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RACE, CARS AND CONSENT: REEVALUATING NO-SUSPICION CONSENT SEARCHES

EAMON KELLY*

I. INTRODUCTION

In the wake of racial profiling studies finding that consent searches are disproportionately used on minority drivers, civil rights leaders across the country are calling for an end to consent searches during routine traffic stops.¹ Consent searches are commonly used to investigate crime during traffic stops, but, like all searches, impose significant inconvenience on drivers. The burden of such searches, however, is not evenly distributed. A statewide study of all traffic stops in Illinois reveals that in 2007, minority drivers were 2.5 times more likely than white

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¹ See, e.g., Stacey Anderson, *Texas NAACP Moves to End Racial Profiling*, BET.COM, Mar. 23, 2005, <http://www.bet.com/News/NewsArticleRaceInAmericaRacialProfiling.htm> (quoting Austin NAACP President Nelson Linder as saying, "We oppose all consensual searches [because of racial profiling concerns]") (last visited Feb. 16, 2009); Press Release, Am. Civil Liberties Union of Ill. (ACLU of Ill.), *Police Data Demonstrates Need for End of Consent Searches in Illinois (July 2007)*, available at http://www.aclu-il.org/news/press/2007/07/police_data_demonstrates_need.shtml.

drivers to be subjected to a consensual search.² Yet, a consent search of a minority driver in Illinois is half as likely to reveal contraband: only 12.93% of consent searches of minority drivers yield contraband, in comparison consent searches of white drivers uncover contraband 24.6% of the time.³ Similar studies in other states confirm that minorities are substantially more likely to be consensually searched and that those searches are less likely to disclose contraband.⁴ This disproportionate targeting of minority drivers calls for a reevaluation of the Fourth Amendment standards applied to consent searches during traffic stops.

Currently, constitutional search-and-seizure jurisprudence provides law enforcement with all but complete discretion to conduct consent searches during traffic stops. Three constitutional requirements determine if a consent search during a traffic stop is valid. First, the traffic stop must be justified at its inception by reasonable suspicion of some *traffic violation*.⁵ However, a reasonable basis for suspicion can be as minor as a seat belt infraction, a missing headlight or a failure to signal.⁶ Second, the duration of the search must be appropriately brief in light of the initial justification for the stop.⁷ But, because officers are authorized to request “consent” to extend the stop—coupled with the wide latitude courts provide when evaluating consensual extension—this limitation is weakened. Third, a court must determine that the consent to search is given volun-

² NW UNIV. CTR. FOR PUB. SAFETY, ILL. TRAFFIC STOPS STATISTICS STUDY 2007 ANN. REP. 11 (2008) [hereinafter ILL. STUDY 2007].

³ *Id.*

⁴ *See, e.g.*, COUNCIL ON CRIME & JUSTICE & INST. ON RACE & POVERTY, MINNESOTA STATEWIDE RACIAL PROFILING REPORT: ALL PARTICIPATING JURISDICTIONS 4 (2003) [hereinafter MINN. STUDY] (prepared for the Minnesota Legislature pursuant to MINN. STAT. § 626.951 (2003)); DEP’T. OF JUSTICE, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 2002 2 (2006) [hereinafter D.O.J. REPORT]; AMY FARRELL, ET AL., RHODE ISLAND TRAFFIC STOP STATISTICS ACT FINAL REPORT 14 (2003) [hereinafter R.I. STUDY].

⁵ *Delaware v. Prouse*, 440 U.S. 648 (1979).

⁶ *Whren v. United States*, 517 U.S. 806 (1996).

⁷ *Terry v. Ohio*, 392 U.S. 1, 17-18 (1968).

tarily and is not the product of coercion.⁸ Operating together, however, these constitutional standards allow officers to use purportedly consensual searches to target drivers even when they lack any suspicion of criminal conduct specific to the driver.

In effect, this allows officers to conduct no-suspicion consent searches in conjunction with routine stops for traffic violations. The constitutional justification for each of the Supreme Court rulings that individually permit no-suspicion consent searches during routine traffic stops may be sound. However, as a whole, coupled with lenient court determinations, serious concerns arise.

Although consent searches can serve a useful purpose, the reasonableness of using no-suspicion consent searches to target drivers can be questioned for four reasons. First, these searches result in a significant intrusion into the privacy of a driver stopped for a routine traffic violation. This intrusion is greater, particularly in terms of length, than the intrusion resulting from other constitutionally permissible police tactics. Second, consent searches are not an incidental burden imposed on all drivers; rather, the burden is disproportionately imposed on minority drivers. Third, when an officer lacks individualized suspicion, the underlying policy interests that justify the permissive approach to consent searches are not implicated. Fourth, no-suspicion searches are essentially random searches (at best) and are only marginally effective when compared to other readily available and less-intrusive investigative tactics.

The failure of the current constitutional framework to address these four concerns provides a convincing policy argument for the application of a new, heightened standard for consent searches that would require reasonable suspicion as a prerequisite to a valid consent search during a traffic stop. This heightened standard has been adopted by the judiciaries of several

⁸ See *Schneekloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (“[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means . . .”).

states interpreting their own state constitutions.⁹ A reasonable suspicion requirement is preferable for two reasons. First, it decreases the likelihood that innocent drivers will be targeted, because it constrains arbitrary decision making and prevents searches based on subtle, unarticulatable bias. Second, as discussed below, requiring reasonable suspicion advances the policy justification relied on in *Schneckloth v. Bustamonte* for promoting consent searches.

This article, however—like the state judiciaries that impose reasonable suspicion requirements—does not question the efficacy and constitutional reasonableness of all consent searches. There are sound reasons for promoting some consent searches, and most consent search scenarios can be distinguished from traffic stops by two factors: (1) the suspicion basis for the request; and (2) the context of the request. When the context for the initial request for the power to search is a criminal investigation, as opposed to traffic enforcement, the facts and circumstances of the suspected crime act to limit the scope of the police investigation.

Further, imposing a reasonable suspicion requirement is an effective response to the targeting of innocent minority drivers for consent searches. Despite calls from civil rights groups for the elimination of all consent searches based on the mounting evidence of the disproportionate targeting of minority drivers, consent searches should not be eliminated completely. If further action to combat racial profiling is required, legislators should consider policies that complement or reinforce a reasonable suspicion requirement. Ultimately, the reasonable suspicion approach best protects the rights of innocent drivers while preserving the role of consent searches as a tool for police officers.

⁹ See, e.g., *State v. Fort*, 660 N.W. 2d 415, 419 (Minn. 2003); *State v. Carty*, 790 A.2d 903, 912 (N.J. 2002).

This article proceeds as follows. Part II explores the Supreme Court's justifications for promoting consent searches. It also examines how the application of three constitutional search and seizure analyses to consent searches facilitates no-suspicion consent searches during traffic stops. Part III directs a critical eye at no-suspicion consent searches, exploring four issues: (1) the intrusion consent searches impose on drivers; (2) the disproportionate impact of consent searches on minorities; (3) the failure of consent searches to advance the policy justification that Justice Stewart articulated in *Bustamonte* as underlying the permissive approach to consent searches; and (4) the ineffectiveness of consent searches when the officer lacks reasonable suspicion. Part IV argues that it is preferable to require officers to have reasonable suspicion of criminal conduct before requesting consent to search a car during a traffic stop, while maintaining consent searches in other situations, such as criminal investigations. Part IV concludes by discussing whether a reasonable suspicion requirement goes far enough, and responds to the call to eliminate consent searches.

II. CURRENT FOURTH AMENDMENT JURISPRUDENCE APPLIED TO TRAFFIC STOPS

Current Fourth Amendment jurisprudence provides officers broad discretion when conducting consent searches during traffic stops. The rationale for the Supreme Court's permissive approach to consent searches was outlined in the landmark decision *Schneekloth v. Bustamonte*.¹⁰ Since *Bustamonte*, the Court has devised a framework for analyzing the Fourth Amendment concerns raised by consent searches during traffic stops that authorizes officers to conduct consent searches even when they lack any suspicion of criminal conduct.

¹⁰ *Schneekloth*, 412 U.S. at 228.

A. *Why are Courts so Deferential to Consent Searches?*

Consent searches occupy a special place in Fourth Amendment jurisprudence as an established exception to the warrant requirement and the general requirement of particularized suspicion. Although searches pursuant to consent have always been presumptively reasonable under the Constitution,¹¹ the Court's efforts to promote consent searches have gone beyond recognition of the exception. The Court has aggressively protected the role of consent-based searches in police search practices by rejecting the argument that consent had to be made knowingly and intelligently.¹² In *Bustamonte*, Justice Stewart, writing for the majority, explained the Court's unwillingness to apply a prophylactic rule analogous to a *Miranda* warning to consensual searches,¹³ and in the process, outlined the three best explanations for the broad deference the Court grants to consent searches.¹⁴

First, *Bustamonte* emphasizes the importance of consent searches in the framework of suspicion-based searches.¹⁵ Justice Stewart observed, "[W]here the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence."¹⁶ Justice Stewart did

¹¹ See Northeastern Univ., Data Collection Resource Ctr., Background and Current Data Collection Efforts: Introduction to Data Collection, <http://www.racialprofilinganalysis.neu.edu/background> (last visited Feb. 15, 2009). *Schneckloth*, 412 U.S. at 219 ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

¹² See *id.* at 231–33 (distinguishing *Miranda* warning); *id.* at 237 (distinguishing "the requirement of a knowing and intelligent waiver . . . applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.").

¹³ See *id.* at 231–33.

¹⁴ See *id.* at 227–28.

¹⁵ *Id.* at 227.

¹⁶ *Id.*

not defend consent searches as a tool to authorize randomized searches of citizenry. Rather, he emphasized that consent searches allow officers to investigate a crime when they have *some* suspicion of criminal conduct, although not enough to conduct a probable-cause search.

Second, Justice Stewart argued that consent searches might result in less inconvenience for the subject of the search.¹⁷ If an officer suspects wrongdoing, an innocent suspect might prefer to dispel this suspicion rather than be detained. The opinion also (reasonably) suggests that a suspect might view a consent search as subjectively less intrusive into his or her privacy because of the (at least theoretical) ability to deny consent. Justice Stewart's points of comparison, however, were nonconsensual searches and continued detention. He was not, and could not, rationally be arguing that a consent search is less intrusive than no search.

Third, in supporting consent searches as an exception to standard Fourth Amendment requirements, Justice Stewart expressed concern about interfering with "standard investigatory techniques."¹⁸ This third point appears to be a concession to the importance and perceived effectiveness of consent searches.

In subsequent decisions, based on the *Bustamonte* policy rationale, the Supreme Court has constructed a framework that provides broad discretion to officers to utilize consent searches during traffic stops.

B. Constitutional Basis for Extending Traffic Stops

Formally, judicial review of the validity of a consent search conducted during a traffic stop requires three substantive Fourth Amendment inquiries to protect the rights of drivers. These inquiries may appear to provide substantive restrictions on the use

¹⁷ *Id.* at 228.

¹⁸ *Id.* at 231.

of consent searches during traffic stops. In practice, however, courts provide officers wide latitude to stop drivers and request consent to search.

First, a court must determine if the traffic stop is justified at its inception by reasonable suspicion of a traffic violation.¹⁹ However, the reason for the stop does not need to be related to the object of the search, thereby vastly expanding the officer's discretion when requesting consent.²⁰ Second, the duration of the search must be appropriately brief in light of the initial justification for the stop.²¹ Yet, by authorizing the officer to request consent to extend the stop, and in light of the wide latitude courts provide when evaluating consensual extension, this limitation is virtually eliminated. Third, a court must determine that the consent to search is given voluntarily and is not the product of coercion.²² However, the Supreme Court has consistently rejected judicial efforts to diminish the coercive impact of police authority when they request consent to search. This framework provides law enforcement with virtually complete discretion, allowing officers to conduct no-suspicion consent searches in conjunction with routine traffic stops.

1. "Reasonable" Justification Required to Make a Traffic Stop

A constitutionally valid traffic stop, in theory, requires only reasonable suspicion of a traffic violation. Thus, an officer can conduct a consent search for drugs during a traffic stop based merely on suspicion of a technical traffic violation.²³ Further, the subjective intent of the officer is irrelevant. If the officer has

¹⁹ *Prouse*, 440 U.S. at 648.

²⁰ *Whren*, 517 U.S. at 806.

²¹ *Terry*, 392 U.S. at 20.

²² See *Schneekloth*, 412 U.S. at 228 (“[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means. . .”).

²³ *Prouse*, 440 U.S. at 648.

probable cause to believe that a traffic violation occurred, the officer can stop the driver, even if the traffic violation is not the actual subjective reason for the stop.²⁴ This construction authorizes an officer to stop a driver for the purpose of conducting a consent search without reasonable suspicion of criminal conduct.

2. Illusory *Terry* Limitations on the Scope of Traffic Stops

Likewise, police conduct after initiating a traffic stop should be constitutionally limited in duration based on the justification for the stop. The temporal limitations are the product of limitations placed on temporary seizure under *Terry* and its progeny, with some modifications. Officers can, however, avoid these limitations by requesting consent to extend the stop even if they lack any suspicion that the driver engaged in criminal conduct. The Supreme Court has developed a test for analyzing the validity of a suspect's consent to this extended seizure, but in practice, courts are very lenient in this analysis.

Traffic stops are analyzed by applying, with modifications, the limitations on the length of a stop developed in *Terry v. Ohio* and its progeny.²⁵ The constitutional limits on the scope of a traditional *Terry* stop are a function of both the length of deten-

²⁴ *Whren*, 517 U.S. at 813.

²⁵ The extension of the *Terry* analysis to traffic stops based on probable cause (versus reasonable suspicion) has been in some doubt. Some courts indicated that *Terry* limitations do not apply when the stop is based on probable cause, albeit probable cause for a traffic violation. See, e.g., *United States v. Childs*, 277 F.3d 947, 950 (7th Cir. 2002) (en banc); Wayne R. LaFave, *The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1864 (2004) [hereinafter LaFave, *The "Routine Traffic Stop"*]. *Illinois v. Caballes* provides further clarification: the majority applied a *Terry*-style analysis to the use of a drug dog during a traffic stop, albeit without invoking *Terry* directly. 543 U.S. 405 (2005). See also *Prouse*, 440 U.S. at 653–54 (applying *Terry* reasonableness standard).

tion and the intrusion of the investigative method employed.²⁶ However, in the traffic stop context, the length of the stop is analyzed to the veritable exclusion of other factors.²⁷ In *Illinois v. Caballes*, the Supreme Court specifically rejected attempts by some lower courts to craft a purpose-based restriction on the use of criminal investigation tactics (e.g. drug dogs) during routine traffic stops.²⁸ Instead, the Court emphasized time limitations.

An officer's conduct, however, may constitutionally exceed the time limitations of a traffic stop if the driver consents to an extension.²⁹ When the extension is based on the driver's purported consent, the consent to extend the traffic stop (the seizure) is distinct from the consent to conduct the search.³⁰ The consent to seizure analysis is analyzed under the "free to terminate" or "free-to-leave" standard explained in *Florida v. Bos-*

²⁶ To be constitutionally permissible under *Terry*, an investigatory stop (such as a traffic stop) must be both "justified at its inception *and* . . . reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20 (emphasis added); accord *Florida v. Royer*, 460 U.S. 491, 500 (1983) (holding that during a *Terry*-stop based on reasonable suspicion "an investigative detention must be temporary and last not longer than is necessary to effectuate the purpose of the stop" and "the investigative methods employed should be the least intrusive methods reasonably available to verify or dispel the officer's suspicion in a short period of time"); see also LaFave, *The "Routine Traffic Stop," supra* note 25, at 1863.

²⁷ *Caballes*, 543 U.S. at 407–08 (indicating that "[w]e may assume" that "a dog sniff that occur[s] during an unreasonably prolonged traffic stop" would be unconstitutional).

²⁸ *Id.* at 409–10 ("The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car.").

²⁹ *United States v. Sanchez-Pena*, 336 F.3d 431, 442–43 (5th Cir. 2003). If an officer has reasonable suspicion that the driver has committed a crime, that suspicion also justifies holding the driver. See, e.g., *United States v. Foreman*, 369 F.3d 776 (4th Cir. 2004); *United States v. Hill*, 195 F.3d 258, 270–73 (6th Cir. 1999).

³⁰ See *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (outlining the consent to seizure analysis).

tick.³¹ In *Bostick*, police officers boarded a bus as part of a drug interdiction effort.³² Once on the bus, they focused on the defendant, with no articulated basis, and asked him some questions.³³ The officers then informed him they were narcotics agents and asked him for consent to search his bag, where they subsequently found drugs.³⁴ Although the Supreme Court did not determine whether there was an unconstitutional seizure, it laid out “the crucial test” for determining if there was an unconstitutional seizure: whether in the totality of the circumstances “a reasonable person” would feel “at liberty to ignore the police presence and go about his business.”³⁵

³¹ *Id.* The *Bostick* court rejected the “free-to-leave” standard where the person is already confined on public transportation, focusing instead on whether the passenger feels “free to decline the officers’ requests or otherwise terminate the encounter.” *Id.* at 436. However, in the context of a traffic stop there is no meaningful distinction between the two standards because the driver terminates the encounter by leaving. *Id.*

³² *Id.* at 431. The officers were in uniform, carrying a weapon in a zipped pouch. *Id.*

³³ *Id.* at 431–32.

³⁴ *Id.*

³⁵ *Id.* at 437. “In applying the totality of the circumstances test [to traffic stops], courts look to numerous factors including the time, place and purpose of the encounter, the words used by the officer, the officer’s tone of voice and general demeanor, the officer’s statements to others present during the encounter, the threatening presence of several officers, the potential display of a weapon by the officer, and the physical touching by the police of the citizen.” *United States v. Weaver*, 282 F.3d 302, 310 (4th Cir. 2002). In addition, “the retention of a citizen’s identification or other personal property or effects is highly material under the totality of the circumstances analysis.” *Id.* See also WAYNE R. LAFAYE, *SEARCH AND SEIZURES, A TREATISE ON THE FOURTH AMENDMENT* § 9.3(g) (4th ed. 2004) [hereinafter LAFAYE, *SEARCH AND SEIZURES*]. Whether the officer informed the suspect they were free to decline their request to extend the stop is an additional factor. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). Some courts consider whether the officer specifically asked permission to conduct further inquiry or merely launched into additional questioning or investigative tactics. *State v. Robinette*, 685 N.E. 2d 762, 770-71 (Ohio 1997) (considering the officers questioning about drugs after the stop “without any break in the conversation” as a factor in concluding that the stop was not consensual).

Although the free-to-leave standard appears to provide substantive protection to drivers, reported opinions demonstrate that this protection is illusory. *United States v. Lattimore*, an *en banc* opinion from the Fourth Circuit, is an example.³⁶ In *Lattimore*, the driver agreed to sign a consent form after the following exchange:

Lattimore: Yeah, and I seen [on T.V.] where [sic] they pulled a guy over, and they, you know, asked him the same thing you're asking me—whether they could search his car or not. And, um, what's the difference? If you do or you don't, it's gonna happen anyway, right?

Trooper: Not really. If you don't, I feel you're hiding something. Therefore, I'll call a drug dog right up the road to come down here and let him search your car.

Lattimore: That's what I'm saying. It don't really make no difference.³⁷

The court unconvincingly, and with little explanation, held that “[t]he totality of the circumstances presented indicate that from this point forward [the signing of the form] the encounter was consensual.”³⁸ How this detention could be considered consensual is unclear. The officer made it clear that the driver would be detained against his will if he did not “consent” to the extension. The choices both involved a prolonged detention. Unfortunately, this flimsy application of the “totality of the circumstances” analysis is not exceptional.³⁹

³⁶ *United States v. Lattimore*, 87 F.3d 647 (4th Cir. 1996) (*en banc*).

³⁷ *Id.* at 649.

³⁸ *Id.* at 653.

³⁹ See, e.g., *LAFAVE, SEARCH AND SEIZURES*, *supra* note 35, at § 9.3(g); see also *Hill*, 195 F.3d at 258 (holding an officer was permitted to extend a traffic stop when the driver declined consent); *United States v. Davis*, 430 F.3d 345 (6th Cir. 2005) (holding an officer was permitted to extend a stop when the suspect declined to offer consent for a search, although a second extension to call a second drug dog was not permitted); *Foreman*, 369 F.3d at 776 (holding

3. Voluntary Consent to a Search

As is common with the consent to seizure analysis, courts set a relatively low bar for determining whether a driver consents to a search. The nominal legal standard is that a search is supported by consent if the consent is voluntarily given and not a product of coercion.⁴⁰ Under *Bustamonte*, a search is valid if in the totality of the circumstances a court finds “the consent was in fact voluntarily given, and *not the result of duress or coercion*, express or implied.”⁴¹ In determining if consent is voluntary and not coerced, courts are to consider both “the characteristics of the accused and the details of the interrogation.”⁴² In establishing the standard, the Court rejected the argument that the police must inform drivers that they can refuse consent before the search is considered consensual.⁴³

Scholarship questioning whether the consent standard actually results in voluntary consent, or is a mere formality, is legion. Studies indicate that drivers rarely decline consent to search their car.⁴⁴ To explain this phenomenon, a number of scholars cite social science research indicating that from a psychological

an officer was permitted to extend a traffic stop when the driver declined consent); *United States v. Douglas*, 195 Fed. Appx. 780, 783 (10th Cir. 2006) (same); *United States v. Hardy*, 855 F.2d 753 (10th Cir. 1988) (same).

⁴⁰ *Schneckloth*, 412 U.S. at 248.

⁴¹ *Id.* at 248-49 (emphasis added). In *Schneckloth*, the Court provided an often cited but non-exclusive list of factors that courts should consider when assessing in “the totality of all the surrounding circumstances” if a search is consensual. *Id.* at 226. Factors include the age, education and intelligence of the accused; knowledge of the right to refuse consent; whether the accused was informed of his constitutional rights; the length of detention; the “repeated and prolonged nature of the questioning”; and physical coercion. *Id.*

⁴² *Id.* at 226.

⁴³ *Id.* at 248-49. The Court refused to extend the “knowing and intelligent waiver” standard applied to various Fifth and Sixth Amendment rights because “the community has a real interest in encouraging consent.” *Id.* at 243-44.

⁴⁴ Illya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the “Voluntary” Waiver of Fourth Amendment Rights*, 44 *How. L.J.* 349, 370 (2001).

perspective, a person asked by the police to consent to a search does not feel free to decline.⁴⁵ This research has identified coercion in situations that the courts claim are not coercive.⁴⁶ Despite this evidence, the Supreme Court has continued to reject lower court attempts to heighten the requirements for proving consent.

For example, in *Ohio v. Robinette* the Court rejected a bright-line “first-tell-then-ask” rule that required officers to inform drivers they were free to go before asking for consent to search.⁴⁷ The Ohio Supreme Court attempted to fashion such a rule on the premise that drivers, once stopped, do not “feel free” to terminate an encounter with police until expressly authorized to leave.⁴⁸ Rejecting the heightened standard, the Court instead reiterated its totality of the circumstances analysis⁴⁹—an analysis that fails to account for the coercive character of a police request for consent—the Court has allowed officers to rely on purported consent.⁵⁰

C. Conclusion

The three tests applied to determine if a consent search during a traffic stop is valid may appear to protect drivers from arbitrary intrusion. However, a review of decisions that apply the

⁴⁵ Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court’s Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 233–40; see LAFAYE, SEARCH AND SEIZURES, *supra* note 35, at §8.2 (“police . . . have increasingly come to rely upon purported ‘consents’.”); Robert H. Whorf, *Consent Searches Following Routine Traffic Stops—The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1, 18-19 (2001).

⁴⁶ Barrio, *supra* note 45, at 233–40; see LAFAYE, SEARCH AND SEIZURES, *supra* note 35, at §8.2; Whorf, *supra* note 45, at 18-19.

⁴⁷ *Robinette*, 519 U.S. at 39–40.

⁴⁸ *Id.* at 41 (Ginsburg, J., dissenting).

⁴⁹ *Id.* at 39–40.

⁵⁰ See LAFAYE, SEARCH AND SEIZURES, *supra* note 35, at §8.2 (“police . . . have increasingly come to rely upon purported ‘consents’.”).

tests leaves the distinct impression that courts are throwing the fight.⁵¹ The apparent judicial bias in favor of validating consent searches is not surprising. Judges almost exclusively review cases in which drugs are found. When police officers, lacking articulable and individualized suspicion, conduct searches that yield drugs, the officers must appear to have an uncanny ability to identify contraband couriers. Courts are understandably leery of interfering with this (perceived) ability. But for every one African American or Latino driver in court, there may be nine that were subjected to a search that failed to yield results.⁵² Further, this false sense of effectiveness obscures other problems caused by allowing consent searches when an officer has no suspicion that a driver engaged in criminal conduct.

III. WHAT IS WRONG WITH NO-SUSPICION CONSENT SEARCHES?

The permissive approach to no-suspicion consent searches during traffic stops is problematic for four reasons. First, consent searches significantly inconvenience innocent drivers. Second, innocent minorities are disproportionately the target of this intrusion. Third, the principal justifications for permissively allowing consent searches are less applicable in the context of no-suspicion consent searches. Fourth, the marginal effectiveness of no-suspicion searches does not justify the practice, which, in terms of effectiveness, is analogous to random traffic stops. Each of these four concerns—intrusiveness, disparate treatment, lack of justification and ineffectiveness—highlight problems

⁵¹ See, e.g., *Douglas*, 195 Fed. Appx. at 783 (holding that officer was justified in detaining a driver who refused to consent to a search, despite court's finding that officer detained drivers for drug dog sniffs in "almost every case in which consent to search is refused"); *Lattimore*, 87 F.3d at 649; *Hardy*, 855 F.2d at 753; *LAFAVE, SEARCH AND SEIZURES*, *supra* note 35, at § 9.3(g).

⁵² See *MINN. STUDY*, *supra* note 4, at 22 (The search "hit rate" was 11.17% for African-American drivers and 9.08% for Latino drivers.).

with the Supreme Court's sanction of no-suspicion consent searches during traffic stops.

A. *No-suspicion Consent Searches are Intrusive*

The considerable inconvenience and intrusion that result from consent searches are at the heart of the concerns about the impact of these searches on innocent drivers. Consent searches are time consuming. The government may argue that the length of consent searches, and thus the intrusion, should be judged based on the seconds it takes to ask for consent to search and not the time it takes to conduct the search. This argument is unpersuasive because the intrusion occurs whether or not the driver "consents" to a search. Once a police officer asks a driver for consent to search a car, the stop is all but inevitably extended for a significant period of time. If the driver declines consent, the officer will almost always extend the stop anyway. Therefore, regardless of whether or not the driver consents, officers impose a significant burden on drivers simply by requesting consent.

Consent searches are also significantly more intrusive than alternative police tactics used during traffic stops. When consent searches are employed during a stop they can be differentiated from other common police practices, such as drug sniffs. Unlike dog sniffs, consent searches inevitably extend the length of a traffic stop. Although a dog sniff can, theoretically, be employed in a way that does not extend a stop, it is unlikely that a consent search can be conducted during the time usually required to execute a traffic stop.⁵³ If a drug dog is available during a stop, an officer can deploy it without extending the time of the stop at

⁵³ Whorf, *supra* note 45, at 18-19.

all, or by only a *de minimis* period.⁵⁴ In contrast, a consent search for drugs can last between 20 and 40 minutes.⁵⁵

Further, focusing only on the time it takes to request consent ignores the reality that drivers are detained *regardless* of whether they consent to the search or not. First, as a practical matter, drivers almost always consent to a search of their car. In Illinois, more than 90% of drivers agreed to consent searches. (Interestingly, there was no compelling difference between the consent rates for Caucasian drivers, 91.45%, and minority drivers, 90.31%).⁵⁶ Similar consent rates were observed in other studies.⁵⁷ For example, one study of traffic stops in Ohio found that more than 90% of drivers gave consent to search their car.⁵⁸

Second, if drivers decline consent, the requesting officer generally becomes suspicious and relies on another justification to detain the driver. Many reported cases reveal an admitted police practice of extending stops involuntarily after a refusal.⁵⁹ In two recent cases, officers in Kansas and Virginia admitted they call for a drug dog in “almost every case in which consent to search

⁵⁴ *Caballes*, 543 U.S. at 405.

⁵⁵ Whorf, *supra* note 45, at 19. Further, unlike drug dogs and questioning, which can be employed during a traffic stop, consent searches are often conducted after a traffic citation or warning has been issued. *Id.* at 2–3.

⁵⁶ ILL. STUDY 2007, *supra* note 2, at 10.

⁵⁷ For example, in *State v. Carty* the New Jersey Supreme Court cited a monitoring report that indicated that more than ninety percent of drivers consent to a search even after being warned they could decline consent. 790 A.2d. at 910-12. Four out of five drivers in the New Jersey study were innocent of any wrongdoing. *Id.*

⁵⁸ Lichtenberg, *supra* note 44, at 370.

⁵⁹ See, e.g., *Davis*, 430 F.3d at 345 (holding that an officer was permitted to extend a stop when the suspect declined to offer consent for a search although a second extension to call a second drug dog was not permitted); *Foreman*, 369 F.3d at 776; *Hill*, 195 F.3d at 258; *Hardy*, 855 F.2d at 753; *Douglas*, 195 Fed. Appx. at 783.

is refused.”⁶⁰ Detaining a driver who refuses consent to search his car while a drug dog arrives can significantly extend a stop.⁶¹

Drivers themselves are also aware that an extended detention awaits them if they refuse to consent to a search of their car.⁶² Popular artist Jay-Z portrayed not only the prevalence of racial profiling, but the common police practice of extended detention if consent to a search is refused in his song, “99 Problems.”⁶³ Further, at least one circuit has sanctioned this practice by up-

⁶⁰ *Douglas*, 195 Fed. Appx. at 783; see also *Foreman*, 369 F.3d at 779 n.4 (The officer admitted that he detains drivers who deny consent for a drug dog sniff if he has reasonable suspicion.).

⁶¹ *Hardy*, 855 F.2d at 761 (upholding a fifty-minute delay while a drug dog was called when the driver declined consent to search the car).

⁶² Recall in *Lattimore* that the “consenting” driver saw officers on TV detain drivers whether or not they consented to searches. See, e.g., *Lattimore*, 87 F.3d at 649 (“Yeah, and I seen [on T.V.] where [sic] they pulled a guy over, and they, you know, asked him the same thing you’re asking me—whether they could search his car or not. And, um, what’s the difference? If you do or you don’t, it’s gonna happen anyway, right?”).

⁶³ The song “99 Problems” on Jay-Z’s “The Black Album,” portrays an exchange between Jay-Z and an officer after being stopped for driving “fifty-five in the fifty-four” miles an hour:

[Officer:] Son do you know why I’m stoppin’ you for?

[Jay-Z:] Cause I’m young and I’m black and my hat’s real low?/ Or do I look like a mind reader sir I don’t know/ Am I under arrest or should I guess some mo’?

[Officer:] Well you was doin’ fifty-five in the fifty-four;/ license and registration and step out of the car/ are you carryin’ a weapon on you? I know a lot of you are

[Jay-Z:] I ain’t steppin’ out of sh** all my paper’s legit

[Officer:] Well do you mind if I look around the car a little bit?

[Jay-Z:] Well my glove compartment is locked, so is the trunk in the back/ And I know my rights, so you gon’ need a warrant for that

[Officer:] Aren’t you sharp as a tack! You some type of lawyer or somethin’, somebody important or somethin’

[Jay-Z:] Nah, I ain’t passed the bar, but I know a little bit/ Enough that you won’t illegally search my sh**

[Officer:] Well we’ll see how smart you are when the canine comes

JAY-Z, 99 PROBLEMS (Def Jam Recordings 2003).

holding a search based on consent granted under threat of dog sniff if consent was declined.⁶⁴ The public awareness of the widespread practice of detaining drivers who refuse consent—as well as the judicial sanction of the practice—undermines the argument that the intrusion of consent searches should be measured only by the time it takes to request consent. Once an officer requests consent to search a car, the driver will all-but inevitably be detained for a significant period of time.

B. No-suspicion Consent Searches Disproportionately Target Innocent Minority Drivers

In light of the intrusion that results from a consensual search, newly available evidence that *innocent* minorities are substantially more likely to be subjected to such searches is particularly

⁶⁴ *Lattimore*, 87 F.3d at 649. The court in *Lattimore* attempted, rather unconvincingly, to recast its decision in terms of whether the driver “withdrew” consent. 87 F.3d at 651. But, the court’s rephrasing of its analysis does not alter its ultimate decision to treat as consensual a search conducted under threat of a drug dog search and after the driver asked, “What’s the difference . . . if I say yes or I say no.” *Id.* at 649.

The Supreme Court has “consistently held that a refusal to cooperate, *without more*, does not furnish the minimal level of objective justification needed for a detention or a seizure.” *Bostick*, 501 U.S. at 437 (emphasis added). But this statement implies, or at least leaves open, whether officers can consider the refusal. Some courts (and many police officers) appear to consider refusal as a factor justifying an involuntary detention on the basis of reasonable suspicion. See *United States v. Goodwin*, 449 F.3d 766, 768–69 (7th Cir. 2006) (finding that a train passenger’s statement that he lost the key to his bag and did not want it searched constituted “giving a suspicious answer” to a request for consent to search. That, coupled with the fact he fit the drug courier profile, “created a reasonable suspicion that the defendant’s luggage contained contraband”); Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 410–17 (2004); see also *United States v. Holt*, 264 F.3d 1215, 1224 (10th Cir. 2001) (“The officer may not use the refusal to answer as the basis for a more intrusive search, but the officer would certainly be permitted to use that information to justify prudent safety-related measures.”). Whatever the state of the jurisprudential debate, in practice, an officer will probably extend the stop if consent is declined.

disturbing. Although the Fourth Amendment protects the guilty and innocent alike,⁶⁵ jurists often suggest that the principal focus when considering the intrusion of a police-initiated traffic stop should be placed on the experience of an innocent driver.⁶⁶ Recent racial profiling studies⁶⁷ indicate that minorities, particularly innocent minorities, are disproportionately subject to a consensual search during a traffic stop.⁶⁸ Yet, searches of minori-

⁶⁵ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (prohibiting the introduction of unconstitutionally seized evidence in criminal prosecutions); see also *Minnesota v. Carter*, 525 U.S. 83, 110 (1998) (Ginsburg, J., dissenting) (“Fourth Amendment protection, reversed for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty.”).

⁶⁶ See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 452 (1990) (“The ‘fear and surprise’ to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law abiding motorists by the nature of the stop.”); *Bostick*, 501 U.S. at 438 (“the ‘reasonable person’ test presupposes an innocent person”); see also *Royer*, 460 U.S. at 519 n.4 (1983) (Blackmun, J., dissenting) (“[T]he potential intrusiveness of the officers’ conduct must be judged from the viewpoint of an innocent person in [his] position”).

⁶⁷ A number of reports on racial profiling and traffic stops are available as a result of new data collected pursuant to state laws requiring police to identify the race of the driver and police tactics used during all traffic stops. Racial profiling data collections began in the late 1990s as jurisdictions began to track information about police stops, searches, tickets and arrests in response to increased focus on racial profiling. NORTHEASTERN UNIV., DATA COLLECTION RESOURCE CTR., BACKGROUND AND CURRENT DATA COLLECTION EFFORTS: INTRODUCTION TO DATA COLLECTION, <http://www.racialprofilinganalysis.neu.edu/background> (last visited Feb. 15, 2009). Increasingly, state legislatures are adopting laws requiring police departments to collect and report racial profiling data as a method of curbing the practice. See, e.g., Press Release, Office of the Governor Rod Blagojevich, Gov. Blagojevich Signs Bill to Extend Profiling Study as State Releases Second Annual Traffic Stop Report (July 7, 2006), available at <http://www.dot.il.gov/press/RacialProfileStudy05.pdf>. Today more than twenty states collect and report this information. NORTHEASTERN UNIV., DATA COLLECTION RESOURCE CTR., BACKGROUND AND CURRENT DATA COLLECTION EFFORTS: HISTORY OF RACIAL PROFILING ANALYSIS, <http://www.racialprofilinganalysis.neu.edu/background/history.php> (last visited Feb. 15, 2009).

⁶⁸ ILL. STUDY 2007, *supra* note 2, at 9–11.

ties are less likely to disclose contraband than searches of white drivers.⁶⁹

The 2007 Illinois Traffic Stops Statistics Study found that minority drivers in Illinois were substantially more likely to be subject to a consensual search when compared to white drivers.⁷⁰ Minority drivers were 2.5 times as likely to be subject to this kind of search.⁷¹ Although consent searches only occurred in a small percentage of stops (1%), minorities were significantly more likely to be subject to a consensual search.⁷² The following chart from the Illinois study summarized the result:

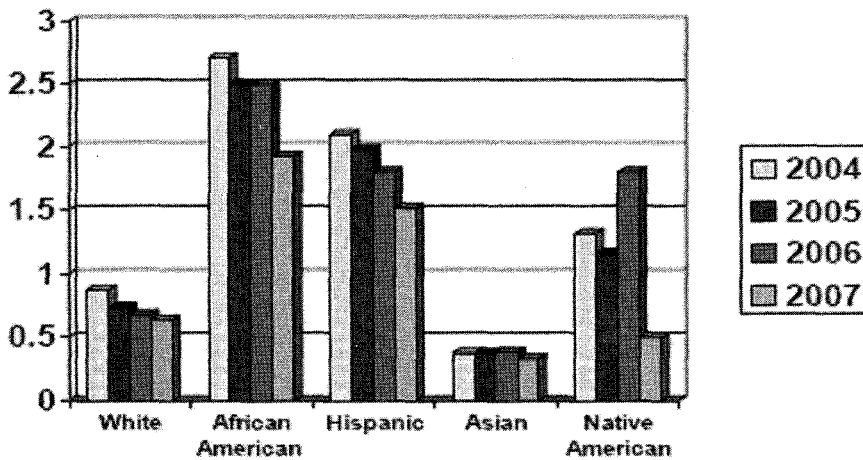


Table 1: Percentage of Illinois Stops Resulting in a Consent Search by Race⁷³

According to the Illinois study, an African American driver was three times as likely to be the subject of a consent search as

⁶⁹ *Id.* at 11.

⁷⁰ *Id.* at 10-11.

⁷¹ *Id.* at 11.

⁷² *Id.*

⁷³ *Id.*

a white driver.⁷⁴ Likewise, a Latino driver was 2.4 times as likely to be subject to a consent search as a white driver.⁷⁵

Similarly, a study of Rhode Island data collected by the Racial Profiling Data Collection Resource Center (Rhode Island study) found the probability that a minority driver would be searched during a traffic stop was significantly higher than that of a white driver.⁷⁶ This study found that the probability that an officer conducted a search of a minority driver after a traffic stop was twice that of a white driver, when controlling for other characteristics.⁷⁷

In addition, the Illinois study, the Rhode Island study, and a similar Minnesota study all found that searches of white drivers were more likely to yield contraband than searches of minority drivers.⁷⁸ The Rhode Island study found that 23.5% of all searches of white drivers revealed contraband.⁷⁹ Yet, Rhode Island law enforcement officers only found contraband in 17.8% of the searches of minority motorists.⁸⁰ The Minnesota study noted “disparities in *discretionary* search rates are particularly troubling” because there was a lower probability that these discretionary searches would yield contraband.⁸¹ Overall, the Minnesota study found 24% of discretionary searches of whites produced contraband compared to only 11% for African Americans, 12% for Asian Americans and 9% for Latinos.⁸² In Illinois, consent searches of minorities were half as likely to uncover contraband as searches of whites.⁸³

⁷⁴ *Id.* at 10.

⁷⁵ *Id.*

⁷⁶ R. I. STUDY, *supra* note 4, at 187.

⁷⁷ *Id.*

⁷⁸ ILL. STUDY 2007, *supra* note 2, at 9–11; R. I. STUDY, *supra* note 4, at 187; MINN. STUDY, *supra* note 4, at 1.

⁷⁹ R. I. STUDY, *supra* note 4, at 189.

⁸⁰ *Id.*

⁸¹ MINN. STUDY, *supra* note 4, at 1 (emphasis added).

⁸² *Id.* at 22.

⁸³ ILL. STUDY 2007, *supra* note 2, at 11.

A national analysis conducted by the Department of Justice (DOJ) projecting the characteristics of traffic stops confirms these results. The DOJ report estimated that 10.2% of African American drivers stopped by the police were searched and 11.4% of Latino drivers stopped were searched, in contrast only 3.5% of white drivers stopped by the police during a traffic stop.⁸⁴ The DOJ report also looked at the success rates of those searches.⁸⁵ The DOJ report confirmed that searches of minorities were less likely to result in arrest. The study estimated that 5.9% of African American drivers and 8.8% of Latino drivers stopped by police were searched but not arrested, compared to only 2.1% of whites.⁸⁶

Together, these studies disclose that the strikingly disproportionate burden of consent searches falls on innocent minority drivers, further undermining the practice.

C. No-suspicion Consent Searches Do Not Promote Interests Justifying Consent Searches

It is also important to consider how no-suspicion consent searches measure up to the three justifications laid down by Justice Stewart for promoting consent searches. Only Justice Stewart's third rationale, fear of interfering with current police practice, remains relevant as applied to no-suspicion consent searches. His first and second justifications, a desire to promote searches where there is some suspicion and a belief that they are subjectively less intrusive, are not valid justifications for no-suspicion consent searches.

⁸⁴ D.O.J. REPORT, *supra* note 4, at 1. Looking at specific subgroups, one out of five (21.7%) young African American males stopped by police were searched compared to a search rate of less than one out of ten (8.2%) for young white males. *Id.* Young Latino males were searched in 16.8% of stops. *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 7.

Consent searches have never been defended as a tool to authorize randomized searches of the citizenry. Rather, as Justice Stewart explained, consent searches are defended as a means of allowing officers to investigate when they have some suspicion not rising to the level that would otherwise authorize them to conduct a search.⁸⁷ Allowing a search where there is some suspicion facilitates criminal investigations and may be beneficial to society because an officer's suspicion indicates a crime may be in process. Ignoring that suspicion might allow a crime to proceed. However, when there is no particularized suspicion, there is no benefit to society.

Justice Stewart also argued that consent searches result in less inconvenience for the target of the search as compared to further detention or suspicion.⁸⁸ A driver may find it more convenient to consent to a search if an officer suspects wrongdoing because it may be preferable to dispel this suspicion. However, this is not to say that the search is unintrusive. Rather, it is based on the assumption that a consent search is less intrusive than a nonconsensual search, or conversely, that the intrusion of a consent search is preferable to continued police suspicion. If, however, the officer does not suspect the driver of wrongdoing, the driver receives no personalized benefit, such as diminished suspicion, yet experiences the intrusion of a search. This search is less convenient than the alternative of no search, which existed before the officer requested consent to search.

It is also important to respond to the argument that the act of giving consent to a search eliminates the significant subjective intrusion that results when an innocent person is targeted for an investigation and searched.⁸⁹ In addition to the physical intru-

⁸⁷ *Schneckloth*, 412 U.S. at 227.

⁸⁸ *Id.* at 228.

⁸⁹ *See United States v. Drayton*, 536 U.S. 194, 207 (2002):

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens

sion resulting from detention, the subjective intrusion of being targeted for investigation is substantial.⁹⁰ In *Delaware v. Prouse*, Justice White acknowledged that being singled out for investigation by the side of the road “may create substantial anxiety.”⁹¹ Likewise, in *Michigan Department of State Police v. Sitz*, Chief Justice Rehnquist observed that a driver’s feeling of “fear and surprise” is heightened when a driver does not see other vehicles being stopped and investigated.⁹² During a consent search, initiated when an officer lacks (and does not express) a justification for the search, a driver inevitably feels this anxiety.

D. No-suspicion Consent Searches are an Ineffective Strategy

In addition to other more fundamental concerns, the effectiveness of no-suspicion consent searches should also be questioned. Recognizing the probability that the random stops are ineffective, not to mention the substantial threat of abuse of power that the Fourth Amendment was intended to guard against, in *Delaware v. Prouse*, the Court found random license and registration traffic stops to be unconstitutional.⁹³ Yet, a consent search conducted after an officer stops a driver, interacts with him, and still does not have suspicion specific to the driver,

for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

Id.; *Schneekloth*, 412 U.S. at 228 (“[A] search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.”).

⁹⁰ In defining the subjective dimension of an intrusion resulting from a traffic stop, courts often focus on the extent to which the stop creates the perception in the innocent driver that he is being singled out. *Sitz*, 496 U.S. at 452–55.

⁹¹ *Prouse*, 440 U.S. at 657.

⁹² *Sitz*, 496 U.S. at 452–55.

⁹³ *Prouse*, 440 U.S. at 661.

can not be considered any different than a random search of all drivers on the road.

The random traffic stops at issue in *Prouse* involved stops where the officer lacked reasonable suspicion. In finding the practice to be unconstitutional, the Court stated that the benefit of the tactic was “marginal at best.”⁹⁴ Applying “common sense,” the *Prouse* Court reasoned that there was a low percentage of unlicensed drivers and therefore a large number of licensed drivers would need to be stopped in order to uncover an unlicensed driver.⁹⁵ The Court also pointed to a readily available alternative: traffic stops “acting upon observed violations,” which were more likely to uncover unlicensed drivers.⁹⁶ After reviewing the evidence, the Court found that “[i]n terms of actually discovering unlicensed drivers or deterring them from driving, the spot check does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment.”⁹⁷

The same failings that the Supreme Court found dispositive in *Prouse* apply with even greater force to no-suspicion consent searches. At the end of a traffic stop, the officer has observed the driver, questioned him or her, and possibly used a drug dog. It is unclear how extending a traffic stop without suspicion under these circumstances could be any more effective than a random traffic stop. If any credit is to be attributed to police training, common sense suggests that extending the search is probably less effective.

Not only is it likely less effective than random stops, because a trained officer has been unable to detect evidence suggesting criminal wrongdoing, but it threatens to erode the very notions of privacy the Fourth Amendment was designed to protect.

⁹⁴ *Id.* at 660.

⁹⁵ *Id.* at 659–60.

⁹⁶ *Id.* at 659.

⁹⁷ *Id.* at 660.

E. Conclusion

Ultimately, as some state courts acknowledge, the current framework for analyzing consent searches fails to protect drivers, particularly minority drivers, from significant intrusion by police.⁹⁸ Further, justifications such as the benefit of dispelling suspicion are illusory when an officer lacks any suspicion of the driver. In addition, the effectiveness of no-suspicion searches can be questioned in light of other available police techniques. Together, these concerns call into question the efficiency of the current Fourth Amendment framework for addressing no-suspicion consent searches.

IV. ELIMINATING NO-SUSPICION CONSENT SEARCHES

In light of these failings, no-suspicion consent searches during traffic stops should be eliminated. A number of state courts prohibit no-suspicion consent searches during traffic stops, requiring officers to have reasonable suspicion of criminal conduct before conducting a consent search. This approach preserves the benefit of searches based on reasonable suspicion, which do not implicate the same concerns. In addition, no-suspicion traffic-stop consent searches can be distinguished from other consent search scenarios, thus imposing a heightened standard during traffic stops would not undermine the validity of other consent searches. Finally, requiring reasonable suspicion offers a substantive and effective response to the problem of targeting minority drivers. Other state and federal courts should follow the lead of these states by requiring that officers conduct consent searches during traffic stops only when they have reasonable suspicion of criminal conduct.

⁹⁸ See *Fort*, 660 N.W. 2d at 415; *Carty*, 790 A.2d at 903; see also *People v. Hollman*, 590 N.E.2d 204, 210 (N.Y. 1992) (holding that to request consent to search an officer must have a “founded suspicion that criminality is afoot”).

A. Several State Courts Impose Reasonable Suspicion Requirements

Given the failure of constitutional jurisprudence to address concerns with no-suspicion consent searches, a number of state high courts are carving out new rules for consent searches during traffic stops based on their state constitutions.⁹⁹ In *State v. Carty*, the New Jersey Supreme Court held that reasonable suspicion of criminal wrongdoing is required before an officer can seek consent to search a vehicle stopped for a lawful purpose.¹⁰⁰ The court noted:

The fact that the motorist already has been detained at the point when an officer asks for consent to search is not dispositive of whether a suspicionless search should be allowed to continue. Because the motorist cannot leave the area before the search is completed, unless it is terminated earlier¹⁰¹

The court adopted this requirement in light of social science and statistical evidence that a “first-tell-then-ask” rule applied in New Jersey was not yielding “truly voluntary searches.”¹⁰²

The Minnesota Supreme Court followed suit in *State v. Fort*, holding that “in the absence of reasonable, articulable suspicion a consent-based search obtained by exploitation of a routine traffic stop that exceeds the scope of the stop’s underlying justi-

⁹⁹ See *Fort*, 660 N.W. 2d at 415 (finding that a passenger had been unconstitutionally seized when subject to a consent search after routine traffic stop because the police had no reasonable, articulatable suspicion.); *Carty*, 790 A.2d at 912 (“[U]nless there is a reasonable and articulatable basis beyond the initial valid motor vehicle stop to continue the detention after completion of the valid traffic stop, any further detention to effectuate a consent to search is unconstitutional.”).

¹⁰⁰ *Carty*, 790 A.2d at 905.

¹⁰¹ *Id.* at 908.

¹⁰² *Id.* at 911–18.

fication is invalid.”¹⁰³ This growing trend recognizes that drivers are being involuntarily detained when there is no suspicion of wrongdoing. Professor Wayne LaFave, a preeminent Fourth Amendment scholar, provided a ringing endorsement of *State v. Fort*, calling it “the best way to deal” with consent searches after routine traffic stops.¹⁰⁴

A reasonable suspicion requirement is preferable because it appropriately balances the interests of the innocent driver and the legitimate societal interest in effective criminal investigations. As these state court decisions implicitly acknowledge, there are strong policy and practical reasons to encourage consent searches *provided* an officer has reasonable suspicion that a driver is engaged in criminal conduct. Searches based on reasonable suspicion are exactly the type of beneficial search the *Bustamonte* Court envisioned when it began defining the current permissive approach to consent searches. As the *Bustamonte* Court explained, “[W]here the police have *some evidence of illicit activity*, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.”¹⁰⁵ A reasonable suspicion requirement also protects innocent drivers from the inconvenience of a consent search when the police lack adequate justification. Importantly, as discussed below, requiring reasonable suspicion as a precondition for conducting a consent search also decreases the probability that the search will be used against innocent minority drivers.

B. Requiring Reasonable Suspicion in the Traffic Stop Context Does Not Undermine Other Consent Searches

This article does not argue that all consent searches should be subject to the reasonable suspicion requirement. The four con-

¹⁰³ *Fort*, 660 N.W. 2d at 416.

¹⁰⁴ LAFAVE, SEARCH AND SEIZURES, *supra* note 35, at §9.3(e).

¹⁰⁵ *Schneckloth*, 412 U.S. at 227 (emphasis added).

cerns discussed in Part III— intrusiveness, disparate treatment, lack of justification and ineffectiveness—are not implicated in most non-traffic stop circumstances where consent searches are employed. First, in most non-traffic circumstances, the officer initiates the stop based on reasonable suspicion of criminal conduct, before he or she asks for consent to search. Second, in the other common consent search scenario not based on suspicion, such as criminal investigations, the nature of the investigations alleviates many of the concerns that arise in the traffic stop context.

A consent search conducted when an officer on public patrol stops a person based on suspicion of criminal conduct is the paradigmatic example of a beneficial consent search and is not subject to the criticism raised in Part III. These searches can be distinguished from no-consent searches because reasonable suspicion is generally required to justify the initial stop and detention of a pedestrian. Reasonable suspicion acts to constrain unfettered police discretion, thereby avoiding racial targeting. Such searches are also the very type of search that the law of consent seeks to promote: searches where an officer has a reasonable suspicion of criminal conduct but not enough to require a search.¹⁰⁶

Likewise, consent searches conducted during an ongoing criminal investigation are not subject to the same criticism. Although the officer may not suspect the subject of the search—such as the mother, neighbor or friend of a victim—concerns about arbitrary targeting are not implicated because the facts and circumstances of the crime itself act to constrain the rational targets of police investigations. Further, there is a clear public interest in promoting these searches, consistent with the justification outlined by Justice Stewart in *Bustamonte* to facilitate criminal investigations.

¹⁰⁶ *Id.*

C. Will a Reasonable Suspicion Standard Do Enough to Protect Innocent Minority Drivers from Unfair Targeting?

Given the extent of the targeting of innocent minorities for consent searches, it is fair to ask whether a reasonable suspicion standard goes far enough to address unfair targeting of minority drivers. A reasonable suspicion requirement will undoubtedly have some impact on the targeting of innocent minority drivers for consent searches. However, relying on evidence from racial profiling studies, several civil rights groups now advocate legislation prohibiting officers from requesting consent to search during traffic stops.¹⁰⁷ This call for the complete elimination of consent searches goes too far. Rather than eliminate consent searches, policy makers concerned with the targeting of innocent minorities should adopt a reasonable suspicion requirement and consider strategies that compliment and reinforce such a standard.

A reasonable suspicion standard imposed on all consent searches will decrease the impact of bias and thereby lessen the burden placed on innocent minority drivers. As racial profiling studies strip away faulty arguments used to justify the disproportionate use of consent searches on minorities—for example —“minorities are more likely to consent” or “minorities are disadvantaged and thus are more likely to have contraband”—the root cause of disproportionate targeting of minorities for consent searches appears self-evident: racial bias.

This bias has the greatest impact where police are given the broadest discretion. For example, although minority drivers are still disproportionately targeted for reasonable-suspicion-based decisions to initiate stops, the discrepancy is smaller than observed with consent searches. In 2007, a minority driver in Illinois was only 10% more likely than a white driver to be pulled over, but was 150% more likely to be subjected to a consensual

¹⁰⁷ See, e.g., Press Release, ACLU of Ill., Civil Rights Groups Ask Governor Blagojevich to End Consent Searches by Illinois State Police (July 24, 2008), available at <http://www.aclu-il.org/news/press/2008/07>.

search.¹⁰⁸ Imposing a reasonable suspicion requirement before a police officer can ask for consent to search a car will limit police discretion and thus should reduce the impact of bias on minority drivers.

Several civil rights groups, however, argue for a more drastic response—the complete elimination of consent searches. The obvious advantage of eliminating consent searches is that it eliminates the potential for the discriminatory decision making. However, consent searches are an important police tool in practice and eliminating all searches risks throwing the baby out with the bathwater. As Justice Stewart observed in *Bustamonte*, “[W]here the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.”¹⁰⁹ In Illinois, 17.6 % of consent searches recovered contraband. Put another way, 4283 of these searches recovered guns or drugs.¹¹⁰ Those 4283 investigations are not an insignificant proportion of all successful criminal investigations; by contrast, in 2005 a total of 94,125 felony criminal charges were filed statewide.¹¹¹ Given the value of consent searches in police practices, a complete ban on consent searches is not the most prudent response, despite the risk that bias will to some extent continue to disproportionately impose the burden of car searches on innocent minorities.

If a reasonable suspicion requirement proves to be an inadequate response—and it may well be—then further policy action that complements and reinforces the reasonable suspicion requirement should be considered. A complete review of such potentially complementary policies is beyond the scope of this

¹⁰⁸ ILL. STUDY 2007, *supra* note 2, at 5, 10. The study found that .64% of white drivers are subjected to a consensual search compared to 1.64% of minority drivers. *Id.*

¹⁰⁹ *Schneckloth*, 412 U.S. at 227.

¹¹⁰ ILL. STUDY 2007, *supra* note 2, at 10-11.

¹¹¹ ILL. CRIMINAL JUSTICE AUTH., TRENDS AND ISSUES 2008: A PROFILE OF CRIMINAL AND JUVENILE JUSTICE IN ILLINOIS: 1995-2005 77 (2008).

article. However, the existing data-collection laws that have been adopted in many states¹¹² could facilitate measures to address potential barriers to effective enforcement of a new reasonable suspicion standard. For example, one barrier to effective enforcement of a reasonable suspicion standard is the lack of a means of policing the reasonable suspicion standard where the driver is innocent. The vast majority of searches of minority drivers targeted for consent searches, almost nine out of ten, uncover no contraband.¹¹³ Yet, the chief remedy for a Fourth Amendment violation is suppression of incriminating evidence, which is no remedy at all for the unjust search of an innocent driver where no evidence was recovered. Further, the absence of an effective deterrence for police who lack reasonable suspicion and effective remedy for drivers could undermine the effectiveness of the new standard.

One possible way, among many, to address this concern would be to create a no-fault administrative complaint system, which could provide drivers the ability to challenge the basis of the officer's request to search and provide these drivers some compensation for their injury without incurring large litigation costs.¹¹⁴ Such a process could set a lower standard for establish-

¹¹² See, e.g., 625 Ill. Comp. Stat. 5/11-212 (2007).

¹¹³ ILL. STUDY 2007, *supra* note 2, at 11.

¹¹⁴ Congressman Conyers and Senator Feinstein have incorporated such an administrative complaint provision in proposed legislation: The End Racial Profiling Act of 2007, H.R. 4611, 110th Congress (2007); S. 2481, 110th Congress (2007). Although the bill would not require all local departments to adopt such a remedy, it requires some police departments to create an administrative complaint procedure and remedy for racial profiling. *Id.* Two technical concerns about such a system are: (1) the administrative burden such a system imposes and (2) the cost of making such payments. An administrative remedy will only be effective if there is a mechanism for informing the driver of his rights and documenting the circumstances of the stop. These challenges are largely addressed in states that impose a data collection requirement. For example, in Illinois, police officers are required to document all traffic stops; requiring them to describe in a sentence or two the basis for concluding that they had reasonable suspicion to request a traffic stop for purposes of a future challenge to the stop. 625 ILL. COMP. STAT. 5/11-212.

ing a successful claim by avoiding the issue of police fault. This administrative procedure would not require a showing of the officer's subjective state of mind.¹¹⁵ Such a system would have the further benefit of shifting the cost of unjust targeting of innocent minorities to the government. Payouts under such a system would also provide a measure of the extent to which drivers are unfairly targeted.¹¹⁶

A second potential barrier is the persistence of racial bias and the likely continuing impact of race on officers as they determine if reasonable suspicion exists to request consent to search a given driver. Although effective ways to resolve individual officer behavior may be elusive, where pockets of such targeting persist, racial profiling data collection statutes could be used to identify departments in need of corrective action. Before state mandated reporting on the outcome of traffic stops, such information was not feasibly available because of the lack of department-specific evidence. For the first time, this information makes it possible to identify districts which appear guilty of the

Further, as part of the stop, police could be required to provide the driver a form for challenging the stop when no contraband is discovered. Officers regularly prepare warnings and tickets; a notice of the driver's right to challenge the stop would be a minor additional inconvenience. The cost of the system may not be as high as some would expect; for example, a payout of \$100 every time a consent search of a car was conducted would only cost approximately \$2.7 million dollars.

¹¹⁵ A determination that the officer lacked reasonable suspicion would still, strictly speaking, require proof of the officer's fault—in the sense that the officer lacked probable cause. Proof that the officer acted based on bias would not be required.

¹¹⁶ In addition, a payout system would provide both hard data and a quantifiable measure of the impact of police bias. Such a system could even be combined with performance funding to police departments to create an incentive for decreasing the number of incidents. There are, however, two philosophical problems with an administrative system. First, a modest payout raises concerns that the payout may belittle the dignitary injury imposed by the discriminatory treatment. Further, while a no-fault system would allow for easier recoveries by the victims of unjustified traffic stops, it lacks the punitive function of punishing the police officer who may have acted based on bias.

most extensive targeting and those that do not. This department-specific data discloses a wide variability across local departments in the rate at which minorities are subjected to traffic stops.¹¹⁷ Corrective action plans should require police departments engaging in the most excessive targeting of minorities to include training programs, supervision and adoption of new department policies. This approach would complement and reinforce a reasonable suspicion requirement.

Although further policy actions, perhaps along the lines discussed above, may ultimately be required to fully address the targeting of innocent minority drivers, establishing a reasonable suspicion requirement for initiating a consent search during a traffic stop is an important, fundamental step towards alleviating such targeting. Requiring reasonable suspicion to conduct consent searches during traffic stops addresses concerns—intrusiveness, disparate treatment, lack of justification and ineffectiveness—raised by the practice of conducting no-suspicion consent searches.

V. CONCLUSION

Requiring officers to have reasonable suspicion before requesting consent to search a car may not eliminate the disproportionate use of consent searches on innocent minorities, but it holds promise for appropriately constraining police discretion and serving the underlying policies of the Fourth Amendment. This analysis refocuses on the intrusion of consent searches on innocent drivers and the effectiveness of this tactic. Requiring reasonable suspicion as a prerequisite to a consent search would not unduly interfere with police interests, as it would reduce the risk of police abuse of power and racial profiling, while increasing the effectiveness of consent searches.

¹¹⁷ See, e.g., ILL. STUDY 2007, *supra* note 2.

