conduct.” (citing *United States v. Jones*, 254 F.3d 692, 695 (8th Cir. 2001))); *United States v. Barragan*, 379 F.3d 524, 530 (8th Cir. 2004) (“Whether or not the suspect has actually consented to a search, the Fourth Amendment requires only that the police reasonably believe the search to be consensual.” (citing *United States v. Sanchez*, 156 F.3d 875, 878 (8th Cir. 1998))).

⁸⁰ *E.g.*, *United States v. Pena-Ponce*, 588 F.3d 579, 584 (8th Cir. 2009); *United States v. Major*, 912 F. Supp. 90, 94, 96–97 (S.D.N.Y. 1996) (holding that even though the defendant was “psychologically more vulnerable to emotional trauma and more likely to be submissive and comply with a demand by law enforcement officers,” his consent was voluntary, in part because the officers were unaware of his inability to voluntarily consent (citations omitted)); *State v. Osborne*, 402 A.2d 493, 497 (N.H. 1979) (holding that notwithstanding a doctor’s testimony as to the defendant’s psychotic state, consent was voluntary because the officers “testified that on the day of the search the defendant had appeared to them to be acting and reacting normally”).

⁸¹ Julia Dahl, *Times Square Shooting: Experts Say Police Need Better Training to Deal with the Mentally Ill*, CBS NEWS (September 16, 2013, 2:37 PM), http://www.cbsnews.com/8301-504083_162-57603132-504083/times-square-shooting-experts-say-police-need-better-training-to-deal-with-the-mentally-ill/ (discussing the need for law enforcement officers to receive increased training in identifying mental illnesses so that they are better equipped to handle suspects with disabilities).

⁸² Morgan Cloud, George B. Shepherd, Alison Nodvin Barkoff & Justin V. Shur, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L.

experts in mental illness and thus, they are not adequately prepared or qualified to assess whether an officer should have found the searchee to be of sufficient mental capacity to have consented voluntarily.⁸³ Fourth, giving legal effect to a particular officer's perception produces inconsistent holdings for defendants with the same mental illness, or where consent was given under the same or similar circumstances.⁸⁴ Not only is this unfair to defendants in trials that recognize a lower standard of officer reasonability, but it also contradicts the principle of *stare decisis* embedded in our legal system. Additionally, this practice sets forth precedential standards for a reasonable officer that are inconsistent and difficult to adhere to, leaving courts with wide discretion to interject their own subjective perspectives on adequate mental capacity.

D. DEFENDANTS WITH MENTAL ILLNESS ARE PARTICULARLY
DISADVANTAGED BY CONSENSUAL SEARCH DOCTRINES: CASE
EXAMPLES

This subpart gives case examples of how assessing the validity of one's consent through the officer's perspective has created a standard for voluntariness that is overwhelmingly low, as officers are so ill-trained that even people with severely debilitating mental illnesses are mistakenly deemed to have consented voluntarily. As a result, officers' misperceptions of one's capacity to consent create precedent and have a continuous legal effect on subsequent determinations. This subpart further exemplifies how the policies described above are particularly harmful to defendants with mental illness, for whom an evaluation of their mental state can be the most important factor in determining whether consent was truly given voluntarily.

1. Requiring Officer Misconduct to Invalidate a Consensual Search
Ignores the Inherent Coercion in Search Requests of Individuals with
Mental Illness

Parts III.B and IV.B explained how courts, including the U.S. Supreme Court, have held that consent to a search is voluntary so long as the requesting officer exercises no coercion. As shown, however, there are

REV. 495, 510–11 (2002) (“The casual observer often does not notice [individuals with a mild form of disability] as being [intellectually disabled.]”).

⁸³ See *id.* at 513–15; LAFAVE, *supra* note 10, § 8.2 (discussing factors to be considered in assessing the validity of consent).

⁸⁴ See LAFAVE, *supra* note 10, § 8.2; Love, *supra* note 31, at 1493, 1496.

many circumstances under which one might consent to a search involuntarily and unwillingly, notwithstanding a court finding that no coercion took place. The most important of these circumstances, for purposes of this Article, is where the consentor is inherently prone to complying with requests from authority figures as a result of his mental health.⁸⁵ For these individuals, a mere request to search is coercive enough, no matter how friendly or polite the requesting officer may seem.⁸⁶

In *State v. Fincher*, for example, the North Carolina Supreme Court found that a defendant who suffered from mild mental retardation, schizophrenia, and periodic hallucinations had validly consented to a request to search when ten police officers were present.⁸⁷ Psychiatric testimony explained that these mental illnesses made the defendant more susceptible to fear than the average person and that thus, he was more likely to unwillingly consent to authority figures like police officers.⁸⁸ Notwithstanding this, the court found the consent voluntary because the officers had not outright “threatened” the defendant with “violence,” nor had they “promised or offered [him] any reward or inducements.”⁸⁹ The court disregarded the fact that evidence demonstrated that the officer’s request was coercive enough, given the defendant’s mental state.⁹⁰

Cases like *Fincher* exemplify how courts discount the strong possibility that the coercion required to invalidate a search may be in the request itself, and moreover, that the mere existence of certain mental illnesses can render consent involuntary.

Additionally, recall the difficulty in a court finding that a law enforcement officer actually coerced one into consenting to a search, described in Part III.B. Courts have set a high standard for officer coercion, and as a result, consensual searches are rarely found unconstitutional. Psychologists have found that people with certain mental illnesses will change their answers to questions where the requester indicates even mild disapproval of the original answer.⁹¹ If this is the case, one can only imagine the inherent fear and difficulty that a person with mental illness would have in refusing to comply with requests coming

⁸⁵ See *supra* Part IV.A.

⁸⁶ See *supra* text accompanying note 50.

⁸⁷ *State v. Fincher*, 305 S.E.2d 685, 689–90 (N.C. 1983).

⁸⁸ *Id.* at 690.

⁸⁹ *Id.* at 691.

⁹⁰ *Id.* at 689–91.

⁹¹ See *supra* text accompanying notes 73–75.

from many officers with guns drawn, or who have forced the person to the ground, or who have chased the person into his house before receiving consent.⁹² As such, the policy of requiring the presence of officer coercion to invalidate a search excessively favors law enforcement, and especially disadvantages people with mental illness.

2. Courts Inadequately Evaluate Whether Consent is Voluntary by Discounting the Effect of Mental Illness

Even when courts do evaluate a consentor's intelligence and subjective perspective through the factors set out in *Schneckloth*, the majority of courts still fail to consider a consentor's mental illness as a separate factor affecting voluntariness.⁹³ More commonly, courts consider only the consentor's intelligence, sophistication, and maturity, which are the only *Schneckloth* factors relating to one's mental capacity.⁹⁴ As a result, courts have found that individuals with mental illness, who are nonetheless sufficiently intelligent, sophisticated, and mature, have validly and voluntarily consented to a search. For example, courts often assess one's mental capacity through his IQ,⁹⁵ within which aspects of the person's personality, mental disabilities, and other personal characteristics typically form no basis. By only considering one's intelligence and maturity, courts' analyses of one's mental capacity to voluntarily consent are insufficient because individuals can suffer from mental illnesses that do not decrease their intelligence, maturity, or sophistication. Despite this, these individuals can still be incapable of or impaired from declining requests from authority figures.⁹⁶ Thus, courts fail to consider the significant effect that a mental illness in and of itself—separate from one's intelligence and sophistication—can have on one's capacity to consent voluntarily.

This occurs even when the existence of the illness is dispositive of

⁹² See *supra* notes 46–49 and accompanying text.

⁹³ See, e.g., *Heckman v. State*, 576 S.E.2d 834, 838 (Ga. 2003) (holding that “a determination of mental illness is not tantamount to a finding of mental incompetency” to consent).

⁹⁴ See *United States v. Grap*, 403 F.3d 439, 443 (7th Cir. 2005) (acknowledging the consentor's history of psychosis, but still concluding that she had the requisite mental capacity to consent because she was able to understand the officer's search request and its consequences); *supra* text accompanying note 21.

⁹⁵ See, e.g., *United States v. Rosario-Diaz*, 202 F.3d 54, 69 (1st Cir. 2000); *State v. Collins*, No. 95-A-0044, 1996 WL 757525, at 4–5 (Ohio Ct. App. Dec. 20, 1996).

⁹⁶ See *supra* Part IV.A (explaining how individuals with mental illness are far more likely to feel compelled to consent to officer requests).

involuntary consent. For example, a federal circuit court of appeals held that a defendant voluntarily consented to a search even though she suffered from “low-average [to] mild retardation,” along with several other mental health illnesses, and had the intellectual capacity of a seven- to eight-year-old.⁹⁷ Further, the psychologist expert witness stated that “because of her limited intellectual functioning, the anxiety and the fear of the authority presented by the police officer didn’t even allow her to even question whether or not she had a right to remove herself from that set of circumstances.”⁹⁸ The court accepted that this testimony was true, as well as testimony that the defendant was mentally incapable of refusing to comply with officer requests.⁹⁹ Nonetheless, the court held that the consent was given voluntarily, outright ignoring the clear evidence that the defendant was incapable of consenting voluntarily as a result of her mental illnesses.¹⁰⁰

3. Considering Only Whether the Officer’s Belief of the Consenter’s Mental Capacity Was Reasonable Leads Courts to Uphold Searches of People with Mental Illness Who Consented Involuntarily

As discussed in Part IV.C, courts assess the voluntariness of one’s consent upon what the requesting officer believed to be the consenter’s mental state and capacity to consent at the time. This doctrine is problematic as law enforcement officers are not adequately qualified to determine whether one has a mental illness that prevents him from voluntarily consenting, especially when the mental illness does not cause any identifiable symptoms. Thus, this assessment should be made after the fact by mental health professionals who can testify as to the consenter’s actual capacity to consent voluntarily, and not by triers of fact who are even less qualified to make this assessment than police officers. This sub-subpart provides examples of how considering only whether an officer’s belief was reasonable has caused courts to hold that defendants have voluntarily consented, even where they have severe mental illnesses that do not produce readily-identifiable symptoms, and even when it is later discovered that the consent was not, in fact, given voluntarily.

A 2005 federal circuit court of appeals upheld a consensual search notwithstanding testimony from a psychiatrist that the consenter “had been

⁹⁷ United States v. Hall, 969 F.2d 1102, 1105–06 (D.C. Cir. 1992).

⁹⁸ *Id.* at 1105.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

hospitalized for a delusional disorder that impaired her ability to make rational decisions, and that she refused to take her medication when she was not in the hospital, causing her to become increasingly delusional [and] out of touch with reality.”¹⁰¹ The court deemed the consent voluntary merely because the requesting officers believed that the consentor had “acted as if she were profoundly aware of the events.”¹⁰² Most surprising of all is that the psychiatrist testified that “at times [she] could *appear* to be fairly lucid, but might nonetheless be in a delusional state.”¹⁰³ Though the court knew that an outsider’s perception of the consentor’s mental illness could be flawed, it upheld the search because the officers believed the consent was made voluntarily—even though actual medical evidence concluded that this was not the case.

Similarly, another circuit court held that a defendant who was suffering from frontotemporal dementia, causing “a progressive loss of [his] basic cognitive abilities,” and from “brain deterioration,” had voluntarily consented to a search.¹⁰⁴ Expert testimony provided that the nature of the defendant’s mental health illnesses did not lead to any identifiable symptoms—but despite this, the court held that the police officer’s belief about the defendant’s mental capacity, though founded on an incorrect perception of his demeanor, was reasonable.¹⁰⁵

State courts have also adopted this tactic.¹⁰⁶ One state supreme court, for example, held that a twenty-two-year-old girl who was “mentally retarded” and “d[id] not have the will to disagree with someone in authority,” and was “very exploitable by others,” had voluntarily consented to police officers’ request to search.¹⁰⁷ In upholding the search, the court emphasized “that the officers acted in good faith without any knowledge of any possible mental limitations that [she] might have.”¹⁰⁸

Cases like these occur regularly in consensual search trials involving defendants with mental illness. Notwithstanding the presence of concrete

¹⁰¹ *United States v. Grap*, 403 F.3d 439, 441 (7th Cir. 2005).

¹⁰² *Id.* at 445.

¹⁰³ *Id.* at 441–42 (emphasis added).

¹⁰⁴ *United States v. Sims*, 428 F.3d 945, 951 (10th Cir. 2005).

¹⁰⁵ *Id.* at 953.

¹⁰⁶ *See, e.g., State v. Osborne*, 402 A.2d 493, 497 (N.H. 1979) (notwithstanding the doctor’s testimony as to the defendant’s psychotic state, consent was voluntary because the officers “testified that on the day of the search the defendant had appeared to them to be acting and reacting normally”).

¹⁰⁷ *State v. McDowell*, 407 S.E.2d 200, 207–08 (N.C. 1991) (internal quotation marks omitted).

¹⁰⁸ *Id.* at 208.

testimony from mental health experts as to the severity of the illness and the incompetency of the defendant to voluntarily consent, the only thing relevant to the evaluation is the officers' beliefs at the time.

In sum, courts disregard consenters' mental health when assessing the validity of consensual searches and in doing so, contradict prevailing doctrine by upholding searches in which defendants did not consent voluntarily.

E. THE RESULTING OVER-CRIMINALIZATION OF INDIVIDUALS WITH MENTAL ILLNESS

The policies and practices used to assess the constitutionality of consensual searches have been particularly detrimental to individuals with mental illness. As such, an overwhelmingly disproportionate amount of prison inmates suffer from mental illness;¹⁰⁹ the rate of prisoners currently suffering from a serious mental illness is four times greater than that of the general public,¹¹⁰ and the U.S. Department of Justice has found that more than half of all prison and jail inmates suffer from mental health disorders.¹¹¹

Of course, this cannot be solely attributed to consensual searches, as the problems in the criminal justice system for people with mental illness are numerous. Judges are inadequately informed about defendants with mental illness, triers of fact are biased against these defendants, and it is difficult for defendants to successfully move their cases to mental health courts, which focus on treatment and rehabilitation.¹¹² Instead, people with mental illness are funneled into jails and prisons that are founded upon

¹⁰⁹ Thomas L. Hafemeister, Sharon G. Garner & Veronica E. Bath, *Forging Links and Renewing Ties: Applying the Principles of Restorative Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 172 (2012) (finding that twenty-five to forty percent of people suffering from mental illness in the United States "become entangled" with the criminal justice system at some point in their lives) (citing Mental Health Early Intervention, Treatment, and Prevention Act of 2000, S. 2639, 106th Cong. § 2(2) (2000)); HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 16–19 (2003), available at <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf>.

¹¹⁰ PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA 32 (2003) (finding that the rate of prisoners suffering from a serious mental illness is three to four times greater than the rate of mental illness within the general public).

¹¹¹ DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, NO. NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON & JAIL INMATES 1 (2006), available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

¹¹² See Redlich, *supra* note 24, at 607.

retributionist principles, where recidivism rates for people with mental illness are high.¹¹³ Despite how ill-equipped prisons are in providing people with mental illness with the services and conditions they need,¹¹⁴ there are still three times as many people with mental illness incarcerated than there are institutionalized in mental health facilities.¹¹⁵ Overall, the criminal justice system fails to appreciate the way in which one's mental illness affects one's proneness to engage in criminal activity.¹¹⁶

The over-criminalization of individuals with mental illness is not caused solely by consensual search doctrines. However, given the high use of these searches in the criminal investigative process,¹¹⁷ the likelihood that the searches will be upheld in court, and the particular effect they

¹¹³ See LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 256–58 (2001); Arthur J. Lurigio, Angie Rollins & John Fallon, *The Effects of Serious Mental Illness on Offender Reentry*, 68 FED. PROBATION 45, 45–46 (2004); Ginger Lerner Wren, *Mental Health Courts: Serving Justice and Promoting Recovery*, 19 ANNALS HEALTH L. 577, 580–82 (2010).

¹¹⁴ Conditions in American jails and prisons are particularly deplorable for those with mental illness. First, prisoners who are mentally ill are more likely to harm themselves, and tend to be at high risk for suicide. Hafemeister et al., *supra* note 109, at 154 (citing TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT 18–20 (1999)); Paul F. Stavis, *Why Prisons Are Brim-Full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?*, 11 GEO. MASON U. C.R. L.J. 157, 183–84 (2000). Second, these prisoners are at significant risk of being harmed by other inmates and guards: they are disproportionately prone to be physically assaulted, forced into “dominating relationships,” and raped, which occurs to both male and female inmates. JAMES ET AL., *supra* note 111, at 10; KUPERS, *supra*; Hafemeister et al., *supra* note 109, at 154; Stavis, *supra*. Additionally, jails and prisons are environments in which mental health disorders are cultivated and worsened—the lack of necessary medical treatment as well as the somber, isolated, and violent surroundings facilitate the deterioration of one's mental health. HUMAN RIGHTS WATCH, *supra* note 109, at 194–95; Jeffrey Draine, Amy Blank Wilson, Stephen Metraux, Trevor Hadley & Arthur C. Evans, *The Impact of Mental Illness Status on the Length of Jail Detention and the Legal Mechanism of Jail Release*, 61 PSYCHIATRIC SERVICES 458, 458–59 (2010) (noting that two-thirds of detainees with mental illness do not receive treatment); Risdon N. Slate, *From the Jailhouse to Capitol Hill: Impacting Mental Health Court Legislation and Defining What Constitutes a Mental Health Court*, 49 CRIME & DELINQ. 6, 14 (2003) (“[I]n excess of 20 percent of jails provide no formal access to mental health treatment . . .”). Note that all incarcerated people have the right to government-provided medical care, which includes mental health treatment, under the Eighth Amendment of the U.S. Constitution. See, e.g., *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989); *Youngberg v. Romeo*, 457 U.S. 307 (1982). As one scholar put it, “[i]f there ever was a place where horrific paranoid delusions might really come true, it is in a prison.” Stavis, *supra*.

¹¹⁵ HUMAN RIGHTS WATCH, *supra* note 112, at 194–95.

¹¹⁶ See Draine et al., *supra* note 114; Amy C. Watson, Patricia Hanrahan, Daniel Luchins & Arthur Lurigio, *Mental Health Courts and Complex Issue of Mentally Ill Offenders*, 52 PSYCHIATRIC SERVICES 477, 477 (2001).

¹¹⁷ See *supra* text accompanying notes 14–15.

have on those with mental illness, one can safely assume that consensual search doctrines contribute at least in part to the magnitude of prisoners with mental illness. In any case, the difficulties that individuals with mental illness suffer throughout the criminal justice system supports the need for additional and increased safeguards, such as those described in the next part.

V. SOLUTIONS

This Article has demonstrated and discussed several legal, ethical, and practical flaws in the extant laws, policies, and practices adopted by courts and law enforcement agencies relating to consensual searches. This part proposes a series of solutions to some of these problems in an attempt to remedy the coercive and unjust effects that consensual searches have, particularly on individuals with mental illness, and to conform these doctrines to the principles and protections founded in the Fourth Amendment.

The solutions are broken down into three subparts based on chronology. Subpart A discusses measures that the government should take beforehand to educate people of their rights against law enforcement officers. Subpart B presents a new standard for valid consensual searches that law enforcement officers should recognize and abide by at the scene: valid consent must be given both knowingly and voluntarily. This subpart also discusses other tactics and policies that law enforcement officers should comply with at the scene. Subpart C discusses post-search procedures that courts should take when evaluating the validity of a consensual search, such as excluding all evidence obtained from an individual who is eventually found to have been incapable of knowingly and voluntarily consenting, rather than giving any weight to the requesting officer's perception of the consentor's mental state. Last, Subpart D addresses and debunks some of the possible counterarguments to the solutions proposed in this Article.

No matter how one might react to the arguments in this Article, the skeptical reader may still wonder whether adopting these solutions is worth the overhaul of the consensual search process. The problems highlighted in this Article are more serious than one may know, however, as approximately twenty-five percent of Americans suffer from some form of mental illness.¹¹⁸ Further, about five percent of the population, or eleven

¹¹⁸ Stephen Reinberg, *CDC: Half of Americans will Suffer from Mental Health Woes*, U.S.A. TODAY (Sept. 5, 2011, 11:28 AM), <http://usatoday30.usatoday.com/news/health/medical/>

million people, suffer from a mental illness that affects their ability to function.¹¹⁹ Moreover, individuals with mental illness are more likely to come into contact with the criminal justice system.¹²⁰ As such, additional procedural safeguards should be implemented to ensure that individuals with mental illness are properly afforded their constitutional right to be free from unreasonable searches. Some of the solutions proffered in this part could and should apply to all members of the public, regardless of their mental health—but for purposes of this Article, these solutions have been geared specifically toward heightening the protections afforded to people with mental illness due to the particular disadvantages they face.

A. EDUCATING THE PUBLIC ABOUT ITS FOURTH AMENDMENT RIGHTS

Currently, few if any states set forth guidelines for Fourth Amendment topics that should be taught in government and social studies classes. Though the federal government has limited influence over the curricula taught in public schools,¹²¹ the U.S. Department of Education should incentivize states and school districts to implement curricula mandates for teachers that include instructing students about the specific circumstances under which warrantless searches may be conducted, and one's rights against law enforcement officers in general. The issue of consensual searches should be included in this curriculum to ensure that students know of their right to refuse an officer's request to search their person or effects.

B. OFFICER CONDUCT AT THE SCENE OF THE POTENTIAL SEARCH

This subpart presents a new standard for consensual searches that law enforcement officers should recognize and abide by, and discusses other

health/medical/mentalhealth/story/2011-09-05/CDC-Half-of-Americans-will-suffer-from-mental-health-woes/50250702/1. The U.S. Centers for Disease Control and Prevention estimate that about half of all Americans will experience some form of mental health problem at some point in their life. *Id.*

¹¹⁹ *Id.*

¹²⁰ Hafemeister et al., *supra* note 109, (citing Mental Health Early Intervention, Treatment, and Prevention Act of 2000, S. 2639, 106th Cong. (2000)); *see supra* notes 109–11 and accompanying text.

¹²¹ Education is not one of the enumerated powers delegated to the federal government in the U.S. Constitution, and there has been much litigation and public policy disputes relating to states' sovereignty over educational issues. *See, e.g.,* Motoko Rich, *Holding States and Schools Accountable*, N.Y. TIMES (Feb. 9, 2013), http://www.nytimes.com/2013/02/10/education/debate-over-federal-role-in-public-school-policy.html?_r=0.

tactics and polices that law enforcement officers should comply with at the scene of a search.

1. Informing Individuals of the Right to Deny a Request to Search

The Fourth Amendment should be interpreted to require that an individual be warned of his right to refuse an officer's request to conduct a search. As this Article has shown, it is already extremely difficult to decline requests from law enforcement officers—and even more so when one is not aware that he can do so.¹²² Explicitly informing an individual of his right to say no is just one way to mitigate the inherently coercive power law enforcement officers already possess.

2. Consent to Search Should be Given Both Knowingly and Voluntarily

Merely being informed of one's right to refuse a search is insufficient proof that consent was given voluntarily because many individuals with mental illness are inherently prone to complying with authority figures, regardless of whether they have the option of saying no or whether they understand the consequences of consenting.¹²³ Thus, a valid consensual search should require that the consent be issued both knowingly and voluntarily.¹²⁴ This would mean that (1) the consenter must be of adequate mental state and have sufficient mental capacity at the time to truly understand the consequences of his consent—both what it would allow the officers to do and the rights he is waiving in the process; and (2) the officers may not use any coercive tactics, even the most subtle, to obtain the consent, such as by taking advantage of one's mental illness or by exercising any of the unfair and unethical law enforcement tactics described in Part III.C.¹²⁵

This proposed standard conforms with *Schneckloth*, where the Court

¹²² *E.g.*, *United States v. Hall*, 969 F.2d 1102, 1105–06 (D.C. Cir. 1992) (describing expert testimony indicating that the defendant's cognitive abilities “precluded a voluntary consent to search without some explicit statement and perhaps restatement of her right to refuse the search”); *State v. McDowell*, 407 S.E.2d 200, 207–08 (N.C. 1991) (accepting testimony that the consenter “may have been able to understand if an officer told her that she had a right to not let him” conduct the search, but deemed the consent voluntary nonetheless (quoting witness testimony)).

¹²³ *See supra* Part IV.A.

¹²⁴ Note that this is an upgrade from the standard set forth in *Schneckloth*, which failed to consider that voluntariness was synonymous with knowledge. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224–45 (1973); *see also* Kaplan et al., *supra* note 2, at 949.

¹²⁵ *See supra* notes 54–57 and accompanying text.

expressed that when it is ultimately found that the searchee did not consent voluntarily, the requesting officer inherently acted with misconduct by proceeding with the search. Thus, the new standard would eliminate the requirement discussed in Part III.B, that the absence of outright coercive tactics by law enforcement officers is dispositive of the consentor's volunteerism.

3. Officers Who Have Any Doubt as to an Individual's Mental Capacity to Voluntarily Consent Should Refrain from Searching Without a Valid Warrant

The final requirement that law enforcement officers should abide by at the scene of a requested search is that when there is any doubt about the consentor's capacity to knowingly and voluntarily consent, the officer should immediately refrain from proceeding with the search and seek a warrant.

Officers presently do not have sufficient expertise to recognize the signs of many mental illnesses, which has time and again caused them to inaccurately perceive one's capacity to voluntarily consent, including where the consentor has a mental illness.¹²⁶ Thus, officers should be made to assume that any indications that the individual may have an incapacitating mental illness will discredit the voluntariness of the consent. Under the proposed standard, even the most minimal doubt as to one's mental health should require the officer to first obtain a search warrant (subject to the presence of any other recognized exceptions to the warrant requirement¹²⁷).

This requirement may appear overly constraining on the officer, but implicit in this solution is that law enforcement officers should be required to undergo more extensive training on recognizing the signs of mental illness.

C. CHANGES IN COURT PROCEEDINGS INVOLVING CONSENSUAL SEARCHES

Even if courts fail to adopt the solution proposed in the preceding subpart—that any doubt that the officer might have as to the consentor's mental capacity to knowingly and voluntarily consent should halt the search—the following solutions may mitigate the prejudicial effects that

¹²⁶ See *supra* Parts IV.C, IV.D.3.

¹²⁷ See *supra* note 10.

these invalidly-conducted consensual searches may have at the consentor's criminal trial.

1. One's Capacity to Validly Consent Should Be Determined by His Actual Mental State and Not by the Requesting Officer's Perception

Part IV.C discussed how courts evaluate the validity of consensual searches through the reasonability of the requesting officer's belief as to the consentor's capacity to voluntarily consent, even where it is proven at trial that the consent was not, in fact, voluntary. This commonly occurs when the consentor is unable to refuse an officer's request as a result of his mental illness, which the officer either fails to perceive or ignores altogether. Part IV.C also discussed several problems with this judicial practice, such as the fact that many debilitating mental illnesses have little if any physical manifestations that an officer could detect, and that triers of fact are not experts nor qualified to gauge what officers should have been able to perceive about the consentor's mental health at the time. As such, this sub-subpart argues that where it is later found that the consentor was in fact incapable of voluntarily consenting at the time, as proved by medical or expert witness testimony, this should trump any incorrect perception the officer might have had, however reasonable it was at the time.

It is virtually impossible to conclusively identify the types of mental illnesses that would render someone incapable of knowingly and voluntarily consenting—each illness and disorder affects individuals differently, and symptoms and degrees of severity vary. For this reason, doctors and mental health experts, who can objectively evaluate the particular circumstances of the search and the conditions of the specific consentor's mental health, should make the assessment and then issue a sound opinion based on the consentor's actual capacity to validly consent at the time.

If officers' incorrect assessments of the validity of one's consent are sufficient to uphold warrantless searches, the principles upon which the Fourth Amendment was founded will begin to deteriorate. As the Supreme Court itself once stated, if an officer's "subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."¹²⁸

¹²⁸ Beck v. Ohio, 379 U.S. 89, 97 (1964).

Given the particular disadvantages that consenters with mental illness have, and the difficulty that officers might have in accurately determining the legitimacy of the consent at the scene, we must err on the side of protecting one's Fourth Amendment rights and defer to one's actual capacity to waive his right to warranted searches.

2. Evidence Obtained from an Illegal Consensual Search Should Be Suppressed at Trial

As discussed above, courts are not required to suppress evidence obtained in a consensual search that the court later finds was conducted illegally.¹²⁹ This sub-subpart proposes that where an officer conducts a consensual search of one who actually did not consent to the search knowingly and voluntarily, as determined at trial, any resulting evidence should be excluded from consideration at any future criminal proceedings involving the defendant. This practice conforms to the original intent of the exclusionary rule: to deter wrongful conduct from law enforcement officers.¹³⁰ If evidence obtained from an unconstitutional consensual search were later inadmissible, officers would be deterred from failing to recognize and respect any doubts they might have about a consenter's mental state, and would instead seek a search warrant that would virtually guarantee the evidence's admissibility.

In addition to the deterrent effect, it is equally important to suppress this evidence if only to honor a defendant's right to an entirely fair and constitutional judicial process. Even if deterrence were irrelevant to consensual searches, facilitating an honest criminal justice process preserves the interest we hold as a society in protecting people from wrongful government intrusions.

D. COUNTERARGUMENTS TO THE PROPOSED SOLUTIONS

This subpart addresses some possible counterarguments to the solutions proposed in this Article, and ultimately concludes that the extant laws, policies, and tactics relating to consensual searches contradict the principles embedded in the Fourth Amendment.

As to the suggested requirement that officers inform an individual of his right to refuse a consensual search, some might call upon the longstanding principle that one's ignorance of the law is no excuse to

¹²⁹ See *supra* Part III.A.2.

¹³⁰ See *supra* notes 33–37 and accompanying text.

break it.¹³¹ However, this principle does not apply in this context, as an unwilling consentor is himself victimized by his ignorance, but is not breaking any laws. Additionally, even where one knows of his option to decline the request to search, he may not know whether the right applies to the search at hand given the wealth of exceptions to the warrant requirement, such as whether “exigent circumstances” exist to justify the search.¹³²

One should also consider the fact that information about this right has been withheld, negligently if not actively, from the public. First, the concept is virtually absent from school curricula, and less so in special education classes, where many people with certain mental illnesses receive their education. Additionally, given that consensual search laws are founded in constitutional case law, these rights and concepts are difficult for the layperson to access and understand. The very nature of consent implies knowing that one can refuse. As the Supreme Court once stated, “no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights.”¹³³

A second argument that may be raised in opposition to the solutions proposed in this Article is that it will result in the loss of a substantial amount of valuable evidence, and people who commit the most heinous of crimes will be improperly absolved. While this concern is not illegitimate, this Article supports the theory that preserving one’s constitutional rights is of the greatest importance, and that the collateral effects of wearing away at these protections are far more dangerous as they can create a slippery slope for future permissible limitations to one’s constitutional guarantees.

If we accept that unwilling and involuntary consensual searches contradict the protections of the Fourth Amendment, then we should accept that imperfect consequences sometimes result from the protection of these rights. For example, we protect the right to free speech for the most discriminatory and hateful speakers, like the Ku Klux Klan, though

¹³¹ See *Check v. United States*, 498 U.S. 192, 199 (1991) (“The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.”); *Lambert v. California*, 355 U.S. 225, 228 (1957) (stating that the American legal system has long recognized that ignorance is not an excuse for violating the law); *Reynolds v. United States*, 98 U.S. 145, 167 (1879) (“Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law.”).

¹³² See *supra* note 10 and accompanying text.

¹³³ *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

the consequences of doing so are often violent and offensive. The Supreme Court has found that respecting the First Amendment is far more important, however, as government censorship is the “hallmark of an authoritarian regime.”¹³⁴ Similarly, depriving people of their Fourth Amendment rights is just as dangerous, in a larger and more symbolic sense, than is the loss of evidence obtained through illegal consensual searches. The criminal justice process in the Constitution exists for a reason—to protect people’s rights, while at the same time setting out practical exceptions and adjustments where the circumstances require.¹³⁵ There is no reason to create another avenue to circumvent the existing process, especially when it requires coercing people into unknowingly waiving their Fourth Amendment rights.

VI. CONCLUSION

This Article discussed the laws, policies, and practices that courts and law enforcement officers and agencies employ with regard to consensual searches in the United States. Part II discussed the background of government searches under the Fourth Amendment and the exception to the warrant requirement for searches conducted as a result of an individual’s consent. Part III discussed the role that one’s mental state has on the validity of a consensual search when it is later challenged in court. It discussed how courts require that consent be given voluntarily, as assessed by a series of factors set out by the Supreme Court in *Schneckloth*, and how the application of these factors has actually minimized the extent to which courts assess one’s mental capacity to validly consent. By requiring the presence of officer misconduct at the search,¹³⁶ by failing to recognize that even the most egregious officer conduct was “coercive,”¹³⁷ and by ignoring the inherent coercion in the request itself,¹³⁸ courts have given strength to an unconstitutional doctrine, leaving individuals with little recourse to challenge wrongful consensual searches.

Part IV applied these principles to those with mental illness to

¹³⁴ *Ginzburg v. United States*, 383 U.S. 463, 498 (1966) (Stewart, J., dissenting).

¹³⁵ See, e.g., *supra* note 10 and accompanying text.

¹³⁶ See *supra* Part III.B.

¹³⁷ See *supra* Part III.B.

¹³⁸ See *supra* Part III.C (discussing the difficulty that most people have in refusing to comply with any requests from law enforcement officers, even when they know that they legally can).

demonstrate how the extant laws and practices have particularly harmed these individuals. It discussed how some mental illnesses virtually incapacitate people from willingly and voluntarily consenting to requests from officers,¹³⁹ how requiring officer misconduct to invalidate a search discounts the effect that one's mental illness can have on one's ability to voluntarily consent,¹⁴⁰ and how courts evaluate challenges to consensual searches by accepting the officer's belief as to whether the individual consented voluntarily or not, rather than based on what medical evidence may prove about the consentor's capacity to do so.¹⁴¹ Part IV then gave case examples of how these laws and practices have resulted in wrongful and unethical holdings against defendants with mental illness¹⁴² and how this has contributed to the over-criminalization of those with mental illness in the United States.¹⁴³

Part V then offered a series of solutions to mitigate the negative effects that consensual search laws have on individuals with mental illness. First, it proposed that students in the public school system should be educated about their Fourth Amendment rights.¹⁴⁴ Second, it proposed various practices that law enforcement officers should abide by at the scene of a search. It proposed that law enforcement officers should be required to inform individuals of their right to decline to consent prior to conducting the search;¹⁴⁵ that valid consent should be made both knowingly and voluntarily;¹⁴⁶ and that when an officer has any doubt as to whether the consent is knowing and voluntary, the officer should refrain from continuing with the search and obtain a warrant.¹⁴⁷ Third, it proposed that courts should evaluate whether consent was given voluntarily based on the individual's actual mental capacity to do so, and not by the officer's perception of this capacity,¹⁴⁸ and that where it is found that consent was given involuntarily, courts should suppress this evidence at trial.¹⁴⁹ Lastly, it addressed some of the counterarguments to the proposed solutions.

¹³⁹ See *supra* Part IV.A.

¹⁴⁰ See *supra* Part IV.B.

¹⁴¹ See *supra* Part IV.C.

¹⁴² See *supra* Part IV.D.

¹⁴³ See *supra* Part IV.E.

¹⁴⁴ See *supra* Part V.A.

¹⁴⁵ See *supra* Part V.B.1.

¹⁴⁶ See *supra* Part V.B.2.

¹⁴⁷ See *supra* Part V.B.3.

¹⁴⁸ See *supra* Part V.C.1.

¹⁴⁹ See *supra* Part V.C.2.

Individuals with mental illness are more likely to comply with requests to search, and American prisons and jails are packed with people with mental illnesses.¹⁵⁰ Law enforcement officers and other government agencies recognize the benefits of people's ignorance of their right to decline a request to search and thus, effectively take advantage of how consensual searches impact individuals with mental illness. The idea that these searches imply asking is farcical—the implicit coercion in consensual searches renders this practice a merely nominal way to protect one's rights, while actually functioning as a way to evade the right to be free from unreasonable searches under the Fourth Amendment.

¹⁵⁰ See *supra* text accompanying notes 109–11.