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**BEYOND POLICE CONDUCT: ANALYZING VOLUNTARY  
CONSENT TO WARRANTLESS SEARCHES BY THE MENTALLY  
ILL AND DISABLED**

I. INTRODUCTION

It is 10 a.m. on a Tuesday, and police detectives are looking for David, a possible suspect in an armed robbery that took place the previous evening. Although they have some evidence from witnesses indicating that David may have been involved in the robbery, the detectives are not certain about the extent of his involvement. They do not have enough information to make out probable cause for an arrest or search warrant. The detectives arrive at the home David shares with his mother, Joanne. She informs them that David is at work but will probably be home in the afternoon and that, in any event, he is never late for dinner, which is always at 6 p.m. The detectives ask Joanne if they can look around in the house, and she agrees. After about forty-five minutes, while looking around in the basement, one of the detectives finds a pistol, a ski mask, and wad of bills inside a brown paper bag that had been stuffed behind the washing machine. Armed with this new and highly incriminating evidence, the detectives obtain a warrant and subsequently arrest David at work. With the evidence seized, he is easily convicted or convinced to plead guilty.

The preceding scenario plays out, with some variations, hundreds if not thousands of times a day across the United States. Searches conducted pursuant to consent make up virtually all warrantless searches.<sup>1</sup> The police strongly prefer obtaining consent to search rather than a search warrant because it is faster, involves less paperwork, is less likely to result in evidence being suppressed, and generally requires using fewer resources.<sup>2</sup>

Add some new facts to the everyday situation described above: Joanne is mentally disabled, and David's sister Evelyn is her court-appointed guardian. Joanne has received disability payments from the Social Security

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1. Rebecca Strauss, Note, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868, 871 (2002).

2. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 4 (1990); David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941, 948 (1997).

Administration for her entire adult life.<sup>3</sup> Suddenly, a motion to suppress the pistol, mask, and money looks a lot more viable.<sup>4</sup> A similar issue arises in this not-too-farfetched scenario: Responding to a noise complaint, police officers knock on the door of an apartment. John answers and quickly accedes to their request to come in. In the living room, in plain view, are several weapons and explosive devices. After his arrest, John is examined by psychiatrists who learn that he was stockpiling the weapons in preparation for Armageddon, and thought the police were fellow warriors who had come to deliver his instructions for the Last Battle. Could John and Joanne have validly consented to the searches conducted in the two hypotheticals? How should a court go about deciding?

Courts that have considered fact patterns similar to the two above have come down on both sides of the question. That is not surprising in and of itself because these are close, fact-sensitive questions.<sup>5</sup> What is surprising is the lack of consistency in courts' reasoning. The Supreme Court laid down the definitive standard for determining voluntary consent to warrantless searches three decades ago in the landmark case of *Schneekloth v. Bustamonte*.<sup>6</sup> Since that time, however, it has become clear that courts have a difficult time applying the standard to cases involving mentally disabled or mentally ill people.

This Note proposes a new test for courts faced with the issue of consent to a warrantless search obtained from a mentally ill or disabled person. Part II will trace the historical evolution of the Supreme Court's definition of "voluntary," in both the consent and confession contexts, and will show how the *Schneekloth* standard has been modified over time. Part III will examine

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3. The factual scenario described is based on a homicide case prosecuted in Missouri in 2003. The motion to suppress evidence was denied, and the defendant in that case was ultimately convicted of second-degree murder.

4. At the end of 2000, almost a million people in the criminal justice system suffered from some form of mental illness. Bazelon Center for Mental Health Law, Fact Sheet #3: Individuals with Mental Illnesses in Jail and Prison, at <http://www.bazelon.org/issues/criminalization/factsheets/criminal3.html> (last visited Sept. 17, 2003). One in six jail inmates has a mental illness, and approximately two-thirds of these suffer from a severe mental illness. *Id.* According to some estimates, approximately one in ten maximum-security and death row inmates nationwide have mental retardation. Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 212 (1999). Altogether, between 45,000 and 200,000 mentally retarded individuals may be currently imprisoned in the United States. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 504 (2002).

5. See Kaplan & Dixon, *supra* note 2, at 948. These factual questions, however, nearly always come out in favor of the prosecution. *Id.* The question often becomes a credibility contest between the police officer and an accused with a strong motive to fabricate. *Id.*

6. 412 U.S. 218 (1973). The standard is one of voluntariness under the totality of the circumstances, which will be explained more completely in Part II, *infra*.

how federal and state courts have applied the standard to cases involving mentally ill or disabled people over the last three decades. Part IV will examine social science literature showing the tendency of people in general to follow directions and suggestions from authority figures, and the tendency of mentally impaired people in particular to respond in the affirmative to questions as a default response. Part V will show that courts' emphasis on coercive police tactics is inadequate to assess the voluntariness of consent given by individuals with particular vulnerabilities. Drawing lessons from the social science literature, some of the more carefully reasoned opinions seen in Part III, and other cases that have dealt with similar issues, Part VI will propose a new test to deal with consent to search obtained from mentally impaired individuals in a thorough, consistent, and fundamentally fair fashion, in the process recapturing the original spirit of *Schneckloth*. In essence, courts should look beyond both the conduct of police in requesting consent and the officers' perception of whether the person was mentally able to consent and focus instead on the narrower factual question of whether the person was capable of voluntary consent. "[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."<sup>7</sup>

## II. SUPREME COURT JURISPRUDENCE ON CONSENT

Searches and seizures are governed by the Fourth Amendment to the U.S. Constitution.<sup>8</sup> The amendment prohibits "unreasonable" searches and seizures and also specifies criteria for issuing valid search warrants.<sup>9</sup> Thus, searches and seizures performed without a valid warrant are *per se* unreasonable, although that rule has some specific exceptions.<sup>10</sup> Over the years, the Supreme Court has recognized several exceptions to the warrant requirement, including: investigatory detentions; searches incident to a lawful arrest; inventory searches; border searches; a variety of exigent circumstances; special rules for searching vehicles and containers without a warrant; administrative searches; and searches conducted pursuant to voluntary consent.<sup>11</sup>

Surprisingly, the Supreme Court was not called upon to define "voluntary" in the consent search context until *Schneckloth* in 1973. With little compelling precedent in Fourth Amendment jurisprudence to guide its analysis, the Court turned first to how it had defined "voluntary" in terms of the Fourteenth Amendment's guarantee of due process and how that had been applied to

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7. *Horton v. California*, 496 U.S. 128, 138 (1990).

8. U.S. CONST. amend. IV.

9. *Id.*

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

11. See generally Michael A. Borucke et al., *Warrantless Searches and Seizures*, 77 GEO. L.J. 517 (1989).

confessions.<sup>12</sup> Noting that the definition and application of voluntariness had proved ambiguous over the years, Justice Potter Stewart, writing for the majority, said that voluntariness is essentially a balancing test between “the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws,” and society’s belief that unfair police tactics threaten our notion of justice.<sup>13</sup> Voluntariness in the due process context had traditionally been defined as requiring a weighing of “the totality of all the circumstances,” including any coercive police tactics and the personal characteristics of the accused.<sup>14</sup>

The opinion would have been wholly unremarkable had the Court not seriously called the due process voluntariness test into question just a few years before in the famous case of *Miranda v. Arizona*.<sup>15</sup> In *Miranda*, the Court noted that the due process voluntariness standard had generated much “confusion” and “misconception” in its application.<sup>16</sup> To create a clear, simple, bright-line test to avoid such confusion and misconception, the Court rejected the due process standard and held that individuals being interrogated in police custody must be given explicit warnings of their right to remain silent and to be represented by counsel before making any statements to the police.<sup>17</sup> A suspect could still make a confession to the police, but he must first knowingly and intelligently waive those rights about which he had been specifically apprised.<sup>18</sup>

With the seven-year-old precedent of *Miranda* looming large, the *Schneckloth* Court had to explain its reliance on the due process voluntariness test in the search and seizure context and distinguish it from the confession context.<sup>19</sup> The Court asserted that when police seek consent to search, it is often out in the field under informal circumstances, which would make giving an effective warning impractical.<sup>20</sup> While considering it a closer call, the Court decided that seeking consent to search in such situations was “immeasurably, far removed” from the custodial interrogation situations that

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12. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973).

13. *Id.* at 224-25.

14. *Id.* at 227. Later in the opinion, the Court was clearly concerned with more than obvious incidents of police brutality. The Court noted that “account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.” *Id.* at 229.

15. 384 U.S. 436 (1966).

16. *Id.* at 461-62 (quoting *Bram v. United States*, 168 U.S. 532, 549 (1897)).

17. *Id.* at 467-69.

18. *Id.* at 475.

19. Although only seven years had passed, a significant turnover had occurred on the Court in those intervening years. Chief Justice Warren was succeeded by Chief Justice Burger. Justices Fortas, Harlan, Clark, and Black were succeeded by Justices Rehnquist, Marshall, Powell, and Blackmun.

20. *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973).

had concerned the *Miranda* Court.<sup>21</sup> Further, the Court noted that *Miranda* itself had already made the distinction, expressly excluding from its holding traditional police work such as seeking evidence in the field and on-the-scene questioning of people who had not been taken into custody.<sup>22</sup>

With that distinction made, Justice Stewart<sup>23</sup> eschewed a warning requirement for consent searches, saying that “knowledge of the right to refuse consent is [not] a necessary prerequisite to demonstrating a ‘voluntary’ consent.”<sup>24</sup> The Court also refused to adopt the “waiver” doctrine that had been applied in *Miranda*—that in order to consent to a search, a person must knowingly and intelligently waive his or her right to be free from unreasonable police searches.<sup>25</sup> Grafting such a requirement onto the Fourth Amendment would be both unwieldy and a break from constitutional tradition because knowing and intelligent waiver had been almost exclusively applied to trial rights, and had been determined in formal hearings before a judge, not by police in the field.<sup>26</sup>

*Schneckloth*'s adoption of the due process totality of the circumstances test for determining the voluntariness of a consent to search has been modified by subsequent Supreme Court decisions in two ways. First, although *Schneckloth* propounded a test for inquiring whether consent had *in fact* been given,<sup>27</sup> it is now clear that objective reasonableness is the standard. That is, would reasonable police officers have thought that the person was consenting under the circumstances? In *Florida v. Jimeno*,<sup>28</sup> the Supreme Court expressly adopted such a reasonableness standard in deciding the scope of a person's consent to a search.<sup>29</sup> The Court held that “it was objectively reasonable for the police to conclude that the general consent to search respondents' car included consent to search containers within that car.”<sup>30</sup> Although this

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21. *Id.* at 232.

22. *Id.*

23. One of the four holdovers, Stewart had joined the dissent in *Miranda*. *Miranda*, 384 U.S. at 504.

24. *Schneckloth*, 412 U.S. at 232-33.

25. *Id.* at 235-46.

26. *Id.* at 241-42. The applicability of knowing and intelligent waiver to the Fourth Amendment will be discussed more thoroughly in Part V, *infra*, during examination of Justice Marshall's dissenting opinion.

27. *Id.* at 227. The court makes repeated reference throughout the opinion to whether a consent was “in fact” voluntary, reinforcing that, at the time of the decision, that was the prevailing standard. *E.g.*, *id.* at 218, 221, 223, 227, 229, 248.

28. 500 U.S. 248 (1991).

29. *Id.* at 251. “The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?” *Id.*

30. *Id.*

reasonableness standard has not yet been broadly applied by the Court to all instances of consent, it requires no stretch of the imagination.<sup>31</sup>

Second, where *Schneckloth* made specific mention of the consenting person's age, education, and intelligence as factors to consider in the totality of the circumstances analysis,<sup>32</sup> the subsequent case of *Colorado v. Connelly*<sup>33</sup> raises serious doubts about whether a court would find a consent to search involuntary absent some form of police misconduct.<sup>34</sup> In *Connelly*, the Court considered a claim by a schizophrenic and hallucinatory defendant that his mental impairment had made it impossible for him to voluntarily waive his *Miranda* rights and make an incriminating statement to the police.<sup>35</sup> The Court specifically repudiated the Colorado Supreme Court's holding that a severe mental illness, even without police pressure, could cause a person's confession to be involuntarily made:

Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. . . . [Even the presence of subtle psychological persuasion] does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness."<sup>36</sup>

Although that holding has never been applied by the Supreme Court to the consent search context, because the voluntariness standard applies, the implication is clear that courts assessing consent searches should make a factual finding of coercive police activity as a condition precedent to any finding of involuntariness.<sup>37</sup>

### III. APPLYING THE *SCHNECKLOTH* STANDARD

In the thirty years since *Schneckloth* was decided, courts have rarely been called upon<sup>38</sup> to apply that standard to cases involving the mentally ill or

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31. The Court has also adopted a broad reasonableness standard in permitting police to reasonably rely on a search warrant that is later found invalid, *United States v. Leon*, 468 U.S. 897, 922 (1984), and in permitting police to reasonably rely on the apparent authority of a person to consent to a search of a dwelling, *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990).

32. *Schneckloth*, 412 U.S. at 226.

33. 479 U.S. 157 (1986).

34. *Id.*

35. *Id.* at 161-62.

36. *Id.* at 164.

37. At least one prominent commentator has suggested that the Supreme Court might well extend *Connelly* to cover consent searches. 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.1 (3d ed. 1996).

38. A much greater number of cases deal with the interplay between intoxication and consent, an issue outside the scope of this Note. For some representative decisions in this area, see *United States v. Dukes*, 139 F.3d 469, 472-73 (5th Cir. 1998) (rejecting claim that Dukes's co-conspirator had been rendered incompetent to voluntarily consent due to chronic drug abuse);

disabled.<sup>39</sup> The relative infrequency, along with the difficulty of the subject matter, have led to varying approaches. The cases can be loosely organized into three groups. The first, by far the largest, is composed of decisions that give cursory treatment to the interplay between voluntary consent and mental impairment. The second is composed of decisions that confuse or conflate the voluntariness of consent with other issues. The third grouping includes decisions that provide structured, in-depth analysis of the issue, although with occasionally variable results.

#### A. *Conclusory Treatment*

In *United States v. Duran*,<sup>40</sup> the Seventh Circuit evaluated the voluntariness of the consent to search given by a defendant's wife, who was in a fragile emotional state and had failed to take medication for a nervous disorder for a week preceding the event.<sup>41</sup> The court found her mental state significant but, "absent a showing that her emotional distress was so profound as to impair her capacity for self-determination," insufficient to ultimately find her consent involuntary.<sup>42</sup> The key factor in the court's holding was that the police had given the wife a consent form to sign that explicitly informed her of her right to refuse consent.<sup>43</sup>

The same court tackled the issue again eight years later in *United States v. Strache*.<sup>44</sup> Assessing the voluntariness of a consent to search given by a mentally ill and suicidal defendant, the court upheld the search and declined to

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*United States v. Gay*, 774 F.2d 368, 377 (10th Cir. 1985) (finding that although Gay was not in an ideal condition for making important life decisions, he was "rational enough to understand requests and to give plausible explanations").

39. There are many references in the cases below to a defendant's intelligence quotient, or "IQ," in reference to mental retardation. Modern medical practice, however, defines a person with mental retardation as someone with "significantly subaverage intellectual functioning," with concurrent limitations in performing at least two of a specified group of daily life skills, manifesting before the age of 18. ROBERT J. GREGORY, FOUNDATIONS OF INTELLECTUAL ASSESSMENT: THE WAIS-III AND OTHER TESTS IN CLINICAL PRACTICE 141 (1999). Court opinions rarely provide enough factual description to conform with this definition, and usually rely on IQ as a substitute. There are several recognized tests for measuring IQ, but again courts rarely specify which was used in a particular case. For two of the more widely-used tests, the Wechsler Adult Intelligence Scale-III (WAIS-III) and the Stanford-Binet: Fourth Edition, the upper limit of significantly subaverage intellectual function is an IQ of about 75, provided that the other clinical measures support a diagnosis of mental retardation. *Id.*

40. 957 F.2d 499 (7th Cir. 1992).

41. *Id.* at 503.

42. *Id.* The court added that the trial court had erred in not considering the importance of her mental state, and said that it was irrelevant whether it had arisen as a result of police conduct. *Id.*

43. *Id.*

44. 202 F.3d 980 (7th Cir. 2000).



suppress the evidence seized by police.<sup>45</sup> The defendant's girlfriend had called police after he threatened to kill himself; although she managed to get the gun away from him, she gave it back after he calmed down.<sup>46</sup> The court focused on the testimony of police that Strache was calm and cooperative, "appeared to be in control of his faculties and understood what was transpiring."<sup>47</sup> The police only transferred Strache to a hospital for a mental health evaluation after discovering the explosive devices.<sup>48</sup> The court gave short shrift to Strache's claim of mental impairment, saying that he "paint[ed] a stark picture of himself as a mentally ill and suicidal young man accosted by a phalanx of police officers pressuring him into verbal consent."<sup>49</sup> Although Strache was handcuffed and had not been advised of his rights at the time his consent to search was sought, the court reasoned that any coercion was mitigated because it was only for twenty minutes and "the police did not badger him for information or consent, nor physically abuse or pressure him."<sup>50</sup>

In *United States v. Ross*,<sup>51</sup> the Fourth Circuit upheld the validity of a search conducted pursuant to the consent of a woman who suffered from long-term brain damage and a resulting mental condition.<sup>52</sup> Psychiatric experts testified that Ross was "significantly impaired at the time she gave consent."<sup>53</sup> The trial court, while taking notice of the expert testimony, concluded that Ross's impairment was not so great that her consent did not result from a "rational intellect" and the exercise of "free will."<sup>54</sup> In affirming the trial court ruling, the Fourth Circuit cited as the decisive factor "Ross'[s] demeanor and responsiveness," together with the lack of force or duress.<sup>55</sup> The court also rejected an argument that the district court had improperly created a rebuttable presumption of voluntariness that "required Ross to present evidence that her mental impairment was so great that it vitiated her consent."<sup>56</sup> The court disagreed, saying that the trial court had properly considered her mental condition as a factor in the required totality of the circumstances analysis.<sup>57</sup>

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45. *Id.* at 985-86. The key evidence consisted of several weapons and explosive devices. *Id.* at 985.

46. *Id.* at 982.

47. *Id.* at 983.

48. *Id.*

49. *Strache*, 202 F.3d at 985.

50. *Id.* at 986.

51. No. 91-5151, 1992 U.S. App. LEXIS 1318 (4th Cir. Feb. 4, 1992) (per curiam).

52. *Id.* at \*8.

53. *Id.* at \*6.

54. *Id.* at \*7.

55. *Id.* at \*9.

56. *Ross*, 1992 U.S. App. LEXIS 1318 at \*10.

57. *Id.*

In *United States v. Habershaw*,<sup>58</sup> a district judge denied a motion to suppress evidence obtained via the consent of a man diagnosed with a variety of psychological ailments who was accused of possession of child pornography.<sup>59</sup> Testimony from a live expert and the report of a second expert were presented at the suppression hearing, variously describing Habershaw as suffering from Attention Deficit/Hyperactivity Disorder, a gender identity disorder, and an impulse control disorder.<sup>60</sup> The testifying expert concluded that Habershaw was incapable of giving “informed consent,” and had difficulty “understanding the consequences of his actions.”<sup>61</sup> The court found this evidence unpersuasive in light of Habershaw’s four previous arrests, high school special education classes, and the absence of coercion or intimidation.<sup>62</sup> The court noted that Habershaw “may not have fully recognized what might happen if he allowed the police to search his computer, [but] this fact alone does not render his consent involuntary.”<sup>63</sup> Particularly significant was the fact that the accused escorted the police around his apartment and actually showed them which files to open on his computer.<sup>64</sup>

In *State v. Osborne*,<sup>65</sup> the Supreme Court of New Hampshire upheld a search where consent was obtained from a defendant who an expert testified was in a psychotic state at the time of the consent.<sup>66</sup> The court’s entire analysis of the mental impairment issue is as follows:

There may be situations in which, due to psychiatric disorders, drugs or intoxication, the defendant’s consent is “not the product of a rational intellect and a free will” and is therefore invalid. “No matter how genuine the belief of the officers is that the consenter is apparently of sound mind and deliberately acting, the search depending on his consent fails if it is judicially determined that he lacked mental capacity.” The determination of mental capacity to consent is a question of fact for the trier of fact, which will not be disturbed if it is reasonably supported by the evidence. At the suppression hearing, Dr. Standow, who first examined the defendant several months after the search, testified at length about the defendant’s alleged “psychotic state.” The other

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58. No. 01-10195-PBS, 2002 U.S. Dist. LEXIS 8977 (D. Mass. May 13, 2002).

59. *Id.* at \*2.

60. *Id.* at \*19-20. Some relevant characteristics of Attention Deficit/Hyperactivity Disorder include inattention to details, difficulties in organization, and susceptibility to distraction. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 85-86 (4th ed., 2000) [hereinafter DSM-IV]. Gender identity disorders can interfere with ordinary activities and impair social functioning. *Id.* at 577. Impulse control disorders are characterized by the failure to resist a variety of antisocial impulses. *Id.* at 663.

61. *Habershaw*, 2002 U.S. Dist. LEXIS 8977 at \*19.

62. *Id.* at \*20-21.

63. *Id.* at \*21.

64. *Id.*

65. 402 A.2d 493 (N.H. 1979).

66. *Id.* at 498.

witnesses, including the arresting officers, testified that on the day of the search the defendant had appeared to them to be acting and reacting normally. Taken as a whole, the evidence supports the trial court's finding that the defendant had a sufficient understanding of the consequences of his consent to give a valid consent to the search.<sup>67</sup>

North Carolina appellate courts have had several opportunities to consider this issue. In *State v. Fincher*,<sup>68</sup> the Supreme Court of North Carolina upheld a finding of voluntary consent to a search for a defendant convicted of murder, rape, and burglary.<sup>69</sup> At least ten officers were present for the arrest, at which time the defendant was Mirandized, handcuffed, and placed in a patrol car.<sup>70</sup> While in the car, the defendant was told that if he did not sign the consent to search form, the police would obtain a warrant, and that "[e]ither way, we are going to search the apartment."<sup>71</sup> At the suppression hearing, Fincher presented expert testimony that he was both mentally retarded and suffered from schizophrenia, sometimes to the point of hallucination.<sup>72</sup> Experts also testified that Fincher, age seventeen, was functionally illiterate, had an IQ between 50 and 65, and was more susceptible to fear than the average person.<sup>73</sup>

The court acknowledged that mental capacity and age were both factors to consider when determining whether consent was voluntary, but that "lack of intelligence does not, however, standing alone, render an in-custody statement incompetent if it is in all other respects voluntarily and understandingly made."<sup>74</sup> The court relied heavily on the lower court's factual findings that there were no threats of violence or promises of rewards made by the police, and that Fincher did not appear to be under the influence of alcohol or drugs, limiting "coercion" to the use of force or promise of a benefit.<sup>75</sup>

In *State v. McDowell*,<sup>76</sup> the same court upheld a similar search where consent was given by a murder defendant's mentally disabled girlfriend.<sup>77</sup> The

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67. *Id.* at 497 (citations omitted). Although the court cited to cases holding that the belief of police officers as to the defendant's mental state is irrelevant, the officers' perceptions served as almost the exclusive basis for the court's own holding. *Id.*

68. 305 S.E.2d 685 (N.C. 1983).

69. *Id.* At 690-91.

70. *Id.* at 689.

71. *Id.*

72. *Id.* at 690.

73. *Fincher*, 305 S.E.2d at 690.

74. *Id.* Note that the court fails to abide by its own rule; immediately after stating that lack of intelligence *alone* will not vitiate consent, the court notes that Fincher's age is also a factor. The court also does not mention the fact of the ten officers in its analysis, another factor that should be considered under *Schnecko*, which the court had cited with approval. *Id.* In this case, Fincher's low intelligence was hardly "standing alone."

75. *Id.* at 691.

76. 407 S.E.2d 200 (N.C. 1991).

77. *Id.* at 208.

trial court found that the girlfriend, twenty-two, was mentally retarded and had dropped out of school in the twelfth grade, “but can write her own name and can read to some extent.”<sup>78</sup> The woman’s social worker testified that she was easily exploited, acquiescent to authority, and lacked the will to disagree with an authority figure.<sup>79</sup> After noting that mental impairment is but a factor in the analysis, the court, without specifying, said that there was sufficient other evidence in the record to indicate that the woman understood the consent form when she signed it.<sup>80</sup> The trial court’s findings “fully support[ed] the legal conclusion that Karen Curtis’[s] consent to the search was voluntarily and intelligently given, free from any duress or coercion.”<sup>81</sup>

In *State v. Collins*,<sup>82</sup> the Court of Appeals of Ohio also considered the intertwined issues of age and mental impairment in affirming the felonious assault conviction of an eighteen-year-old defendant with borderline mental retardation.<sup>83</sup> Collins had a tested IQ of 76, but had graduated from high school.<sup>84</sup> The court weighed Collins’ age and intellectual ability against the fact that he had been given *Miranda* warnings, and was questioned only briefly in his own home.<sup>85</sup> Most significantly, the court said, Collins volunteered to retrieve the evidence and handed it over to the police, “‘clearly show[ing]’ that the suspect knowingly and voluntarily consented.”<sup>86</sup>

In *State v. Singleton*,<sup>87</sup> the Court of Criminal Appeals of Tennessee upheld the murder conviction of a man who claimed that his consent was involuntary due to his below-average intelligence.<sup>88</sup> Singleton signed a written consent form to search his farm, and police eventually discovered the body of the

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78. *Id.* at 207.

79. *Id.* at 207-08.

80. *Id.* at 208.

81. *McDowell*, 407 S.E.2d at 208. Faced with these two precedents from the state high court, it was short work for a lower state appellate court to uphold a finding of voluntary consent of a defendant convicted of drug trafficking. *State v. James*, 454 S.E.2d 858 (N.C. Ct. App. 1995). While conducting a “drug sweep” on an interstate bus, police observed the defendant behaving nervously and obtained his consent to search him and his luggage, including a portable radio which contained the drugs. *Id.* at 860. At the suppression hearing, the defense expert testified that James had an IQ of 70, that he could only read three- and four-letter words, and that he had been conditioned in special education classes to be cooperative toward authority figures. *Id.* at 860-61. Still, the court found ample evidence to support the trial court’s finding that James had consented voluntarily, especially considering that the defendant himself testified that he had consented of “his own free will.” *Id.* at 862.

82. No. 95-A-0044, 1996 Ohio App. LEXIS 5805 (Ohio Ct. App. Dec. 20, 1996).

83. *Id.* At \*18.

84. *Id.* at \*16.

85. *Id.* at \*16-18.

86. *Id.* at \*20-21 (quoting *State v. Rutter*, 589 N.E.2d 421, 423 (Ohio Ct. App. 1990)).

87. No. 03C01-9406-CR-00221, 1995 Tenn. Crim. App. LEXIS 198 (Tenn. Crim. App. Mar. 13, 1995).

88. *Id.* At \*1

victim in a padlocked freezer.<sup>89</sup> The court noted that, although Singleton had an IQ of 74 and had encountered many difficulties in school, he also had the wherewithal to operate a tobacco farm and participate in a scheme to defraud the federal government of tobacco subsidies, which figured into the motive for the crime.<sup>90</sup> In addition, Singleton had given oral consent to the police to search his farm at least twice in the days preceding the actual search and signing of the consent form, giving him “ample opportunity to reflect on his decision before granting written consent.”<sup>91</sup> No pressure or use of force by the officers was alleged, and they testified that Singleton had been friendly and cooperative throughout.<sup>92</sup>

In *State v. Jolla*,<sup>93</sup> the Supreme Court of Louisiana upheld the validity of a consent to search given by a couple convicted of child abuse, where both defendants claimed a mental impairment.<sup>94</sup> A child protection worker received a complaint that the couple was keeping seven-year-old twins in isolation and in deplorable conditions, and referred the matter routinely to police; the responding officer happened to know the family personally.<sup>95</sup> In the course of a friendly but persistent exchange, the officer eventually coaxed permission from the couple to observe the twins in their bedroom, where conditions were as bad or worse than the informant had described.<sup>96</sup> The officer, although maintaining a friendly and calm demeanor and informing the Jollas of their right to refuse him permission to search, persisted past the husband’s refusal and request to return another day.<sup>97</sup> Despite the persistence, the court found the atmosphere to be free from coercion because the Jollas were not under arrest and were free to leave when they consented to the search.<sup>98</sup>

Altogether, three state high courts, two federal appellate courts and several other trial and lower appellate courts treated the issue of how mental impairment relates to voluntary consent with little more than perfunctory analysis. Typically, lower court findings were upheld with a restatement of the facts of the case and a sentence or two of analysis.

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89. *Id.* at \*3-4.

90. *Id.* at \*12.

91. *Id.* at \*13.

92. *Singleton*, 1995 Tenn. Crim. App. LEXIS 198 at \*6, \*13.

93. 384 So. 2d 370 (La. 1980).

94. *Id.* at 371. Interestingly, although the Jollas both had tested IQs of 67, they did not raise this fact in relation to their consent to the search; they made the mental deficiency claim only with respect to the waiver of their *Miranda* rights prior to giving taped statements to the police. *Id.* at 372-74.

95. *Id.* at 371.

96. *Id.* at 371-72.

97. *Id.* at 372.

98. *Jolla*, 384 So. 2d at 373. Mr. Jolla, in fact, left the house at one point during the search. *Id.*

*B. Confusing the Issues*

In *United States v. Velasquez*,<sup>99</sup> the Third Circuit Court of Appeals upheld the validity of a warrantless search where consent was given by a woman who suffered, according to both defense and state psychiatrists, from an adjustment disorder.<sup>100</sup> The defense expert had testified that the disorder, coupled with the stress of the detention, completely undermined the woman's voluntary consent.<sup>101</sup> The court relegated its discussion of the defendant's mental health to a footnote, which merely referenced the discussion of Velasquez's competency to stand trial. In that discussion, the court upheld the trial court's ruling that "however irrational her decisions not to disclose information [to counsel] were, she was not incapable of assisting counsel by reason of mental defect."<sup>102</sup> How the standard for competency to stand trial relates to the standard for determining whether a consent to search is voluntary was not explained. The court reasoned that, because she was merely detained inside the patrol car during a traffic stop when consent was given rather than under formal arrest, coercive factors were minimized.<sup>103</sup> There were no allegations of threats or promises by the police, and Velasquez was college-educated and fluent in English.<sup>104</sup>

In *United States v. Rosario-Diaz*,<sup>105</sup> the First Circuit Court of Appeals, dealing with a defendant who had a tested IQ in the mid-70s and no prior involvement with the police, upheld the admission of evidence obtained pursuant to one of the defendants' consent.<sup>106</sup> The court weighed the defense expert's testimony against that of a government expert and the arresting officer, who testified that the defendant "understood what was happening when she waived her Fifth Amendment rights and consented to the search."<sup>107</sup> The court emphasized the absence of coercive conduct by the police, either physical or psychological.<sup>108</sup> The court also lumped the issues of voluntary

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99. 885 F.2d 1076 (3d Cir. 1989).

100. *Id.* at 1082. Adjustment disorders are "psychological response[s] to an identifiable stressor or stressors that results in . . . clinically significant emotional or behavioral symptoms." DSM-IV, *supra* note 60, at 679. The psychological reaction can cause significant impairment in social interactions. *Id.*

101. *Velasquez*, 885 F.2d at 1082.

102. *Id.* at 1089-90.

103. *Id.* at 1082. In fact, because the officer asked her into the car because it was "warmer and quieter than outside," the court found "no coercion" in the situation, apparently considering it quite significant that Velasquez could still see her companion in the other car. *Id.*

104. *Id.*

105. 202 F.3d 54 (1st Cir. 2000).

106. *Id.* at 69.

107. *Id.* The Fifth Amendment protects defendants against making self-incriminating statements and also affords a right to counsel before police questioning; it is unrelated to consensual searches. *Miranda v. Arizona*, 384 U.S. 436 (1966).

108. *Rosario-Diaz*, 202 F.3d at 69.

confession and voluntary consent together, and treated both as governed by *Connelly*.<sup>109</sup>

In *United States v. Major*,<sup>110</sup> a federal district court denied a motion to suppress evidence seized pursuant to the consent of Thomas Major, a forty-seven-year-old, college-educated businessman accused of money laundering.<sup>111</sup> Major testified at the suppression hearing that he and his family had fled Hungary to escape anti-Semitism when he was eight years old and that, at the border with Austria, a Russian soldier had shot and killed their guide just a few feet from him.<sup>112</sup> When agents entered his office, Major said he was afraid for his life and could only think about the shooting of the guide.<sup>113</sup> Major's father, a Holocaust survivor, had ingrained in him the attitude to always cooperate in confrontational situations because the goal was to simply survive.<sup>114</sup> A psychiatrist also testified, giving his diagnosis that Major suffered from Posttraumatic Stress Disorder, and stating that his childhood experience made Major more susceptible to comply with law enforcement.<sup>115</sup>

The court did not discuss Major's mental state issues in the portion of its opinion dealing with consent to the search but did when ruling on the motion to suppress other statements he made at the time.<sup>116</sup> The court noted that there was no evidence that the agents took advantage of any susceptibility Major may have had, nor were they aware of it.<sup>117</sup> The judge also found that, although Major may have been initially shocked when confronted by the gun-wielding agents, he regained his composure after the weapons were holstered.<sup>118</sup> Ultimately, the judge's decision turned on credibility, and she elected to accept the account of the police officer who testified at the hearing.<sup>119</sup>

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109. *Id.* at 69; *see also supra* notes 33-37 and accompanying text.

110. 912 F. Supp. 90 (S.D.N.Y. 1996).

111. *Id.* at 93.

112. *Id.* at 94.

113. *Id.*

114. *Id.* For a dramatic account of how surviving the Holocaust can impact one's life, see ELIE WIESEL, *NIGHT* (Stella Rodway trans., 1960) (1958).

115. *Major*, 912 F. Supp. at 94. Posttraumatic Stress Disorder produces intense feelings of fear, helplessness, or horror as a response to a direct personal experience that involves actual or threatened death or serious bodily injury. DSM-IV, *supra* note 60, at 463.

116. *Major*, 912 F. Supp. at 96. Because the *Miranda* warning was given to Major, the overall standard for determining voluntariness (totality of the circumstances) would be the same for both questions, although the court does not explicitly make this point. Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2004 (1998).

117. *Major*, 912 F. Supp. at 96.

118. *Id.*

119. *Id.* at 97.

In *State v. Blakely*,<sup>120</sup> the Court of Appeals of New Mexico attempted unsuccessfully to articulate a clear test for mental capacity to consent to a search in affirming a drug possession conviction in 1993.<sup>121</sup> Police responded to a 911 call from the defendant, who had threatened suicide, and, according to departmental procedure, took him into custody for a mental health evaluation.<sup>122</sup> During the pat down, Blakely volunteered that he had a syringe and some drugs in his pocket.<sup>123</sup> In addition to his mental health problems, Blakely claimed that his intoxication rendered his consent invalid.<sup>124</sup> Although the issue was consent to search, the court applied the prevailing test that had been developed in state courts for determining the validity of an incriminating statement, stating that “the defendant must have had sufficient mental capacity at the time he made the statement to be conscious of the physical acts performed by him, to retain them in his memory, and to state them with reasonable accuracy.”<sup>125</sup> Because Blakely correctly informed the officer that there were drugs in his pocket, he obviously was conscious of his physical acts, remembered them, and could articulate them accurately, the court reasoned.<sup>126</sup> The court also found that coercive police activity, absent here, was a necessary precondition to finding a statement to be involuntary.<sup>127</sup>

Four courts, although they gave more depth to their analysis and explained their holdings much more extensively than the cases in the previous section, still did not provide clear guidance on the issue of mental impairment and voluntary consent. These courts typically imported standards related to confessions or competency to stand trial, but they did not explain how or why these standards should be applied to consent searches.

### C. Careful Analysis

The Eighth Circuit considered the validity and voluntary nature of consent in *United States v. Gipp*,<sup>128</sup> where the defendant claimed both that he was under the influence of drugs and that the officer’s approach re-aggravated his posttraumatic stress disorder.<sup>129</sup> The court took a bifurcated approach,

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120. 853 P.2d 168 (N.M. Ct. App. 1993).

121. *Id.*

122. *Id.* at 170. Although the mental health center determined that Blakely did not need to be committed, he attempted suicide in jail later that same day. *Id.*

123. *Id.*

124. *Id.* at 171.

125. *Blakely*, 853 P.2d at 171. This is also quite similar to the standard for determining a witness’s competency to testify. *See, e.g.*, FED. R. EVID. 601.

126. *Blakely*, 853 P.2d at 171. One might well note that, based on this test, as long as the police actually find incriminating evidence based on consent, the search will be deemed voluntary.

127. *Id.*

128. 147 F.3d 680 (8th Cir. 1998).

129. *Id.* at 685.



examining both the characteristics of the person giving consent, including intoxication and intelligence, and the environment in which consent was given.<sup>130</sup> The court noted the absence of threats, promises, or any psychological coercion, and the short duration of the detention.<sup>131</sup> Turning to the intoxication and mental impairment issues, the court noted that the defense expert could not testify with precision as to how impaired the defendant was at the time consent was given and observed that the defendant answered questions intelligently, behaved rationally, and did not exhibit any symptoms of impairment.<sup>132</sup>

In *United States v. Hall*,<sup>133</sup> the District of Columbia Circuit upheld as voluntary a consent to search given by an eighteen-year-old woman with an IQ of 76 and a history of psychological problems.<sup>134</sup> An expert testified that, given Hall's reading and language skills of a seven- or eight-year-old child, her other cognitive abilities, and a borderline personality disorder, she was incapable of voluntary consent "without some explicit statement and perhaps restatement of her right to refuse."<sup>135</sup> The expert said that, because of her mental impairments, the anxiety and fear of the situation rendered her incapable of even questioning whether she was free to leave.<sup>136</sup>

The appellate court eschewed a "reasonable person" standard and said that the key question was whether the defendant in fact felt subjectively compelled to consent.<sup>137</sup> To answer this question, the court used the same bifurcated analysis identified in *Gipp*, considering separately police coercive activity and the defendant's subjective mental state.<sup>138</sup> The court recognized that "[t]here is inevitably some pressure or apprehension on the part of an individual whenever the police approach and begin asking questions. . . . Moreover, that pressure and apprehension is bound to be heightened when the questioning occurs in the middle of the night in a relatively deserted parking lot."<sup>139</sup> However, the fact that the officer was in plain clothes, spoke conversationally, had his weapon concealed, and did not use any force or threats mitigated the coerciveness of the situation.<sup>140</sup>

For the subjective factors, the court concluded that the expert testimony on Hall's mental impairment was undercut to a degree by the fact that Hall

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130. *Id.* at 685-86.

131. *Id.* at 686. Gipp's car was searched during a traffic stop. *Id.*

132. *Id.*

133. 969 F.2d 1102 (D.C. Cir. 1992).

134. *Id.* at 1106.

135. *Id.* at 1105.

136. *Id.*

137. *Id.* 1106.

138. *Hall*, 969 F.2d at 1107; *see also supra* text accompanying note 130.

139. *Hall*, 969 F.2d at 1107.

140. *Id.*

initially lied to police in response to some questions, eventually refused to answer questions, and requested an attorney, demonstrating that she had the capacity to resist police questioning.<sup>141</sup> The court noted that this was a close question, but it was ultimately restrained by the “clearly erroneous” standard of review on the issue.<sup>142</sup>

In *State v. Allies*,<sup>143</sup> the Supreme Court of Montana upheld a trial judge’s finding that a murder defendant suffering from a borderline personality disorder and under the influence of drugs did not voluntarily consent to a search.<sup>144</sup> The court noted the defendant’s drug dependence and several items of coercive police conduct, including the use of deception, isolation in a small room, the “good cop-bad cop” interrogation technique, and the intimidation that Allies’s difficulties were medical, rather than criminal, in nature.<sup>145</sup> Yet, the court concluded that the expert psychiatric testimony demonstrated that, even had those factors not been present, “there is doubt that the defendant was capable of voluntarily and knowingly consenting to the search.”<sup>146</sup> The defendant’s mental condition may have prevented a rational decision on whether to waive his constitutional rights.<sup>147</sup> The court was particularly concerned that the police officers were well aware of Allies’s condition; in their own testimony, they described him as “talking to the walls” and “completely out of it.”<sup>148</sup> During interrogation, Allies also professed a belief that the “Space Brothers” were exerting an evil influence over him and that he had been cursed by his ex-wife; he also threatened to commit suicide.<sup>149</sup> The Montana Supreme Court also adopted the bifurcated method of analysis, saying that “‘totality of the circumstances’ . . . includes not only the police techniques . . . but also the testimony presented of the defendant’s mental condition.”<sup>150</sup>

In *State v. Williams*,<sup>151</sup> one of the rare cases where a state appellate court has overturned a trial judge’s finding of voluntary consent given by a mentally impaired person, the Supreme Court of Appeals of West Virginia ordered a

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141. *Id.* at 1108. However, even children as young as three will lie in order to avoid anticipated unpleasant consequences. ARLENE EISENBERG ET AL., *WHAT TO EXPECT: THE TODDLER YEARS* 460-62 (1994).

142. *Hall*, 969 F.2d at 1109.

143. 621 P.2d 1080 (Mont. 1980).

144. *Id.* at 1088.

145. *Id.* at 1085-86. For a criticism of the coercive nature of these techniques and others, see WELSH S. WHITE, *MIRANDA’S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 25-38 (2001).

146. *Allies*, 621 P.2d at 1086.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1087.

151. 249 S.E.2d 758 (W. Va. 1978).

new trial for a man convicted of first degree murder.<sup>152</sup> The defendant was awakened from an alcohol-induced sleep and accompanied by five police officers back to the station, where he subsequently gave consent to search his jacket and eventually confessed to the crime.<sup>153</sup> The court noted that consent obtained in a custodial situation “must be subjected to the most careful scrutiny.”<sup>154</sup> On the issue of mental impairment, the defendant had presented expert testimony that his IQ was 60.<sup>155</sup> Williams also testified at the suppression hearing that he could not read or write except for his name and had never completed elementary school.<sup>156</sup> The officers, aware of his limited intelligence, went to great lengths to help him understand his rights.<sup>157</sup> Nonetheless, his mental impairment, combined with the custodial situation and the presence of so many officers, clearly pointed to “mere submission to authority,” rather than voluntary consent.<sup>158</sup>

In *State v. Sondergaard*,<sup>159</sup> the Court of Appeals of Washington upheld a trial court’s finding of lack of valid consent given by a woman who was hallucinating at the time she was approached by the police.<sup>160</sup> The woman, when approached in her hotel room, was rocking back and forth, pointing randomly about the room; she told the police that stationary objects were moving about.<sup>161</sup> The officer was not coercive, made no threats or promises, and merely asked the woman if he could look inside her purse.<sup>162</sup> Despite the lack of coercive police conduct, the court suppressed the drugs seized from the defendant’s purse, reasoning that “[w]hen a person with an obvious mental disability or incapacity gives what appears to be a consent to search, that apparent consent is not necessarily rendered voluntary simply because the police asked for consent in a non-threatening manner.”<sup>163</sup> The court declined the state’s invitation to apply *Connelly*<sup>164</sup> to the consent search context and

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152. *Id.* at 765.

153. *Id.* at 762.

154. *Id.* at 763.

155. *Id.* at 764.

156. *Williams*, 249 S.E.2d. at 762.

157. *Id.* at 761.

158. *Id.* at 764. The court, however, undercuts its reasoning by citing the “no sane man” rule of *Higgins v. United States*, 209 F.2d 819 (D.C. Cir. 1954). *Id.* The *Higgins* rule, which states that no sane person who denies his guilt would actually be willing to allow police to search for easily-discovered incriminating evidence, has been roundly criticized and rejected. *See, e.g.*, *Leavitt v. Howard*, 462 F.2d 992 (1st Cir. 1972); *United States v. Gorman*, 355 F.2d 151 (2d Cir. 1965); *LAFAYE*, *supra* note 37, at § 8.1.

159. 938 P.2d 351 (Wash. Ct. App. 1997).

160. *Id.* at 355.

161. *Id.* at 352.

162. *Id.* at 353.

163. *Id.* at 354.

164. *See supra* text accompanying notes 33-37.

argued that federal cases continued to suggest that lack of capacity, standing alone, could vitiate an apparent consent.<sup>165</sup>

In the recent case of *State v. Bocanegra*,<sup>166</sup> the Court of Appeals of Washington had the opportunity to directly apply the rule and reasoning of *Sondergaard* to a slightly different factual situation.<sup>167</sup> Following up on a tip that Edward Bocanegra was growing marijuana on his property, the police went to the house and obtained consent from his mother to search the premises.<sup>168</sup> After detecting some signs of marijuana growing from a locked garage, the officers obtained a search warrant, pursuant to which they discovered a large number of marijuana plants.<sup>169</sup> At the pretrial hearing, testimony ensued that the mother had been raised and educated in Germany, and that she suffered from chronic paranoid schizophrenia, which the defense expert said combined to render her unable to understand the consent to search form.<sup>170</sup> While noting the precedent, the court distinguished the case due to the fact that the police were on notice in *Sondergaard* as to the defendant's mental illness, thus making it unreasonable to rely on her consent.<sup>171</sup> Mrs. Hoffman-Bocanegra, by contrast, displayed no signs of mental illness, with "no evidence that the police knew or should have known that Hoffman-Bocanegra . . . was mentally incompetent and incapable of consenting to the search."<sup>172</sup>

This review of the available cases underscores that courts are in need of better guidance on how to apply the due process voluntariness standard to consent given by a mentally impaired person. Courts that make a serious effort to address the issue often still find themselves in a legal morass as they attempt to import standards relating to mental competency from other areas of criminal procedure and shoehorn them into the voluntariness test. Even courts that have developed and follow a clear and well thought-out test that does not stray from the issue at hand reveal a fatal defect in applying the voluntariness test to this population: Courts rely heavily on the degree to which the person's condition was readily apparent to the investigating officers, leading to unequal treatment of individuals with similar degrees of impairment.

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165. *Sondergaard*, 938 P.2d 354-55.

166. No. 28151-1-II, 2003 Wash. App. LEXIS 1877 at \*1 (Wash. Ct. App. Aug. 26, 2003).

167. *Id.*

168. *Id.* at \*2.

169. *Id.*

170. *Id.* at \*4-\*6. Schizophrenia can include a wide range of cognitive impairment related to perception, volition, inferential thinking, communication, and thought production and may involve hallucinations, delusional thinking, and disorganized thinking and behavior. DSM-IV, *supra* note 60, at 299-300.

171. *Bocanegra*, 2003 Wash. App. LEXIS 1877 at \*6-7.

172. *Id.* at \*7.

## IV. BEHAVIOR THEORY AND THE MENTALLY ILL AND DISABLED

In the 1960s, Stanley Milgram performed a series of experiments that have become among the most widely known and cited in the history of behavioral psychology.<sup>173</sup> Although he conducted many variations of the experiments over the years, the basic design was the same for all of them.<sup>174</sup> People would come, in response to an advertisement, to participate in an experiment purportedly related to memory and learning. Upon arrival, one person would be designated the “teacher” and another the “learner.” The learner was taken to another room and strapped into a chair with an electrode attached to his wrist. The learner, in reality an actor, was not actually hooked up to any devices, but was to play a key role in the experiment. The teacher, on the other hand, was the walk-in participant and went with the researcher to a kind of control room where the researcher explained the details of the experiment. The purpose, the teacher was told, was to measure the effect of punishment on learning. A “shock generator” with a range of switches marked from 15 volts to 450 volts in 15-volt increments was in the control room. Accompanying labels ranged from “Slight Shock” to “Danger—Severe Shock.” Two switches at the very end of the row were simply labeled “XXX.”

The teacher was instructed to administer the test to the learner in the next room. With each correct response, he was to move on the next item, but incorrect responses or refusals to answer were to be met with shocks of sequentially increasing intensity. The learner, of course, had been instructed to purposely answer many of the questions incorrectly and, in addition, to begin displaying signs of discomfort at various points. When he received a “shock” of 75 volts, the learner would grunt; at 120 volts, he complained verbally; at 150, he would demand to be released. The protests grew increasingly strong as

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173. ARTHUR G. MILLER, *THE OBEDIENCE EXPERIMENTS: A CASE STUDY OF CONTROVERSY IN SOCIAL SCIENCE* v (1986); Thomas Blass, *The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority*, in *OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM* 36-37 (Thomas Blass ed., 2000). Arguably, only the work of B.F. Skinner, who created a box that rewarded rats with a food pellet for giving a desired response such as pressing a lever, and Ivan Pavlov, who conditioned dogs to salivate at the sound of a ringing bell, are more readily recognized in the field. See, e.g., Robert M. Yerkes & Sergius Morgulis, *The Method of Pavlov in Animal Psychology*, in *A HISTORY OF PSYCHOLOGY: ORIGINAL SOURCES AND CONTEMPORARY RESEARCH* 345 (Ludy T. Benjamin, Jr., ed., 2nd ed. 1997); James H. Capshew, *Engineering Behavior: Project Pigeon, World War II and the Conditioning of B.F. Skinner*, in *A HISTORY OF PSYCHOLOGY: ORIGINAL SOURCES AND CONTEMPORARY RESEARCH*, *supra*, at 472.

174. See François Rochat & Andre Modigliani, *Authority: Obedience, Defiance, and Identification in Experimental and Historical Contexts*, in *A NEW OUTLINE OF SOCIAL PSYCHOLOGY* 235 (Martin Gold & Elizabeth Douvan eds., 1997).

the shocks progressed, culminating in an “agonized scream” at 285 volts and higher levels.<sup>175</sup>

As the teacher reacted to the protests of the learner and hesitated or expressed concerns about continuing, the researcher would use a series of verbal prods: “[p]lease continue;” “[t]he experiment requires that you continue;” “[i]t is absolutely essential that you continue;” and “[y]ou have no other choice, you *must* go on.”<sup>176</sup> The researcher was “firm, but not impolite.”<sup>177</sup> If the teacher refused to continue after all four prods, the experiment was over. In “Experiment 5,” which was conducted in a basement rather than an elegant Yale University laboratory, the learner was also instructed to mention a fictitious heart condition in his protests.<sup>178</sup> Nonetheless, 65 percent of the teachers remained obedient throughout the experiment, administering the highest “shocks” possible to the learners.<sup>179</sup> The average maximum shock delivered was between 360 and 375 volts, well beyond the point where learners began screaming and begging to be released.<sup>180</sup>

Milgram concluded that a variety of social forces program people to obey authority figures.<sup>181</sup> First, social conditioning “prepares” people to obey authority figures; children obey teachers in school, moviegoers obey ushers in the theater, and thus subjects are more likely to obey the experimenter in the experiment.<sup>182</sup> This theory essentially means that it is the authority of the situation, rather than the personality or behavior of the experimenter, that engenders obedience.<sup>183</sup> Second, Milgram also theorized that the subjects were in an “agentic state” where they viewed themselves as carrying out another

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175. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 3-4, 14-26 (1974).

176. *Id.* at 21.

177. *Id.* The role of the researcher was played by a high school biology teacher, who dressed for the part in a gray technician’s coat. *Id.* at 16.

178. *Id.* at 55-56. The “learner” was played by a forty-seven-year-old accountant whom most participants found “mild-mannered and likable.” *Id.* at 16. The full script of the learner’s responses, including the references to the heart problem, underscores the intensity of the experiment. *Id.* at 56-57.

179. *Id.* at 60.

180. MILGRAM, *supra* note 175, at 60.

181. See 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, 236. As Milgram himself noted, the dramatic quality of the experiment is “somewhat obscured in print. For the subject, the situation is not a game; conflict is intense and obvious.” MILGRAM, *supra* note 175, at 4.

182. Barrio, *supra* note 181, at 236.

183. See *id.*; John Sabini & Maury Silver, *Dispositional vs. Situational Interpretations of Milgram’s Obedience Experiments: The Fundamental Attribution Error*, 13 J. THEORY SOC. BEHAV. 147, 151 (1983).

person's wishes and were thus less responsible for their own actions.<sup>184</sup> Finally, Milgram's experiments pointed to specific situational facts that encouraged obedience, such as the subjects' politeness, the awkwardness of walking out of the experiment, and the desire to uphold their initial promise to the researcher.<sup>185</sup>

Milgram demonstrated that people will often perform actions against their own moral judgment even though they will gain nothing from obeying and there are few consequences for disobeying the request of an authority figure.<sup>186</sup> Even in friendly encounters, most people feel very uncomfortable in refusing a police request.<sup>187</sup>

Milgram's research, though widely known, has not been universally hailed.<sup>188</sup> The ethics of the experiments were soundly decried, with strong objections to the use of deception and to the prospect of delivering electric shocks to human subjects, almost from the moment Milgram's initial study was published.<sup>189</sup> Milgram was criticized for allowing the goal of expanding human knowledge to justify his ethically questionable experimental means, an assertion he did not precisely refute.<sup>190</sup> Other critics more directly attacked Milgram's methodology and results.<sup>191</sup> One critic argued that it was the laboratory setting, with the "teachers" investing a heavy importance in the scientific nature of the experiment and the expertise of the researcher, that induced obedience.<sup>192</sup> Behavior in the laboratory "must be interpreted, taking into account the determining role of the laboratory context itself."<sup>193</sup> Other critics suggested that the fact that the experimenter remained dispassionate and did not display any concern toward the "learner" was a subtle tip-off to the "teacher" about the true nature of the experiment.<sup>194</sup> People typically trust that scenarios where psychological researchers inflict intense pain on their research subjects do not occur, so the participants simply readjusted their view and decided that it was "safe" to shock the learners.<sup>195</sup> Other critics cautioned against trying to extrapolate Milgram's results beyond the setting of a lab,

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184. See MILGRAM, *supra* note 175, at 143-52.

185. See Sabini & Silver, *supra* note 183, at 147-48.

186. *Id.* at 150-51.

187. Barrio, *supra* note 181, at 216.

188. See MILLER, *supra* note 173, at v.

189. *Id.* at 88-90.

190. See *id.* at 88-91.

191. See generally *id.* at 139-78.

192. *Id.* at 141.

193. MILLER, *supra* note 173, at 142.

194. *Id.* at 143-44.

195. *Id.* This argument is undercut when one reads the transcripts of Milgram's research sessions and understands the very real agitation and concern for the "learner" displayed by many of the "teachers." See, e.g., MILGRAM, *supra* note 175, at 73-77.

where the role of authority was played by a scientific researcher.<sup>196</sup> Despite the criticism, however, Milgram's research is generally accepted and viewed as having significant value in the field.<sup>197</sup>

This human tendency to automatically obey authority figures becomes an especially acute problem when considering the mentally impaired, as they are more likely than the average person to respond to pressure and coercion.<sup>198</sup> Mentally retarded individuals have an especially strong desire to please others, particularly authority figures, and often will tell them whatever it is the individual thinks they want to hear.<sup>199</sup> Consistent with Milgram's social conditioning hypothesis, mentally retarded individuals are thought to obey authority figures more often because they usually have several people in authority over them and have often been through training programs to increase their compliance with authority.<sup>200</sup>

Mentally retarded individuals are also much more likely to respond "yes" to questions regardless of what is actually being asked and whether that response is even appropriate—a phenomenon known as "acquiescence."<sup>201</sup> Several reasons have been forwarded for the increased "acquiescence" of mentally impaired individuals. Studies show that "acquiescence" is inversely related to IQ scores and directly related to the strength of the suggestion.<sup>202</sup> Responding affirmatively has also been viewed as a default response strategy for retarded individuals who do not understand either the question or the appropriate answer.<sup>203</sup> Individuals with mental retardation have been shown to be particularly suggestible when the question contains sophisticated or abstract ideals or when they are uncertain of the details.<sup>204</sup> In addition, individuals with mental retardation are much more likely to change their response if the questioner indicates even mild disapproval.<sup>205</sup>

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196. MILLER, *supra* note 173, at 149.

197. *Id.* at 256.

198. Everington & Fulero, *supra* note 4, at 212.

199. *Id.* at 213.

200. W. M. L. Finlay & E. Lyons, *Acquiescence in Interviews with People Who Have Mental Retardation*, 40 MENTAL RETARDATION 14, 18 (2002).

201. Everington & Fulero, *supra* note 4, at 213. Acquiescence has been defined as "the tendency to agree with or say yes to statements or questions, regardless of the content of the items." Finlay & Lyons, *supra* note 200, at 14 (citation omitted).

202. Finlay & Lyons, *supra* note 200, at 19-20. Other factors that have been shown to increase suggestibility are a belief and personal trust that the interviewer's intentions are genuine and the belief that the interviewer expects the subject to know and provide an answer. *Id.* at 20.

203. *Id.* at 20.

204. *Id.*

205. Everington & Fulero, *supra* note 4, at 218. The authors found such "shifting" was prevalent even in regard to questions about a story the individuals had listened to, rather than questions about their own culpability for a crime. "One can speculate that if this group of individuals is so suggestible in this low-risk questioning situation, then they might be even more



V. THE INADEQUACY OF THE *SCHNECKLOTH* VOLUNTARINESS STANDARD

Application of the totality of the circumstances standard from *Schneckloth*<sup>206</sup> is problematic at best in trial court rulings on the voluntariness of consent given by mentally impaired individuals, as “a conclusion on voluntariness is expected to emerge from a hopper into which all factors, volitional and cognitive, are randomly thrown.”<sup>207</sup> That problem becomes uniquely exacerbated when a court has to contend with the additional claim that mental impairment invalidated apparent consent.<sup>208</sup> Justice Thurgood Marshall anticipated the problems and the inherent inconsistency of the standard in his dissenting opinion in *Schneckloth*.<sup>209</sup> Marshall wrote that the court had missed the key issue by misplacing its focus on coercive police conduct.<sup>210</sup> The real inquiry should have been “whether a simple statement of assent to search, without more, should be sufficient to permit the police to search . . . .”<sup>211</sup>

Marshall argued that adopting the due process voluntariness standard from confession cases was not the correct approach because the context of consent searches and confessions are very different.<sup>212</sup> In the confession context, knowledge of the right to be free from coercion is irrelevant—no one would give up the right to be free from coercion.<sup>213</sup> Rather, the *Miranda* warnings serve to mitigate the coercive effects of a custodial interrogation.<sup>214</sup> Consent to a search is a different concept than simply being free from coercion, Marshall argued.<sup>215</sup> Consent is a means to circumvent the substantive requirements of the Fourth Amendment, namely the warrant requirement and its exceptions

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likely to respond to suggestible questions and to ‘shift’ their answers when the pressure is greater.” *Id.*

206. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *see also supra* notes 12-27 and accompanying text.

207. JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 80-81 (1993). Some have argued that courts’ strained reading of the Fourth Amendment results from the pressure of the exclusionary rule, whose strict application would prevent highly probative evidence, often of very serious crimes, from being admitted. *See, e.g.*, STEVEN R. SCHLESINGER, *EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE* 63 (1977).

208. *See* ALAN WERTHEIMER, *COERCION* 117 (1987) (noting that “the Court entirely ignores the cognitive dimension of consent . . .”). In the confession context, one prominent author observed that courts often confuse cognitive issues with coercive police conduct issues. GRANO, *supra* note 207, at 80.

209. As Solicitor General of the United States, Marshall had argued in favor of the *Miranda* decision before the Supreme Court in 1966. *See Miranda v. Arizona*, 384 U.S. 436, 438 (1984).

210. *Schneckloth v. Bustamonte*, 412 U.S. 218, 278 (1973) (Marshall, J., dissenting).

211. *Id.* (footnote omitted).

212. *Id.* at 280. Marshall notes that “the phrase ‘voluntary consent’ seems redundant in a way that the phrase ‘voluntary confession’ does not.” *Id.* at n.6.

213. *Id.* at 281.

214. *Id.*

215. *Schneckloth*, 412 U.S. at 282.

related to exigent circumstances, which are related to justifiable law enforcement needs.<sup>216</sup> Consent searches are not an exception to the warrant requirement by the same rationale as those based on exigent circumstances; rather, they are permitted because citizens are free to choose whether to exercise their constitutional right to be free from a search conducted without probable cause.<sup>217</sup>

Marshall feared that the majority's holding would limit Fourth Amendment rights to those sophisticated and knowledgeable enough to assert them on their own.<sup>218</sup> The practical impact of the ruling would inevitably result in police conducting "a charade of asking for consent. If they display any firmness at all, a verbal expression of assent will undoubtedly be forthcoming."<sup>219</sup> Marshall would not necessarily have required police to inform suspects of their right to refuse consent, but he saw that as the simplest way for the prosecution to satisfy its burden of showing the suspect's knowledge of his or her rights.<sup>220</sup>

The distinction the *Schneckloth* majority made between the criteria for voluntariness of consent and voluntariness of confession is somewhat contrived.<sup>221</sup> This is probably because the definition the Court created for voluntary consent is a legal fiction, essentially a public policy compromise between the needs of law enforcement and the need for public perception of the criminal justice system as fair.<sup>222</sup> This artificial approach, and its analytical consequence of shoving the cognitive aspects of voluntariness aside, leads to oddly juxtaposed decisions where one seriously impaired person is deemed to have voluntarily consented while a modestly impaired person is deemed to have not.<sup>223</sup> In fact, using the voluntariness standard for consent searches has led to the same problems that led the Court to ultimately reconsider that standard in the confession context in the *Miranda* decision.<sup>224</sup>

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216. *Id.*

217. *Id.* at 283.

218. *Id.* at 289.

219. *Id.* at 284.

220. *Schneckloth*, 412 U.S. at 286.

221. See WERTHEIMER, *supra* note 208, at 116. Professor Wertheimer points out that the *Schneckloth* majority echoed the dissenting opinion in *Miranda*, and he argues that the *Schneckloth* decision was really an expression on the part of the majority that *Miranda* had been wrongly decided. *Id.*

222. Kaplan & Dixon, *supra* note 2, at 950.

223. Compare *State v. McDowell*, 407 S.E.2d 200 (N.C. 1991), with *State v. Allies*, 621 P.2d 1080 (Mont. 1981). See also *supra* notes 76, 143.

224. See Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869-72 (1981) (reviewing YALE KAMISAR, *POLICE INTERROGATION AND CONFESSION: ESSAYS IN LAW AND POLICY* (1980)). Professor Schulhofer identified six defects in the voluntariness test: It fails to provide guidance to police officers; application of the standard nearly always involves a "swearing contest" between police officers and the defendant; the test allows police to use considerable pressure; it encourages manipulation of the weak; it fails to adequately check police

Even more troubling is that judicial attempts to adapt the voluntariness standard to the specific situation of the mentally disabled have shown themselves to be inadequate for the task.<sup>225</sup> The courts in *Sondergaard* and *Bocanegra*, for example, applied exactly the same test, yet they each reached different outcomes based solely on the fact that in one case officers were at least on notice of the suspect's disability, while in the other case they were not.<sup>226</sup> Two individuals with similar levels of impairment were treated very differently based exclusively on the accident of a perceptive officer, a more readily apparent manifestation of their condition, or other factors completely unrelated to the act of consenting to the search.

The application of Milgram's research to the authority of the police in the consent search context is clear. Milgram himself, although not specifically addressing the problem, anticipated it in a 1965 article. He noted:

If in this study an anonymous experimenter could successfully command adults to subdue a fifty-year-old man, and force on him painful electric shocks against his protests, one can only wonder what government, with its vastly greater authority and prestige, can command of its subjects.<sup>227</sup>

## VI. THE PROPOSED TEST

There are several possibilities that courts could adopt to address the problem of consent given by the mentally impaired with more sensitivity, consistency and thoroughness. From the research of Milgram and others, some have drawn the conclusion that a *Miranda*-type warning is needed when police seek consent to perform a warrantless search.<sup>228</sup> In fact, in a subsequent variation of his experiment, where Milgram allowed the "teacher" to choose which shock level to administer (in effect giving them a warning that they need not proceed to the most harmful level), only one of the forty subjects administered the highest voltage, and the average voltage delivered was between seventy-five and ninety volts.<sup>229</sup>

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brutality; and, perhaps most troubling, the voluntariness standard "impair[s] the effectiveness and the legitimacy of judicial review." *Id.* In the pre-*Miranda* confession context, "conscientious trial judges [were] left without guidance for resolving confession claims [and] they were virtually invited to give weight to their subjective preferences when performing the elusive task of balancing." *Id.* at 869-70. Both trial and appellate judges concerned about the release of a dangerous offender often look the other way and permit tactics that should have led to exclusion if the standard had been properly followed. *See id.* at 870.

225. *See* Cloud et al., *supra* note 4, at 572.

226. *See supra* notes 159-72 and accompanying text.

227. Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUMAN RELATIONS 57, 75 (1965).

228. Barrio, *supra* note 181, at 246-47.

229. MILGRAM, *supra* note 175, at 61, 70-72.

Subsequent research based on the “Milgram paradigm” examined various potential bases of social power that might have induced the high rates of obedience in the Milgram experiments and determined that coercive power was a key component of obedience despite the polite and clinical demeanor of the researcher in the Milgram experiment.<sup>230</sup> However, because *Schneckloth* minimized and marginalized the role of the subjective perception of police authority and coercion,<sup>231</sup> the likelihood that courts would now move to broadly require *Miranda*-type warnings for consent searches is highly unlikely. Furthermore, in the context of mentally impaired individuals, even an explicit warning is unlikely to be effective.<sup>232</sup> And warnings in and of themselves, particularly if not understood, are little guarantee against the use of subtle coercive techniques.<sup>233</sup>

Another possibility would be to supplement the *Schneckloth* standard with some additional criteria, evaluated within a consistent analytical framework, to achieve more coherent and fair results when analyzing consent given by mentally impaired individuals. Several courts, including the Courts of Appeals for the Eighth Circuit, the District of Columbia Circuit and the Supreme Court of Montana, have already attempted such a solution.<sup>234</sup> In the test adopted by these courts, the person claiming a mental impairment has the initial burden to come forward with evidence to support their claim, although the prosecution would still have the ultimate burden of proving that consent was given voluntarily.<sup>235</sup>

The court then uses a two-step approach to analyze voluntariness. First, the court examines the relevant facts that bear on the characteristics of the consentor. This step requires an analysis of the nature and extent of the

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230. See Blass, *supra* note 173, at 42-44.

231. See Kaplan & Dixon, *supra* note 2, at 950. More than one federal court has taken a dim view of a variation on the “obedience to authority” argument, rejecting the idea that one’s acquiescent attitude toward police, regardless of the source, can ever be a relevant factor in the voluntariness analysis. See *United States v. Arias-Mata*, No. 97-20067-03-EEO, 1998 U.S. Dist. LEXIS 6499, at \*6-7 (D. Kan. Apr. 8, 1998) (quoting *United States v. Zapata*, 997 F.2d 751, 759 (10th Cir. 1993)).

232. Everington & Fulero, *supra* note 4, at 217. “[I]t is clear that individuals with mental retardation have significant problems in comprehension of the *Miranda* warning.” *Id.* A very thorough and influential study concluded that individuals with mental retardation literally do not understand the definitions of most of the words used in the *Miranda* warnings. Cloud et al., *supra* note 4, at 541. Everington and Fulero recommend that when a suspect is believed to have a disability, extra effort should be made to ensure they understand their rights. This practice is more effectively done by having the individual explain the meaning of the questions in their own words, rather than relying on responses to yes/no questions. Everington & Fulero, *supra* note 4, at 219.

233. See *Gentile v. United States*, 419 U.S. 979, 982 (1974).

234. See notes 128-150 and accompanying text.

235. See *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

claimed mental impairment at a suppression hearing. The second step of this analysis would include all of the traditional coercive factors.<sup>236</sup> Courts here could bring much more careful scrutiny to the use of police deception in obtaining consent. The use of deception to induce someone to give up their right to be free from unreasonable searches is tantamount to coercion, and it should be placed completely outside the approved methods available to police when dealing with a mentally impaired and vulnerable individual.<sup>237</sup> The cases analyzed above, however, as well as the general trend in Fourth Amendment jurisprudence toward reasonableness, make it clear that courts should not expect police to have the same level of expertise as a psychiatrist employing a battery of tests. Therefore, the extent to which the police were aware or should have been aware of the impairment of the consenting individual will necessarily be the decisive factor. As police training on these issues gradually improves,<sup>238</sup> officers could reasonably be held to higher standards for recognizing individuals with mental impairments and responding to them appropriately.

This approach, however, suffers from the fatal flaw already described: People with similar disabilities are afforded different treatment by the courts based almost entirely on the extent to which their impairment is perceivable by the police. Presumably, there is little dispute that police should not take advantage of people they know or suspect are especially vulnerable. But why should the seemingly average, yet equally impaired, suspect suffer? In addition, a test that relies on what a police officer knew or should have known about a person's mental condition is virtually impossible to administer.<sup>239</sup> Officers can easily and even plausibly assert that they had no knowledge or reason to know of the person's mental impairments, turning the question into the kind of "swearing contest" that almost always favors the police.<sup>240</sup> The

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236. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (listing lack of advice as to the right to refuse consent, length of detention, repeated and prolonged nature of questioning, and physical punishment among others).

237. *See Strauss*, *supra* note 1, at 884-85.

238. Police departments, at least in major metropolitan areas, are receiving significantly more training on recognizing and dealing with mentally ill and impaired persons than they have in the past. *See generally* CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT, COUNCIL OF STATE GOVERNMENTS, CONSENSUS PROJECT REPORT: POLICY STATEMENT 28: TRAINING FOR LAW ENFORCEMENT PERSONNEL (2002), available at <http://consensusproject.org/topics/toc/ch-VI/ps28-training-law-enforcement> (last visited Mar. 18, 2004). The goal of such training is to teach officers to both recognize the potential presence of mental illness in the field, to help officers understand how mental illness may have contributed to a situation, and to understand how to de-escalate that situation. *Id.*

239. *See White*, *supra* note 116, at 2046.

240. *See id.* Compounding the problem is that the vast majority of mentally retarded individuals suffer from only a mild or moderate disability, leading to a lack of identification of their impairment and overestimation of the ability to understand complex subjects. Cloud et al.,

only means of achieving judicial consistency and fair treatment of the mentally impaired is to exclude all evidence obtained pursuant to a consent to search given by a mentally impaired person.

Two years prior to the *Schneckloth* decision, the Fifth Circuit Court of Appeals considered *United States v. Elrod*,<sup>241</sup> a bank robbery case where the consent to search was given by the defendant's accomplice, who had been declared incompetent to stand trial.<sup>242</sup> Acting on a tip, the FBI picked up Elrod's accomplice, Wright, at a bar in New Orleans. Wright voluntarily accompanied the agents to their office and executed a "consent to search" form for the hotel room he and Elrod shared, where the agents found the money from the robbery.<sup>243</sup> After their arrest, Wright was analyzed for competency to stand trial and ultimately was declared incompetent due to his long history of mental illness, including schizophrenia.<sup>244</sup>

The court saw the issues of Wright's competency to give consent and whether his consent was voluntary as "inextricably intertwined."<sup>245</sup> The court posed the question as "one of mental awareness so that the act of consent was the consensual act of one who knew what he was doing and had a reasonable appreciation of the nature and significance of his actions."<sup>246</sup> After finding that there was sufficient evidence to conclude that Wright was mentally incompetent when he signed the consent form, the court turned to the prosecution's argument that it was unreasonable to require the police to make psychological determinations of suspects' competency to consent. The Court stated:

No matter how genuine the belief of the officers is that the consent is apparently of sound mind and deliberately acting, the search depending on his consent fails if it is judicially determined that he lacked mental capacity. It is not that the actions of the officers were imprudent or unfounded. It is that the key to validity—consent—is lacking for want of mental capacity, no matter how much concealed.<sup>247</sup>

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*supra* note 4, at 511. The authors found that regardless of the level of disability, the mentally retarded subjects they interviewed understood neither the content of *Miranda* warnings nor the underlying rights. *Id.* at 538.

241. *United States v. Elrod*, 441 F.2d 353 (5th Cir. 1971).

242. *Id.* at 354.

243. *Id.* at 354. The money was inside locked suitcases, to which Wright also supplied the key. *Id.*

244. *Id.* at 355.

245. *Id.*

246. *Elrod*, 441 F.2d at 355.

247. *Id.* at 356.

Although there is at least implied support for the *Elrod* approach in *Schneekloth* itself,<sup>248</sup> subsequent decisions such as *Jimeno* and *Connelly* might seem to cast serious doubt on the legal viability of this support.<sup>249</sup>

The *Connelly* court, for example, concluded that a suspect's mental condition, standing alone, could "never conclude the due process inquiry."<sup>250</sup> However, the *Connelly* decision, despite its attempt to distinguish itself, runs directly counter to at least two older Supreme Court cases<sup>251</sup> applying the voluntariness test to mentally ill or disabled individuals.<sup>252</sup> "The *Connelly* opinion's attempt to manufacture police misconduct in those cases and to further find that such 'wrongdoing' was the basis for those decisions therefore is, to say the least, less than candid."<sup>253</sup> Refusing to apply *Connelly* to consensual searches, then, would be less a departure from precedent than a return to it.

The Supreme Court of Mississippi has suggested that it would adopt just such an approach if an appropriate case were to reach it.<sup>254</sup> In dicta, the court said that to be valid, consent to search must be both voluntary and given by a person without diminished mental capacity.<sup>255</sup> The defendant would have the burden of demonstrating lack of capacity, but once that burden is met, the presumption of involuntariness would become irrebuttable.<sup>256</sup> This test, for all the virtues of its simplicity and its clear acknowledgment of the difficulties surrounding obtaining consent to search from a mentally impaired person, may be unlikely to be broadly adopted. Mississippi has adopted a higher standard for voluntary consent, adopting the knowing waiver approach of *Miranda* and Justice Marshall's *Schneekloth* dissent.<sup>257</sup> Despite the controlling precedent of *Schneekloth*, however, it is clear that the due process voluntariness standard is

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248. *Metcalf v. Long*, 615 F. Supp. 1108, 1116 n.10 (D. Del. 1985).

249. LAFAVE, *supra* note 37 (concluding that if the *Schneekloth* rule were "read through" *Connelly*, *Elrod* would have a contrary outcome). For a contrasting view that "*Connelly* should not be read as altering the basic role of the due process test," see WHITE, *supra* note 145, at 197-99.

250. *Colorado v. Connelly*, 479 U.S. 157, 165 (1986).

251. See *Townsend v. Sain*, 372 U.S. 293, 307-08 (1963) (excluding a confession as involuntary where the defendant had been given a drug to aid narcotic withdrawal symptoms that also had truth-serum-like effects); *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960) (excluding as involuntary a confession obtained at a time when the defendant was judged to be insane).

252. See WHITE, *supra* note 145, at 202.

253. Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 135 (1988).

254. *Jones v. State*, 607 So. 2d 23, 28 (Miss. 1991).

255. *Id.*

256. See *id.*

257. See *id.* at 28-29. The United States Supreme Court, also in dicta, has suggested that consent to search given by a mentally impaired person would be invalid if given while in custody. *United States v. Watson*, 423 U.S. 411, 424-25 (1976).

as unworkable in the consent search context as it was when the *Miranda* Court criticized it in the confession context.<sup>258</sup>

The Supreme Court's recent reaffirmance of *Miranda*<sup>259</sup> underscores the importance to the criminal justice process of having bright-line rules that are easily definable and applicable. In *Dickerson v. United States*, the Court considered a constitutional challenge to a federal statute that purported to overrule the *Miranda* holding and restore the due process voluntariness standard as the sole test for determining the admissibility of confessions.<sup>260</sup> While the specific holding of the case was that *Miranda* was a constitutional rule that could not be superseded by a mere statute,<sup>261</sup> Chief Justice Rehnquist, writing for the majority, underscored that "the totality-of-the-circumstances test which [18 U.S.C.] § 3501 seeks to revive is more difficult . . . for courts to apply in a consistent manner."<sup>262</sup> Whether the test is applied to a confession or a consent to search, the problem of judicial inconsistency remains a troubling one, and one that could be ameliorated by the test proposed in this Note.

There remains, of course, another objection to the proposed test; namely, that by excluding evidence obtained pursuant to the consent of a mentally impaired person, the test seemingly ignores what the Supreme Court has called the primary purpose of the exclusionary rule: its deterrent value.<sup>263</sup> According to the deterrent rationale, if excluding evidence is unlikely to prevent future police misconduct, then there is no purpose served by the exclusion.<sup>264</sup> In *United States v. Leon*, the Court "concluded that because the cost entailed in excluding relevant evidence outweighed any benefit, the exclusionary rule should not apply even though defendant's fourth amendment rights were violated."<sup>265</sup>

To allow the deterrence rationale to dictate the application of the exclusionary rule in this way is to allow outcomes to dictate the content of the Constitution. If the deterrence rationale is truly the only basis for excluding evidence, then "the upshot of the Court's position is that unless exclusion will deter someone in an official capacity, there can be no due process violation no matter how unjust the result."<sup>266</sup> A rule that provides a more "coherent theory of justice"<sup>267</sup> is one that excludes evidence because an individual's characteristics render their consent involuntary in fact. Police conduct, being

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258. See *Miranda v. Arizona*, 384 U.S. 436, 461-62 (1966).

259. *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

260. *Id.* at 432-44.

261. *Id.* at 444.

262. *Id.*

263. See generally *United States v. Leon*, 468 U.S. 897, 905-21 (1984).

264. *Id.* at 918.

265. Benner, *supra* note 253, at 136.

266. *Id.*

267. *Id.* at 137.



irrelevant in the analysis under this rule, does not bring the deterrence rationale into play.<sup>268</sup>

Society's attitudes toward those with mental impairments is changing.<sup>269</sup> The Supreme Court has already recognized that "some characteristics of mental retardation undermine the strength of the procedural protections" embedded in the Constitution.<sup>270</sup> When analyzing whether mentally impaired individuals have voluntarily consented to police searches of their homes or possessions, courts have given the issue cursory lip-service treatment, confused the standard with others that also relate to mental ability, or devised tests that lead to unsatisfying and discriminatory results. Despite the costs, courts should widely adopt the approach of the Fifth Circuit and the Supreme Court of Mississippi and exclude evidence when they determine that mentally impaired individuals have not, in fact, voluntarily consented to the searches that produced it.

BRIAN S. LOVE\*

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268. As Chief Justice Warren Burger noted, the exclusionary rule "demonstrably has neither deterred deliberate violations of the Fourth Amendment nor decreased those errors in judgment that will inevitably occur" in the high-pressure atmosphere of police work. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting). Chief Justice Burger heavily criticized the exclusionary rule, but he acknowledged that the alternatives were either inadequate or beyond the power of courts to provide. *Id.* at 418-22.

269. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 314-15 (2002).

270. *Id.* at 317.

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