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CONSENT TO SEARCH IN RESPONSE TO POLICE THREATS TO SEEK OR TO OBTAIN A SEARCH WARRANT: SOME ALTERNATIVES

Courts have recognized that when police make "suggestions" to citizens, the citizens often do not consent freely to the police requests, but instead respond out of fear or coercion.[1] For this reason, the Supreme Court held in *Bumper v. North Carolina*[2] that a search made pursuant to a warrant "cannot later be justified on the basis of consent if it turns out that the warrant was invalid."[3] The Court reasoned that "[w]hen 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."[4]

Another situation in which consent may have been obtained coercively is when police, seeking consent to search, threaten to seek or to obtain a search warrant. A citizen may believe that obtaining a warrant is a nondiscretionary procedure and therefore may "consent" to the search. The consent in such a situation may be no more voluntary, however, than the "consent" obtained after a police officer presents a warrant. In both situations, the citizen may be responding out of a belief of inevitability rather than out of a free decision to allow the search.

Because of the potential for coercion in consent searches and because the Supreme Court has not decided whether searches conducted after these types of police threats are coercive, there is a need to examine what case law there is on this issue. More importantly, there is a need to examine whether there are alternatives to this type of search.

THE CASE LAW ON THE CONSENT SEARCH

Although searches generally are to be conducted pursuant to a valid search warrant,[5] search warrants actually have played a comparatively minor role in law enforcement[6] because of the many exceptions made to the general rule.[7] One exception to the warrant rule is the consent search, which occurs when the occupant of the premises consents to a search.[8] This exception has attained popularity among the police because they believe that the procedure for obtaining a search warrant is too technical and time consuming while not affording the individual any increased protection.[9] In addition, the restrictions on the other types of exceptions to the warrant requirement[10] have made the

[1] *See, e.g.*, Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951) (consent given after being jailed and questioned for several hours by police); J. Clarke, The Robber, the Police and the Fourth Amendment 134 (April 1974) (unpublished thesis in Northwestern University Law Library).

[2] 391 U.S. 543 (1968).

[3] *Id.* at 549 (footnote omitted).

[4] *Id.* at 550.

[5] *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-defined exceptions.") (footnotes omitted); Johnson v. United States, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforçement agent.").

[6] MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, commentary at 493 (1975) (conclusion based on 1961–66 data).

[7] A detailed examination of some of the exceptions to the warrant requirement is found in Haddad, *Well-Delineated Exceptions, Claims of Sham and Fourfold Probable Cause*, 68 J. CRIM. L. & C. 198 (1977). For a discussion of all the exceptions to the warrant requirement, see W. LAFAVE, SEARCH AND SEIZURE (1978).

[8] *E.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Davis v. United States, 328 U.S. 582 (1946); United States v. Rothman, 492 F.2d 1260 (9th Cir. 1963); Channel v. United States, 285 F.2d 217, 219 (9th Cir. 1960); State v. Ege, 274 N.W.2d 350 (Iowa 1979); State v. Nicholson, 225 Kan. 418, 590 P.2d 1069 (1979); Annot., 36 L. Ed. 2d 1143 (1972). *But see* United States v. Arrington, 215 F.2d 630 (7th Cir. 1954). For a discussion of consent searches in general, see J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: PRETRIAL RIGHTS § 50 (1972).

[9] P. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 159 (1967).

[10] *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753 (1979) (warrant required prior to searching luggage taken from an automobile properly stopped and searched for contraband); Mincey v. Arizona, 437 U.S. 385 (1979) (seriousness of offense under investigation does not create exigent circumstance such that warrantless search is justified); United States v. Chadwick, 433 U.S. 1 (1979) (warrant required when search remote in time and place from arrest); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (limiting *Carroll* automobile searches); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest limited to immediate area).

consent search a more attractive alternative for police.[11]

Increased use of the consent search exception merits careful scrutiny of the circumstances surrounding consent to search. Because the person who consents to a search relinquishes constitutional protection,[12] consent must be given freely and voluntarily.[13] In order to meet its burden of proving valid consent,[14] the state must show that there were no factors present which, in their totality, might have forced the occupant to consent.[15]

Although the decisions hold that the mere presence of a police officer is not so coercive that it will invalidate consent to search,[16] the courts have found that certain statements made by police do force a citizen to "consent." For example, if an officer declares, "I have come here to search your house," this will be viewed as coercive.[17] Consent is generally invalid if it was based on a law officer's untrue statement,[18] if it was made in situations where an average person would believe his only option was to consent,[19] or if it occurred in response to implied or express police threats.[20] In all of these

[11] It once was believed that the consent search played a relatively minor role in law enforcement. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, commentary at 492-93 (1975).

[12] The fourth amendment protects citizens against warrantless searches. U.S. CONST. amend. IV.

[13] *See* Bumper v. North Carolina, 391 U.S. 543, 548 (1968); Wren v. United States, 352 F.2d 617 (10th Cir. 1965), *cert. denied*, 384 U.S. 944 (1966); Simmons v. Bomar, 349 F.2d 365 (6th Cir. 1965); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); Kovach v. United States, 53 F.2d 639 (6th Cir. 1931).

[14] Bumper v. North Carolina, 391 U.S. at 548-50. *See also* Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921).

[15] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 249 (1973); Flournoy v. State, 131 Ga. App. 171, 172, 205 S.E.2d 473, 474 (1974).

[16] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); Consumer Credit Ins. Agency v. United States, 599 F.2d 770 (6th Cir. 1979) (consent to delivery of subpoenas); United States v. Novero, 58 F. Supp. 275 (E.D. Mo. 1944); People v. Reed, 393 Mich. 342, 224 N.W.2d 867, *cert. denied*, 422 U.S. 1044 (1975); Note, *Consent Searches—Relinquishment of Fourth Amendment Rights—The Need For A Warning*, 5 GONZ. L. REV. 315, 317 (1970). *Cf.* note 59 *infra* (cases where presence of police is considered).

However, "true consent, free of fear or pressure, is not so readily to be found" in any setting involving police. Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951). One court ruled that, where circumstances of consent were not clear, it would assume that the presence of police made it impossible for a suspect to freely consent to search even in the absence of force. Lee v. United States, 232 F.2d 354, 355 (D.C. Cir. 1956). *See also* United States v. McCunn, 40 F.2d 295 (S.D.N.Y. 1930).

[17] *See* Johnson v. United States, 333 U.S. 10 (1948) (coercion where defendant consented after officer said, "I want to talk to you a bit."); Amos v. United States, 255 U.S. 313 (1921) (coercion where revenue officers said they had come to search premises for violations of revenue law); Ferrara v. State, 319 So. 2d 629 (Fla. App. 1975) (coercion where officers told defendant that they were going to search his apartment); State v. Ahern, 227 N.W.2d 164 (Iowa 1975) (coercion when police kicked door down); People v. Kaigler, 368 Mich. 281, 118 N.W.2d 406 (1962) (coercion where detective stated that he would search whether defendant consented or not).

[18] *See, e.g.*, Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (police falsely claimed to have a warrant); United States v. Heath, 580 F.2d 1011, 1035 (10th Cir.), *cert. denied*, 439 U.S. 1075 (1978) (federal agent told defendant that she should consent because narcotics found in her car could not be used in court); United States v. Kampbell, 574 F.2d 962 (8th Cir. 1978) (investigator threatened that defendant's home could be ransacked under a search warrant); United States v. Sclafini, 265 F.2d 408, 415 (2d Cir.), *cert. denied*, 360 U.S. 918 (1959) (consent after agents told taxpayer that no proceedings would eventuate from search); State v. Barrow, 320 A.2d 895 (Me. 1974) (police incorrectly told defendant that they could search the car without a warrant if they saw anything suspicious through the window). *Cf.* Graves v. Beto, 424 F.2d 524 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970) (consent to blood test invalid when police deceived defendant as to purpose of test). *But cf.* Commonwealth v. Brown, 437 Pa. 1, 261 A.2d 879 (1970) (deception as to use of gun acquired by undercover agent does not violate defendant's fourth amendment rights).

Professor LaFave believes that police officers' deliberate attempts to deceive a person by falsely claiming to have a warrant constitutes "a gross and deliberate effort to thwart Fourth Amendment protections [and] deserve[s] to be dealt with . . . severely." 2 W. LAFAVE, *supra* note 7, at 640 n.15.

[19] *See, e.g.*, Bumper v. North Carolina, 391 U.S. 543 (1968); Amos v. United States, 255 U.S. 313 (1921) (implied coercion where federal agents told defendant's wife that they had come to search premises for violations of the revenue law); United States v. Hall, 468 F. Supp. 123 (E.D. Tex. 1979) (officers knocking loudly and persistently on door and demanding entry); *In re* 2029 Herring St., 464 F. Supp. 164 (S.D.N.Y. 1979) (layperson granting consent after having been told earlier that her consent was not needed because the officers had a search warrant). *Contra*, People v. Stock, 56 Ill. 2d 461, 309 N.E.2d 19 (1974) (subjective feeling that refusal to consent would be futile does not negate consent).

[20] *See, e.g.*, United States v. Kampbell, 574 F.2d 962 (8th Cir. 1978) (threat that home could be ransacked under a warrant); United States v. Bolin, 514 F.2d 554 (7th Cir. 1975) (threat to arrest girlfriend); Waldron v. United States, 219 F.2d 37 (D.C. Cir. 1955) (officers said that if they had to get a warrant they would not be responsible for what would happen to the defendant's apartment); *In re* Nwamu, 421 F. Supp. 1361 (S.D.N.Y. 1976) (threats of contempt, in part, used to enforce

situations, the statements voided the consent and invalidated the search.

The *Bumper* Analogy

MAJORITY VIEW OF *BUMPER*

The majority of courts, however, have upheld consent to search in response to police statements threatening to seek or to obtain a search warrant.[21] These decisions are based on a patchwork of rationales. Some consider the words used by the officer;[22] others look at all the circumstances[23] or find the presence of probable cause to obtain a search warrant to be determinative.[24] Still others uphold a threat when it was made in response to questions by the occupants, or they simply view all threats to seek or to obtain warrants as informative.[25] Many simply fail to address the possibility that a police threat is coercive.[26]

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subpoena duces tecum); Lightford v. State, 90 Nev. 136, 520 P.2d 955 (1974) (police talked about kicking in the door if defendant did not consent); Paprskar v. State, 484 S.W.2d 731 (Tex. Crim. App. 1972) (defendant's wife subjected to physical abuse, show of arms, and surrounded by a "veritable posse").

[21] *See, e.g.*, People v. Magby, 37 Ill. 2d 197, 226 N.E.2d 33 (1967) (consent valid where officer told defendant: "If you don't care to let us search, we'll get a warrant.").

Many cases imply that where law enforcement officers indicate that they will attempt to obtain or are getting a warrant, such a statement cannot serve to vitiate an otherwise consensual search. United States v. Culp, 472 F.2d 459, 461 n.1 (8th Cir.), *cert. denied*, 411 U.S. 970 (1973). *See, e.g.*, United States v. Savage, 459 F.2d 60, 61 (5th Cir. 1972) (per curiam) (police said they could get a warrant); United States *ex rel.* Gockley v. Meyers, 378 F.2d 398, 399 (3d Cir. 1967) (police told defendant that they were going to get a search warrant); Gatterdam v. United States, 5 F.2d 673, 674 (6th Cir. 1925) (officer said: "You might as well consent, because, if you do not, we will go and get a search warrant."); United States v. Manarite, 314 F. Supp. 607, 612–13 (S.D.N.Y. 1970), *aff'd*, 448 F.2d 583 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971) (officer said he intended to obtain a warrant); United States v. Fitzpatrick, 289 F. Supp. 767, 772 (D. Utah 1968) (agents said they had a right to and would get a search warrant whether or not defendant consented); Hamilton v. State, 260 F. Supp. 632, 633 (E.D.N.C. 1966) (police threatened to get a warrant); Simmons v. Bomar, 230 F. Supp. 226, 228 (M.D. Tenn. 1964), *aff'd*, 349 F.2d 365 (6th Cir. 1965) (per curiam) (officer said: "[Y]ou want to let us search and look around or do you want part of us to go get a warrant and some of us to stay until they get back with a warrant?"); Kershner v. Boles, 212 F. Supp. 9, 10 (N.D.W. Va. 1963) (officer told defendant he could get a warrant); United States v. Haas, 106 F. Supp. 295, 296 (W.D. Pa. 1952) (police threat to get a warrant); People v. Ward, 27 Cal. App. 3d 218, 225–26, 103 Cal. Rptr. 671, 675–76 (1972) (officers said that if defendant did not consent they would have to apply for a search warrant and possibly would get it); People v. Rupar, 244 Cal. App. 2d 292, 295, 53 Cal. Rptr. 70, 71 (1966) (policeman said his partner would go and get a warrant); Barlow v. State, 280 A.2d 703 (Del. 1971) (officer said he could get a warrant within a short time); State v. Yoss, 146 Mont. 508, 513, 409 P.2d 452, 455 (1965) (policeman said: "Either you sign [the consent form] or we will go to Court anyway and get a search warrant to search your house."); State v. Hamilton, 264 N.C. 277, 281, 141 S.E.2d 506, 512 (1965), *cert. denied*, 384 U.S. 1020 (1966) (officer said he could get a warrant); State v. Douglas, 488 P.2d 1366, 1373–75 (Or. 1971), *cert. denied*, 406 U.S. 974 (1972) (officer said he would apply for or attempt to get a warrant); Thurman v. State, 455 S.W.2d 177, 180 (Tenn. Crim. App. 1970), *cert. denied*, 401 U.S. 938 (1971) (police advised defendant that they could get a warrant). *But see* United States v. Minor, 117 F. Supp. 697, 698 (E.D. Okla. 1953); United States v. Baldocci, 42 F.2d 567 (S.D. Cal. 1930).

Upholding consent in response to police threat to seek a warrant: United States v. Boukater, 409 F.2d 537 (5th Cir. 1969) (policeman said that he would attempt to get a warrant); People v. Hancock, 186 Colo. 30, 525 P.2d 435 (1974) (officers told defendant that if he did not consent a warrant could and would be sought); State v. Kissner, 252 N.W.2d 330 (S.D. 1977) (officer said he would present evidence to judge but he could not predict whether a warrant would be issued). *See also* Commonwealth v. Mamon, 449 Pa. 249, 253, 297 A.2d 471, 474 (1972) (officer said he probably could get a warrant).

Upholding consent when police officer unequivocably states that he will obtain a warrant: United States v. Bracer, 342 F.2d 522 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965) (agents told defendants that they were going to get a search warrant); United States v. Kohn, 365 F. Supp. 1031 (E.D.N.Y. 1973), *aff'd*, 495 F.2d 763 (2d Cir.) (per curiam), *cert. denied*, 419 U.S. 965 (1974) (officer said he had the right to get a search warrant). *But see* State v. Lewis, 80 N.M. 274, 277, 454 P.2d 360, 363 (1969); Poe v. Oklahoma City, 483 P.2d 1190, 1191 (Okla. Crim. App. 1971). *Cf.* Losieau v. Sigler, 421 F.2d 825, 827 (8th Cir. 1970) (consent obtained at gunpoint after officers stated that there was a search warrant at the police station and they could get it if necessary).

Similarly, consent is valid if an officer states that he will seek a warrant and believes that it will be issued. *See* United States v. Faruolo, 506 F.2d 490 (2d Cir. 1974).

For an analysis based on the language of the threat, see text accompanying notes 40–45 *infra*.

[22] *See* text accompanying notes 40–45 *infra*.

[23] *See* text accompanying notes 46–62 *infra*.

[24] *See* text accompanying notes 63–73 *infra*.

[25] *See* text accompanying note 68 *infra*.

[26] *See* United States *ex rel.* Gockley v. Meyers, 378 F.2d 398, 399 (3d Cir. 1967) (police told defendant that they were going to get a search warrant); Gatterdam v. United States, 5 F.2d 673, 674 (6th Cir. 1925) (officer stated: "You might as well consent, because, if you do not, we will go and get a search warrant"); Hamilton v. State, 260 F. Supp. 632, 633 (E.D.N.C. 1966) (police threatened to get a warrant); Simmons v. Bomar, 230 F. Supp. 226, 229 (M.D. Tenn. 1964), *aff'd*, 349 F.2d 365 (6th Cir. 1965) (per curiam) (officer said: "[Y]ou want to let us

The courts adopting these rationales view the *Bumper* decision as inapplicable to cases in which the police threatened to obtain a warrant.[27] In *Bumper*, the Court found coercion when police claimed to possess a warrant.[28] Because a warrant grants the police authority to search regardless of consent, reliance on consent to search is inappropriate when a warrant is present if the warrant is later held unlawful.[29] By contrast, these courts argue, where no warrant is present, the officer is acting within his rights when he seeks to obtain a warrant.[30] Thus, a citizen is giving consent in response to a police threat to do what the police officer is legally able to do.[31]

A BROADER VIEW OF *BUMPER*

A broader view of *Bumper*, however, shows a strong similarity between cases in which the police already have a warrant and those in which the police merely threaten to obtain one. In *Bumper*, the Court found consent was obtained coercively because "[w]hen a law enforcement official claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search."[32] In such a situation, the citizen will permit the search because he views the search as inevitable in light of the warrant. Likewise, when a police officer threatens to seek or to obtain a warrant, the police threat may lead the citizen to believe that the search is inevitable. Because the premise underlying the consent in both cases is the inevitability of the search, both situations are inherently coercive.[33] The only difference between the claim of authority in *Bumper* and the police threat to obtain a warrant is one of immediacy. The perception of inevitability may be the same whether the claim of lawful authority is perceived to emanate from the search warrant or from the police officer's words.

This interpretation of *Bumper* focuses on the consenting individual's subjective reaction to the police threat or statement, not on the statement itself.[34] Thus, *Bumper* does not control a situation where a person acquiesces to a search without basing consent on a police officer's claim of lawful authority. For example, where citizens, upon being served with search warrants, have told officials that they need not read or show them the warrant and that they are free to search, courts have upheld the subsequent searches based on consent.[35] The rationale is that the particular individual was not coerced by the policeman's warrant.

Because the key in *Bumper* is the individual's subjective reaction to the police statements, a court addressing a situation in which police threatened to seek a warrant should examine the individual's subjective reaction to the threat before it finds consent. While it is true that some individuals are able to consent freely after such threats, not all do. Alternatives to the majority approach of finding valid consent must be developed to deal with those cases in which individuals are coerced by threats to seek a warrant.

ALTERNATIVE APPROACHES

In fashioning these alternatives, care must be taken to avoid the inconsistency and the confusion which have plagued fourth amendment analysis.[36]

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search and look around or do you want part of us to go get a warrant and some of us to stay until they get back with a warrant?"); Kersher v. Boles, 212 F. Supp. 9, 10 (N.D.W. Va. 1963) (officer told defendant he could get a warrant); United States v. Haas, 106 F. Supp. 295, 296 (W.D. Pa. 1952) (police threat to get a warrant); People v. Rupar, 244 Cal. App. 2d 292, 295, 53 Cal. Rptr. 70, 71 (1966) (officer said he would wait and his partner would get a warrant); State v. Hamilton, 264 N.C. 277, 281, 141 S.E.2d 506, 512 (1965), *cert. denied*, 384 U.S. 1020 (1966) (officer said he could get a warrant); Thurman v. State, 455 S.W.2d 177, 180 (Tenn. Crim. App. 1970), *cert. denied*, 401 U.S. 938 (1971) (police advised defendant that they could obtain a warrant).

[27] *See* cases cited in notes 23–26 *supra*.

[28] 391 U.S. at 550.

[29] *Id.* at 549.

[30] *See, e.g.*, People v. Rupar, 244 Cal. App. 2d 292, 298, 53 Cal. Rptr. 70, 73 (1966).

[31] *Id.*

[32] 391 U.S. at 550.

[33] Courts have held consent vitiated in other situations where it appeared that to do otherwise would be useless. Holloway v. Wolff, 482 F.2d 110 (8th Cir. 1973) (defendant could see that police had control over her home and had obtained incriminating evidence); People v. Clark Memorial Home, 114 Ill. App. 2d 249, 252 N.E.2d 546 (1969) (officers gained entry when patrons left automatic door open and gambling equipment in plain view upon entry).

[34] Hoover v. Beto, 467 F.2d 516 (5th Cir. 1971), *cert. denied*, 409 U.S. 1086 (1972); Earls v. State, 496 S.W.2d 464 (Tenn. 1973), *petition for habeas corpus relief denied*, 379 F. Supp. 576 (E.D. Tenn. 1974).

[35] Hoover v. Beto, 467 F.2d 516 (5th Cir. 1971), *cert. denied*, 409 U.S. 1086 (1972); Earls v. Tennessee, 379 F. Supp. 576 (E.D. Tenn. 1974).

[36] Justices of the Supreme Court have been quite cognizant of the inconsistencies in fourth amendment doctrine. "This branch of the law is something less than a seamless web." Cady v. Dombrowski, 413 U.S. 433, 440 (1973). "The decisions of the Supreme Court involving the fourth amendment are hardly notable for their predictability." Ker v. California, 374 U.S. 23, 45 (1963)

In addition, the alternatives must take into account the fact that the Supreme Court recently has favored a balancing approach in fourth amendment cases.[37] Because of the rather drastic results of the exclusionary rule,[38] this balance often favors traditional law enforcement.[39] Therefore, in line with these concerns, the following alternatives supply added protection to the citizens granting consent without significantly interfering with traditional law enforcement functions.

The Semantic Distinction Approach. An approach suggested by at least one court is to look at the actual words spoken by the police officer to determine whether coercion is present.[40] For example, if an officer says he will "get" a warrant rather than "apply for" a warrant, he may give the citizen the impression that the issuance of a warrant is a nondiscretionary process.[41] The citizen's consent in such a case is given in response to an implicit claim of authority. The situation resembles cases where consent was vitiated by untruthful statements by police[42] because the police officer's failure to communicate that the warrant process is discretionary deceives the citizen.

Judge Newman of the Second Circuit best stated the rationale of the semantic distinction approach:

> [W]ords spoken in the process of obtaining consent to waiver of a constitutional right ought to be chosen with care. The officers are not proceeding in haste to make a split second decision of their authority to apprehend a fleeing suspect. They face a situation that normally calls for a delay necessary to obtain a search warrant. If they are to forego the requirement, it should not be too much to ask that they take care not to confront the accused with a choice that totally obliterates the important protective function of the warrant-issuing process.[43]

Because this approach emphasizes police use of a word indicating the discretionary nature of warrant proceedings, it is useful only if the citizen views the distinction between "get" and "apply for" as meaningful. Certainly, some perceptive citizens will note the distinction. For them, the semantic distinction approach makes sense because if it is presumed that if they are aware of the element of discretion, they will consent only if they truly want to do so.

However, many citizens will not recognize or will not accord any value to the difference in semantics. These citizens still will perceive the search as inevitable and likely will conclude that standing on one's constitutional rights and refusing to consent to a search would be futile and counterproductive. Just as "a reasonable person might read an officer's 'May I' as the courteous expression of demand backed by the force of law,"[44] so too might "seeking" a warrant be equated with "obtaining" a warrant.

Furthermore, the semantic approach creates evidentiary problems. Placing undue emphasis on the words used at the time of the search is inappropriate because later testimony is subject to fading memories.[45] Neither the citizen nor the police officer is likely to be able to recall the exact words uttered, yet it is the exact words that must be

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(Harlan, J., concurring). "The course of true law pertaining to search and seizure has not—to put it mildly—run smooth." Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

[37] *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 653–55 (1979).

[38] Often the exclusion of evidence will result in an obviously guilty defendant going free even though he committed the most despicable of crimes. *See* Bumper v. North Carolina, 391 U.S. 543, 555 (Black, J., dissenting). Justice Traynor has written: "Of all the two-faced problems in the law, there is none more tormenting than that posed by the exclusionary rule." Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 319.

[39] Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

[40] United States v. Boukater, 409 F.2d 537, 538 (5th Cir. 1969) (upholding consent when police officer said that he would attempt to get a warrant, but indicating that the search might have been held invalid if the officer had said that he would get a warrant).

[41] *Id.*

[42] *See* note 18 *supra*.

[43] United States v. Faruolo, 506 F.2d 490, 495–98 (2d Cir. 1974) (Newman, J., concurring). Judge Newman, however, would not establish the semantic distinction approach as a separate and dispositive test. *See* text accompanying note 55 *infra*.

[44] Schneckloth v. Bustamonte, 412 U.S. 218, 275–76 (1973) (Douglas, J., dissenting).

[45] Fading memories are often colored with individual desires. For example, in the case of a consent search,

> [a] homeowner who invites the police to make a search which turns out contrary to his interests will probably regret having made the invitation; and he may slide easily from wishing he had not done so to believing he did not. He will slide even more easily if it is not claimed that he invited the inspection but only acceded to a request. On the other hand, a police officer who is eager to search may convince himself easily that the homeowner had consented, and even more easily recall the consent after he has found what he was looking for.

Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 55 (1974).

remembered if semantic nuances are to be given significance.

Totality of the Circumstances Test. Some other courts determine the voluntariness of a consent made in response to a police threat to seek or to obtain a search warrant by looking at the totality of the circumstances surrounding the consent.[46] This test is based on the Supreme Court's holding in *Schneckloth v. Bustamonte*[47] that "the question of whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances."[48] One of the most marked examples of the application of this test was provided by the Second Circuit in *United States v. Kohn*.[49] In *Kohn*, the police gave *Miranda* warnings[50] to the suspect, and he indicated that he knew about the process of obtaining a warrant.[51] The court held that these factors offset the agents' assertion that they had the "right" to get a warrant and would secure the premises, leave a guard, and return with a warrant in the morning if consent were not given.[52]

The totality of the circumstances test incorporates a number of approaches.[53] The threat to seek or to obtain a search warrant may be a factor weighing in favor of a determination of involuntariness.[54] Judge Newman suggests giving substantial weight to semantics within the framework of this test.[55] Moreover, a warning,[56] even though not required,[57] could be held to offset the coercive effect of the threat.[58] In addition, this approach allows for consideration of the number of officers present,[59] whether the officers making the threat had probable cause to search,[60] and other factors that may make the threat more or less coercive.

A serious defect in the totality of circumstances test, though, is that, as with any balancing approach, there is a great problem in determining what should be weighed in the balance and what weight should be given to each factor. There are no guidelines for what words are coercive and in what setting they are coercive. Moreover, there is no way to judge which coercive statements are more important than others.[61]

[46] *See, e.g.*, United States v. Faroulo, 506 F.2d 490 (2d Cir. 1974); United States v. Kohn, 495 F.2d 763 (2d Cir.) (per curiam), *cert. denied*, 419 U.S. 965 (1974); United States v. Bracer, 342 F.2d 522 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965).

[47] 412 U.S. 218 (1973).

[48] *Id.* at 228.

[49] 365 F. Supp. 1031 (E.D.N.Y. 1973), *aff'd*, 495 F.2d 763 (2d Cir.) (per curiam), *cert. denied*, 419 U.S. 965 (1974). The Second Circuit consistently applies the "totality of the circumstances" test. *See* United States v. Faroulo, 506 F.2d 490 (2d Cir. 1974); United States v. Bracer, 342 F.2d 522 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965).

[50] *Miranda* warnings were weighed within the totality of the circumstances in People v. Griffin, 53 Ill. App. 3d 294, 368 N.E.2d 738 (1977).

[51] Prior to *Schneckloth*, California courts required the citizen to do something affirmative to indicate his reluctance to cooperate with the police to establish submission to authority. *See* Note, *The Need for a Warning Prior to Waiver of the Fourth Amendment*, 10 SANTA CLARA LAW. 205, 211 (1969).

[52] 365 F. Supp. 1031, 1033 (E.D.N.Y. 1973), *aff'd*, 506 F.2d 490 (2d Cir. 1974).

[53] Professor Weinreb suggests that only when there is probable cause and an emergency should consent to search be upheld. *See* Weinreb, note 45 *supra*, at 57–58.

[54] United States v. Mayes, 552 F.2d 729 (6th Cir. 1977); People v. Ward, 27 Cal. App. 3d 218, 225–26, 103 Cal. Rptr. 671, 675–76 (1972).

[55] United States v. Faroulo, 506 F.2d 490, 498 (2d Cir. 1974) (Newman, J., concurring).

[56] For a suggested warning, see text accompanying note 79 *infra*.

[57] 412 U.S. 218, 232–33 (1973).

[58] Some courts hold the absence of warnings to be an important factor under the totality of the circumstances. *See, e.g.*, United States v. Heimforth, 493 F.2d 970 (9th Cir.), *cert. denied*, 416 U.S. 908 (1974); United States v. DeMarco, 488 F.2d 828 (2d Cir. 1973).

[59] *See, e.g.*, United States v. Mayes, 552 F.2d 729 (6th Cir. 1977); United States v. Hearn, 496 F.2d 236 (6th Cir.), *cert. denied*, 419 U.S. 1048 (1974); United States v. Marshall, 488 F.2d 1169 (9th Cir. 1974); Harless v. Turner, 456 F.2d 1337 (10th Cir. 1972); People v. Blitz, 38 Ill. App. 3d 419, 347 N.E.2d 764 (1976), *cert. denied*, 435 U.S. 974 (1978); People v. Gonzalez, 39 N.Y.2d 122, 347 N.E.2d 575, 383 N.Y.S. 2d 215 (1976); Lowery v. State, 499 S.W.2d 160 (Tex. Crim. App. 1973).

[60] *E.g.*, United States v. Scheiblauer, 472 F.2d 297 (9th Cir. 1973) (defendant already admitted suitcase contained marijuana); Code v. State, 234 Ga. 90, 214 S.E.2d 873 (1975) (car matching witness' description of car involved in robbery found parked in front of defendant's home); State v. Rathburn, 195 Neb. 485, 239 N.W.2d 253 (1976) (policeman had probable cause to search automobile because he smelled odor of burned marijuana); State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975) (informant supplying probable cause to support search warrant).

The rationale supporting inclusion of probable cause and its drawbacks are considered in detail in the next section.

[61] According to Professor LaFave:

> [I]t can seldom be said with confidence that a particular combination of factors will inevitably ensure a finding of either consent or no consent. This is because of (i) the inherent ambiguity of the voluntariness test and (ii) the resulting freedom of trial and appellate courts to inject their own values into the decision process while purporting to follow the dictates of the Supreme Court.

2 W. LAFAVE, *supra* note 7, at 638.

Professor Weinreb believes that the totality of the

More importantly, *Bumper* does not advocate merely weighing the factors. Instead, it invalidates consent given pursuant to a policeman's claim of lawful authority.[62] When consent in response to a police threat to seek or to obtain a warrant is premised on the belief that the search is inevitable, the implied claim of authority alone should invalidate consent. Determination of the voluntariness of consent based on the totality of the circumstances does not give the individual enough protection.

Examination of the Basis for the Police Threat to Seek or to Obtain a Search Warrant. Because the broad *Bumper* analogy hinges upon the belief that a search is inevitable, the basis for that belief is crucial. Under the basis-examination approach, consent obtained in response to a police threat is valid only when the police actually had probable cause sufficient to support the issuance of a warrant.[63] To obtain a search warrant, an officer must satisfy the court that probable cause exists.[64] However, when an officer threatens to seek or to obtain a search warrant, the officer may or may not have probable cause at that time to support the issuance of a warrant. If the citizen consents to such a search, the consent probably is premised on the belief that the issuance of a warrant is a nondiscretionary procedure and, therefore, that the search inevitably will occur.[65] Citizens, who in the absence of a threat would not consent, are likely to consent in response to such threat. If the officer making the threat had probable cause to support the issuance of a warrant, the citizen's perception that the search is inevitable is correct, so the threat is not deceptive. He either must consent in response to the police threat to seek or to obtain a warrant or later be compelled to allow a search pursuant to a warrant.

Under the basis-examination approach, if probable cause is present, then the citizen is afforded protection equal to that which would have been provided by an impartial magistrate. If, however, the police threat was made without probable cause, then the consent is invalid and the resulting evidence is excluded.[66] For example, one court upheld the validity of consent given in response to a police threat to obtain a warrant to search luggage which the defendant had admitted contained marijuana.[67] The rationale is that such threats are informative when they are based upon probable cause and when the citizen is told that he need not consent to the search.[68] Consent is invalid, however, when police threats are made in the absence of probable cause because such threats are only coercive.[69] While the Supreme Court has recognized a need for accepting consent to search even when no probable cause to search exists,[70] it has not specifically decided whether probable cause is needed when the consent is given in response to a police threat to obtain a warrant.

This approach might deter officers from threatening to obtain warrants if no probable cause existed or searching if they lacked probable cause and consent was given only in response to a

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circumstances test, "which depends on retrospective determination of the consenting person's state of mind, is unlikely to be satisfactory however ample the facts upon which the determination is based. It will not provide convincing distinctions among cases that are decided differently." Weinreb, *supra* note 45, at 58.

[62] 391 U.S. 543, 548-49 (1968).

[63] While there are a number of cases upholding consent in response to a police threat to seek or obtain a warrant where officers had probable cause, these cases ostensibly consider the totality of the circumstances surrounding consent. Consequently, the basis-examination approach may not be a distinct test as applied by the courts. *See* note 60 *supra.*

[64] The fourth amendment provides in pertinent part: "[N]o warrant shall issue but upon probable cause. . . ." U.S. CONST. amend. IV.

[65] Courts have voiced a concern that police will persuade the individual that "insistence upon fourth amendment guarantees will secure for him merely a delay of the inevitable search rather than the protection against unreasonable search and seizure to which he is constitutionally entitled." Herriot v. State, 337 So. 2d 165, 168 (Ala. Crim. App. 1976) (quoting Whitman v. State, 25 Md. App. 428, 456, 336 A.2d 515, 531 (1975)).

[66] *See, e.g.*, Flournoy v. State, 131 Ga. App. 171, 205 S.E.2d 473 (1974). The *Flournoy* court held that the absence of probable cause made the police threat coercive. Unlike cases where probable cause is present, the totality of the circumstances appear not to be considered.

[67] United States v. Scheiblauer, 472 F.2d 297 (9th Cir. 1973).

[68] United States v. Faroulo, 506 F.2d 490 (2d Cir. 1974); United States v. Savage, 459 F.2d 60 (5th Cir. 1972) (per curiam); People v. Magby, 37 Ill. 2d 197, 226 N.E.2d 33 (1967); People v. Griffin, 53 Ill. App. 3d 294, 368 N.E.2d 738 (1977).

[69] *See, e.g.*, Herriott v. State, 337 So. 2d 165 (Ala. Crim. App. 1976); Flournoy v. State, 131 Ga. App. 171, 205 S.E.2d 473 (1974). *Contra*, United States v. Curiale, 414 F.2d 744 (2d Cir.), *cert. denied*, 396 U.S. 959 (1969); Thurman v. State, 455 S.W.2d 177 (Tenn. Crim. App. 1970), *cert. denied*, 401 U.S. 938 (1971). In both *Curiale* and *Thurman*, the courts held consent valid in the absence of probable cause.

[70] Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) ("In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by valid consent may be the only means of obtaining important and reliable evidence.") (footnote omitted).

threat.[71] This positive result would protect citizens who mistakenly believe that a search is inevitable.

On the other hand, this approach might lead police to threaten citizens with the possibility of obtaining a search warrant whenever the citizen refuses consent but probable cause is present. Consent in reponse to such a threat correctly would be premised on the inevitability of the search. In a sense, such threats would be informative. But the informative aspect of the threat—that the search really is inevitable—is woefully incomplete. To permit police to threaten citizens to encourage waiver of constitutional rights properly falls outside traditional law enforcement values.[72] In addition, a retrospective rather than a prospective determination of the presence of probable cause invites abuse, particularly when admissibility of evidence is dependent on the preexistence of probable cause.[73] The number and magnitude of the problems with the examination of basis approach make it unsatisfactory.

Prohibition of Consent Search in Response to Police Threat to Obtain a Warrant. An approach currently not employed by any jurisdiction is to prohibit all consent searches in response to police threats to obtain a warrant. Those who support this approach agree that no one would consent to a search when he believed that evidence incriminating himself would be found[74] unless he believed that the threatened search was inevitable. The number of cases in which incriminating evidence is found easily by police immediately after consent in response to threats to seek or to obtain a warrant[75] indicates that acquiesence to search in many cases is premised on inevitability. Because the officer cannot be certain that a warrant will issue, the citizen's acquiesence is misplaced. Protection of the individual consenting to a search in response to a police threat, it may be argued, can only be afforded effectively by eliminating this branch of the consent search exception altogether.

Unlike prohibition of consent searches, the prohibition of police threats to seek or to obtain search warrants would not interfere with traditional law enforcement functions of police.[76] Whereas the consent search comes within the ambit of traditional police investigatory techniques,[77] police threats to seek or to obtain warrants do not comport with the modern view of police professionalism.[78] Similarly, in the typical consent search situation, the citizen might have an interest in saving himself the time, aggravation, and unnecessary "embarrassment to himself and to his friends or neighbors who might be questioned as the result of suspicion."[79] This interest is not likely to be the controlling consideration in granting consent only after a police threat. If such aggravations were paramount, it would seem likely that consent, given an opportunity, would precede the threat. In the absence of policy reasons supporting the encouragement of police threats to citizens, even a mere possibility of coercion supports prohibition.

By forbidding officers with probable cause from threatening citizens with the perceived inevitability of a search pursuant to a warrant, this approach has several benefits not shared by the three other alternatives already discussed. Unlike the semantic distinction approach, prohibition affords the less perceptive citizen protection identical with that of

[71] An officer knowing that evidence will be excluded will be deterred from threatening. The purpose of the exclusionary rule is to prevent such infringements of individual rights. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 217 (1960).

[72] Although "[t]he circumstances that prompt the initial request to search may develop or be a logical extension of investigative police questioning," to allow police to threaten citizens comes seriously close to giving them "carte blanche to extract what they can from a suspect" and, therefore, would seem to fall outside traditional law enforcement functions. Schneckloth v. Bustamonte, 412 U.S. at 218, 225.

[73] Such a procedure would bypass "the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96 (1964). *See generally* LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965).

[74] United States v. Curiale, 414 F.2d 744 (2d Cir.), *cert. denied*, 396 U.S. 959 (1969) (defendant consented to search when stolen dimes were hidden in rear room of building under platform).

[75] United States v. Savage, 459 F.2d 60, 61 (5th Cir. 1972) (per curiam); United States v. Fitzpatrick, 289 F. Supp. 767 (D. Utah 1968); Barlow v. State, 280 A.2d 703 (Del. 1971); State v. Douglas, 488 P.2d 1366, 1373–75 (Or. 1971), *cert. denied*, 406 U.S. 974 (1972); State v. Kissner, 252 N.W.2d 330 (S.D. 1977); Thurman v. State, 455 S.W.2d 177 (Tenn. Crim. App. 1970), *cert. denied*, 401 U.S. 938 (1971).

[76] One court would significantly narrow the consent search exception. United States v. Arrington, 215 F.2d 630 (7th Cir. 1954).

[77] Schneckloth v. Bustamonte, 412 U.S. 218, 231–32 (1973).

[78] *See generally* A. NIEDERHOFFER, BEHIND THE SHIELD 27–32 (1967).

[79] Note, *Consent Search: Waiver of Fourth Amendment Rights*, 12 ST. LOUIS L.J. 297, 306 (1967).

a person who perceives every semantic nuance. Prohibition eliminates the uncertainty of the case-by-case analysis resulting from a totality of the circumstances approach, and it provides prospective protection to the citizen rather than a reliance on a retrospective examination of the basis for the police threat. In the absence of a warning that would negate the potential coercive effect of the police threat, prohibition of consent search following a police threat to seek or to obtain a warrant is the best approach.

Required Warnings. Another possible alternative is to require officers to accompany all threats to seek or to obtain search warrants with a warning that consent need not be given. To minimize the possibility that the citizen would perceive that the search is inevitable, such a warning would emphasize the discretionary nature of the procedure of obtaining search warrants.

Extensive warnings would not be necessary to effectuate this protection.[80] This author suggests the following warning:

> You have a right to refuse to allow me to search your home, and if you decide to refuse, I will go to court and apply for a search warrant. You should understand that I cannot be certain that a warrant will or will not be issued. The judge will determine whether there is probable cause to believe that there is contraband or evidence of a crime within your home. The issuance of a warrant is entirely within the discretion of the judge.

In the years after *Miranda*, commentators have urged that warnings should be required prior to consent searches.[81] The warnings are necessary, it is argued, because the fourth and fifth amendments "run almost into each other."[82] The Model Penal Code already requires that a warning be given prior to a consent search,[83] and the Federal Bureau of Investigation for decades has given such warnings before obtaining consent to search.[84] Furthermore, one court has found that giving warnings prior to consent searches does not impair the effectiveness of the police.[85]

Recently, however, the Supreme Court has restricted the situations in which *Miranda*-type warnings are required[86] and has even rejected a require-

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[80] For an example of a more limited warning as applied to consent searches, see the model code instruction, note 83 *infra*.

[81] *E.g.*, Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970); Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967); Note, *supra* note 16; Note, *supra* note 79; *Note, supra* note 51.

The Columbia note proposed the following warning:

> You have a right to refuse to allow me to search your home, and if you decide to refuse, I will respect your refusal. If you do decide to let me search, you won't be able to change your mind later on, and during the search I'll be able to look in places and take things that I couldn't even if I could get a search warrant. You have a right to a lawyer before you decide, and if you can't afford a lawyer we will get one for you and you won't have to pay for him. There are many different laws which are designed to protect you from my searching, but they are too complicated for me to explain or for you to understand, so if you think you would like to take advantage of this very important information you will need a lawyer to help you before you tell me I can search.

67 COLUM. L. REV. at 158.

Justice Goldberg's position in right to counsel cases eloquently states the position of those who favor warnings because consent should be intelligently given: "[N]o system of criminal justice can, or should, survive if it comes to depend on the citizens' abdication through unawareness of their constitutional rights." Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

[82] Boyd v. United States, 116 U.S. 616, 630 (1886). In *Boyd*, Justice Bradley stated:

> We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself which in criminal cases is condemned in the Fifth Amendment . . . .

Id. at 633.

For a note taking this approach, see Wallenstein, *Consent Searches*, 4 CRIM. L. BULL. 509 (1968).

[83] "Before undertaking a search under the provisions of this Article, an officer present shall inform the individual whose consent is sought that he is under no obligation to give such consent and that anything found may be taken and used in evidence." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 240.2(2) (1975).

[84] MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 240.2, commentary at 534 (1975). *See* CRIMINAL DIVISION, U.S. DEP'T. OF JUSTICE, HANDBOOK ON THE LAW OF SEARCH AND SEIZURE 47–48 (1968); Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, *supra* note 81, at 143 (referring to a letter from J. Edgar Hoover on file in the Columbia Law Library).

[85] *See In re* Santos, 400 F. Supp. 784 (M.D. Pa. 1975) (warning given to suspects without impairing effectiveness of the police). *See also* United States v. Miller, 395 F.2d 116 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968).

[86] *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977) (defendant not in custody within meaning of *Miranda* when he came to police station for questioning in response to police request). Indeed, Judge Moylan felt a need to note that, although *Miranda* is only a shriveled skeleton of its former self, it "is not technically dead." Vines v. State, 40 Md. App. 658, 664, 394 A.2d 809, 812 (1978) (Moylan, J., concurring).

ment that warnings be given in consent search cases.[87] The Court believes that such warnings would hamper the "traditional function of police officers in investigating crime."[88] Moreover, it regards consent search situations "immeasurably far removed from custodial interrogation,"[89] in part because it "occur[s] on the highway or in a person's home or office, and under informal and unstructured conditions."[90]

Despite the Court's position, consent in response to police threats resembles answers made in custodial interrogation more closely than it does consent given absent a threat. First, in the consent-search situation, the officer is seeking consent. The consent in response to the police query is uncoerced only if the officer conveys to the citizen a belief that the citizen may refuse. Where an officer threatens the citizen with a warrant, the officer is acting in a coercive manner and conveys to the individual the impression that a refusal is meaningless, the search inevitable. The atmosphere created by the threat, like that of the custodial interrogation, "suggests the invincibility of law."[91] Such threats to seek or to obtain warrants closely resemble the psychological coercion regarded as evil in *Miranda*.[92] The threats may be "psychological forces as potent and effectual in achieving a 'consent' as the traditional techniques and familiar instruments of physical persuasion."[93]

Second, while the threats to seek or to obtain search warrants may not be made to citizens in custody, where a policeman is threatening a citizen it cannot be said that they are involved in a natural interchange or informal setting.[94]

Finally, "the law relating to availability of a warrant, the right to search, and the admissibility of evidence seized is at least as confusing to the layman as the law relating to oral admissions."[95] With consent searches, it is impossible to determine the extent to which the consenting citizen premised his consent upon the assumption that the police search was inevitable.[96] But where police threats convey such an impression, it is certainly more likely that the layperson will possess this belief. Because consent came only after the police threat, the potential coercion is more apparent. Consequently, a citizen is in greater need of protection when the police make threats to seek or to obtain warrants. Warnings would provide such protection and also would provide a more objective means of determining whether there was consent in response to such a police threat.

Conclusion

The Supreme Court has never addressed the question of whether coercion invalidating consent to search is present when such consent is granted in response to police threats to seek or to obtain a search warrant. A broad reading of *Bumper v. North Carolina* indicates that coercion exists in many of these situations. An examination of five alternatives to the present majority view upholding consent in response to police threats to seek or to obtain a warrant shows protection of the consenting individual may be afforded only by the prohibition of such threats or by accompanying the police threats with required warnings.

Thomas G. Gardiner

[87] Schneckloth v. Bustamonte, 412 U.S. 218, 231 (1973). For an identical state case holding, see People v. Woolsey, 90 Cal. App. 3d 994, 153 Cal. Rptr. 746 (1979).

[88] Schneckloth v. Bustamonte, 412 U.S. 218, 232 (1973).

[89] *Id.*

[90] *Id.*

[91] Miranda v. Arizona, 384 U.S. 436, 449 (1966) (quoting C. O'Hara, Fundamentals of Criminal Interrogation 99 (1956)).

[92] 384 U.S. at 448.

[93] Whitman v. State, 25 Md. App. 428, 336 A.2d 515 (1975).

[94] This criticism was also made by Justice Marshall in Schneckloth v. Bustamonte, 412 U.S. 218, 288 (1973) (Marshall, J., dissenting). *See* Note, *The Doctrine of Waiver and Consent Searches*, 49 Notre Dame Law. 891, 902 (1974). The argument applies more forcefully when consent is made in response to police threat to seek or to obtain a warrant than where consent occurs after the police merely request permission to search.

[95] Model Code of Pre-Arraignment Procedure § 240.2, commentary at 534 (1975).

[96] *See, e.g.*, United States v. Moderacki, 280 F. Supp. 633 (D. Del. 1968).