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COMMENT

ANOTHER STAB AT *SCHNECKLOTH*: THE PROBLEM OF LIMITED CONSENT SEARCHES AND PLAIN VIEW SEIZURES

MICHAEL J. FRIEDMAN

I. INTRODUCTION

Shortly after dawn on the morning of October 18, 1996, agents of the Drug Enforcement Administration arrived at the apartment of Agripina Fernandez in the Washington Heights section of Manhattan to execute a warrant for her arrest.¹ The agents knocked and announced themselves as police officers, and when Ms. Fernandez answered the door, they informed her that she was under arrest for conspiracy to distribute narcotics.² Ms. Fernandez, asserting her innocence, told the agents to "look anywhere, you will see there is no drugs, there is no guns, I have done no drug dealing."³ One of the agents later testified, "she was very insistent that we look around . . . because we weren't going to find any drugs if we did."⁴ The agents then searched Ms. Fernandez's purse and her dresser and found neither guns nor drugs.⁵ They did, however, locate and seize numerous documents which they believed tied Ms. Fernandez to the drug conspiracy they were investigating.⁶

¹ United States v. Padilla, 986 F. Supp. 163, 166 (S.D.N.Y. 1997).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 167.

⁶ *Id.*

The district court reviewing these events not implausibly characterized Ms. Fernandez's words as a limited consent to search for guns and drugs only.⁷ Nonetheless, the court allowed the government to use evidence lying beyond the scope of that consent against Ms. Fernandez.⁸ In this case and many others like it, the words of the suspect's consent had remarkably little bearing on what items the police could legally seize and use against her.⁹ This gap between what a suspect says and what the police may do in response is bridged by the plain view doctrine, which allows officers to seize incriminating items found in the course of an otherwise lawful search.¹⁰ The plain view doctrine in general is well settled and uncontroversial, but its effect on the candor of police requests for consent to search has not previously been examined.

The primary problem with plain view seizures during limited consent searches is that the consenting suspect gets less privacy than she bargained for. The suspect's clear, unambiguous offer, taking Ms. Fernandez's case as an example, to look for guns and drugs only, coupled with the agents' verbal acceptance of that limitation, creates, in the parlance of contract law, an agreement between police and suspect as to what may be searched.¹¹ But the plain view doctrine operates as the fine print in that agreement, creating an exception which only the police, and not the suspect, are aware of at the time the agreement is made.

This situation is all the more abhorrent when a police officer deliberately deceives the suspect. The plain view doctrine opens a wide avenue to the police for pretextual consent searches. Consider the following: A police officer with a hunch,

⁷ *Id.* at 169. While Ms. Fernandez did begin her consent, "look anywhere," the district court found that the context of her statement in its entirety placed limits on that consent.

⁸ *Id.* at 171.

⁹ Other cases like *Padilla* are discussed *infra* in Part III.

¹⁰ See *Horton v. California*, 496 U.S. 128 (1990).

¹¹ Several courts have noted a parallel between search consents and contract law, specifically Restatement (Second) of Contracts § 164, which voids contracts entered into by a party relying on a fraudulent or material misrepresentation. See, e.g., *State v. Rodgers*, 349 N.W.2d 453, 462 (Wis. 1984), and *infra* note 151 and accompanying text.

but without probable cause, that a suspect possesses an incriminating bed frame in his apartment asks the suspect for consent to see the layout of his apartment to aid in the investigation of a domestic dispute in an adjacent apartment.¹² The suspect, assured that he is not the subject of the investigation, consents.¹³ The officer then enters, looks at the layout of the apartment, and finds the incriminating bed frame lying in plain view.¹⁴ This scenario may seem far fetched, but it is exactly what happened in a recent Colorado case.¹⁵ In this case, and in other cases where non-contraband evidence is found in plain view, the consenting suspect is unlikely to be aware that he is exposing anything incriminating by consenting to a pretextual search request. Yet he is left to ponder his lack of foresight from behind bars.

The current state of search and seizure law does nothing to help the deceived consenter. The Supreme Court neglected to address the problem of limited consent searches in its most recent explication of the plain view doctrine.¹⁶ A plurality of the Court in the 1971 case *Coolidge v. New Hampshire*¹⁷ required that, among other conditions discussed below, police discovery of an item be inadvertent for that item to be admissible.¹⁸ The plurality reasoned that inadvertence prevents police from deliberately expanding the scope of their search beyond the particularity of their warrant.¹⁹ In 1990, after a number of jurisdictions began ignoring the *Coolidge* inadvertence requirement because only four justices had endorsed it, the Court revisited the issue, holding by a seven to two margin in *Horton v. California*²⁰ that inadvertence is not a necessary prerequisite of a lawful plain view seizure.²¹ This Comment will argue that the Court's reasons for

¹² See *People v. Zamora*, 940 P.2d 939, 941 (Colo. Ct. App. 1996).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* *Zamora* is examined in depth *infra* in the text accompanying notes 152-69.

¹⁶ See *Horton v. California*, 496 U.S. 128 (1990).

¹⁷ 403 U.S. 443 (1971).

¹⁸ *Id.* at 469-71.

¹⁹ *Id.* at 471.

²⁰ 496 U.S. 128 (1990).

²¹ *Id.* at 130.

jettisoning the inadvertence requirement, while entirely appropriate for searches initially justified by warrants or exigencies, are not applicable to limited consent searches.²² On the contrary, the majority's logic in *Horton*, specifically the Court's consideration of sinister police motives, supports a holding that inadvertence should still be required for plain view seizures executed during limited consent searches.²³

This Comment will explore the problematic relationship between limited consent searches and plain view seizures. Part II will trace the development of both the consent and plain view exceptions to the warrant requirement of the Fourth Amendment. Part III will examine some recent state and federal cases which turn on plain view extensions of limited consent searches. These cases highlight the problems lurking at the intersection of the two doctrines. Part IV will suggest several alternative rules which could better guide courts confronted with plain view seizures after limited consents, and will argue their efficacy.

Fortunately, plain view seizures during limited consent searches do not happen often. For reasons discussed below, limited consent searches only occur under rare circumstances.²⁴ Perhaps as a result of the infrequent occasions to visit this issue, most courts have applied the plain view doctrine to limited consent searches without acknowledging or questioning the special problems implicated at the intersection of the two. Most of these courts have admitted the evidence at issue so long as it was found in areas authorized to be searched by the limited consent. Nonetheless, I will argue that the deception, the potential for pretextual intrusions, and the doctrinal failure in this unusual situation justifies a change in police protocol. When conducting a limited consent search, police officers should be required to warn the suspect that items other than the stated objects of the search will also be subject to seizure if the suspect

²² See *Horton*, 496 U.S. at 138-39. Consent is not mentioned at all in *Horton*. See *infra* text accompanying notes 90-95 for a complete discussion of the Court's reasons for no longer requiring inadvertence.

²³ The failure of the *Horton* logic in the consent search context is discussed at length *infra* text accompanying notes 174-77.

²⁴ See *infra* note 41 and accompanying text.

grants consent. Such a requirement would amount to a retreat from the Supreme Court's 1973 holding in *Schneckloth v. Bustamonte*²⁵ that a suspect's knowledge of his right to refuse consent is not a necessary element of a valid consent. However, that step is necessary to clarify, both for suspect and officer, exactly what expectations of privacy will be honored in the ensuing search.

II. BACKGROUND LAW

The Fourth Amendment commands:

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.²⁶

While the Supreme Court once read this language to require warrants for all searches and seizures, the modern Court has instead directed only that a search or seizure be "reasonable."²⁷ In so shifting, the Court has carved out numerous exceptions to the warrant requirement, both for searches and seizures. These exceptions include: administrative inspections;²⁸ exigent circumstances;²⁹ consent searches;³⁰ searches incident

²⁵ 412 U.S. 218 (1973).

²⁶ U.S. CONST. amend. IV.

²⁷ See, e.g., *California v. Acevedo*, 500 U.S. 565, 581-85 (1991) (Scalia, J., concurring) ("What [the Fourth Amendment] explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use. . . . [T]he supposed 'general rule' that a warrant is always required does not appear to have any basis in the common law and confuses rather than facilitates any attempt to develop rules of reasonableness in light of changed legal circumstances. . ."). See generally Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982).

²⁸ See *Camara v. Municipal Court*, 387 U.S. 523 (1967) (reasonable legislative goals provide enough probable cause to justify administrative searches).

²⁹ See, e.g., *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit of armed robber is exigent circumstance justifying warrantless entry of a home and its full-scale search). See also *Acevedo*, 500 U.S. at 572 (probable cause, but not a warrant, required to search vehicles because they might flee the jurisdiction).

³⁰ See *Schneckloth*, 412 U.S. at 248-49 (allowing searches on the basis of voluntary consent, such voluntariness to be determined by the totality of the circumstances). See also *infra* Part II(A).

to arrest;³¹ inventory searches;³² frisks and protective sweeps;³³ immigration inspections;³⁴ fire investigations;³⁵ the plain view doctrine;³⁶ *Terry* stops;³⁷ road checkpoints;³⁸ and interrogations generally so long as the suspect reasonably perceives that he is "at liberty to ignore the police presence and go about his business."³⁹ Most relevant to this discussion are consent searches and plain view seizures.

A. CONSENT SEARCHES

Police officers seek a suspect's consent to search for various reasons: to avoid the delays and administrative inconvenience of securing a warrant; to avoid the risk of suppression of evidence intrinsic to the more technical warrant process; or simply be-

³¹ See *United States v. Robinson*, 414 U.S. 218 (1973) (allowing full dress search without a warrant following a custodial arrest). See also *Chimel v. California*, 395 U.S. 752 (1969) (allowing warrantless search of area within suspect's immediate control upon arrest). Ms. Fernandez's situation in *Padilla* does not fall under the search incident to arrest exception outlined in *Chimel* because the police sought to search an area (her bedroom) well beyond her immediate control at the time of her arrest (Ms. Fernandez was in the front entry area of her apartment at the time). See *United States v. Padilla*, 986 F. Supp. 163, 166 (S.D.N.Y. 1997).

³² See *Colorado v. Bertine*, 479 U.S. 367 (1987) (allowing inventory search of impounded car provided established procedures dictate when to do so); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (inventory of personal effects following arrest permitted); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (warrantless inventory search upheld as "routine administrative caretaking").

³³ See *Michigan v. Long*, 463 U.S. 1032 (1983) (warrantless search of passenger area of car allowed where police have reasonable suspicion that it contains a weapon). See also *Terry v. Ohio*, 392 U.S. at 1 (if officer has "reasonable suspicion" that a suspect is armed, he may physically check whether suspect is armed, and if so, disarm him).

³⁴ See *United States v. Ortiz*, 422 U.S. 891 (1975) (fixed checkpoint stops allowed if police have minimal discretion as to who to stop).

³⁵ See *Michigan v. Tyler*, 436 U.S. 499 (1978) (allowing warrantless searches following fires).

³⁶ See *Horton v. California*, 496 U.S. 128 (1990) (allowing warrantless seizure of an item where police have lawful access to vantage point from which item is viewed, item is in plain view when discovered, and it is immediately apparent to officers that item is incriminating). See also *infra* Part II(B).

³⁷ See *Terry*, 392 U.S. 1 (1968); *United States v. Sharpe*, 470 U.S. 675 (1985) (limiting length of *Terry* stops).

³⁸ See *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (allowing brief detention at surprise sobriety checkpoints).

³⁹ *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 576, 569 (1988)).

cause they lack probable cause.⁴⁰ Police also prefer consent searches because, unless the suspect has the presence of mind to qualify his consent, consent searches may be far broader in scope than warrant searches which are confined by the Fourth Amendment's particularity requirement.⁴¹ Consent searches can be general and exploratory, making it easy for police to justify their intrusion after the fact on the basis of what they have already found, regardless of whether they had probable cause before they found it.

The reasons why a suspect succumbs to a consent request are far less obvious.⁴² In many cases, a suspect "voluntarily"⁴³ allows police to conduct a search that the suspect knows will uncover incriminating evidence, and courts have been quick to point out the logical shortcomings of such a concession.⁴⁴ "Voluntariness" is a very slippery term. In one sense, all decisions made while a person is conscious, even those made under threat

⁴⁰ 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.1 (3d ed. 1996). See also RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 21 (1984) (collecting police officer anecdotes as to why consent is easier to get than a warrant, with one officer estimating that 98% of warrantless searches in his city are justified on consent grounds).

⁴¹ See LAFAVE, *supra* note 40, § 8.1. Because consent searches are usually initiated by police officers to allow a broad search, they are seldom of limited scope. Ms. Fernandez's offer of consent in *Padilla* was unusual in that the suspect and not the officer initiated the discussion.

⁴² "What is baffling about consent to search is why it is ever given. Why should anyone surrender to the police, perhaps without a whimper, an interest recognized both practically and legally to be of the first order and often resulting in the discovery of evidence which incriminates the consenter?" Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 187 (1991).

⁴³ All the government must show to validate a consent search is that the consent was voluntary. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), discussed *infra* in the text accompanying notes 48-60.

⁴⁴ See, e.g., *People v. Massiah*, 367 N.Y.S.2d 73, 75 (N.Y. App. Div. 1975) ("We cannot credit the testimony of the police officer that the codefendant, an ex-felon, would consent to a search with knowledge that the contraband sought was in the room in open view. We refuse to credit testimony which has the appearance of having been patently tailored to nullify constitutional objections"); *Higgins v. United States*, 209 F.2d 819, 820 (D.C. Cir. 1954) ("[N]o sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered. It follows that when police identify themselves as such, search a room, and find contraband in it, the occupant's words or signs of acquiescence in the search, accompanied by denial of guilt, do not show consent; at least in the absence of some extraordinary circumstance, such as ignorance that contraband is present.").

of physical violence or adverse legal consequences, are “voluntary” in that they represent a choice of alternatives.⁴⁵ And in another sense, no decisions are “voluntary” because all decisions are based on the prior accumulation of external influences which have inextricably shaped a person’s values and desires and have predetermined the outcome of any given decision.⁴⁶ Somewhere between those extremes lies Stanley Milgram’s obedience theory, which also casts doubt on the meaningfulness of “voluntary” consent by surmising that all encounters with law enforcement personnel are inherently coercive.⁴⁷ This Comment does not endeavor to assign any normative values to these theories or to take sides in the philosophical combat between free will and determinism. Rather, the point here is that the term “voluntariness” is possessed of a vast range of meanings, and is consequently an extremely shaky foundation upon which to build concrete rules of decision.

Nonetheless, the Supreme Court assigned great importance to the concept of “voluntariness” in its major opinion on consent searches, *Schneckloth v. Bustamonte*.⁴⁸ While on routine patrol in Sunnyvale, California, a police officer stopped a vehicle with a broken headlight and license plate light.⁴⁹ After learning that the driver had no license, the officer asked one of the six passengers, who said the car belonged to his brother, for per-

⁴⁵ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973) (“Except where a person is unconscious or drugged or otherwise lacks capacity for personal choice, all incriminating statements—even those made under brutal treatment—are voluntary in the sense of representing a choice of alternatives”).

⁴⁶ See Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989); George C. Thomas III & Marshall D. Bilder, *Criminal Law: Aristotle’s Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243 (1991).

⁴⁷ See Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court’s Conception of Voluntary Consent*, 97 U. ILL. L. REV. 215 (1997); Rotenberg, *supra* note 42, at 187-89. Fear of some negative repercussion for refusing consent, while perhaps a natural reaction for most laymen, is completely unfounded in law. A suspect’s refusal to give consent cannot be considered suspicious conduct which can be used against him to establish probable cause. See *United States v. Skidmore*, 894 F.2d 925, 927 (7th Cir. 1990); *State v. Moreno*, 619 So. 2d 62, 66 (La. 1993).

⁴⁸ 412 U.S. 218 (1973).

⁴⁹ *Id.* at 220.

mission to search the car.⁵⁰ That passenger gave permission and actually assisted in the search, opening the trunk and glove box for the officer.⁵¹ The officer found three stolen checks under the left rear seat, and arrested passenger Robert Bustamonte for their theft.⁵² The question presented by this case was whether a suspect's consent can be "voluntary" if the suspect is not informed of his right to refuse consent. The California courts, applying a rule that consent searches must be voluntary under "the totality of the circumstances," affirmed the denial of Bustamonte's suppression motion.⁵³ On collateral review, the Ninth Circuit disagreed, applying a "waiver of a constitutional right" theory which requires that the suspect know he has the right to refuse consent.⁵⁴

The Supreme Court adopted the California "totality of the circumstances" test, holding that the suspect's knowledge of his right to refuse consent is only one factor to consider in determining whether his consent is voluntary.⁵⁵ In reaching this result, the only meaning the Court could muster for the term "voluntariness" was the rather tautological claim that it reflects a balance between the need for effective enforcement and "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness."⁵⁶

Satisfied with this meager definition of "voluntariness," the Court spent the majority of its opinion weighing various tests for determining whether a consent was in fact "voluntary."⁵⁷ The Court recognized the inherent difficulty of enforcing a test which looks to the subjective state of mind of the consenting suspect, so only two other tests were really viable: looking objec-

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 221.

⁵⁴ *Id.* at 221-22.

⁵⁵ *Id.* at 248-49.

⁵⁶ *Id.* at 224-25. This definition is tautological because it is the Fourth Amendment, not the word "voluntariness" which must reflect the balance between police power and individual liberties. The Court here merely restates its job as interpreter of the Constitution; it does not define a complex term.

⁵⁷ *Id.* at 226-49.

tively at the totality of the circumstances surrounding the suspect's decision to consent, or requiring *Miranda*-type warnings to alert all suspects to their right to refuse consent.⁵⁸ In adopting the former, the Court called the latter "thoroughly impractical."⁵⁹ The Court argued that warnings were inappropriate in the consent search context because the Fifth and Sixth Amendment trial rights protected by *Miranda* warnings are different from the Fourth Amendment property and liberty rights implicated by consent searches:

A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided. . . . The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. . . . The Fourth Amendment "is not an adjunct to the ascertainment of truth." The guarantees of the Fourth Amendment "stand as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone."⁶⁰

The Court's valuation of rights affecting accuracy at trial and the "ascertainment of truth" above "the right of each individual to be left alone" is at the core of *Schneckloth*. By distinguishing the rights protected, the Court justified applying the

⁵⁸ *Id.* at 229-31.

⁵⁹ *Id.* at 231. In dissent, Justice Marshall responded to this label as follows:

I must conclude with some reluctance that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. Of course it would be 'practical' for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.

Id. at 288 (Marshall, J., dissenting).

⁶⁰ *Id.* at 241-42 (quoting *Tehran v. United States ex rel Shott*, 382 U.S. 406, 416 (1966)).

high standard of knowing waiver to one set of rights and not to the other.

In its consent cases since *Schneckloth*, the Court has moved even further away from subjective determinations of whether a consent was voluntary. Two cases, *Illinois v. Rodriguez*⁶¹ and *Florida v. Jimeno*,⁶² set forth a standard which examines the objective reasonableness of the officer's behavior in reacting to the suspect's consent, rather than the objective reasonableness of the suspect in granting consent.

Writing for the Court in *Rodriguez*, Justice Scalia pointed out that since officers and magistrates need only be "reasonable" and not necessarily correct in justifying non-consent searches, it stands to reason that the same should be true of consent searches:

It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.⁶³

After *Rodriguez*, it is the officer's belief that the suspect consented which must be objectively reasonable.⁶⁴ The court asks

⁶¹ 497 U.S. 177 (1990).

⁶² 500 U.S. 248 (1991).

⁶³ *Rodriguez*, 497 U.S. at 185-86.

⁶⁴ This rule stands in contrast to the test for whether a suspect was seized. In *California v. Hodari D.*, 499 U.S. 621, 628 (1991), and *Florida v. Bostick*, 501 U.S. 429, 434 (1991), the Court held that an encounter is not a seizure if a reasonable suspect would feel free to disregard the police and go about his business. In the seizure context, unlike with consent searches, it is the suspect's belief, not the officer's, which must be reasonable.

This distinction explains why the "no sane man" theory, *supra* note 44, was not squarely addressed in *Bostick*: "We do reject, however, Bostick's argument that he must have been seized because no reasonable person would freely consent to a search

not whether the suspect's consent actually was voluntary under the totality of the circumstances, but rather whether the officer reasonably perceived the suspect's consent to be voluntary under the totality of the circumstances. The suspect's actual feelings, whether predetermined by indoctrinated obedience or a product of free will, are irrelevant so long as their outward manifestation looks like voluntary consent.⁶⁵

This same objective standard applies when determining the scope of a limited consent to search. Occasionally, the police will ask a suspect to consent to a search of limited scope, whether in location (a request to search the garage), object (a request to search for drugs), or time (a request to search bags "quickly"). Other times, as with Ms. Fernandez in *Padilla*, the suspect will affirmatively offer to let police conduct a limited search without being asked. In *Florida v. Jimeno*,⁶⁶ the defendant consented to a search of his car but challenged the police officer's opening of a folded brown paper bag in the course of that search.⁶⁷ Writing for the Court, Chief Justice Rehnquist applied the *Rodriguez* test to the question of whether the defendant's consent to search his car included authorization to open containers found within the car: "The standard for measuring the scope of a suspect's consent is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"⁶⁸ In *Jimeno*, the Court concluded, a reasonable observer would have construed the defendant's consent as allowing the further search of closed containers.⁶⁹

When a suspect limits his consent by the object of the search, the police are entitled to search anywhere that object

of luggage that he or she knows contains drugs. This argument cannot prevail because the 'reasonable person' test presupposes an *innocent* person." *Bostick*, 501 U.S. at 437-38. The "reasonable person test" in *Bostick* examines the suspect's conduct, whereas the reasonable person test in *Rodriguez* examines the officer's conduct.

⁶⁵ See *supra* notes 45-47.

⁶⁶ 500 U.S. 248 (1991).

⁶⁷ *Id.* at 249-50.

⁶⁸ *Id.* at 251.

⁶⁹ *Id.* at 252.

might be located,⁷⁰ but not where the object could not possibly be located.⁷¹ In the words of Justice Stevens, "a lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search."⁷² However, limiting the scope of a consent search has little restrictive effect on what the police may seize if other incriminating objects are left in plain view.⁷³

B. THE PLAIN VIEW DOCTRINE

The term "plain view" arises in two somewhat distinct Fourth Amendment contexts. First, it refers to observations made by police officers without physical intrusion into a constitutionally protected area.⁷⁴ These observations are not "searches" because, as Lord Camden pointed out in 1765, "the eye cannot by the laws of England be guilty of a trespass."⁷⁵

⁷⁰ See, e.g., *United States v. Brandon*, 847 F.2d 625, 630 (10th Cir. 1988) (consent to search for money justified looking under mattress); *People v. Torrand*, 622 P.2d 562, 565 (Colo. 1981) ("Where, as here, the consent is confined to certain items, the search itself likewise must be limited to the terms of the consent. Under such circumstances the search must be restricted to those objects and areas which are likely to contain the articles sought.").

⁷¹ See, e.g., *State v. Younger*, 702 A.2d 477, 480 (N.J. Super. Ct. App. Div. 1997) (officer's opening of change purse when consent was limited to a search for a handgun was "unauthorized, unreasonable, and unconstitutional"); *Lugar v. Commonwealth*, 202 S.E.2d 894 (Va. 1974) (consent to search for a fugitive does not justify searching areas too small to contain a person). See also *United States v. Ross*, 456 U.S. 798, 824 (1982):

The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

⁷² *Ross*, 456 U.S. at 820-21.

⁷³ This is the subject of Part III, *infra*.

⁷⁴ See 1 LAFAVE, *supra* note 40, § 2.2.

⁷⁵ *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (1765). While Fourth Amendment searches are no longer strictly defined in terms of property rights—compare *Warden v. Hayden*, 387 U.S. 294, 304 (1967) ("The premise that property interests

Standing alone, plain view observations do not justify the seizure of the items observed, but they do give rise to a high level of probable cause which the police may use to justify a legal seizure if other circumstances exist (e.g. exigency or a warrant for another object) to justify entry.⁷⁶ The Supreme Court discussed plain view observations in its "open fields" cases⁷⁷ and in *Katz v. United States*⁷⁸ and its direct progeny,⁷⁹ establishing a loose rule that a plain view observation is only a search if it infringes on the owner's⁸⁰ reasonable expectation of privacy.⁸¹

Just as items observed in plain view require some independent justification for their seizure, items susceptible to plain view seizure require some independent justification for their initial

control the right of the Government to search and seize has been discredited"), with *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.")—property was the original justification for omitting plain view observations from the protection of the Fourth Amendment. See *Olmstead v. United States*, 277 U.S. 438, 464, 466 (1928).

⁷⁶ See *Coolidge v. New Hampshire*, 403 U.S. 443, 464-71 (1971).

⁷⁷ See *Florida v. Riley*, 488 U.S. 445 (1989); *United States v. Dunn*, 480 U.S. 294 (1987); *Oliver v. United States*, 466 U.S. 170 (1984).

⁷⁸ 389 U.S. 347 (1967).

⁷⁹ See, e.g., *United States v. White*, 401 U.S. 745 (1971).

⁸⁰ In *Rakas v. Illinois*, 439 U.S. 128 (1978), the Court held that only suspects who own the property being seized or the property containing the objects being seized possess a reasonable expectation of privacy.

⁸¹ "Objects, activities, or statements that [a suspect] exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." *Katz*, 389 U.S. at 367 (Harlan, J., concurring). This rule generally operates to prohibit police from employing artificial sensory aids by which a reasonable suspect would not expect to be examined. But see *Texas v. Brown*, 460 U.S. 730, 739-40 (1983) (officers may use flashlights to inspect the inside of automobiles); *Riley*, 488 U.S. at 450 (officers may use a helicopter to inspect an enclosed greenhouse open to the sky); *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986):

It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance not generally available to the public, such as satellite technology, might be constitutionally protected absent a warrant. But the photographs here [taken with a commercial mapping camera from an airplane in navigable airspace] are not so revealing of intimate details as to raise constitutional concerns. . . . The mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.

search.⁸² “It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence.”⁸³

Warrantless seizure of an item is justified under the plain view exception where: (1) the police have lawful access to the place from which the item can be plainly viewed; (2) the item seized is in fact in plain view at the time it is discovered; and (3) it is “immediately apparent” to the police at the time of discovery that the item constitutes evidence of a crime.⁸⁴ The “immediately apparent” requirement is met only where the officers have “probable cause to believe that an object in plain view is [evidence of a crime] without conducting some further search of the object.”⁸⁵

Justice Stewart, writing for a plurality of the Court in *Coolidge v. New Hampshire*,⁸⁶ explained that plain view seizures do not offend the twin goals of the Fourth Amendment because

⁸² Of course, all evidence is in plain view at the moment of seizure. “The problem with the ‘plain view’ doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.” *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971).

⁸³ *Harris v. United States*, 390 U.S. 234, 236 (1968).

⁸⁴ See *Horton v. California*, 496 U.S. 128, 136-37 (1990).

⁸⁵ *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). See also *Soldal v. Cook County*, 506 U.S. 56, 66 (1992) (“In the absence of consent or a warrant permitting the seizure of the items in question, such seizures can be justified only if they meet the probable cause standard and if they are unaccompanied by unlawful trespass.”) (citations omitted); *Arizona v. Hicks*, 480 U.S. 321, 326-27 (1987) (requiring probable cause to seize items found in plain view); *Warden v. Hayden*, 387 U.S. 294, 307 (1967) (“There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of ‘mere evidence,’ probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.”); *United States v. Grubczak*, 793 F.2d 458, 461 (2d Cir. 1986) (“The incriminating nature of an object is generally deemed ‘immediately apparent’ where police have probable cause to believe it is evidence of crime.”) (quoting *United States v. Ochs*, 595 F.2d 1247, 1258 (2d Cir. 1979)); *United States v. Gonzalez-Athehorta*, 729 F. Supp. 248, 259 (E.D.N.Y. 1990) (“The incriminating nature of an object is immediately apparent if the police have probable cause to believe it is evidence of a crime, but if an item must be moved even slightly, to ascertain its incriminatory nature, the requirement of the plain view doctrine is not satisfied.”) (citations omitted). See generally Dan Gunter, Note, *The Plain View Doctrine and the Problem of Interpretation: The Case of State v. Barnum*, 75 OR. L. REV. 577 (1996).

⁸⁶ 403 U.S. 443 (1971)

they neither allow searches without probable cause nor expand the scope of the initial search "into a general or exploratory one":

As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement. Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.⁸⁷

To better insulate the public from police stretching particularized searches into exploratory ones with the plain view doctrine, Justice Stewart also required that an officer's discovery of an item in plain view be inadvertent to justify its lawful seizure: "If the intentional intrusion is bottomed on a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'Warrants . . . particularly describing . . . [the] things to be seized.'"⁸⁸ Stewart's inadvertence requirement would cause no additional inconvenience to police, he reasoned, because if they knew about an item's location ahead of time, they could easily include it in their warrant application before the magistrate.⁸⁹

But nineteen years later, a seven justice majority rejected Stewart's inadvertence requirement. In *Horton v. California*,⁹⁰ the Court found two flaws with requiring inadvertent discovery. First, the Court could imagine no sinister motive for police to deliberately omit an item from their warrant application.⁹¹ Police would logically seek to put as much information as they had in their warrant application, thereby getting the broadest possible warrant; any failure to mention an item which is likely to be present could only be due to "oversight or careless mistake,"

⁸⁷ *Id.* at 467-68.

⁸⁸ *Id.* at 471.

⁸⁹ *Id.* at 470.

⁹⁰ 496 U.S. 128 (1990).

⁹¹ *See id.* at 138-39.

and correcting that mistake is not worth the administrative inconvenience of procuring another warrant.⁹² Second, the Court criticized inadvertence as redundant upon existing limitations on the breadth of warrants, and thus “hardly . . . worth the candle.”⁹³ The Court argued that the legitimate goal of preventing generalized searches is already protected by the particularity requirement of the Fourth Amendment and by the axiom that “a warrantless search [must] be circumscribed by the exigencies which justify its initiation.”⁹⁴ The Court thus found inadvertency to be superfluous to the plain view doctrine, leaving the three requirements listed above—lawful vantage point, plain sight, and “immediately apparent”—as the only prerequisites for a lawful plain view seizure.⁹⁵

*Arizona v. Hicks*⁹⁶ sets forth the outer limits of what it means for an item’s incriminating nature to be “immediately apparent.” On April 18, 1984, police responded to a report that a bullet had been fired through the floor of the defendant’s apartment, injuring a downstairs neighbor.⁹⁷ The continuing danger to other neighbors constituted exigent circumstances sufficient to justify the warrantless entry into the defendant’s apartment to search for the shooter, other victims, and for the weapon.⁹⁸ Once inside, the officers found and seized three firearms and a stocking-cap mask.⁹⁹ In the course of this search, an officer noticed two sets of state-of-the-art Bang and Olufsen stereo components “which seemed out of place in the squalid and otherwise ill-appointed four-room apartment.”¹⁰⁰ Suspecting the components were stolen, the officer moved a turntable so he could read the serial numbers printed on its underside.¹⁰¹ He

⁹² *Id.* at 138 n.9.

⁹³ *Id.* at 139-40.

⁹⁴ *Id.*

⁹⁵ See *supra* note 84. A number of states retained the *Coolidge* inadvertence requirement on state law grounds despite *Horton*. See, e.g., *State v. Arredondo*, 944 P.2d 276, 282 (N.M. Ct. App. 1997); *State v. Meyer*, 893 P.2d 159, 165 n.6 (Haw. 1995).

⁹⁶ 480 U.S. 321 (1987).

⁹⁷ *Id.* at 323.

⁹⁸ *Id.* at 324.

⁹⁹ *Id.* at 323.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

reported the numbers to headquarters by telephone, learned that the components had been taken in an armed robbery, and eventually seized them.¹⁰²

Justice Scalia delivered the opinion of the Court, holding that the officer's moving of the turntable constituted a search separate from and additional to the lawful search for shooters, victims, and weapons which initially brought the police into the apartment.¹⁰³ If the officer had looked at the turntable without handling it, and was able to determine that it was stolen solely on the basis of that look and his prior knowledge, then the plain view doctrine would sustain the seizure.¹⁰⁴

But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry. . . . A search is a search, even if it happens to disclose nothing but the bottom of a turntable.¹⁰⁵

Hicks identifies an extra step inherent in most searches in which the police physically move an object to better determine its evidentiary value or that of its contents. That extra step, if not justified by probable cause, is beyond the limits of the plain view doctrine. The significance of the *Hicks* extra step limitation varies directly with the size of the object of the initial search: while a legal search for drugs justifies moving small objects and opening small containers (in effect, a general search), a legal search for a person only justifies opening closet doors and looking under beds or other containers large enough to conceal a person.¹⁰⁶

By this same token, documents require greater examination to determine their relevance than do other physical items. In *Andresen v. Maryland*,¹⁰⁷ the Supreme Court acknowledged this distinction:

¹⁰² *Id.* at 323-24.

¹⁰³ *Id.* at 324-25.

¹⁰⁴ *Id.* at 325.

¹⁰⁵ *Id.*

¹⁰⁶ See *United States v. Ross*, 456 U.S. 798, 820-24 (1982).

¹⁰⁷ 427 U.S. 463 (1976).

We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized.¹⁰⁸

In cases where officers are authorized to search only for certain incriminating documents, the inspection of all documents—incriminating and innocent—is inherent in the process of deciding which documents are incriminating and which are not.¹⁰⁹

In summary, the current law allows a suspect to consent to an otherwise illegal search, so long as his consent appears voluntary under the totality of the circumstances.¹¹⁰ The suspect's knowledge of his right to refuse consent is an element to be considered amongst the totality of the circumstances, but his lack of knowledge of that right does not preclude a finding of voluntariness.¹¹¹ A suspect may also limit the scope of his consent, such limit to be defined by the understanding of an objectively reasonable police officer witnessing the exchange.¹¹² Police officers may seize items not mentioned as the object of the consent if those items are in plain view in an area where the officers are allowed to be, and the incriminating nature of those items is immediately apparent to the officers without moving them.¹¹³

III. LIMITED CONSENT AND PLAIN VIEW IN THE COURTS

Two lines of cases highlight the deception inherent in plain view seizures during limited consent searches: those where the

¹⁰⁸ *Id.* at 482 n.11.

¹⁰⁹ *See* *United States v. Soussi*, 29 F.3d 565, 571-72 (10th Cir. 1994); *United States v. Menon*, 24 F.3d 550, 559-60 (3d Cir. 1994); *Gunter*, *supra* note 85.

¹¹⁰ *See* *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

¹¹¹ *Id.* at 249.

¹¹² *See* *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

¹¹³ *See* *Horton v. California*, 496 U.S. 128, 136-37 (1990); *Arizona v. Hicks*, 480 U.S. 321, 324 (1987).

police search physical areas not authorized by the consent and seize objects found therein, and those where the police search areas authorized by the consent but seize objects other than those mentioned to the consenting suspect. Stated differently, the two types are those where the police exceed the scope of the consent and those where they manipulate the scope of consent. These sets of cases provoke different objections, and are treated separately in the following sections.

A. EXCEEDING THE SCOPE OF CONSENT

The most noted case for plain view seizures during limited consent searches is *United States v. Dichiarinte*.¹¹⁴ The defendant was arrested for sale of narcotics while away from his home.¹¹⁵ When asked if he had drugs at home, the defendant responded, "I have never seen narcotics. You guys come over to the house and look, you are welcome to."¹¹⁶ The police then took the defendant to his home and began searching.¹¹⁷ After forty-five minutes, the defendant noticed that the officers were inspecting documents which they had removed from a drawer near the sofa.¹¹⁸ According to the defendant, when he saw the officer seize some currency exchange receipts, he said, "Does that look like narcotics if that is what you want to search for?" and the officer replied, "Sorry, Pal, we are here now and this is what we are going to do."¹¹⁹ The defendant then attempted to call off the search, but it continued over his objections for another ten minutes.¹²⁰ The defendant was subsequently convicted of two counts of willful tax evasion based on the documents seized on that occasion.¹²¹

The Court of Appeals found that the defendant's offer to "come over to the house and look" was in reference to the drugs being discussed, and hence construed the consent to be limited

¹¹⁴ 445 F.2d 126 (7th Cir. 1971).

¹¹⁵ *Id.* at 128.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 127.

to a search for narcotics.¹²² The court recognized in this situation a tremendous potential for police officers to evade the Fourth Amendment prohibition of generalized, exploratory searches: "Government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search."¹²³

The Seventh Circuit was not alone in its fear of general exploratory searches; only seventeen days after the issuance of *Dichiarinte*, the Supreme Court published its opinion in *Coolidge* in which it endorsed the plain view doctrine only after reassuring its readers that the doctrine would not turn a limited search "into a general or exploratory one."¹²⁴ This similarity between the concerns of the Seventh Circuit in limiting consent searches and the concerns of the Supreme Court in endorsing plain view seizures illustrates the tension between the two doctrines. Whereas the plain view doctrine supposedly guards against general and exploratory searches by confining police to areas in which they are legally permitted to be, consent searches afford police the opportunity to eliminate or at least manipulate the boundaries of those areas by misleading the consenting suspect. The danger of a general exploratory search arises in this situation because the suspect, who would not have granted consent had he known the actual reason for the search, is cajoled into allowing what he perceives as a harmless investigation by the affirmative misrepresentations of the police officers. If, however, the suspect knew exactly what items were susceptible to seizure under the plain view doctrine once he grants consent, he would at least have the opportunity to decide whether to assert his Fourth Amendment rights. The defendant in *Dichiarinte* wanted to keep the police out of his currency documents, and apparently believed he had set such a limit by consenting only to a search for narcotics, but because he was unaware of the plain

¹²² *Id.* at 129.

¹²³ *Id.* at 129-30.

¹²⁴ *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). *Dichiarinte* was issued on June 4, 1971, and *Coolidge* on June 21, 1971.

view doctrine, he was unable to protect himself until the police had already found the currency receipts.¹²⁵

The *Dichiarinte* court went on to explain how the plain view doctrine does not, on its own, justify the expansion of a search to areas not contemplated by the consent:

[A]t least some of the items seized and later used in the Government's tax evasion investigation were not in plain view but had to be opened and read. Even assuming that these items were evidence of crime and thus subject to seizure, their criminal character was not apparent on a mere surface inspection, and defendant's limited consent did not authorize the agents' opening and reading them.¹²⁶

This language is virtually identical to the *Padilla* court's holding twenty six years later that "[a]ll documents which were not immediately incriminatory on their face should not have been seized."¹²⁷

Colorado's highest court reached a similar result in *People v. Torand*.¹²⁸ There, the defendant consented to a police request to search his apartment for a shotgun and a thirty-five millimeter camera.¹²⁹ During the ensuing search, one police officer found and opened a shaving kit in the bathroom.¹³⁰ Inside, he found a high school graduation ring which he examined and noted its unique inscription.¹³¹ The officer replaced the ring and continued his search, eventually finding the shotgun and camera for which he was looking and arresting the defendant for bur-

¹²⁵ See *Dichiarinte*, 445 F.2d at 128-29.

¹²⁶ *Id.* at 130-31. This observation was unaffected by *Coolidge*.

¹²⁷ *United States v. Padilla*, 986 F. Supp. 163, 170 (S.D.N.Y. 1997). Other cases reach this same result: *State v. Williams*, No. 96-2817-CR, 1997 WL 365362 (Wis. Ct. App., July 3, 1997) (where consent given to look inside duffel bag, unlawful for police to remove box of laundry detergent from bag and inspect it without probable cause); *City of Warwick v. Robalewski*, 385 A.2d 669 (R.I. 1978) (for seizure of stolen camera during consent search to be lawful under plain view, officer must have had probable cause to believe it was stolen before he picked it up and opened its case); *People v. Harwood*, 141 Cal. Rptr. 519 (Cal. Ct. App. 1977) (where consent given to search premises for cocaine and money, unlawful for police to intercept telephone calls).

¹²⁸ 622 P.2d 562 (Colo. 1981) (en banc).

¹²⁹ *Id.* at 563.

¹³⁰ *Id.* at 564.

¹³¹ *Id.*

glary.¹³² The next morning, the same officer contacted the victim of the burglary and learned from her for the first time that a high school graduation ring matching the description of the one he had seen the night before in the defendant's shaving kit was also missing.¹³³ The officer then obtained a warrant to return to the defendant's apartment and eventually seized the ring.¹³⁴ The trial court, ruling on a suppression motion as to the camera and the shotgun (they were admitted), made no findings with respect to the ring.¹³⁵

The Colorado Supreme Court remanded this case for a determination of whether the Pentax camera could have fit inside the shaving kit which the officer examined.¹³⁶ The Court gave these instructions to the trial court on remand:

If the police already found the camera before opening the shaving kit, then the search of the kit would have been improper as exceeding the scope of the consent. The defendant's consent to search for the shotgun would afford no basis to search the interior of a shaving kit. However, a shaving kit of sufficient size might well serve as a hiding place for a stolen camera.¹³⁷

As in *Hicks*, *Dichiarinte*, and *Padilla*, the extra step of opening the shaving kit and examining its contents was characterized as an additional search requiring its own Fourth Amendment justification. The consent to search for a shotgun and a thirty-five millimeter camera was the officer's only justification. Thus, if that consent did not contemplate the opening of the shaving kit, there was no lawful reason to do so. The general rule which emerges from these cases is that a search based solely on consent must be confined to areas and containers capable of secreting the items contemplated by the consent. Just as moving a turntable when searching for weapons and suspects was unlawful in *Hicks*, opening notebooks and leafing through documents when searching for drugs was unlawful in *Padilla* and *Dichiarinte*,

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 566.

¹³⁶ *Id.* at 567.

¹³⁷ *Id.* at 566.

and opening a small shaving kit while searching for a large camera was unlawful in *Torand*.

B. MANIPULATING THE SCOPE OF CONSENT

The second category of deceptive cases are those involving searches which stay within the territorial confines contemplated by the consent, but which are obtained by misrepresentation as to the aim of the search. These cases are to be distinguished from cases in which the police misrepresent their identity, not their purpose, to gain consensual entry,¹³⁸ and from cases in which the police manufacture an emergency to gain consensual entry.¹³⁹

1. *Pre-Schneckloth Doctrine*

An early case addressing fraudulent consent requests is *Alexander v. United States*,¹⁴⁰ although it is of tangential relevance to

¹³⁸ The Supreme Court has ruled definitively that a private person inviting another into his home to conduct illegal activity must accept the risk that their guest is a government agent. An officer may lawfully obtain an invitation into a house by misrepresenting his identity. See *Lewis v. United States*, 385 U.S. 206, 211 (1966); *United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1997); *State v. Johnston*, 518 N.W.2d 759, 762 (Wis. 1994). Readers of an earlier version of this Comment suggested that a police officer's power to gain consensual entry by misrepresenting his purpose and identity includes the power to misrepresent his purpose but reveal his identity. Indeed, Judge Easterbrook recently commented on this point:

If dissimulation so successful that the suspect does not know that he is talking to an agent is compatible with voluntariness, how could there be a rule that misdirection by a known agent always spoils consent? Professor LaFave is rightly puzzled by courts' greater willingness to suppress evidence when agents who reveal their status give deceptive answers to inquiries about the purpose of the investigation than when agents lie about their status as agents.

United States v. Peters, 153 F.3d 445, 464 (7th Cir. 1998) (Easterbrook, J., concurring) (referring to 3 LAFAVE, *supra* note 40, § 8.2(n), discussed *infra* note 172 and accompanying text). This "greater includes the lesser" theory ignores the fact that undercover police encounters are treated quite differently from overt encounters in a variety of legal contexts. For example, while a defendant may lie to an undercover officer without repercussion, a defendant lying to a uniformed officer is subject to prosecution for obstruction of justice under 18 U.S.C. § 1503, which requires specific intent. The two situations are distinct, not a "greater" and a "lesser."

¹³⁹ See *People v. Jefferson*, 350 N.Y.S.2d 3, 4 (N.Y. App. Div. 1973) (invalidating consent where police told suspects they were investigating a gas leak; suspect had no choice but to grant entry).

¹⁴⁰ 390 F.2d 101 (5th Cir. 1968).

this discussion as it predates *Schneckloth*. In *Alexander*, the defendant was a postal employee suspected of stealing money from letters deposited in collection boxes on his route.¹⁴¹ To confirm their suspicions, inspectors planted three letters containing one dollar bills marked with a chemical which fluoresces in ultraviolet light in a collection box on the defendant's route.¹⁴² After observing the defendant collect those letters, the inspectors approached the defendant as he was leaving work at the end of the day.¹⁴³ The inspectors identified themselves and advised him that they were investigating theft of jewelry from the U.S. mails.¹⁴⁴ They then asked the defendant to show them his wallet on the false grounds that the jewelry they sought was small enough to be contained therein.¹⁴⁵ The defendant opened his wallet and the marked money was discovered and seized.¹⁴⁶ Confronted with this evidence, the defendant confessed and led the inspectors to his car, where they found the opened letters they had planted in the collection box.¹⁴⁷

The defendant was convicted of stealing, abstracting and removing a total of seven dollars from the U.S. mails.¹⁴⁸ He appealed on the grounds that his consent to let the inspectors search his wallet was involuntary because it was won by the inspector's deceit as to their actual purpose.¹⁴⁹ The Fifth Circuit agreed, declaring, "[i]ntimidation and deceit are not the norms of voluntarism. In order for the response to be free, the stimulus must be devoid of mendacity. We do not hesitate to undo fraudulently induced contracts. Are the disabilities here less maleficent?"¹⁵⁰

The Fifth Circuit's comparison of deceptive consent requests to fraudulently induced contracts is not unique to *Alex-*

¹⁴¹ *Id.* at 102.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 103.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 102.

¹⁴⁹ *Id.* at 110.

¹⁵⁰ *Id.*

ander, although it has not proven to be a winning argument in any other case.¹⁵¹ This result is intuitive, for search consents are usually given under circumstances which would invalidate contracts due to the great imbalance of bargaining power and the doctrines of unconscionability and adhesion. Since criminal suspects do not have the luxury of deliberating over the terms of their agreement with the police, criminal courts must settle for a less chaste "meeting of the minds" than may civil courts.

2. *Post-Schneekloth Doctrine*

The *Alexander* court, writing in 1968, had no set analytical standard to follow. However, following the Supreme Court's 1973 *Schneekloth* opinion, courts are required to look at the "totality of the circumstances," of which the suspect's knowledge of his right to refuse consent is only one factor. However, knowledge of one's right to refuse consent is a separate issue from knowledge of the investigating officer's genuine motives. Is deliberate police deception as to the purpose of a search merely another component of the "totality of the circumstances" or is it a *prima facie* showing of coercion? Courts are split on this question.

A recent Colorado case illustrates the current debate. In *People v. Zamora*,¹⁵² the defendant abducted a thirteen-year-old

¹⁵¹ See, e.g., *United States v. 9844 S. Titan Court*, 75 F.3d 1470, 1492 (10th Cir. 1996) (referring to the right to dictate the terms of a consent as a "contractual right"); *People v. Cooney*, 286 Cal. Rptr. 765, 770 (Cal. App. Dep't Super. Ct. 1991) (Bea, J., dissenting) ("This formulation of how to determine the extent of the consent to search seems to me to posit a familiar fact question, of the kind dealt with in courts daily when issues of property or contract are determined."); *Beaupre v. State*, 526 S.W.2d 811, 815 (Tex. Crim. App. 1975) (rejecting defendant's argument that her offer to let the sheriff search her car "was in the nature of an 'offer to contract and that the offer died either for failure of consideration (if unilateral) or lack of acceptance (if bilateral)"); *Williams v. City of Portsmouth*, 538 F. Supp. 74, 77 (E.D. Va. 1982) ("consent to search is not a contract"); *State v. Rodgers*, 349 N.W.2d 453, 462 (Wis. 1984) (Abrahamson, J., dissenting) ("In contract law, if a party's manifestation of assent is induced by a fraudulent or material misrepresentation upon which the party is justified in relying, the consent may be withdrawn. I see no reason why a lower standard than that applied in a contract case should be applied when the issue is consent to enter a home without a warrant to make an arrest when a search warrant could be obtained and there are no exigent circumstances.") (citing Restatement (Second) of Contracts § 164(a) (1979)).

¹⁵² 940 P.2d 939 (Colo. Ct. App. 1996).

girl on her way to school and took her to his apartment, where he sexually assaulted her.¹⁵³ He then drove the victim back to school and told her not to tell anyone about what happened.¹⁵⁴ The victim told her mother anyway, and then gave a statement to police in which she described her attacker and his apartment, including its approximate location, its interior layout, its messy appearance, and the presence of an unfilled waterbed frame in the bedroom.¹⁵⁵ The police eventually located what they believed to be the assailant's apartment, and waited for him to arrive.¹⁵⁶ When the defendant, a man who did not match the victim's description of her assailant, arrived with his girlfriend, the police knocked on the door.¹⁵⁷ The defendant answered the door, but refused to let the police inside and talk as they requested, telling the officers that the apartment was too messy.¹⁵⁸ The officers then falsely told the defendant that they just wanted a "quick look" at the layout of the apartment to aid in their investigation of a domestic dispute in an adjacent apartment.¹⁵⁹ The defendant succumbed to this request, allowing the officers to enter.¹⁶⁰ Once inside, the police found that the floor plan, the messiness, and an unfilled waterbed frame in the bedroom all matched the victim's description of the apartment in which she was molested.¹⁶¹ The victim later identified the defendant in a photographic lineup and he was convicted of sexual assault on a child and kidnapping.¹⁶²

The defendant appealed on the grounds that his consent to search his apartment was obtained through deception and was therefore involuntary.¹⁶³ A divided Colorado Court of Appeals let the conviction stand, with both majority and dissent collect-

¹⁵³ *Id.* at 941.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

ing dozens of cases supporting their respective positions. Both sides agreed to the "totality of the circumstances" analysis prescribed by *Schneckloth*, but they disagreed as to what weight police deception is to carry within that analysis.

The majority focused on the fact that the officers' ruse request to look at the layout of the apartment was in fact the true object of their search, albeit not for the purpose proffered.¹⁶⁴ The police, in the majority's view, did not exceed the scope of their consent because the defendant voluntarily allowed them to look at the layout of the apartment, during which time they observed the incriminating waterbed frame in plain view.¹⁶⁵ The majority held that the totality of the circumstances weighed in favor of a finding of voluntariness and upheld the conviction, because the police stayed within the scope of the consent, the officers were not threatening or overbearing, and the defendant knew he could refuse entry.¹⁶⁶

In dissent, Judge Taubman questioned whether the officers actually stayed within the limits of their consent by asking to see the apartment's layout while secretly looking for a waterbed.¹⁶⁷ He then listed a dozen cases from federal and state jurisdictions around the nation holding that police deception or misconduct renders a consent involuntary.¹⁶⁸ Judge Taubman concluded:

¹⁶⁴ *Id.* at 943.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 947 (Taubman, J., dissenting).

¹⁶⁸ *Id.* at 946-47 (citing *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990) (a ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent); *United States v. Briley*, 726 F.2d 1301, 1305 n.2 (8th Cir. 1984) (noting as an important factor as to voluntary consent whether police tell defendant they are not seeking to arrest him or that he is not a suspect); *United States v. Turpin*, 707 F.2d 332, 332-35 (8th Cir. 1983) (misrepresentations about the nature of an investigation may be evidence of coercion and the misrepresentation may even invalidate the consent if it was given in reliance on the officer's deceit); *United States v. Tweel*, 550 F.2d 297, 299 (5th Cir. 1977) (consent to search is unreasonable under the Fourth Amendment if induced by deceit, trickery, or misrepresentation); *McCall v. People*, 623 P.2d 397, 403 (Colo. 1981) ("Where, as here, entry into the home is gained by a preconceived deception as to purpose, consent in the constitutional sense is lacking"); *People v. Daugherty*, 514 N.E.2d 228, 232 (Ill. App. Ct. 1987) (Where law enforcement officer without a warrant falsely claims that he has legitimate police business to conduct in order to gain consent to enter the premises, such deception is

Where a police officer, without a warrant, uses his official position of authority and falsely claims that he has legitimate police business to conduct in order to gain consent to enter and search a person's home, where the officer affirmatively and intentionally misleads the occupant into believing he or she is not involved in a criminal investigation, and where the defendant grants consent, at least in part, on the basis of those misrepresentations, I would hold that such consent cannot be considered voluntary.¹⁶⁹

Judge Taubman's opinion is one of many from courts across the nation which challenge deceptive consent requests on the grounds that the public deserves more candor from uniformed law enforcement officers. The Fifth Circuit's opinion in *SEC v. ESM Government Securities, Inc.*¹⁷⁰ is another:

We believe that a private person has the right to expect that the government, when acting in its own name, will behave honorably. When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.¹⁷¹

so unfair that it renders the consent invalid); *State v. Schweich*, 414 N.W.2d 227, 230 (Minn. App. 1987) (misrepresentation of the purpose of a search can rise to such a level of deception as to invalidate the consent; by not informing defendant he was under investigation before obtaining his consent, the state engaged in improper deceptive conduct); *People v. Lee*, 610 N.Y.S.2d 1013, 1017-18 (Orange County Court 1994) (ruse held unfair where police engage in coercive tactics); *Commonwealth v. Slaton*, 608 A.2d 5, 9 (Pa. 1992) (affirmative misrepresentation by government agent constitutes consent through deception, which is implied coercion); *State v. Bailey*, 417 A.2d 915, 918-19 (R.I. 1980) (consent to enter one's home cannot be deemed free or voluntary unless person said to be consenting is aware of purpose for which police seek to enter); *State v. McCrorey*, 851 P.2d 1234, 1240 (Wash. Ct. App. 1993) (police acting in their official capacity may not actively misrepresent their purpose to gain entry or to exceed the scope of the consent given)).

¹⁶⁹ *Zamora*, 940 P.2d at 948.

¹⁷⁰ 645 F.2d 310 (1981).

¹⁷¹ *Id.* at 316. The court went on to cite Justice Brandeis's justification of the exclusionary rule on the grounds that judicial sanctioning of illegal police conduct would pollute the authority of the courts: "Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." *Id.* (citing *Olmstead v. United States*, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting)).

Even Professor Wayne LaFave, the nation's leading authority on the Fourth Amendment, has noted, "as unsettling as it may be to say that there is no surer test to apply to the *Alexander* type of case than to ask if the deception is 'fair,' this is the question which must be asked under the *Schneckloth* formulation."¹⁷²

IV. SECRETS AND LIES

In *Zamora*, the officers' ruse succeeded because they lied about their purpose and kept the plain view doctrine a secret.¹⁷³ All the police needed was some excuse to look in the bedroom. Once they lawfully gained that vantage point, the plain view doctrine would justify any further action based on their confirmation of the victim's waterbed description. However, since the defendant himself did not match the description given by the victim of her attacker, the police did not have sufficient probable cause to obtain a search warrant. Instead, they asked to view the apartment for the limited purpose of gauging the floor plan to aid in the investigation of a fictitious domestic dispute, which the officers assured the defendant had nothing to do with him. This case illustrates precisely the danger of plain view extensions of limited consent searches, for it is highly unlikely that the defendant, who had already refused consent once, would have consented had the police stated the actual reasons for their investigation.

The factual situation in *Zamora* also shows why Justice Stewart was right to require inadvertent discovery in *Coolidge*, and what the Court missed in *Horton*. The *Horton* Court could not comprehend why the police would deliberately omit an item they thought would be present from their warrant application.¹⁷⁴ The Court reasoned that police officers would want to include

¹⁷² 3 LAFAVE, *supra* note 41, § 8.2(n). The "Schneckloth formulation" Professor LaFave refers to is the majority's definition of "voluntariness" as reflecting a balance between effective law enforcement and "unfairness." See *supra* text accompanying note 56.

¹⁷³ Because the police did not seize the waterbed frame on their first visit, the plain view doctrine itself was not invoked. In all other respects, *Zamora* looks like a plain view case. Furthermore, a 'fruit of the poisonous tree' analysis would yield the same result as if this were a straight plain view case.

¹⁷⁴ See *Horton v. California*, 496 U.S. 128, 138-39 (1990).

as much information as possible in a warrant application in hopes of securing the widest possible latitude in conducting their search. However, police officers in a situation like that in *Zamora* have different motives entirely. When securing consent to search, police can achieve a much broader authorization by deliberately omitting a crucial piece of information from their consent request. If the police are able to trick the suspect into thinking that they are investigating someone else (as they did in *Zamora*) or that they are seeking objects which the suspect knows are not present (as they also did in *Zamora*), it becomes possible for the police to entice the suspect into unknowingly revealing the incriminating evidence (the waterbed frame in *Zamora*). The *Horton* Court was right that there is no reason to underreport information to a magistrate when applying for a warrant,¹⁷⁵ but it failed to recognize that underreporting information to a suspect when seeking his consent can yield access to areas which police could not otherwise search because they lack both probable cause and an appropriate exigency, and because the suspect would not consent to a more forthright request.

The *Horton* Court's other reason for rejecting the *Coolidge* inadvertence requirement was that particularity restrictions on warrants and scope restrictions on exigencies already protect sufficiently against general, exploratory searches.¹⁷⁶ In the cases listed in Part A of this section—*Dichiarinte*, *Padilla*, and *Torand*—limits on the scope of the search did indeed protect against generalized searches. But in the straight deception cases—*Alexander*, *Zamora*, and the cases cited by Judge Taubman¹⁷⁷—limits on the scope of the search did not prevent the police from exploring wherever they could lie their way into. Without an inadvertent discovery requirement during limited consent searches, which would suppress evidence that officers knew about in advance of their search but did not mention when gaining entry, police have a motive to conceal their purpose and nothing but their own creativity to prevent them from engaging

¹⁷⁵ *Id.* at 138.

¹⁷⁶ *Id.* at 139.

¹⁷⁷ See *supra* note 168.

in precisely the kind of generalized, exploratory searches that the Fourth Amendment abhors.

The above analysis suggests that an inadvertent discovery rule for limited consent searches would solve the problem of deceptive police behavior. Such a rule would require police to articulate prior to any search, either in their warrant application or their consent request, the actual objects of their proposed search. Any objects found in plain view thereafter would be admissible only if the police genuinely did not expect those items to be there.

However, any rule which depends upon the subjective intent of police officers is inherently easy for police to manipulate and hence difficult for courts to enforce.¹⁷⁸ In *Zamora*, for example, police wishing to admit the waterbed frame under an inadvertence rule would simply make no record of the victim's description of the waterbed, proceed as they did, and then claim at the suppression hearing that their discovery of the waterbed was inadvertent and its relevance corroborated by the victim only after the initial search. If this fact pattern seems implausible, compare it with the officer's behavior in *Torand*, a case decided while the *Coolidge* inadvertence rule still ruled the land, where the officer found a high school ring "inadvertently" during a limited consent search for a camera and a shotgun and only determined its relevance when talking to the victim the next morning.¹⁷⁹ The officer's version of events in *Torand* seems perfectly tailored to sidestep the inadvertence requirement and thus avoid any constitutional objection from the court.

In general, the only ways to avoid the manipulation of facts caused by subjective standards are, as the *Schneckloth* Court realized, by objectively examining the totality of the circumstances or by requiring uniform warnings.¹⁸⁰ When deliberate deceit by government agents is one of the circumstances present, it is difficult to find that the suspect's consent was voluntary. Courts which have done so have uniformly voiced their disapproval of

¹⁷⁸ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 229-30 (1973).

¹⁷⁹ See *People v. Torand*, 622 P.2d 526, 564 (Colo. 1981).

¹⁸⁰ See *Schneckloth*, 412 U.S. at 229-30.

the deceit they allow, and most have allowed only ruses where they do not exceed some level of fundamental "fairness."¹⁸¹

Herein lies the failure of *Schneckloth*. When "fairness" becomes one of the criteria in evaluating the totality of the circumstances, the entire test becomes meaningless. "Fairness" is a trump card capable of defeating whatever other careful and objective factors the court has compiled for or against a finding of "voluntariness." In addition, since "voluntariness" itself is a subjectively weighted term to begin with, defining it in terms of "fairness" is like multiplying two independent variables—nobody can predict the result and the court is left with just as free a hand as if there were no test at all.

A simple warning by the police, given before all limited consent searches begin and advising the suspect that any incriminating evidence found in the course of the search can be seized and used against him, would solve the whole problem. Returning to *Padilla* as an illustration, when told they may search for drugs only, the police should be required to respond that other items, including documents, may be subject to seizure if found in the course of this search. If the suspect still consents, so be it. However, now she will get what she deserves. Courts would no longer have to determine whether voluntariness was present because the warning would serve as a proxy for voluntariness, guaranteeing that every suspect knew to what they were consenting. Police would no longer be able to deceive suspects as to the purpose of their search in order to gain consensual entry, a practice of which courts across the nation have disapproved. Finally, the Supreme Court would be able to tie up some doctrinal loose ends. First, the Court would complete its analysis of the plain view inadvertence requirement that it left unfinished with respect to consent searches in *Horton*. And second, the Court would salvage the totality of the circumstances test of *Schneckloth* which stands in grave danger of emasculation by

¹⁸¹ See *People v. Zamora*, 940 P.2d 939, 942 (Colo. Ct. App. 1996); *People v. Daugherty*, 514 N.E.2d 228 (Ill. App. Ct. 1987) (ruses tolerable if they do not exceed the bounds of fundamental fairness); 3 LAFAYETTE, *supra* note 40, § 8.2(n) (there is no surer test to apply to deception cases than to ask if the deception is "fair").

courts using "fairness" as part of the totality of the circumstances.

Such a warning system, required only in the case of limited consent searches, would prevent only intentionally deceptive police conduct. In the far more frequent case of general consent searches, no warning is necessary because the police may rely on the terms of the actual consent, not the plain view doctrine, to justify any seizures. And in cases like *Padilla*, where the suspect volunteers her limited consent without any police manipulation, this warning requirement would potentially curtail only an investigative device which was offered to the police as a windfall. It would not restrict police capacity to affirmatively investigate as they would have without the suspect's spontaneous offer of consent.

V. CONCLUSION

The current law of limited consent searches and plain view seizures combines to create a wide avenue for police to gain entry by substituting deceit for probable cause. By proffering one purpose and concealing another, police play a game of bait-and-switch which leaves the victim unwittingly deprived of his Fourth Amendment rights and courts complaining that the police are not being "fair." The Supreme Court's current guidelines for consent searches and plain view seizures, while quite workable in most situations, fail at their intersection, providing inadequate protection against the general exploratory searches that the Fourth Amendment abhors. The only effective way to prevent police from using the plain view and consent exceptions to investigate by deception is to require police to inform consenting suspects prior to limited searches that incriminating items other than the stated objects of the search will be subject to seizure and will be used against them if discovered in plain view.