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NOTE

We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches

*Rebecca Strauss**

In October of 1995, Aaron Salvo was studying and living at Ashland College.[1] College officials informed local FBI agents that they suspected Salvo of possible child molestation and related conduct based on incriminating electronic mail.[2] FBI agents approached Salvo at his dormitory, asked to speak with him in private about the suspicious mail, and suggested they speak in Salvo's dorm room.[3] Salvo agreed to speak with the officers, but declined to do so in his room because his roommate was there, and he did not want to get anyone else involved in the embarrassing nature of the upcoming conversation. Salvo claimed that during the conversation in another room, an FBI agent requested permission to search Salvo's room by telling Salvo "we can do it discreetly or go to the Courthouse and talk to the Ashland County Prosecutor, get a warrant and be back with uniformed police to conduct the search, and he [Salvo] would be excluded from the room."[4] Another agent told Salvo that the first agent "was not playing games, and would search his room whether Salvo let him or not."[5]

At a hearing to suppress the evidence discovered during the search of his room, Salvo argued that his consent was coerced because he did not feel like he could choose to refuse his consent.[6] The district court found that Salvo's consent was involuntary because of the FBI agent's statement that "they could do it the easy way or the hard way."[7] The Sixth Circuit overturned the district court's ruling by holding that "[i]t is well-settled that the agent's statements to the effect that he would obtain a warrant if Salvo did not consent to the search does not taint

* The author would like to thank Professor Yale Kamisar for inspiring the topic of this Note, and Adam Strauss for his unending support and encouragement.

1. United States v. Salvo, 133 F.3d 943, 945 (6th Cir. 1998).

2. *Id.*

3. *Id.*

4. *Id.* at 946.

5. *Id.*

6. *Id.*

7. *Id.* at 954.

Salvo's consent to a search."[8] The court reasoned that since the FBI agents would have been able to obtain a warrant if they had sought one, the threat was not "baseless" and therefore not coercive.[9]

A few years before Salvo's experience, the South Carolina police stopped Furman Lattimore's car for speeding.[10] The police officer asked to search Lattimore's car for narcotics or contraband.[11] Lattimore asked the officer to confirm that if he didn't consent, the officer would search his car anyway. The officer confirmed his suspicion: "If you don't, I feel you're hiding something. Therefore, I'll call a drug dog right up the road to come down here and let him search the car."[12] Lattimore signed the consent form, but later moved to suppress the evidence seized pursuant to the search. The district court ruled that his consent was voluntary, even though it was "concerned" with the statement about the drug dog.[13] The Fourth Circuit upheld the search despite the government's concession that the police officer did not have the legal authority to permit a drug dog to sniff Lattimore's car.[14] Both cases illustrate the problem that this Note addresses: when law enforcement informs the subject of a search that they will search the premises with or without the subject's consent, is the resulting consent valid?

The authorities may conduct a consent search only if the person subject to the search grants valid consent. Over thirty years ago, in *Bumper v. North Carolina*,[15] Justice Stewart expressed the simple statement: "[w]here there is coercion there cannot be consent."[16] *Bumper* was an appeal from a rape conviction in North Carolina. The petitioner wished to suppress a .22-caliber rifle found in his home during a search that he argued violated the Fourth Amendment.[17] The police seized the rifle in the petitioner's home, which he shared with

8. *Id.*; *see also* United States v. Evans, 27 F.3d 1219 (7th Cir. 1994) (holding under similar circumstances that the police officer's promise to return with a search warrant did not vitiate otherwise voluntary consent).

9. *Salvo*, 133 F.3d at 954.

10. United States v. Lattimore, 87 F.3d 647 (4th Cir. 1996).

11. *Id.* at 649.

12. *Id.*

13. *Id.* at 650.

14. *Id.* at 652

15. 391 U.S. 543 (1968).

16. *Id.* at 550.

17. The Fourth Amendment to the Constitution provides:

> The 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.

U.S. CONST. amend. IV.

his sixty-six-year-old grandmother, an African American widow. Their home was located on a rural, isolated dirt road.[18] Four white officers met the grandmother at her front door, and one announced "I have a search warrant to search your house." The petitioner's grandmother told them to "go ahead" and opened the door for them.[19]

At a motion to suppress the evidence,[20] the police relied on the grandmother's consent, rather than a search warrant, to justify the search. The issue presented to the Court was whether consent is valid when the police inform the consenter that an officer possesses a search warrant. Justice Stewart concluded that "there can be no consent under such circumstances."[21] The Court held that consent cannot later justify a search conducted on the basis of an invalid search warrant. The same is true, the Court reasoned, when no search warrant was issued at all or when the State does not rely on a warrant to justify the search.[22] *Bumper*'s narrowest holding is that when consent to a search is given only after police falsely inform the consenter that they have a search warrant *in their possession*, the consent is invalid as a result of "colorably lawful coercion."[23]

If police officers tell a subject of a search that they are *in the process* of getting a search warrant, or will be applying for a search warrant to search her home and then ask for consent, it seems that the case would be similar to *Bumper*, in that "when a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search."[24] Surprisingly, courts have not held that *Bumper* invalidates consent when an officer informs the consenter that he will obtain a search warrant.[25] Thus, courts have applied *Bumper*'s prohibition against "colorably

18. The Court probably included the grandmother's race, age, and rural location since those facts seem to add to the overall suspicion that her consent was not entirely voluntary.

19. *Bumper*, 391 U.S. at 546.

20. A motion to suppress evidence demands that certain otherwise probative evidence not be used by the prosecution against the defendant because the police obtained it unlawfully.

21. *Bumper*, 391 U.S. at 548.

22. *Id.* at 549-50. In the present case, the Court expressed doubt that any warrant was ever issued, or if one was, whether it was valid. *Id.* at 550 n.15.

23. "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion — albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.* at 550.

24. *Id.* For the argument that *Bumper* invalidates consent in such situations, see Thomas G. Gardiner, *Consent to Search in Response to Police Threats to Seek or to Obtain a Warrant: Some Alternatives*, 71 J. CRIM. L. & CRIMINOLOGY 163, 165-66 (1980).

25. *See, e.g.*, Idaho v. Kilby, 947 P.2d 420 (Idaho 1997) (rejecting defendant's argument that *Bumper* invalidated his consent when a police officer told defendant that he would apply for a search warrant if defendant refused consent).

lawful coercion"[26] only in the narrow instance when an officer claims to have a warrant in his possession.[27] This Note argues that when an officer conveys the impression to the subject of a search that he will return with a warrant if the subject of the search does not offer his consent, the situation is deceptive, and coercive, and courts should not permit it.[28]

The most common search employed by the police is the consent search: some ninety-eight percent of searches police conduct without a warrant they conduct pursuant to consent.[29] The consent exception is valid only if the consent is voluntary and given by one with the authority to give such consent.[30] While considerable debate surrounds both the issue of who has the ability to consent,[31] and the voluntary na-

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26. *Bumper*, 391 U.S. at 550.

27. Courts even fail to strike down searches in which the police claim to have a warrant with them, distinguishing those cases from *Bumper* in unimportant ways. *See, e.g.*, United States v. Swink, No. 1:00CR135-1, 2000 WL 1264145 (M.D.N.C. July 19, 2000) (dismissing defendant's reliance on *Bumper* to invalidate his consent because officers told him of a search warrant after he consented); United States v. Acosta, 786 F. Supp. 494 (E.D. Pa. 1992), *rev'd on other grounds*, 965 F.2d 1248 (3d Cir. 1992) (holding that law enforcement officer's actions were lawful in light of *Bumper* when he knocked on defendant's door, yelling "It's the police; open the door. . . I have a warrant; open the door"); Byars v. Arkansas, 533 S.W.2d 175 (Ark. 1976) (holding that *Bumper* did not prevent defendant's consent from being voluntary where his consent was given after police told him they had a search warrant, which later turned out to be invalid).

28. The Fourth Amendment prohibits unreasonable searches and seizures in order to protect private citizens from government intrusions into their private spheres. To effectuate this prohibition, the Supreme Court has developed a presumption in favor of requiring that police obtain a search warrant before conducting a search. This requirement ensures that a neutral magistrate will weed out unreasonable searches. The alternative is to leave that judgment to the police, and as the Court stated in *Katz v. United States*, "Bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violation only in the discretion of the police." 389 U.S. 347 (1967).

Nonetheless, the Court has created so many exceptions to the warrant requirement that the vast majority of those searched do not enjoy the protection a search warrant offers them. Such exceptions to the search warrant requirement include exigent circumstances, Minnesota v. Olson 495 U.S. 91 (1990), searches of vehicles, California v. Carney, 471 U.S. 386 (1985), inventory searches, South Dakota v. Opperman, 428 U.S. 364 (1976), the plain view doctrine, Coolidge v. New Hampshire, 403 U.S. 443 (1971), searches incident to lawful arrests, Chimel v. California, 395 U.S. 752 (1969), and consent searches.

29. RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES (National Center for State Courts 1984) at 21.

30. *See, e.g.*, Illinois v. Rodriguez 497 U.S. 177, 190 (1990) (Marshall, J., dissenting); Johnson v. United States, 333 U.S. 10, 13 (1948).

31. *See generally* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987); Nancy J. Kloster, Note, *An Analysis of the Gradual Erosion of the Fourth Amendment Regarding Voluntary Third Party Consent Searches: The Defendant's Perspective*, 72 N.D. L. REV. 99 (1996); Matt McCaughey, Note, *And a Child Shall Lead Them: The Validity of Children's Consent to Warrantless Searches of the Family Home*, 34 U. LOUISVILLE J. FAM. LAW 747 (1995); Ira C. Rothberger, Jr., Casenote, Illinois v. Rodriguez: *Should Apparent Authority Validate Third-Party Consent Searches?*, 63 U. COLO. L. REV. 481 (1992).

ture of consent, this Note primarily focuses on the issue of what constitutes voluntary consent.

The Supreme Court prescribed the test to determine voluntariness in *Schneckloth v. Bustamonte*, decided in 1973.[32] The Court held that lower courts should look to the totality of the circumstances surrounding the consent in determining voluntariness.[33] Under *Schneckloth* a consenter does not have to be informed of his right to refuse to consent. Voluntary consent means that the consenter had a choice to refuse and the police obtained the consent without practicing any coercive tactics.[34] Courts may consider the consenter's knowledge of his rights as one factor in the total equation.

While the *Schneckloth* Court helped determine what is *not* necessary for voluntary consent, it did not explore fully when coercion exists. Some of the courts routinely consider the number of uniformed officers present,[35] factor the display of weapons,[36] time of day,[37] the existence of prior illegal police action, the defendant's maturity, sophistication, mental or emotional state,[38] the defendant's previous or subsequent refusal of consent, whether the defendant is in custody,[39] the defendant's belief that the officers would not find any incriminating evidence,[40] physical mistreatment of the defendant by police,[41] and

32. 412 U.S. 218.

33. Interestingly, the Court had rejected the same test as applied to confessions in *Miranda v. Arizona*, 384 U.S 436, *reh'g denied*, 385 U.S 890 (1966). The Court in *Miranda* held that the inherent coerciveness of in-custody interrogation required special safeguards against compelling a suspect to incriminate himself. The Court held that in order to fully "exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Miranda*, 384 U.S. at 467. The *Schneckloth* Court looked to the confession context to analyze when consent (in the confession context, consent to incriminate oneself) is truly voluntary. The Court, ignoring *Miranda*, found that their past self-incrimination cases all looked to the total circumstances of the confession, and not to the "presence or absence of a single controlling criterion." Schneckloth v. Bustamonte, 412 U.S. 218, 226. Later in the opinion, Justice Stewart squarely confronted *Miranda*, stating that its holding is "simply inapplicable" to consent searches. *Miranda*'s holding rested on the inherent coerciveness of custodial surroundings. In the consent search cases, there are no such inherently coercive techniques. "*Miranda*, of course, did not reach investigative questioning of a person not in custody, which is most directly analogous to the situation of a consent search, and it assuredly did not indicate that such questioning ought to be deemed inherently coercive." *Id.* at 247.

34. The specifics are discussed in detail in Part II.

35. *See* People v. Reed, 224 N.W.2d 867 (Mich. 1975).

36. *See* United States v. Perez, 644 F.2d 1299 (9th Cir. 1981); United States v. Mapp, 476 F.2d 67 (2d. Cir. 1973); Lowery v. State, 499 S.W.2d 160 (Tex. Crim. App. 1973).

37. *See* United States v. Mapp, 476 F.2d 67 (2d Cir. 1973).

38. *See* United States v. Bynum, 125 F. Supp.2d 772, 783 (E.D.Va. 2000).

39. *See* United States v. Citizen, 234 F.3d 234, 242 (5th Cir. 2000); United States v. Hall, 565 F.2d 917 (5th Cir. 1978); Guzman v. State, 672 S.W.2d 656 (Ark. 1984).

40. *See* United States v. Citizen, 234 F.3d 234, 242 (5th Cir. 2000).

41. *See* United States v. McCurdy, 40 F.3d 1111, 1119 (10th Cir. 1994).

the defendant's awareness of his right to refuse consent.[42] Some circuits apply the same specific factors to each case,[43] and others view each case individually.[44] The federal circuits, in particular, have struggled with the situation where a police officer told the consenter that

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42. *See* United States v. Cormier, 220 F.3d 1103, 1112 (9th Cir. 2000).

43. *See, e.g.*, United States v. Cormier, 220 F.3d 1103, 1112 (9th Cir. 2000):

> This Court considers the following five factors in determining whether a person has freely consented to a search: (1) whether defendant was in custody; (2) whether the arresting officers had their guns drawn; (3) whether *Miranda* warnings were given; (4) whether the defendant was told he had the right not to consent; and (5) whether the defendant was told that a search warrant could be obtained

See also, e.g., United States v. Yusuff, 96 F.3d 982, 985-86 (7th Cir. 1996):

> [The list of factors courts use to determine whether consent was voluntary are:] (1) whether the encounter occurred in a public place; (2) whether the suspect consented to speak with the officers; (3) whether the officers informed the individual that he was not under arrest and was free to leave; (4) whether the individuals were moved to another area; (5) whether there was a threatening presence of several officers and a display of weapons or physical force; (6) whether the officers deprived the defendant of documents she needed to continue on her way; and (7) whether the officers' tone of voice was such that their requests would likely be obeyed.

The Eleventh Circuit, for instance, examines the semantics of the officer's statement to determine its coerciveness. United States v. Garcia, 890 F.2d 355, 362 n.7. If the officer informs the consenter that he will *attempt* to procure a warrant if the subject refuses to consent, there is no coercion. Alternatively, if the officer tells the consenter that he *will* definitely obtain a warrant, the court may consider that statement coercive. *Id.*

The Ninth Circuit employs a unique approach: the tone of the officer's voice determines whether the "search warrant statement" is coercive, or alternatively, informative. If the officer promises to return with a warrant in a non-threatening manner, he is merely informing the consenter of his right to force the officer to seek a warrant. *See also* United States v. White, 979 F.2d 539, 542 (7th Cir. 1992) ("Although no warning of her right to refuse consent was given, the promise that the police would obtain a search warrant if she refused implicitly communicated the option to her.") On the other hand, if the officer makes the statement in a threatening way, the statement may vitiate the resulting consent if there is no actual probable cause to support the warrant. *See Cormier*, 220 F.3d at 1112.

Other federal circuits ignore the semantics and tone of voice. *See, e.g.*, United States v. Evans, 27 F.3d 1219, 1231 (7th Cir. 1994); United States v. Vasquez, 638 F.2d 507, 528-29 (2d Cir. 1980); United States v. Dennis, 625 F.2d 782 (8th Cir. 1980), and instead look to whether the officer makes the search warrant statement in good faith or bad faith. A bad faith statement is made when there is no basis for a search warrant, or used as a pretext to obtain consent, United States v. Slavo, 133 F.3d 943, 954-55 (6th Cir. 1998). Courts sometimes look to whether actual probable cause existed for a search warrant to determine if there was an actual basis for the search warrant statement. Other times, they look to the subjective knowledge of the officer: if he believed actual probable cause existed, there was a basis for the statement, and there is no coercion. *See* United States v. Roberts, 86 F. Supp. 2d. 678, 688 (S.D. Tex. 2000) ("The courts have not clearly stated whether it is critical that the searching officer had a reasonable, good-faith belief that a warrant would properly issue, or that the warrant could in fact have been issued consistent with the Fourth Amendment.").

44. *See, e.g.,* United States v. Butler, 966 F.2d 559, 562 (10th Cir. 1992) (testing the voluntary nature of consent by the totality of the circumstances test, but not listing specific factors to consider); United States v. Garcia, 890 F.2d 355, 360 (11th Cir. 1989) ("[I]n determining whether [the defendant's] consent was voluntary, we must scrutinize the facts, and strike a balance between [the defendant's] right to be free from coercive conduct and the legitimate need of the government to conduct lawful searches.").

the officer would return with a search warrant if he refused to consent.[45]

This Note argues that it is deceptive and coercive for an officer to make a search warrant statement while requesting consent, and therefore the resulting search violates the Fourth Amendment. It further argues that courts should have the broader goal of limiting consent searches, or at least not encouraging them, and therefore should prohibit the deceitful police tactic of making such statements. Part I asserts that courts should disfavor consent searches because they too closely resemble the general warrants that the Fourth Amendment seeks to prohibit. Moreover, the scope of a consent search is considerably broader than a warrant search, and therefore significantly impacts the privacy interests of the consenter. Part II argues that courts should consider deceitful police practices when determining the voluntariness of consent because deception represents the police overstepping their authority. Part III explains that the promise of a search warrant is deceptive and therefore should invalidate consent because the promise misinforms the consenter of his rights. This Note concludes that courts should not permit a search warrant statement unless it is part of a comprehensive statement of the consenter's rights under the Fourth Amendment.

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45. *See, e.g.*, United States v. Perez-Montanez, 202 F.3d 434, 438-39 (1st Cir. 2000) (refusing to overturn the district court's ruling that consent to a search is valid even if the officer stated he will "obtain other means" to seize the evidence because that statement is not the same as saying he is presently entitled to search); United States v. Cormier, 220 F.3d 1103, 1112 (9th Cir. 2000) (acknowledging that sometimes the 9th Circuit has held that promising to return with a warrant does not preclude a finding of voluntary consent, and at other times such a promise is deemed coercive, and resolving the conflict by holding that the coerciveness of the promises depends on whether the promise was made "in a threatening manner"); United States v. Salvo, 133 F.3d 943, 954 (6th Cir. 1998) (holding that the FBI agent's statement to the suspect that if he refused consent, the officer would return with a warrant, did not coerce the suspect because the statement was not baseless or a pretext to coerce the defendant); United States v. Evans, 27 F.3d 1219, 1231 (7th Cir. 1994) (holding that the officer's promise to return with a search warrant was not coercive because there was actual probable cause, even though the officer told the consenter "it would go an awful lot easier" if he just consented, and the officer promised to search more of the consenter's property if he forced the officer to return with a warrant); United States v. White, 979 F.2d 539, 542 (7th Cir. 1992) (holding that baseless threats to obtain a search warrant may be coercive, but "genuine" statements do not render invalid otherwise valid consent); United States v. Duran, 957 F.2d 499, 502 (7th Cir. 1992) (admitting that, while the officer's promise to return with a warrant may have induced consent, it was not coercive since the police had probable cause for a warrant); United States v. Garcia, 890 F.2d 355, 362 n.7 (11th Cir. 1989) (holding that if the officer states he will attempt to obtain a warrant, there is no coercion, but indicating that if the officer stated he would obtain a warrant, resulting consent may violate *Bumper*); United States v. Culp, 472 F.2d 459, 461 (8th Cir. 1973) (holding that an officer did not coerce the defendant into consenting when he stated that a fellow officer was "in the process" of getting a search warrant, and that the home would be searched whether the defendant liked it or not. The court did allude to the *Bumper* case, but found that other evidence surrounding the search evidenced consent).

I. CONSENT SEARCHES v. WARRANT SEARCHES

This Part argues that consent searches resemble general warrants in that they are left to the discretion of the police office, and have almost limitless scope. The drafters of the Fourth Amendment sought to prohibit general warrants, which permitted indiscriminate searches.[46] Consent searches, like general warrants, allow the police almost limitless discretion of who to search, and a wide scope of where to search.[47] Consequently, just as the Fourth Amendment put an end to general warrants, it should constrain the use of consent searches. Section I.A argues the similarity between general warrants and consent searches. Section I.B explains the differences between consent searches and warrant searches.

A. *General Warrants*

The Fourth Amendment protects individual privacy by limiting the discretion of law enforcement to search private places.[48] At the time the founders drafted the Constitution and Bill of Rights, they were familiar with "general warrants", which offered no such protection from the abusively used discretion of the state. The general intent of the Fourth Amendment was to limit the discretion and abuse of discretion by law enforcement to invade the privacy of citizens. When the founders drafted the Bill of Rights, they were most concerned about "general warrants."[49] The term applied to warrants that lacked par-

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46. *See* Florida v. Bostick, 501 U.S. 429 (1991) (Marshall, J., dissenting).

47. See Section B of this Part.

48. U.S. CONST. amend. IV.

The relationship between the first "reasonable" clause and second "warrant" clause is a matter of frequent debate. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925 (1997); Luis G. Stelzner, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10 N.M. L. REV. 33 (1979-80). In addition to the prohibition of general searches, the Fourth Amendment either imposes a warrant requirement or a standard of reasonableness. One reading of the Fourth Amendment imposes a presumption of the need for a warrant, unless a specific exception applies. Valid consent is a well established exception to the warrant requirement. The other interpretation of the Fourth Amendment asserts that there is no requirement of a warrant for every search, but just a requirement that every search be reasonable. Reasonableness does not always mean a police officer must obtain a warrant beforehand. If, after a warrantless search, the court finds the officer acted reasonably, then the search should be upheld.

Despite which view of the Fourth Amendment scholars and the Court eventually agree on, all agree that the founders strongly disfavored general warrants for reasons that hold true today. The founders disliked general warrants because the warrants left too much discretion to police officers. Similarly, consent searches leave considerably more discretion to the police than warrant searches. Therefore, if courts are to be true to the purpose of the Fourth Amendment, they should constrict the use of consent searches.

49. Davies, *supra* note 48, at 558.

ticular information, lacked a complaint under oath, or lacked a showing of cause for the search.[50] The colonists condemned general warrants because they allowed law enforcement too much discretionary authority to search or arrest as they liked, without adequate supervision.[51] In addition to fearing searches lacking any probable cause, the founders were concerned about placing the determination of the existence of probable cause, or when to search without it, in the hands of the police.[52] These concerns are equally forceful in modern times because of the almost limitless discretion consent searches grant to the police.[53]

The Supreme Court recognizes that the original intent of the drafters of the Fourth Amendment was to prevent general searches, but fails to associate general searches with consent searches. Justice Marshall noted that although the general warrant was an effective means of law enforcement, "it was one of the primary aims of the Fourth Amendment to protect citizens from the tyranny of being singled out for search and seizure without particularized suspicion notwithstanding the effectiveness of this method."[54] In other instances, the Court has explained that the purpose of the Fourth Amendment is to prevent general searches, although they have not couched it in general warrant terms. In *Johnson v. United States*, for instance, the Court stated that when the right of privacy must yield to a search, a judicial officer should be the one to authorize that invasion.[55] If the police, instead of a detached magistrate, could decide when probable cause exists, the Fourth Amendment would be a "nullity."[56]

Consent searches come dangerously close to general warrants by giving the searching police officer undue discretion to determine the scope of the search. The Court has held that when the subject of a search voluntarily gives his consent, it is reasonable for a police officer

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50. *Id.*

51. *Id.* at 578. Hostility towards granting discretionary power to law enforcement officers was also why writs of assistance were disapproved. *Id.* at 580.

52. The primary reason for fearing police discretion was classism: the upper class did not want to be harassed by the "lower class" law enforcement officers. They preferred to have one of their own, a magistrate, make the determination as to which homes deserved to be searched because of adequate suspicion. For a thorough discussion of the original purpose of the search warrant requirement, including this classist argument, see Davies, *supra* note 48, at 577-78.

53. *See supra* Part I.B.

54. Florida v. Bostick, 501 U.S. 429 (1991) (Marshall, J., dissenting).

55. Johnson v. United States, 333 U.S. 10, 14 (1948); *see also* Stegald v. United States, 451 U.S. 204, 213 (1981) ("In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant.").

56. *See Johnson*, 333 U.S. at 14.

to conduct a search without a warrant.[57] Like general warrants, however, consent searches give the police officer wide discretion as to whom to search, and the scope of that search.[58] Consent searches rob a neutral magistrate of the authority to determine probable cause and scope.[59] The liberal use of consent searches also allows for suspicionless searches, clearly violating the Fourth Amendment's requirement of probable cause.[60] Thus, at the very least, the original purpose of the Fourth Amendment and the Supreme Court's prohibition of general warrants should force courts to hesitate before determining the validity of a consent search.

B. *Consent Searches v. Warrant Searches*

As explained above, the Fourth Amendment requires search warrants to prevent general searches. The requirement of a search warrant has a real impact on the subject of the search — it serves to protect him. A consent search offers no such protection. If probable cause exists to search a home, the police investigating the theft have a choice: they can go to the house and ask permission to search it, or they can ask a magistrate for a search warrant to search the home.[61] First, assume the officers decide on a consent search. They might do so, even if probable cause to support a search warrant exists.[62] The police officers can gain consent to search the home after explaining to the owner that they are searching for evidence of a crime, even if it is a different crime than the one they are actually investigating.[63]

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57. At least one author claims that because of the wide scope, consent searches are never reasonable. *See* Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 186 (1991).

58. Rotenberg, *supra* note 57, at 186.

59. *See infra* notes 78-82 and accompanying text.

60. "Because of the frequent reliance upon consent searches, it is apparent that the constitutional protection against unreasonable searches and seizures widens or narrows, depending upon the difficulty or ease with which the prosecution can establish such consent." WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.1 (2d ed. 1987).

61. *See* Davis v. United States, 328 U.S. 582, 593-94 (1940) (stating that a consent search is an established exception to the requirement of both a search warrant and probable cause).

62. Consent is often requested even if the officer has other authority for the search. The California Attorney General advises California police officers to "always ask for consent to search even when you have other authority for the search. It can never hurt, and it may help a great deal. . . ." Rotenberg, *supra* note 57 at 190 (quoting the California Attorney General). Officers may follow such advice because they believe the application process for a search warrant is overly technical, limits the scope of searches too much, is time consuming to acquire, and is less likely to produce suppressible evidence than a consent search. LAFAVE, *supra* note 60, at § 8.1.

63. *See* Michael J. Friedman, Comment, *Another Stab at Schneckloth: The Problem of Limited Consent Searches and Plain View Seizures*, 89 J. CRIM. L. & CRIMINOLOGY 313, 314-15 (1998) (explaining that such deceit on the part of the police is legal).

Once the owner agrees to the search, the police have received consent to search any area in his home where they reasonably may find evidence of the crime they claimed to be investigating.[64] The scope of their consent search is limited to the *stated* purpose of the search.[65] If, in the course of the search, the police come across evidence of another crime the police can seize the goods.[66] They may seize evidence of a crime they intended to search for in the first place, even though this purpose was hidden from the subject of the search.[67] The plain view doctrine does restrict the police to seizing items in plain view only if the officer is legally entitled to be in a place to view the incriminating evidence.[68] Since the police may lawfully search just about everywhere in the home, depending on the creativity of their stated purpose for the search, just about everything will be in plain view.[69]

The scope of a consent search is limited to that which a reasonable person listening to the subject of the search's consent would have thought he consented to.[70] If the police exceed the scope of that consent during the search, however, and the subject fails to object, the

64. The scope of a consent search depends on whether the consent is specific or general. If general consent is given, which means the consenter did not specify a limitation, the police can conduct a general search. The general search is limited to what a reasonable officer would think the consenter had agreed. LAFAVE, *supra* note 60, at § 8.1(c). If the officer expressed the intent of the search, the search is limited by that expressed intent. Florida v. Jimeno, 500 U.S. 248 (1991). The police must respect any limit the consenter specifies, so when the consenter agrees but says "you can look in the bedroom" or gives some other limiting instruction the police must respect it. LAFAVE, *supra* note 60, at § 8.1(c).

65. *Jimeno*, 500 U.S. 248.

66. As long as the police did not explicitly tell Citizen that any evidence seized would only be used to solve the abduction case, they can use the evidence for any criminal investigation, even if the other purpose was the *real* purpose of the search. *See* Friedman, *supra* note 63, at 338-40.

67. The issue would differ if officers promised to use any evidence seized only for the child abduction case. But so long as the police do not state explicitly that they will use evidence only for a specific purpose, they can use it for anything. *See* United States v. Andrews, 746 F.2d 247 (5th Cir. 1984).

68. The plain view doctrine allows the police to seize items without a warrant if the officer views the item from a lawful vantage point, he has a right of physical access to it from the lawful vantage point, and its nature as an article subject to seizure is immediately apparent. *See* Horton v. California, 496 U.S. 128 (1990); Arizona v. Hicks, 480 U.S. 321 (1987); Texas v. Brown, 460 U.S. 730 (1983); Coolidge v. New Hampshire, 403 U.S. 443, *reh'g* denied, 404 U.S. 874 (1971). "Lawful vantage point" means that the officer is not violating any laws, including the Fourth Amendment, by being in that location. An officer can be in a location lawfully if he is not in a private place that gives rise to Fourth Amendment protection, or he is in a private location, but there under a valid search warrant or exception to the search warrant requirement. *See Horton*, 496 U.S. 128.

69. A recent change in the plain view doctrine permits the police to seize evidence in plain view, even if they were trying to find just such evidence. *See Horton*, 496 U.S. 128. Previously, the plain view doctrine was limited to inadvertent discoveries. For an analysis of this change's impact on consent searches, see Friedman, *supra* note 63.

70. *See Jimeno*, 500 U.S. 248.

search is valid, and any evidence is admissible.[71] Thus, assuming that the subject of the search does not object to a police search broader than his consent,[72] the police may search without limit.[73] In addition to a wider scope of search, the subject is also less protected because courts are less likely to exclude evidence obtained from a search based on consent than evidence obtained from a warrant search because the police don't have as many technical requirements with which to comply.[74] The exclusion of impermissibly obtained evidence should deter police transgression. Since courts are less likely to exclude evidence from a consent search, the deterrent effect of the exclusionary rule does not work to prevent police from overstepping the already generous boundaries of the scope of a consent search.[75]

The warrant search is more limited and protects individuals in two ways. It requires probable cause before the police can search a home, and it limits the scope of the actual search. If the police chose to search a home with a search warrant instead of the owner's consent, the police would have gone to a magistrate and demonstrated the requisite level of probable cause[76] to obtain a search warrant successfully. The police also would have signed an affidavit explaining the basis of their suspicion, and any later legal challenge to the sufficiency of probable cause on which the warrant rested would be based on the

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71. LAFAVE, *supra* note 60, at § 8.1(c).

72. It is extremely unlikely that a consenter would know the legal scope of a search, and also know that if he does not object at that moment, he waives the right to object. Furthermore, psychological studies show that people are extremely likely to submit to a request from an authority figure, both when giving consent and when allowing a search beyond its original scope. *See generally* 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 (1997).

73. *See* Rotenberg, *supra* note 57, at 185-86.

74. The exclusionary rule is quite simple: it prohibits the use of any evidence that was searched for or seized illegally. *See* Mapp v. Ohio, 367 U.S 643, *reh'g denied*, 368 U.S 871 (1961) (holding that the exclusionary rule applies to the states); Weeks v. United States, 232 U.S 383 (1914) (establishing the exclusionary rule, but limiting it to the federal courts). For an explanation of why courts are less likely to exclude evidence seized pursuant to a consent search than evidence seized pursuant to a warrant search, see David S. Kaplan & Lisa Dixon, *Symposium on Coercion: An Interdisciplinary Examination of Coercion, Exploitation and the Law: I. Coercive and Exploitative Bargaining: Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941, 948 (1997) ("Evidence produced during a consent search is less likely to be suppressed on technical grounds."). *See also* Joseph G. Casaccio, Note, *Illegally Acquired Information, Consent Searches, and Tainted Fruit*, 87 COLUM. L. REV. 842 (1987) (describing how some courts consider consent an intervening factor in tainted fruit analysis).

75. The deterrent effect of the exclusionary rule has become the main rationale for the rule itself. The Court has reinforced its belief in the deterrent effect many times. *See* Arizona v. Evans, 514 U.S. 1 (1995); *see also* Illinois v. Krull, 480 U.S. 340 (1987); United States v. Leon, 468 U.S. 897 (1984); United States v. Janis, 428 U.S. 433 (1976); United States v. Calandra, 414 U.S. 338 (1974).

76. Probable cause describes the quantum of evidence needed to show specific items are probably located at a certain place at this time.

"four corners" of the affidavit.[77] If, after considering the affidavit, the magistrate determined that the issuance of a warrant was proper, the warrant would detail the specific goods the police had cause to believe were in the home,[78] and where police could look for the goods.[79] Thus, the search conducted pursuant to a search warrant, in contrast to the consent search described above, would be conducted in the following manner. The police would commence a search in the places specified in the warrant for the specified goods. The warrant would authorize a search only in places where the police could find the evidence of the actual crime under investigation. If the police exceeded the scope of the warrant, they would not be able to use any evidence obtained outside the permitted scope. Moreover, a court would likely suppress any "fruit" of the illegal search.[80] The potential exclusion of any evidence seized outside of the warrant's scope motivates the police to stay within the specified scope.

Although a warrant search better protects his privacy, courts and others may have little sympathy for a subject of a search and his right to privacy when there is probable cause that he committed a criminal act, and therefore he forfeits his right to privacy in a way law-abiding citizens do not.[81] Courts seem to uphold consent searches, however, even though there is no reason to suspect a person of *any* wrongdoing. Consider the following variations. Suppose that that probable cause did not exist to suspect the subject of the search of a crime, so if the police had applied for a warrant, the magistrate would have turned it down. The police mistakenly think they have probable cause, but prefer to conduct a consent search to save time, expand the scope of the search, or protect seized evidence from later attack in court. A re-

77. The "four corners" requirement prevents the police from adding subsequently gathered information at trial or a hearing. The police must cross the probable cause threshold at the time they apply for the warrant, no matter how much information they gather at a later time to support their original suspicions. *See* Whitely v. Warden, 401 U.S. 560, 565 n.8 (1971) ("Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate.").

78. LAFAVE, *supra* note 60, at § 4.6.

79. *Id.* at § 4.5.

80. "Fruit" refers to the fruit of the poisonous tree doctrine, first used in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). The catchy name of the doctrine first appeared in *Nardone v. United States*, 308 U.S. 338 (1939). In general, the doctrine requires the exclusion of evidence if its discovery was the direct result of a violation of the Constitution. Of course, this general proposition is subject to numerous caveats. *See* New York v. Harris, 495 U.S. 14 (1990); Taylor v. Alabama, 457 U.S. 687 (1982); United States v. Crews, 445 U.S. 463 (1980); United States v. Ceccolini, 435 U.S. 268 (1978); Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U.S. 471 (1963).

81. *Compare* Gouled v. United States, 255 U.S. 298 (1921) (holding that the entry of an informant under the guise of legitimate purpose violates the Fourth Amendment) *with* Lewis v. United States, 385 U.S. 206 (1966) (holding that when an informant is invited to enter to do illegal business, the police did not violate the Fourth Amendment).

viewing court would likely uphold the consent search *even though there is no actual probable cause to believe the subject has broken any law.*[82]

Suppose the police knew they did not have probable cause to search the subject's home. Maybe they did not have any legitimate reason to suspect the subject of a specific crime, but thought that if they could search every nook and cranny, they might find some evidence of some sort of wrongdoing and, at the very least, he would be put through the inconvenience and humiliation of a police search. A neutral magistrate would not issue a search warrant in this latter case, yet a reviewing court would uphold the consent search.[83] The dichotomy arises from the fact that consent searches are not only exceptions to the search warrant requirement, they are also excepted from any of the requirements for a search warrant to be issued, like probable cause. Thus, the police do not need to have individualized suspicion for a consent search.[84]

The current judicial framework encourages consent searches, despite the impact on privacy and the contradiction with the purpose of the Fourth Amendment. The Court encourages consent searches in at least two ways: allowing consent searches after coercive police tactics that are not allowed in other contexts,[85] and by singing the praises of consent searches. Leading the way is *Scheckloth v. Bustamonte.*[86] In *Scheckloth*, the last Court decision to address consent searches comprehensively, the Court highlighted the virtues of consent searches. According to the Court, the subjects of consent searches are less inconvenienced, law enforcement gathers valuable incriminating evidence that may be unavailable in the absence of a consent search, and a fruitless consent search may exculpate the innocent.[87] The Supreme Court's encouragement of consent searches has lead directly to lower courts approving consent searches. For example, an Illinois court was faced with a questionable consent search. After quoting *Schneckloth*, the court reasoned that the consent search was actually better for the

82. If the police promised to return with a search warrant in this case, courts would consider it a "good faith threat." *See* discussion *infra* Part III.

83. If the police promised to return with a search warrant in this case, it would likely be struck down as a "bad faith threat" if the police knew they did not have probable cause. *See* discussion *infra* Part III.

84. Moreover, police attempt to receive consent for a search most often when there is no probable cause, and no search warrant could be obtained. *See, e.g.,* State v. Allen, 603 A.2d 71 (N.J. 1992); McIntosh v. State, 753 S.W.2d 273 (Ark. 1988).

85. See *infra* Part II for a discussion of how the Court prohibits coercion in the confession context, but has remained silent on the same type of coercion in the consent search context.

86. 412 U.S. 218 (1973).

87. 412 U.S. at 227-43.

defendant, and upheld the search.[88] When the Court encouraged consent searches in *Schneckloth*, it did not consider the ways consent searches intrude on a person's rights under the Fourth Amendment.[89] The truth is that consent searches allow causeless, boundaryless searches whereas warrant searches better protect privacy. Therefore, courts should apply strict standards when validating consent.

II. DECEPTION BY POLICE OFFICERS

The existence of coercion negates the effect of consent.[90] Unfortunately, courts have difficulty determining when coercion exists because the Supreme Court has not provided clear guidance. The "totality of the circumstances" test leads to considerable ambiguity, especially when distinguishing involuntary consent and coerced consent. Courts should eliminate this confusion, at least in regards to the situation of the police deceiving consenters of their Fourth Amendment rights. This Part discusses what coercion is, pointing out its ambiguous nature. Then, this Part argues that courts should consider deceit as coercion, just as they do in the confession context. Since coercion negates consent, police deception should negate any resulting consent.

The totality of the circumstances test for detecting coercion leads to and indeed requires courts to judge each case on an ad hoc basis. Since there is little guidance from the Supreme Court,[91] the circuits are confused. For example, in the Fifth Circuit, the court held consent was involuntary when the police told the defendant they would test his blood for alcohol content, when in fact they tested it for a rape match.[92] The same circuit, however, held that consent was voluntary when the police asked the defendant to show a firearm to show a connection with robberies, when their real purpose was to charge the defendant with being a felon in possession of a firearm.[93] The court distinguished the cases because in *Andrews* the police did not explicitly

88. People v. Ford, 403 N.E.2d 512, 518-19 (Ill. 1980); *see also* State v. Smith, 488 S.E.2d 210, 213 (N.C. 1997) (stating that *Schneckloth* specifically addressed the situation of a police officer choosing to conduct a consent search instead of a warrant search, and because of the benefits of a consent search police should have the discretion to choose a consent search, resulting in the consent in the present case being validated); United States v. McCray, 692 F. Supp. 1019, 1021-22 (E.D. Ark. 1988) (quoting *Schneckloth*'s language that suggests consent searches are less inconvenient for the subject of the search, and then holding that police do not need any suspicion to request consent).

89. 412 U.S. 218.

90. *See supra* notes 29-31 and accompanying text.

91. *See generally* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE § 5.9 (9th ed. 1999).

92. Graves v. Beto, 424 F.2d 524 (5th Cir. 1970).

93. United States v. Andrews, 746 F.2d 247 (5th Cir. 1984).

promise the defendant that the evidence would only be used for one purpose.[94] The Fifth Circuit's experience demonstrates how the totality of the circumstances test leads to unpredictable results.

Judging the validity of consent is difficult because courts often confuse voluntary consent and coerced consent. Sometimes courts use the terms interchangeably, but intending different meanings. Coercion is coercive conduct by law enforcement, whereas voluntariness refers to the subjective state of mind of the subject of police pressure, and whether they feel they have a choice in how they respond to the police request.

In the confession context the Court has focused on the coercive behavior of police officers and disregard involuntariness. The case of *Colorado v. Connelly*[95] is a useful example of the distinction between coercion and involuntariness. The mentally disturbed defendant, without any prompting by authority, sought out the police and confessed to a murder because voices in his head demanded it. He confessed involuntarily in that he did not believe he had any choice, although the police did not coerce him into confessing. The Court held the confession valid because of the lack of coercive behavior by the police.

Unlike confession cases, in the context of consent searches, courts look to both coercion and involuntariness without distinguishing between the two. For instance, in the Eleventh Circuit, the list of factors routinely considered in their totality of the circumstances test include both coercive factors, like the presence of coercive police procedure, and voluntary factors, like the defendant's knowledge of his right to refuse consent and the defendant's education and intelligence.[96]

As the *Colorado* Court held implicitly, the coercive actions by law enforcement determine the admissibility of a confession. Voluntariness is too slippery a concept for the courts to use effectively as a test since, at some level, a suspect always has a choice. Just as courts are not able to inquire into the voluntariness of a confessor, courts are not able to validate how viable the consenter thought his other choices were at the time in question. Courts should validate consent if it is free of coercion; the voluntariness of the consent should not be given importance. Like confession law, courts should judge consent to search by a coercive approach. In both contexts, courts should focus on the actions of police officers rather than the subjective knowledge and intention of the consenter. While courts do not distinguish linguistically between coercion and voluntariness, the difference is important. Focusing on the coerciveness of police behavior provides an objective method to determine the nature of the consent instead of attempting

94. *Id.* at 250.

95. 479 U.S. 157 (1986).

96. *See* Tukes v. Dugger, 911 F.2d 508, 517 (11th Cir. 1990).

the daunting task of imagining what the consenter was or was not thinking at the time he consented.

Deception should constitute coercion in the context of consent searches. The Supreme Court has not addressed deception in the context of inducing consent to be searched, and lower courts and commentators have only addressed it rarely.[97] Though the court has not addressed the issue in the context of consent searches, it has done so in the context of confessions and interrogations.[98] *Miranda v. Arizona*, the case that has shaped interrogation law and practice since 1966, prohibits law enforcement from using threats or trickery to entice a suspect into waiving his rights.[99] While *Miranda* prohibits the use of deceit to obtain a waiver, it does not directly address police deceit in obtaining a confession once the suspect waived his rights. At least one commentator has suggested that *Miranda* should prohibit post-waiver deception, but law enforcement or the courts have not adopted that view.[100] Theoretically, police trickery may negate the voluntary nature of the resulting statement under the "totality of the circumstances" test, but it rarely does in practice.[101] Interrogation law permits deceit once the suspect is made aware of his rights and voluntarily waives them, but the law strictly prohibits deceit as a method of convincing the suspect to consent to speak to the police.

Just as courts do not allow deceit in the interrogation context, they should not allow it in the search context either.[102] The Supreme Court, in *Schneckloth*, deemed the comparison between coerced confessions

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97. "[T]here is no common understanding as to what constitutes permissible deception in enforcing the criminal law." LAFAVE, *supra* note 60, § 8.2(n).

Police do not understand deception to be inappropriate at all. One criminal procedure scholar, Christopher Slobogin, has grouped police deception into three categories: undercover work, search and seizures, and interrogation. Chistopher Slobogin, *Deceit, Pretext and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 778-88 (1997). The search and seizure category includes "lying about police authority to conduct the search or seizure." *Id.* at 781. "For instance, police may state that they do not need a warrant when they know the law requires they have one, assert they have a warrant when they do not, or state they can get a warrant when in fact they know they can not." *Id.*

98. Miranda v. Arizona, 384 U.S. 436 (1966).

99. *Miranda*, 384 U.S. at 476 ("Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.").

100. *See* Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

101. Statements made by the defendant to the police must be voluntary. To determine whether such statements are voluntary, courts use the "totality of the circumstances" test. *See, e.g.*, Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986).

102. For one court's hint that such should be the rule, see U.S. v. Acosta-Chavez, No. 97-3288, 1998 U.S. App. LEXIS 17159, at *20 (10th Cir. 1998) (unpublished opinion) ("Consent induced by trickery or deception may be involuntary."). The current situation is that often the court may rule depending on the court's attitude toward the specific coercion in question, just how deceitful it actually is. *See* LAFAVE, *supra* note 60, at § 8.2(n).

and coerced consent appropriate and extremely useful.[103] In fact, the majority of the voluntariness analysis in *Schneckloth* consisted of exploring voluntariness in interrogation jurisprudence. Detractors may argue that the *Schneckloth* Court's ultimate holding was that consent to searches should be governed by a different standard than consent to be questioned. True, the Court compared consent searches to the waiver of interrogation law rights, and concluded that the inherent coercive nature of custodial interrogations required a more rigorous bright line rule, the now famous *Miranda* warnings, than consent to a search required.[104] The Court, however, reached its conclusion by considering only non-custodial consent, whereas *Miranda* specifically addressed custodial situations.[105] The *Schneckloth* Court, in every other aspect, considered consent to a search comparable to the waiver of Miranda rights. The only difference they noted, which is the point the case turned on, was the amount of inherent coercion present.[106]

An alternate solution to determining when the law should prohibit deceit is to explore the philosophical justifications for lying, and to apply those justifications to police deception to determine if any can be justified.[107] According to this approach, police deception is defensible only if used against an identified threat to society. A neutral magistrate or judge should identify the threats to society, the targets of the search.[108] This type of ex ante judicial review of deceptive tactics would eliminate almost all deception in connection with searches since the police most often misrepresent their authority when they do not have probable cause to support the search.[109]

This requirement would prohibit the type of deception at issue in this Note. As one commentator points out, "[i]n situations in which the police misrepresent their authority . . . they usually lack sufficient suspicion to authorize their action. Assuming so, a judge is unlikely to find the target is a criminal-enemy to whom police can lie."[110]

As in interrogations, if the police obtain consent to relinquish a right by deception, the consent is coerced. The argument for doing so does not rest on the consenter's view of his options, but rather rests on the premise that such deception involves overstepping by the police.

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103. 412 U.S. 218 (1973).

104. *Id.*

105. *Id.*

106. Interestingly, after *Schneckloth*, the Court maintained its position that the police do not need to read the subject of the search his Fourth Amendment rights even if he is in custody when consent is requested. *See* LAFAVE, *supra* note 60, at § 8.2(i).

107. *See* Slobogin, *supra* note 97.

108. *Id.* at 808.

109. *Id.*

110. *Id.*

As the next Part argues, the "we can do this the easy way or the hard way" statement is just the type of deception that should invalidate consent.

III. INFORMING A SUSPECT THAT REFUSING CONSENT IS FUTILE IS DECEPTIVE

As Part I argued, if an officer tells a consenter that it makes no difference whether he consents or forces the officer to come back with a warrant, the officer intentionally deceives the consenter and the courts should not consider the resulting consent valid. Currently, the federal circuits reach different results depending on whether the officer made the statement in good faith or bad faith. This Part argues that distinction is not useful because both types of threats should vitiate consent. First, telling the subject of a search of his alternatives in "good faith" and stating that consent would be better for him or that the choices will yield equal implications is deceitful. The police know that the implications are different when they make these statements to consenters. The police make the false statement with the intention of convincing the consenter to relinquish his rights, which is coercive. Second, telling the subject of the search of his alternatives in "bad faith" is not distinguishable from the "good faith" statement, and therefore courts should prohibit them both.

Courts typically classify some police references to search warrants as unobjectionable. These references fall into two categories, one in which the police officer has not made the statement as a pretext in order to coerce the consenter, and the second where there is actual probable cause to support a warrant if the officer applied for one.[111] This Note uses the shorthand phrase "good faith" statement to refer to such statements. While not explicitly stated, since other good faith tests under the Fourth Amendment employ an objective standard, this test presumably would also be an objective test. It would, then, apply equally to the officer who should have known a warrant was obtainable, and would not apply to the officer who thought a warrant was obtainable when that thought was unreasonable under the circumstances.

If a police officer requests consent to search a home, the owner may initially refuse, or at least show reluctance to freely consent to the search. The police officer, in an effort to secure consent, may inform the subject that if he continues to refuse consent, they will return with a search warrant anyway, and when they return they will bring additional uniformed officers in marked cars, which will cause consider-

111. *See, e.g.*, United States v. Roberts, 86 F. Supp.2d 678, 687-88 (S.D. Tex. 2000) and cases cited therein.

able embarrassment.[112] This is the "we can do this the easy way or the hard way, but either way we will do what we want" message. The subject consequently gives his consent. If the officers actually thought or should have thought that there was probable cause for a warrant, courts would consider the threat a "good faith" threat and uphold the resulting consent.[113]

This is the wrong result because there is no such thing as a "good faith" threat to obtain a search warrant. The trained police officer *knows or should know* that the implications for the consenter differ depending on whether the search is conducted by consent or by warrant. They ask for consent instead of waiting for a warrant precisely for these reasons.[114] Courts are less likely to suppress evidence collected during a consent search.[115] As exclusionary rule jurisprudence makes clear, the exclusion of evidence is a strong motivating factor for police officers.[116] Additionally, officers can conduct a much wider search if a warrant does not establish boundaries of the search. Thus, when officers accurately inform a potential consenter that they have the ability to obtain and return with a search warrant, they trick the consenter into believing either (1) there is no difference for the consenter he gives consent or refuses, or (2) the consenter is wiser to give consent rather than wait for the search warrant.[117] Courts should flatly prohibit police from tricking a consenter into giving up his rights.[118]

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112. See, for example, United States v. Salvo, 133 F.3d 943 (6th Cir. 1998), holding that consent was voluntary where defendant initially refused consent, but later consented when FBI agents explained how embarrassing it would be for him to have them return with a warrant; and United States v. Evans, 27 F.3d 1219 (7th Cir. 1994), describing the interaction between the FBI agent and defendant as follows:

> The agent allegedly told him that if he signed the consent form the agents would not search his house and that 'it would go an awful lot easier on [Evans]'; if he refused to consent, according to Glenn, the agent stated that the FBI would obtain a search warrant and search his house as well as other areas of his premises.

Id. at 1224 (alteration in original) (citations omitted).

113. *See, e.g.*, United States v. Evans, 27 F.3d 1219 (7th Cir. 1994); United States v. Kaplan, 895 F.2d 618 (9th Cir. 1990); United States v. Twomey, 884 F.2d 46 (1st Cir. 1989); United States v. Calvente, 722 F.2d 1019 (2d Cir. 1983).

114. *See* LAFAVE, *supra* note 60, at § 8.1.

115. *See* Kaplan & Dixon, *supra* note 74 at 948.

116. *See supra* notes 74-75 and accompanying text.

117. The *Schneckloth* court explicitly made the argument that consent searches are better for the subject than warrant searches. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1972).

118. At least one circuit has noted that a search warrant statement made in good faith, when probable cause actually exists, is beneficial in that it serves to notify the consenter of his right to demand a warrant search. *See* United States v. Torres-Sanchez, 83 F.3d 1123, 1130 (9th Cir. 1996) (holding that when determining whether the defendant consented voluntarily, the factor of whether a search warrant statement was made could work for or against voluntariness, depending on whether the statement was made in a threatening manner). That analysis is misguided because the police have only partially informed the consenter of his rights, and misconstrued his rights by making it seem advantageous to grant con-

What if the police, *knowing they have no probable cause to search a home*, ask the owner to consent to a search. After his initial refusal, the police tell him that if he continues to refuse to consent, they will return with a search warrant anyway. This is what courts term a bad faith threat: the police make the statement with the knowledge that a magistrate would not grant a search warrant. The statement is made anyway purely to trick the consenter into giving consent, since that is the only way the police will be able to gain access. This type of deception is correctly recognized as improper and unlawful by most courts. But why treat it differently from the good faith threats? The effect on the consenter is the same if probable cause exists or not: they are told they do not have a choice to refuse entry to the police. The motivations of the police are the same: depriving the consenter of his rights to be searched pursuant to a warrant. Courts should use the same reasoning they use when looking down on bad faith threats as they do when considering good faith threats. As this Part shows, the police telling the subject of a search that "we can do this the easy way or the hard way" is deceptive and coercive, and courts should invalidate the practice.

IV. CONCLUSION

The courts should prohibit the police practice of informing the consenter that the police will return with a warrant if the potential consenter refuses consent. Even if it is true that a magistrate could grant a search warrant, the officer is misinforming the consenter of his rights under the Fourth Amendment. While the Supreme Court has not obligated the police to inform the consenter of his Fourth Amendment rights, he cannot misrepresent or lie to the consenter about his rights. Furthermore, by allowing such threats, courts encourage just the type of searches that the Fourth Amendment was meant to prohibit — those conducted without the neutral determination of probable cause by a detached magistrate. Therefore, courts should not permit consent searches when the officer misrepresents the rights of the consenter by telling him his options are to consent or to wait for the officer to return with a warrant.

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sent rather than waiting for a search warrant. A similar situation exists if a police officer informs a suspect that if he does not speak to the police without his lawyer, things will be much worse for him. Or, in other words, the police construe the assertion of the suspect's right as harmful to the suspect. The Court, in *Miranda*, prohibited the police from using trickery to entice a suspect into waiving his rights. *See supra* Part II. Moreover, such deceit is offensive to anyone who believes in the value of constitutional protections.