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# Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches

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# Consent Engendered:<sup>1</sup> A Feminist Critique of Consensual Fourth Amendment Searches

*Dr. Dana Raigrodski\**

## I. INTRODUCTION

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>2</sup>

While a search conducted without a warrant issued upon probable cause is generally “*per se* unreasonable,”<sup>3</sup> the general rule is subject to “a few specifically established and well-delineated exceptions.”<sup>4</sup> One of the specifically established exceptions to the requirements of both a warrant and probable cause is a search conducted based on consent.<sup>5</sup> I will argue that the Court constructs the notion of consent (and its opposite —

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1. Minow, Martha, *The Supreme Court, 1986-Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

2. U.S. CONST. amend. IV.

3. *See Katz v. United States*, 389 U.S. 347, 357 (1967).

4. *Id.*

5. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

coercion) from a male perspective, which maintains social structures of domination and power disparities and perpetuates the subordination of women, minorities, and other disempowered members of society. As feminists have demonstrated, the line between consent and coercion, between agency and victimization, is neither clear nor neutral. Hence, the uncritical deployment of consent itself to legitimize searches and seizures is problematic and oppressive.

The uncritical use of consent within Fourth Amendment law is especially oppressive because this exception threatens to overshadow the rule and carries with it an enormous potential for abuse. Unlike the other exceptions to the warrant requirement (and to the probable cause requirement),<sup>6</sup> the consent exception exempts not only the warrant requirement but also the need for any other articulated justification for the search. The Court's cases seem to convey the message that, absent coercion, searches conducted pursuant to consent are per se reasonable regardless of the practicability of obtaining a warrant or the existence of any suspicion of misconduct. Moreover, the police are not even required to inform the individual of his or her right to terminate the encounter or to withhold consent to a requested search. Thus, it is not surprising that obtaining the individual's consent to a search has become a widely utilized investigative tool by the police. Hypothetically at least, the police could decide to conduct a fishing expedition, going from door to door asking politely for permission to search the house, in the hope of uncovering evidence of illegal activity or just for the sake of monitoring the conduct of the citizens of the United States. According to the current jurisprudence of the Court, there is nothing that makes such conduct "unreasonable" and therefore unconstitutional.

If the police are to succeed in these widespread arbitrary search attempts, it will likely be, according to the Court, because of the result of each individual voluntarily cooperating with the government. Since the individual is by no means coerced by the police to consent to the search, we, as a liberal democracy, must respect the citizen's free choice. Traditional critics of the Court have argued that only informed consent, i.e., when the individual has knowingly relinquished his or her right to refuse to give consent to search, is truly a voluntary consent. From a feminist perspective, the core problem lies in the Court's sharp distinction and tendency to find voluntary consent rather than coercion.

The Court's construction of consent and coercion disregards the inherently coercive nature of all police-initiated encounters that undermine

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6. See, e.g., *United States v. Robinson*, 414 U.S. 218 (1973) (searches incident to arrest); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (searches under exigent circumstances); *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk searches); *Harris v. United States*, 390 U.S. 234 (1968) (plain view searches); *Carroll v. United States*, 267 U.S. 132 (1925) (motor vehicle searches).

the notion of a meaningful consent. Moreover, the dichotomy of consent-coercion perpetuates patriarchal power structures that privilege, among other things, the police in its encounter with the individual. This dichotomy reflects a male perspective and is itself an artificial construct of patriarchal ideology. As I will argue, the Court's consent-to-search cases are driven by this patriarchal ideology to maintain social structures of power disparities and to perpetuate the subordination of women, minorities, and other disempowered members of society.

We need to acknowledge the power and submission paradigm that underlies police-citizen encounters and to scrutinize the entire notion of consent. In order to confront both power and consent, I will turn to feminist critique of consent, particularly in the area of rape, and to feminist writings about choice and agency. Based on these writings I will argue that by distinguishing coerced consent to a search (which is not consent altogether) from truly voluntary consent the Court renders invisible the falsity of the dichotomy between coercion and choice and their interplay in our patriarchal society.

Nonetheless, feminist theories maintain that choice and agency are possible so long as they are understood as constrained and construed by conditions of domination and by coercive forces. Yet, in the context of searches and seizures, the Court ignores both this matrix and any acts of agency within it. On one hand, the Court rejects the notion that any systems of subordination are in place. On the other hand, it silences any attempts to resist and escape these subordinating conditions. Consequently, the legal and social patriarchal structures remain invisible and intact. While we are all harmed by a society structured upon domination, women and others who traditionally occupy a subordinated place are particularly disadvantaged, in and outside of the realm of searches and seizures.

## II. VOLUNTARY CONSENT OR COERCION?

In *Bumper v. North Carolina*,<sup>7</sup> the issue presented was whether a search could be justified as lawful on the basis of consent when that consent has been given after the officer asserted that he possessed a warrant.<sup>8</sup> The Court held that there could be no consent under such circumstances.<sup>9</sup> It first stated that a prosecutor has the burden of proving that the consent was, in fact, freely and voluntarily given.<sup>10</sup> This burden

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7. 391 U.S. 543 (1968).

8. *Id.* at 548. In this case, officers went to the house of Mrs. Leath, the petitioner's grandmother with whom he lived, and announced they had a search warrant to search her house. *Id.* at 546. Mrs. Leath responded: "Go ahead," and opened the door. *Id.* at 547. The officers found a rifle later introduced as evidence against the defendant. *Id.* at 546. At the suppression hearing the State argued it was not relying on a warrant to justify the search but rather on Mrs. Leath's consent. *Id.*

9. *Id.* at 548.

10. *Id.*

cannot be discharged by showing no more than acquiescence to a claim of lawful authority.<sup>11</sup> Accordingly, when an officer claims authority to search a home under a warrant she announces in effect that the occupant has no right to resist. In so holding, the Court relied on lower courts' cases to underscore the aspects of obedience and submission to the authority of the law that are inherent in this situation and create the tinge of coercion.<sup>12</sup> Finally, the Court concluded that "[t]he situation is instinct with coercion — albeit colorably lawful coercion," and "[w]here there is coercion there cannot be consent."<sup>13</sup>

The Court next addressed the question of how the prosecution may demonstrate that consent is voluntarily given in *Schneckloth v. Bustamonte*.<sup>14</sup> Turning for guidance to Fourteenth Amendment case law about the determination of voluntariness of a defendant's confession,<sup>15</sup> the Court held that the voluntariness of consent is a question of fact to be determined from the totality of the circumstances.<sup>16</sup> These circumstances may include such factors as the youth of the suspect, lack of education, low intelligence, and lack of any advisement to the suspect of his constitutional rights.<sup>17</sup> However, while knowledge of the right to refuse consent is a relevant factor, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.<sup>18</sup>

The Court emphasized the idea that consent cannot be coerced, explicitly or implicitly, by implied threat or by covert force.<sup>19</sup> If under all the circumstances it appears that the consent was not given voluntarily — that it was coerced by threats, or force, or granted only in submission to a

11. *Id.* at 548-49.

12. *Id.* at 549 n.14. The Court first quoted from *Bull v. Armstrong*:

One is not held to have consented to the search of his premises where it is accomplished pursuant to an apparently valid search warrant . . . the legal effect is that consent is on the basis of such a warrant and his permission is construed as an intention to abide by the law and not resist the search under the warrant, rather than an invitation to search.

48 So. 2d 467, 470 (Ala. 1990). It also quoted from *Meno v. State*:

One who, upon the command of an officer . . . opens the door to the officer and acquiesces in obedience to such a request, no matter by what language used in such acquiescence, is but showing a regard for the supremacy of the law . . . . The presentation of a search warrant . . . is tinged with coercion, and submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission to the law.

164 N.E. 93, 96 (Ind. 1925).

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

14. 412 U.S. 218, 222-23 (1973).

15. *Id.* at 223-27.

16. *Id.* at 227, 248-49.

17. *Id.* at 226, 248.

18. *Id.* at 227, 248-49.

19. *Id.* at 228.

claim of lawful authority as in *Bumper* — the consent is invalid and the search unreasonable.<sup>20</sup> Searches that are the product of police coercion can therefore be filtered out without undermining the continuing validity of consent searches.<sup>21</sup> The Court thus created a dichotomy between coercion and voluntary consent, and drew a bright line between those “rare” instances where consent is coerced by threats, force, or claim of authority and all other “consensual” police encounters where consent to a search is deemed voluntary and valid.

*Schneckloth* exemplified, in the Court’s opinion, an instance where no coercion was inherent and there was no reason to believe that the consent to the search was presumptively coerced.<sup>22</sup> In this case, the vehicle was legally stopped at 2:40 a.m., for a burnt-out headlight and license plate light. The six men in the car appeared to be Hispanic,<sup>23</sup> and of those only Alcala, a passenger, produced a driver’s license at the officer’s request. Alcala explained to the officer that the car belonged to his brother. After the men complied with the officer’s request to step out of the car and two additional policemen arrived, the officer asked Alcala if he could search the car. Alcala replied: “Sure, go ahead.” The atmosphere, according to the officer’s uncontradicted testimony, was “very congenial,” no one was threatened with arrest, and no crime was discussed. The driver, Gonzales, testified that the officer asked Alcala, “Does the trunk open?” Alcala answered “Yes,” got the keys from the car, and opened the trunk. Both Gonzales and the officer testified that Alcala’s assent to the search was freely, even casually given.<sup>24</sup> The Court concluded that these were clearly circumstances where consent was freely given without coercion or submission to authority.<sup>25</sup>

Since in *Schneckloth* the lawfulness of the initial stop was not in dispute, it did not factor into the Court’s analysis of the consented-to-search that followed. In its subsequent cases, however, the determination of the voluntariness of the consent to search largely depended on the preceding detention. If it amounted to an unlawful seizure, then the subsequent search was invalid under the “fruit of the poisonous tree” doctrine. If, on the other hand, the detention was relegated to the realm of consensual encounters, the subsequent consent to the search typically was deemed voluntary as well.

For example, in *United States v. Mendenhall*<sup>26</sup> the Court considered whether an encounter in an airport was a lawful seizure. Assuming that it

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20. *Id.* at 233-34.

21. *Id.* at 229.

22. *Id.* at 247.

23. See David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, SUP. CT. REV. 271, 322 n.238 (1997).

24. *Schneckloth*, 412 U.S. at 220-21.

25. *Id.* at 221.

26. 446 U.S. 544 (1980).

was lawful, the question remained whether the defendant consented voluntarily to further intrusion by the police. The Court relied on *Schneckloth* in holding that the non-verbal consent of Mendenhall to accompany the agents to the DEA office, followed by her consent to a strip-search, was uninfected by an unlawful detention,<sup>27</sup> and thus was voluntary based on the totality of the circumstances.<sup>28</sup> The Court found Mendenhall's consent to accompany the agents to be voluntary because she was *simply asked* if she would accompany the agents; because there were no threats or show of force; because the initial questioning at the concourse was brief; and because her ticket and identification were returned to her beforehand.<sup>29</sup> The consent to the strip search that followed was also freely and voluntarily given because Mendenhall, a 22-year-old with an 11<sup>th</sup> grade education, was plainly capable of a knowing consent. She was expressly told twice that she could decline to consent to the search, before expressly consenting to it. Plus the agents themselves informed her she was free to withhold consent, which substantially lessened the probability that their conduct could reasonably have appeared to her as coercive.<sup>30</sup>

The Court rejected the argument that Mendenhall in fact resisted the search when, in response to being told that the search would require her to disrobe, she stated that she had a plane to catch, characterizing the comment simply as an expression of concern that the search be conducted quickly.<sup>31</sup> The Court also rejected the argument that Mendenhall would not have voluntarily consented to a search that was likely to disclose the narcotics she was carrying. Instead the Court speculated that Mendenhall may have thought she was acting in her self-interest by voluntarily cooperating with the agents in the hope of receiving more lenient treatment.<sup>32</sup> Mendenhall's actual state of mind was not discussed.

By contrast, the dissent criticized the majority for concluding, based on the absence of evidence that Mendenhall resisted her detention, that she voluntarily consented to being taken to the DEA office despite having no choice in the matter, and for presuming consent from a showing of acquiescence to authority.<sup>33</sup> Contrary to the majority, the dissent found that Mendenhall was unlawfully seized, at least from the moment she was escorted to the DEA office,<sup>34</sup> thus rendering her consent to the search mere

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27. *Id.* at 558-59.

28. *Id.* at 557-60.

29. *Id.* at 557-58.

30. *Id.* at 558-59.

31. *Id.* at 559.

32. *Id.* at 559, 559 n.7.

33. *Id.* at 566-67 (White, J., dissenting). Justice White emphasized that when asked to go to the DEA office Ms. Mendenhall was not told that she could refuse to accompany the agents to the office, and that there was no evidence of what Ms. Mendenhall said, if anything, in response to that request. *Id.* at 575-76.

34. *Id.* at 574-75.

acquiescence to police authority, analogous to *Bumper*.<sup>35</sup>

In another airport case, *Florida v. Royer*,<sup>36</sup> the issue of consent to the search of Royer's suitcase also turned on whether the preceding detention was an unlawful seizure. In contrast to *Mendenhall*, the Court concluded that Royer was unlawfully seized when escorted to a police room, and therefore held that his subsequent consent to the search was tainted with illegality.<sup>37</sup> The dissent, however, concluded that Royer voluntarily consented to accompany the officers to the room, in a spirit of apparent cooperation, and that his consent to the search was likewise voluntary. Justice Rehnquist concluded,

Royer consented to go to the room . . . . [T]hat conclusion is warranted by the totality of the circumstances [citation omitted] . . . . Royer was not told that he had to go to the room but was simply asked, after a brief period of questioning, if he would accompany the detectives to the room . . . . There were neither threats nor any show of force . . . . In fact Royer admits that the detectives were quite polite . . . [in the room]. [He] simply continued to cooperate with the detectives as he had from the beginning of the encounter.<sup>38</sup>

In *Florida v. Bostick*,<sup>39</sup> the Court employed the conflated "seizure followed by consent to a search" analysis in the context of suspicionless bus sweeps.<sup>40</sup> Using circular reasoning, the Court considered factors relevant to the determination of a voluntary consent to a search in deciding whether Bostick was seized, which, in turn, reflected on the validity of his later consent to a luggage search. The Court emphasized that Bostick consented to the search of his bag after being informed of his right to withhold consent.<sup>41</sup> It also rejected Bostick's argument that he must have been seized because no reasonable person would freely consent to a search of luggage he or she knows contains drugs.<sup>42</sup> The Court reiterated the rule that the police may request consent to search luggage on a bus without creating a seizure so long as the officers do not convey the message that

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35. *Id.* at 557.

36. 460 U.S. 491 (1983).

37. *Id.* at 501-03.

38. *Id.* at 530-32 (Rehnquist, J., dissenting).

39. 501 U.S. 429 (1991).

40. *See, e.g., id.* at 447 (Marshall, J., dissenting) ("[A]s the State concedes, and as the majority purports to 'accept,' [citation omitted] if respondent was unlawfully seized when the officers approached him and initiated questioning, the resulting search was likewise unlawful no matter how well advised respondent was of his right to refuse it.") [citation omitted].

41. *Id.* at 432. Bostick disputed both these facts, but the trial court resolved the matter in favor of the state, and the Court took it at face value.

42. *Id.* at 437-38.



compliance with their request is required.<sup>43</sup> As Justice O'Connor explained, "[c]learly, a bus passenger's decision to cooperate with law enforcement officers authorizes the police to conduct a search . . . only if the cooperation is voluntary. Consent that is the product of official intimidation or harassment is not consent at all."<sup>44</sup>

The Court has since declined to modify its rulings. In *Ohio v. Robinette*,<sup>45</sup> the Court refused to replace the totality-of-circumstances voluntariness test with a *per se* rule that would require that the individual be advised that they are free to go at the termination of a lawful seizure before their consent to a search will be recognized as voluntary.<sup>46</sup> And in 2002, the Court in *United States v. Drayton*<sup>47</sup> again rejected the suggestion that police officers must always inform citizens of their right to refuse when seeking permission.<sup>48</sup>

*Drayton* presented the Court with an opportunity to reconsider its characterization of police-citizen encounters as balanced in power and as typically wholly non-coercive. Throughout the years, the Court has been sharply criticized by state and lower courts, by prominent legal scholars, and from within for its unrealistic portrayal of police-initiated encounters, and for taking too lightly the power imbalances between the police and the individual, which would likely lead an individual to give his consent to a search in most cases.<sup>49</sup> Nevertheless, the Court maintained the fiction of completely consensual police-encounters. Under circumstances similar to those in *Bostik*, it stated,

everything that took place between Officer Lang and [respondents] suggests that it was cooperative and that there was nothing coercive [or] confrontational about the encounter. There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an

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43. *Id.* at 437.

44. *Id.* at 438.

45. 519 U.S. 33 (1996).

46. *Id.* at 35, 40. In this case, the Court encountered what has become a widespread police practice. At the conclusion of a lawful traffic stop, after a ticket had been issued and the driver's license returned, the officer asked Robinette, "One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" to which Robinette responded "No." Thereupon the officer asked if he could search the car and Robinette consented. *Id.* at 35-36. See also Ian D. Midgley, *Just One Question Before We Get to Ohio v. Robinette: "Are You Carrying Any Contraband . . . Weapons, Drugs, Constitutional Protections . . . Anything Like That?"*, 48 CASE W. RES. L. REV. 173, 183-84 (1997).

47. 536 U.S. 194 (2002).

48. *Id.* at 207-08.

49. See *infra* note 58 and accompanying text.

authoritative tone of voice.<sup>50</sup>

Consequently, Drayton and his companion Brown were not seized, and their consent to the search of their luggage and their persons was deemed voluntary.<sup>51</sup>

### III. THE COERCIVE NATURE OF POLICE ENCOUNTERS: THE FALSITY OF THE CONSENT-COERCION DICHOTOMY EXPOSED

The Justices who dissent from the Court's consent opinions have mostly focused their critique on the fact that the Court is willing to construe uninformed consent as a meaningful consent and waiver of the individual's Fourth Amendment rights.<sup>52</sup> At least part of this critique is based on a realistic assessment of the nature of the interchange between citizens and the police,<sup>53</sup> and on an understanding that "under many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by the force of law."<sup>54</sup> Justice Marshall even goes as far as to say that "[m]ost cases, in my view, are akin to *Bumper v. North Carolina*: consent is ordinarily given as acquiescence in an implicit claim of authority to search."<sup>55</sup> Justice Stevens made similar observations in *Ohio v. Robinette*,<sup>56</sup> and has recently emphasized in *Drayton*,

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50. *Id.* at 200.

51. *Id.* at 208.

52. *See, e.g.*, *Schneckloth*, 412 U.S. at 275 (Douglas, J., dissenting) ("[V]erbal assent to a search is not enough . . . the fact that consent was given to the search does not imply that the suspect knew that the alternative of a refusal existed."); *Id.* at 277 (Brennan, J., dissenting) ("It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence."); *Id.* (Marshall, J., dissenting) ("I would have thought that the capacity to choose necessarily depends upon knowledge that there is a choice to be made."); *Id.* at 284-85 (Marshall, J., dissenting) ("I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as choice at all. If consent to a search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police.").

53. *Id.* at 289 (Marshall, J., dissenting).

54. *Id.* at 275-76 (Douglas, J., dissenting); *Id.* at 289 (Marshall, J., dissenting). Both justices directly quote the same passage of the Court of Appeals opinion that the *Schneckloth* majority overturned. *Bustamonte v. Schneckloth*, 448 F.2d 699, 701 (9th Cir. 1971).

55. *Id.* at 289 (Marshall, J., dissenting).

56. 519 U.S. 33, 47-48 (1996) (Stevens, J., dissenting) ("The fact that this particular officer successfully used a similar method of obtaining consent to search roughly 786 times in one year [citation omitted], indicates that motorists generally respond in a manner that is contrary to their self-interest. Repeated decisions by ordinary citizens to surrender that interest cannot satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so.").

The police not only carry legitimate authority but also exercise power free from immediate check, and when the attention of several officers is brought to bear on one civilian the imbalance of immediate power is unmistakable. We all understand this, as well as we understand that a display of power rising to Justice Stewart's "threatening" level may overbear a normal person's ability to act freely, even in the absence of explicit commands or the formalities of detention. As common as this understanding is, however, there is little sign of it in the Court's opinion.<sup>57</sup>

Many state courts and legal scholars share this criticism of the Court's unrealistic characterization of consent searches.<sup>58</sup> David Sklansky has highlighted the fictitious thread of consent running through the Court's police encounters and consensual search cases.<sup>59</sup> As Sklansky observes,

while the Court places considerable weight on the notion that there is such a thing as a wholly noncoercive encounter with a police officer, anyone who has ever been stopped by the police knows that this is nonsense. Every encounter with a uniformed officer necessarily involves some amount of apprehension, and hence some amount of psychological if not physical coercion.<sup>60</sup>

In *Schneckloth*, the Court chose to perpetuate the fiction that some requests from police officers are wholly free from any "implied threat" or

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57. 536 U.S. at 210 (Souter, J., dissenting).

58. See, e.g., William Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1063 - 64 (1995) ("if the officer puts his command in the form of a question, consent is deemed voluntary and the evidence comes in."); Tracey Maclin, *Seeing the Constitution From the Backseat of a Police Squad Car*, 70 B.U. L. REV. 543, 547 (1990) ("I too, approach questions involving police-citizen encounters with a certain bias. I believe that many of these encounters are inherently unequal.") and *Id.* note 15 ("Confronting a police officer is not like confronting a civilian. Of course any individual has a right to approach any other individual . . . . But it is not quite the same when the police stop someone. There is authority in the approach of the police, and command in their tone. I can ignore the ordinary person, but can I ignore the police?") (citing Reich, *Police Questioning Of Law Abiding Citizens*, 75 YALE L.J. 1161, 1162 (1966)); Robert Ward, *Consensual Searches, The Fairytale that Became a Nightmare: Fargo Lessons Concerning Police Initiated Encounters*, 15 TOURO L. REV. 451, 464-465 (1999) ("Police initiated encounters are inherently coercive . . . . The Court is comfortable ignoring reality. It assumes that citizens retain a level of control and autonomy in police initiated encounters that is not supported by the experiences of ordinary people. This willful blindness does not exist when the discussion on consent, voluntariness and reasonable belief shifts to other areas of law like contracts or property. In these areas, the law tends to be more sensitive to issues of disparate power and the absence of meaningful choice.").

59. See generally Sklansky, *supra* note 23.

60. *Id.* at 318-19.

“subtl[e] . . . coercion.”<sup>61</sup> After *Bostick, Robinette, and Drayton* it is clear that consent and voluntariness are, in the context of constitutional criminal procedure, legal fictions.<sup>62</sup>

This criticism finds its support in psychological findings about obedience to authority and uniform. Adrian Barrio has revisited Stanley Milgram’s experiments in obedience theory<sup>63</sup> and applied those principles to consent searches.<sup>64</sup> Milgram’s research, Barrio asserts, showed that obedience to authority “is a deeply ingrained behavior tendency” in all persons, “overriding training in ethics, sympathy, and moral conduct.”<sup>65</sup> Milgram argued that a variety of social forces prepare individuals for obedience.<sup>66</sup> As children, for example, most people are taught to obey parental authority and teachers’ authority. Both parents and teachers reward compliance and punish disobedience, creating a system of incentives and disincentives that overwhelmingly favors submission to authority.<sup>67</sup>

These experiences in turn define the individual’s perception of legitimate authority.<sup>68</sup> Almost without fail “the power of the authority stems not from personal characteristics but from [the authority figure’s] perceived position in a social structure.”<sup>69</sup> Another experiment conducted by Leonard Bickman further proved that “the degree to which a person obeys authority largely depends upon the uniform worn by the authority figure.”<sup>70</sup> Based on Milgram’s and Bickman’s findings, Barrio argues that the “‘obedience phenomenon’ operates in any situation involving clearly defined authority figures and subordinates,”<sup>71</sup> and that “a police officer’s seemingly innocuous request to search has remarkable coercive power.”<sup>72</sup> The irrational behavior of guilty suspects consenting to searches in the face of police authority, Barrio concludes, provides strong evidence that individuals “attribute legitimacy to the police officer’s uniform, and that they obey police authority reflexively.”<sup>73</sup>

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61. *Id.* at 319.

62. *Id.* at 320-21.

63. Milgram’s experiments were originally designed to explain the unblinking loyalty of lower-echelon Nazi war criminals.

64. Adrian Barrio, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory Into the Supreme Court’s Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215.

65. *Id.* at 233-34.

66. *Id.* at 236.

67. *Id.*

68. *Id.* (“[A]uthority is contextually perceived and does not necessarily transcend the situation in which it is encountered.”)

69. *Id.*

70. *Id.* at 238.

71. *Id.* at 240.

72. *Id.* at 243.

73. *Id.*

Other scholars have made similar arguments.<sup>74</sup> For example, Robert Ward intentionally places his analysis outside the context of police-minority encounters, by using as an example a scene from the movie *Fargo*. In that scene, the detained suspect, a white male, is being politely questioned by a pregnant, uniformed white officer — obviously a member of a less powerful group. Nonetheless, the suspect feels obligated to cooperate with the officer's questioning.<sup>75</sup> By using an example in which the gender of the suspect supposedly empowers him as against the officer, and in which racial tensions are not an issue, Ward is able to focus our attention on the core issue of whether coercion and obedience to the authority of the police are inherent to police-initiated encounters.

Like Barrio, Ward acknowledges that police initiated encounters are inherently coercive, because it is a relationship constructed on disparate power.<sup>76</sup> Nonetheless, similar to the dissenting justices, both Barrio and Ward think that requiring the officer to advise the suspect of his right to withhold consent would overcome these coercive forces and the reflexive obedience.<sup>77</sup> I do not share their view. True, the giving of an 'informed' consent is surely more meaningful than the giving of reflexive and ignorant responses. But as *Mendenhall* demonstrates, knowledge of the right to withhold consent and an opportunity to reflect, do not guarantee that consent will be voluntary in a sense of manifesting free will and true choice. Knowledge is not synonymous with unconstrained actual choice. Women, for example, usually know that they have a right not to consent to sex. In many cases however, particularly in the context of date or marital rape or sexual harassment by employers, women nonetheless "consent," and submit to the socially empowered and domineering male even absent an overt threat or force. We would not infer that in all of these cases women consented to have sex in the sense of free choice and unconstrained agency.

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74. See, e.g., Robert Ward, *Consensual Searches, The Fairytale that Became a Nightmare: Fargo Lessons Concerning Police Initiated Encounters*, 15 *TOURO L. REV.* 451 (1999); Catherine Twitero, *The Future of Vehicle Consent Searches in Minnesota: State v. George*, 24 *WM. MITCHELL L. REV.* 1155 (1998); see generally Midgley, *supra* note 46.

75. Ward, *supra* note 74, at 455-56.

76. *Id.* at 466.

77. See Barrio, *supra* note 64, at 247-48 ("To curb the coercive power of police authority, the police officer should be required to advise the suspect of his right to withhold consent prior to requesting his permission to search. Such a warning would combat the obedience phenomenon by assuring the suspect both that he is under no obligation to give consent and that the investigating officer is 'prepared to recognize this privilege.' [W]arnings would ensure that consent is 'in fact, freely and voluntarily given.'"); Ward, *supra* note 74, at 477 ("The combined forces of obedience to authority, the power of the uniform and lower expectations of privacy make it imperative that citizens be told at the outset that they do have a choice. If the concept of voluntariness and consent are to have any meaning, then the Court should impose safeguards which will insure that the byproduct of police initiated encounter indeed is voluntary and consensual."); Twitero, *supra* note 74, at 1180-81.

The drawback of an approach that focuses on informed consent as the solution to the problem of coercive police-initiated encounters is that it treats the concepts of consent and choice as non-contingent, thus leaving them intact. In contrast, feminist critique subjects these concepts to close scrutiny, especially in the context of rape. One of the first people to scrutinize coercion and consent was Catherine MacKinnon.<sup>78</sup> According to MacKinnon, "rape is a sex crime that is not regarded as a crime when it looks like sex."<sup>79</sup> The law defines rape as intercourse with force or coercion and without consent. The problem is telling the difference.

The traditional legal starting point has been to define rape as distinct from intercourse, though for women it may be difficult to distinguish between the two under conditions of male dominance.<sup>80</sup> The law of rape, MacKinnon argues, "presents consent as a free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and disparity."<sup>81</sup> The deeper problem is that women are socialized to respond to men with passive receptivity. They may have or perceive no alternative to acquiescence, and may prefer it to the escalated risk of injury and the humiliation of a lost fight. Some women, on the other hand, may even eroticize dominance and submission. Sexual intercourse may be deeply unwanted and the woman would never have initiated it, yet no legal force may be present. "When sex is violent," wrote MacKinnon, "women may have lost control over what is done to them," but "the absence of force does not ensure the presence of that control."<sup>82</sup>

In criticizing statutory rape laws, MacKinnon also argues that the "age line under which girls are presumed to be disabled from consenting to sex . . . rationalizes a condition of sexual coercion for all other women."<sup>83</sup> By making consent irrelevant based on an assumption of powerlessness in the most aggravated case for female powerlessness, the law defines those above the age line as powerful, whether they actually have power to consent or not.<sup>84</sup> As MacKinnon explains, "[d]ividing and protecting the most vulnerable becomes a device for not protecting everyone who needs it."<sup>85</sup>

Similarly, by holding consent to a search as *per se* involuntary when coerced by a claim of authority, as in *Bumper*, or by a preceding unlawful seizure, as in *Royer*, and distinguishing these instances of coercion from all other consensual police encounters, the Court is able to maintain the fiction that police encounters typically are consensual and that consent to a search

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78. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172-83 (1989).

79. *Id.* at 172.

80. *Id.* at 174.

81. *Id.* at 174-75.

82. *Id.* at 177-78.

83. *Id.* at 175.

84. *Id.* at 175-76.

85. *Id.*

given under such circumstances is voluntary. The Court's jurisprudence ensures that most encounters would not amount to a seizure. Consequently, instances of *per se* involuntary consent are few and the overwhelming majority of police-citizen encounters are deemed not to entail any coercion. The individual is thus presumed to possess the power and choice to resist the police, and this presumption results in the erosion of the Fourth Amendment protections for most individuals.

A feminist inquiry criticizes the Court's conceptualization of consent and coercion within search and seizure law at its most fundamental level. Under conditions of male dominance, the intertwined notions of consent, choice, and coercion do not help us distinguish between the "criminal" rape and the "normal" intercourse, while at the same time they maintain the invisibility of the underlying power disparities and constraints put in place by the patriarchal structures. In the same way, the notions of consent and coercion in Fourth Amendment jurisprudence operate to leave unexposed and unchecked the inherent power disparities between the police and the individual. For example, in stating that "[t]hose searches that are the product of police coercion can be filtered out,"<sup>86</sup> the Court assumes that most consented-to searches are not the product of police coercion, and that it is possible to distinguish the former from the latter by maintaining standards of consent and voluntariness. This has hardly been the case, however.

Other feminist scholars follow MacKinnon in exposing the male dominance and inherent power disparities that constrain women's choices and their ability to differentiate, for example, between sex and rape based on notions of consent and coercion. Dorothy Roberts agrees with MacKinnon that the "pervasive effect of male dominance makes it impossible to say definitively that some of women's sexual relations with men (called sex) are 'free' and others (called rape) are 'coerced.'"<sup>87</sup> First, the concept of choice, like force and consent, is a social construct. Second, and more fundamentally, "a person's consent or choice does not necessarily enhance her autonomy since she may agree to a transaction out of obedience to a more powerful authority."<sup>88</sup> Consequently, the conception of rape or sexual abuse in terms of "choice" leaves us where we started. Roberts ultimately cautions us: "If hierarchies of power, supported by deeply embedded images, determine whose autonomy matters, how can the law make autonomy a meaningful concept?"<sup>89</sup>

It is helpful to highlight the false dichotomy of consensual sex and rape

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86. *Schneckloth*, 412 U.S. at 229.

87. Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 370 (1993).

88. *Id.* at 382.

89. *Id.* at 386.

in the context of teen sex.<sup>90</sup> Michelle Oberman argues that teen girls experience many of their sexual encounters in the gray area between fully consensual sex and rape.<sup>91</sup> Thus, as Oberman asserts:

in confining its inquiry to an assessment of whether consent was given, modern statutory rape law loses sight of the considerable coercion, violence, and ambivalence in “consensual” teen sex. Even between age-mates in a situation of apparent social equality power may be so vastly imbalanced that evidence of verbal consent does not reveal the true nature of a teenage sexual encounter . . . [The law] classifies intercourse in a binary fashion as either consensual sex or rape. However, from the girl’s vantage point, her consent may have been so fraught with ambivalence that it was meaningless.<sup>92</sup>

Similar critiques of consent and free choice are offered by Katherine Baker,<sup>93</sup> and Jane Harris Aiken.<sup>94</sup> Significantly, the feminist critique reaches beyond sexuality and intercourse. As Ruth Gavison summarizes:

nothing we decide is really “free” in the sense that it is determined only by our own wishes and preferences. We are constrained by various limits: opportunities, socialization, expectations, resources, and perceptions. Many of these constraints are person-made and not inevitable. Similarly, nothing is voluntary and equal . . . Consent becomes anything but the product of bargaining between free and equal adults . . . . When women “choose” to marry, when women “want” sex, when women “choose” to stay home and spend time with their children rather than pursue their careers in “workaholic” ways, women are not choosing freely, but rather are selecting from choices mandated by social constraints and

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90. Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15 (1994).

91. *Id.* at 70.

92. *Id.* at 70-72.

93. Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 665 (1999) (“The lines between pressure and force, strength and violence, and reluctance and refusal are not nearly as clear as the law would like them to be. Lack of effective communication makes it particularly hard for men and women to tell the difference between sex and rape.”).

94. Jane Harris Aiken, *Intimate Violence and the Problem of Consent*, 48 S.C. L. REV. 615 (1997) at 615 (“This essay is about . . . the double binds women experience in their intimate lives and the ways in which the law reinforces those binds by interpreting women’s constrained choices as consent.”), and at 637 (“This essay suggests that courts should scrutinize evidence of apparent consent more carefully to determine if it is the product of severely constrained choices.”).



norms. The fact that many women feel happy and fulfilled in these "choices" is not evidence that these "choices" are free . . . Society has induced these feelings in women so that women will not rebel against their exploitation and oppression. Basically dependent upon men as breadwinners and sources of power and status, women are not free to "exit" and are therefore unable to negotiate the conditions of their relationships from positions of freedom and equality . . . many decisions not subject to state regulation or physical coercion are not authentic exercises of individual autonomy and choice; much of what determines our conduct stems from external constraints with diverse and pervasive sources.<sup>95</sup>

Along these lines, Christo Lassiter exposes the power imbalance inherent in police encounters in the context of traffic stops,<sup>96</sup> and argues, unlike Ward and Barrio, for the elimination of consent from the lexicon of traffic stop interrogations altogether.<sup>97</sup> In making his argument, Lassiter points to the way in which feminist scholars such as MacKinnon have argued that women are unable to freely consent to sex due to the power imbalance in a male-dominated society.<sup>98</sup> Lassiter's argument is compelling and attractive. Nonetheless, he seems to make the same mistake as some feminists by painting a picture of complete subordination and victimization, and of ruling out agency altogether.

The portrayal of women or racial minorities as wholly dominated victims has produced much discussion within the feminist movement. Kathryn Abrams, Elizabeth Schneider, and Martha Mahoney have been particularly vocal in arguing that we should acknowledge the possibility and complexity of women's agency and resistance in the face of subordination. Abrams advances a theory of partial agency that attempts to avoid extreme characterizations of women as either unconstrained agents or wholly dominated victims, by balancing the backdrop of systemic, gender-based oppression with specific descriptions of the limited forms of agency and resistance that women do exercise despite oppression.<sup>99</sup> She argues for a feminist conception of the self that juxtaposes "women's capacity for

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95. Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 16-18 (1992).

96. Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79 (1998).

97. *Id.* at 82.

98. *Id.* at 131 n.259.

99. See, e.g., Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761 (1990); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theories*, 95 COLUM. L. REV. 304 (1995) [hereinafter Abrams, *Sex Wars Redux*]; Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self Direction*, 40 WM. & MARY L. REV. 805 (1999) [hereinafter Abrams, *From Autonomy to Agency*].

self-direction and resistance, on one hand, with often-internalized patriarchal constraint, on the other."<sup>100</sup> Premising legal analysis of private choice on this model of individual agency, Abrams argues, would lead to better interpretations of women's sexual decision making. For example, coercion and consent should be defined more appropriately in rape cases.<sup>101</sup>

Other scholars such as Elizabeth Schneider focus on exposing the false dichotomy between women's victimization and women's agency and argue that the portrayal of women as solely victims or agents is neither accurate nor adequate to explain the complex realities of women's lives. Schneider calls for feminists and practitioners to seek to understand both the social context of women's oppression, which shapes women's choices and constrains women's agency and resistance, and to recognize women's agency and resistance in a more nuanced way.<sup>102</sup>

Martha Mahoney similarly argues that the legal images of battered women that have emerged from battered women's self-defense advocacy often depict them as pathologically passive in the face of their partners' abuse. But the reality of most battered women's lives is far more complex. Women may be unable to bring a battering relationship to a rapid close, but they may assert themselves in a variety of ways that contribute to their security — and to that of their children — and equip them ultimately to end the relationship. For example, they may gather funds, information, and support that ultimately help them to escape the relationship, or they may strategize actively in the face of separation abuse, which exposes women to increased violence when they try to leave, and succeed at separating after multiple attempts. These aspects of battered women's acts need to be recognized as a form of agency. They permit battered women to protect their children, to preserve specific portions of their lives, and in some cases, to exit their abusive relationships.<sup>103</sup>

In sum, instead of positing that those who suffer oppressions lack agency due to their victimization, we should acknowledge that the agency of anyone who is oppressed, especially those subjected to multiple oppressions, exists within a complex arena of fractured structural forces and pressures. A fair presentation of a situation should thus evaluate one's

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100. Abrams, *Sex Wars Redux*, *supra* note 99, at 346.

101. *Id.* at 361-62.

102. See, e.g., Elizabeth Schneider, *Describing and Changing: Women's Self-defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986) [hereinafter Schneider, *Describing and Changing*] (focusing on tensions between themes of victimization and agency in problem of expert testimony on battering); Elizabeth Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992) [hereinafter Schneider, *Particularity and Generality*]; Elizabeth Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387 (1993) [hereinafter Schneider, *Feminism and the False Dichotomy*].

103. See, e.g., Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

agency within this context. While we must stop ignoring the structural forces and constraints that shape and limit our agency, we should not take these forces and constraints to be all that there is. The point is not that we should read every story as a story of subordination. Rather we must "never explain or close off any story into being just one story."<sup>104</sup>

Once we are armed with the understanding that agency and choice are socially constrained by power hierarchies, and that agency and resistance are possible within a constrained and subordinated life, a critical re-examination of *Bumper v. North Carolina*<sup>105</sup> is possible. Recall that in *Bumper* the Court held that Mrs. Leath's consent was *per se* tainted with coercion.<sup>106</sup> It pointed out that Mrs. Leath, "a 66-year-old Negro widow, [who lived] in a house located in a rural area at the end of an isolated mile-long dirt road," was approached at her door by four white law enforcement officers claiming to have a warrant to search her house.<sup>107</sup> Such a factual description seems to recognize that social factors usually associated with subordination and powerlessness — such as race, age, and gender — may have limited, if not eliminated Mrs. Leath's ability to refuse the officers' claimed legal right to search her house.

However, it did not occur to the Court to consider whether, even within the context of power disparities between Mrs. Leath and the officers, it was possible for Mrs. Leath to act as an agent. It failed to perceive her conduct as a possible act of resistance to subordination, although her testimony may be interpreted to support this idea. Mrs. Leath testified,

He just came on in and said he had a warrant to search the house, and he didn't read it to me or nothing. So, I just told him to come on in and go ahead and search, and I went on about my work. I wasn't concerned what he was about.

....

He said he was the law and had a search warrant to search the house, why I thought he could go ahead. I believed he had a search warrant. I took him at his word. . . . I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house . . . I let them search and it was all my own free will. Nobody forced me at all. I just give them a free will to

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104. Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 98 (1994).

105. 391 U.S. 543.

106. *Id.* at 550.

107. *Id.* at 546.

look because I felt like the boy wasn't guilty.<sup>108</sup>

Yet the Court explicitly dismisses any elements of agency in Mrs. Leath's testimony by explaining that the transcript is written in a first person narrative rather than the actual questions and answers, the effect of which is to put into the mouth of the witness some of the words of the attorneys. It remarks that "[i]n the case of *an obviously compliant witness like Mrs. Leath*, the result is a narrative that has the tone of decisiveness but is shot through with contradictions."<sup>109</sup> But since the Court did not observe Mrs. Leath on the witness stand, the basis of its conclusion that she was obviously a compliant witness who had words "put in her mouth" is unclear. If the Court indeed regarded her race, gender, and age as proxies of submission, this characterization of Mrs. Leath is a natural extension of her overall portrayal as powerless and obedient.

Whereas for the *Bumper* majority Mrs. Leath is only a victim, for the dissenters her agency is uncompromised. Justice Black concluded that Mrs. Leath voluntarily and freely consented to the search.<sup>110</sup> In his eyes,

Mrs. Leath's readiness to permit the search was the action of a person so conscious of her innocence, so proud of her own home, that she was not going to require a search warrant, thus indicating a doubt about the rectitude of her household. There are such people in this world of ours, and the evidence causes me to believe Mrs. Leath is one of them.<sup>111</sup>

This characterization of Mrs. Leath accords with the Court's other consent-to-search cases, where it typically sees agency and uncoerced choices where they are most likely absent.

For both the *Bumper* majority and the dissent, a person is either an agent or a victim, wholly free and unconstrained or completely submissive. Instead, a feminist consciousness attempts to break out of these simplistic, one-dimensional dichotomies. It understands that our stories are shot through with contradiction because this is how we experience our lives — in different shades of gray rather than in black and white. The contradictions of our lives are evident in *Illinois v. Rodriguez*,<sup>112</sup> which is one of several cases involving third party consent to a search. Generally, a third party who shares common authority over property with a defendant may also give an effective consent to a search of that property.<sup>113</sup> Common

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108. *Id.* at 546-47, 547 n.8.

109. *Id.* at 547 n.8. (emphasis added).

110. *Id.* at 556-57 (Black, J., dissenting).

111. *Id.* at 556-57.

112. 497 U.S. 177 (1990).

113. See *United States v. Matlock*, 415 U.S. 164, 171 (1974) (holding that consent is

authority rests on mutual use of the property so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in their own right.<sup>114</sup> In *Rodriguez*, the Court expanded the third-party consent doctrine by holding that a third party can give an effective consent even though the third party has no actual authority to give consent.<sup>115</sup>

In *Rodriguez*, a woman summoned police officers to her house to report that her daughter Gail Fischer had been beaten. Fischer, who showed signs of severe beating, told the police that her boyfriend Ed Rodriguez assaulted her earlier that day in another apartment, where he was currently sleeping. She agreed to travel there with the police and unlock the door with her key so that the officers could enter and arrest Rodriguez for battery. After entry into the apartment, the police officers found drugs and related paraphernalia in the apartment and found Rodriguez sleeping in the bedroom.<sup>116</sup> The facts tell a story of a woman who attempts to bring a violent relationship to an end, first by leaving her abuser and then by turning to the police in an attempt to bring about his arrest. The Court however does not see this picture, or chooses to ignore it.

Without acknowledging that life is filled with contradiction, the Court manipulated the contradictions in Fischer's life and construed both the evidence of her victimization and the evidence of her resistance against her abuser, in finding that she lacked actual authority to consent to the search.

The Court first held that Fischer obviously had no common authority over the apartment and therefore had no actual authority to consent to the search.<sup>117</sup> Although Fischer and her two young children had lived with Rodriguez in the apartment beginning since December 1984, she and the children moved out on July 1, 1985, almost a month before the search, and went to live with her mother. Fischer had taken her clothing and the children's clothing with her, though she left behind some furniture and household effects. In addition, she was not allowed to invite others to the apartment on her own; she never went to the apartment when Rodriguez was not there; her name was not on the lease nor did she contribute to the rent; and she had taken the key without Rodriguez's knowledge.<sup>118</sup>

The Court next held that the warrantless entry into Rodriguez's home would nonetheless be valid if the officers reasonably believed that Fischer had authority to consent.<sup>119</sup> The officers' belief must be judged against an objective standard: "Would the facts available to the officer at the moment

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valid if "obtained from a third-party who possessed common authority over . . . the premises or effects sought to be inspected").

114. *Id.* at 171 n.7.

115. *Rodriguez*, 497 U.S. at 186.

116. *Id.* at 179-80.

117. *Id.* at 182.

118. *Id.* at 181.

119. *Id.* at 188-89.

warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.”<sup>120</sup> The Court therefore remanded the case to the lower court for consideration of that question. While the three dissenting Justices rejected this apparent authority test, they agreed that Fischer had no actual authority to consent to the search.<sup>121</sup>

Through a feminist gaze, however, the Court could have reached a better understanding as to why Fischer was not named on the lease and did not contribute to the rent, as to why she was not allowed to invite friends and not allowed in the apartment when Rodriguez was away. These are manifestations of the control and subordination that can exist within an abusive relationship, especially when exacerbated by economic inferiority. Instead, the Court blinds itself to this reality and construes these facts as evidence that Fischer had no control over the apartment she shared with her boyfriend. From a feminist stance, due to the power disparity between the two, it should not follow from Fischer’s lack of control over the apartment that she lacked control to give consent to search. Likewise, the Court could have construed the fact that Fischer recently left the apartment with her children and only a few personal belongings as a desperate attempt to resist the violence and protect herself and her children by leaving the abuser. Similarly, it could have appreciated her act of resistance to her subordination and abuse in calling the police and accompanying them to the apartment to arrest Rodriguez after a “separation attack.” But the Court chose to ignore this complex picture of subordination and resistance, victimhood and agency, and thus perpetuated Fischer’s subordinated status and disempowerment.

Not only does the Court’s denial of Fischer’s actual authority to consent to the search invalidate her agency and perpetuate her subordination, but also its construction of the apparent authority test has a similar effect. Rather than validating her act of self-actualization as an agent capable of authorizing the search of the apartment, the Court supplants Fischer’s perspective with that of the reasonable officer. The articulated reasonable person test has the potential of validating, hence empowering the police officer’s conduct, while at the same time silencing the individual by rendering her perspective irrelevant and not worthy of legal acknowledgement.

Both *Bumper* and *Rodriguez* demonstrate the multiplicity and complexity of agency and coercion. Significantly, however, these two cases also expose the gender-oppressive nature of this binary legal discourse, which may explain why the Court is so insistent on maintaining the fiction of consent and coercion. In both cases, the Court rejects possible manifestations of actual agency and invalidates the consent to the

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120. *Id.* at 188 (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

121. *Id.* at 193-94 (Marshall, J., dissenting).

search given by the individual. In contrast, its jurisprudence in the other cases maintains a fiction of consensual police encounters and searches, and relies on abstract notions of unconstrained agency and free choice to validate the individual's consent to a search. This inconsistency serves to perpetuate male ideology through the mechanisms of law and maintain the powerlessness and exclusion of women, minorities and other subordinated members of society.

Encounters between the police and the individual cannot be characterized as equal in power under our current social hierarchical structures. Rather they reflect the invisible subordination of the individual to the power of the patriarchal state and law. In most cases, the individual would in fact be powerless to resist these forces and would quietly submit by consenting to the search, absent meaningful choices from his or her subordinated position. Every time the Court insists on characterizing this submission as a true act of agency and free-willed choice, oblivious to power disparities and social constraints, it reifies the individual's subordinated state. This is especially true for women and minorities whose subordination to the police is but one manifestation of their all-encompassing social subordination.

Nonetheless, resistance and empowerment are possible even under conditions of subordination. The Court, however, cannot allow that to happen if the patriarchal structure is to remain in place. Therefore, the Court must reject any glimpses of agency and empowerment on behalf of the otherwise subordinated individual. The *Bumper* Court and the *Rodriguez* Court do so by portraying a picture of complete lack of agency where the reality from the point of view of individual woman may have been one of control and empowerment rather than submission to authority. By thus rejecting these women's attempts at self-empowerment and trumping their perspectives, the Court perpetuates women's subordination and sends the message that there is no escape from life of subordination and powerlessness if you are a woman, a minority, or both. In so doing, it perpetuates the oppression of all women and racial minorities, and reinforces power as the basic norm that structures our society, to the disadvantage of us all.

#### IV. ENGENDERING CONSENT AND COERCION

Fourth Amendment jurisprudence has purportedly paid attention to exertions of power and authority by infusing search and seizure law with notions of consent and coercion. Nonetheless, as construed from the viewpoint of white men, only overt traditional manifestations of force and coercion are acknowledged doctrinally as being real, while the basic assumption of free will and agency remains unchallenged. Since broader socially oppressive forces are unaccounted for within our current jurisprudence most people are left unprotected when their exchanges with

the police are deemed consensual. Thus, the current paradigm of power, consent, and coercion within the Fourth Amendment may have actually contributed to the exclusion of alternative conceptualizations of power that would truly eradicate the oppression of those at the bottom of the social hierarchies.

It is time the Court erased the artificial line drawn between voluntary consent and coercion, and acknowledged the complexities of life that result in the mutual construction and inextricable connection of consent and coercion. In assessing an encounter between the police and an individual we must acknowledge the multiple ways in which the state manifests power over individuals beyond notions of physical force or other forms of overt coercion. We need to focus on police coercion and abuse in terms of control and domination based on situated multifaceted social power webs. We need to focus on the power webs of gender, class, and race among others, which enable the police and the state to subordinate individuals in seemingly non-abusive ways. At the same time, we need to constantly reexamine the notion of consent and the possibility of choice under such conditions of power disparity. While we should question choices that seem to perpetuate the individual's subordination, we should also strive to affirm choices that empower the individual and truly guarantee his or her security as well the security of our society.

In conceptualizing domination and disempowerment, we need to recognize that human beings are formed in their preferences, abilities, and capacities to respond to coercion, by material circumstances and relationships or affiliations with others. A crucial part of acknowledging our social situatedness would be to highlight the formative and covert effects of inequalities of power.<sup>122</sup> The law must acknowledge how we are socialized, especially along lines of gender and race, to submit to those in power in the name of cooperation and obedience. It also needs to understand how different power webs make us vulnerable to different things, at different places, and at different times. For each individual, but especially for members of traditionally subordinated groups, the point of most powerlessness, and hence most vulnerability to abuse, arises from various interlocking power structures in varying degrees.

Women's experiences are living proof of this. Women experience their lives both as victims of oppression and as agents resisting it; as both subordinated by privacy and empowered by it; as both rational and emotional. One lesson from feminist jurisprudence lies in the rejection of simple dichotomies and the abandonment of the either/or that characterize our current jurisprudence. On many occasions the police dominate the encounter with the individual. Yet in some instances, particular individuals successfully resist the oppressive power of the state, and may even

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122. Abrams, *From Autonomy to Agency*, *supra* note 99, at 845.



dominate the encounter. A simplistic and dichotomized approach to free will and coercion, agency and victimization, power and powerlessness, cannot ensure that both the individual and the police officers will be secured, respected, and valued as human beings.

The question then becomes how to choose among the competing stories of the circumstances leading to a search from the perspectives of the police officer and the individual without invalidating the experience of one or the other in a way that is as oppressive as the legacy of our current jurisprudence. When both the individual and the police officer tell compelling stories of consent how can we know which is right? I suggest we embrace the values of anti-subordination and empowerment to guide us in resolving power struggles within the context of the Fourth Amendment.

We should be guided by our substantive commitment to focus on power webs and interlocking systems of subordination, and by our commitment to redistribute and share social power. Our substantive commitments do not tell us what to do, but they may and should help us select from plausible, competing choices in a given circumstance.<sup>123</sup> Therefore, our focus on power hierarchies may enable us to choose among these competing realities. In this latter function, a jurisprudence of power is best captured in the principles of anti-subordination and empowerment.

Valuing the principle of antisubordination means a serious commitment to evaluating and eradicating all forms of oppression.<sup>124</sup> We should explicitly examine whether an individual was less powerful than the police in the specific case, and whether the police exploited or benefited, directly or indirectly, from its power over the individual. We can assume that typically the police are more powerful than the individual, even though this is due to the operation of social forces outside the specific encounter and to the individual's social position. We can also assume that the police benefit from its privileged position of power and the relative powerlessness of the individual, even if the officer does not intentionally exploit the vulnerability of the individual. Finally, we can assume that the individual is subordinated at least to the extent that the police benefit from her relative powerlessness. Consequently, the burden should be on the state to persuade us that no power disparity, in its broadest sense, operated to the disadvantage of the individual, or that the individual acted out of true agency and empowerment.

This moral choice to commit to antisubordination would hold police officers and other government agents to a heightened standard in light of the significant power they typically have over the individual by the virtue of their position of authority and social legitimization. As the powerful

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123. Minow, *supra* note 1, at 91.

124. See Volpp, *supra* note 104, at 97-98 (arguing that antisubordination is a value that the legal system must factor into the decision whether to present testimony as to a defendant's cultural background.).

party, the police would have a moral obligation to see the world from the point of view of those they govern or control, and to exercise its power in the interests of the governed individual.<sup>125</sup> Judges will also be bound by this heightened moral obligation. They should consider the human consequences of their decisions, rather than insulating themselves in abstractions.<sup>126</sup> The Court should not let the formalities of consent determine the limits of our inquiry into the police and the individual's conduct. Instead, the Court must identify the power matrix between the parties, considering such factors as the gender, race, and class of both the officer and the individual, and any other factors which may contribute to an imbalance of power in the specific case at hand, such as general police practices or general attitudes about crime and security.

The court must then determine whether such power disparities were exploited in an impermissible way. In examining whether the government officers unfairly benefit from such power imbalances, our inquiry should not be limited to intentional exploitation of power. Power imbalances are often invisible and appear natural. However, as long as people are disadvantaged because of their non-white race, for example, white people enjoy the privilege and power that accompanies whiteness. As long as male ideology and perspective dominate the world, men enjoy the social status and privilege of those on the top of the hierarchy, regardless of whether they harbor personal hostility toward those beneath them or not. This is exactly why we impose a moral obligation on the powerful to act from the perspective of those less powerful.

Thus, in evaluating the consensual nature of the search and of the encounter between the police and the individual we should primarily focus on the actual state of mind of the individual. We should attempt to evaluate his or her agency and choices within the complex arena of fractured structural forces and pressures, especially historic indicators of multiple social oppressions. This would require asking different sets of questions. We should ask, for example, did the individual act with a consciousness of his or her social position? What is the range of experience that informed her ability to imagine alternative choices? How did he feel when he "consented?"

This kind of inquiry may not necessarily steer our ultimate choice along lines of what we have traditionally regarded as reason and rationality. The stories told by the individuals involved evoke emotions that eventually may be all that we can rely on in making our choices. But this is not something to fear, but rather something to be emulated. We need to learn

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125. See Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV. 861, 893 (1997).

126. Minow, *supra* note 1, at 89.

to accept contradiction, ambiguity, and ambivalence in our lives.<sup>127</sup> We should stop fearing that we will be unable to make judgments if we embrace complexity and subjectivity. We can and do make judgments all the time, in a way committed to making meaning.<sup>128</sup>

When our conscious examination of the power structures leaves us equally moved by the stories of the officer and the individual, our substantive commitment to antissubordination and redistribution of power should lead us, in most cases, to choose to empower the individual, if only because, until now, the jurisprudence has "erred" on the side of the police. In so redistributing power, the benefit of validating and empowering those who have thus far been denied power outweighs the losses of excess power and privilege that police have enjoyed. But make no mistake, these are explicit moral choices that do not hide behind abstractions of consent and coercion. It is my choice of who should carry the burden of persuasion, my choice of whose side to take when in doubt or when equally persuaded, and my choice about who should gain power and who should lose power when sharing is impossible. This is my way of making meaning of consent, coercion and all that is in-between.

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127. Schneider, *Feminism and the False Dichotomy*, *supra* note 102, at 397.

128. Minow, *supra* note 1, at 90-91.