

# FOURTH AMENDMENT ACCOMMODATIONS: (UN)COMPELLING PUBLIC NEEDS, BALANCING ACTS, AND THE FICTION OF CONSENT

Guy-Uriel E. Charles\*

*The problems of public housing—including crime, drugs, and gun violence—have received an enormous amount of national attention. Much attention has also focused on warrantless searches and consent searches as solutions to these problems. This Note addresses the constitutionality of these proposals and asserts that if the Supreme Court's current Fourth Amendment jurisprudence is taken to its logical extremes, warrantless searches in public housing can be found constitutional. The author argues, however, that such an interpretation fails to strike the proper balance between public need and privacy in the public housing context. The Note concludes by proposing alternative consent-based regimes that would pass constitutional muster.*

INTRODUCTION .....	462
I. HISTORY OF PUBLIC HOUSING .....	466
II. FROM CAMARA TO ACTON: ADMINISTRATIVE	
SEARCHES AND THE WARRANT(LESS) REQUIREMENT .....	471
A. Camara's Legacies .....	474

---

\* Law Clerk, The Honorable Judge Damon J. Keith, Circuit Judge, United States Court of Appeals for the Sixth Circuit. B.A. 1992, Spring Arbor College; J.D. 1996, University of Michigan Law School; Ph.D. precandidate, Political Science, University of Michigan.

I would like to dedicate this Note to my father, the Reverend Joseph Charles, for inspiring me to be a lawyer, and to the Honorable Damon J. Keith, for his shining example as a great jurist and mentor. I would like to thank, first and foremost, the Lord God for his grace and blessings. I am extremely indebted to Professor Samuel Gross for the care that he devoted to this manuscript, for a plethora of helpful suggestions, and for his unfailing support of students of color at the University of Michigan Law School. I am also grateful to Professors Richard Pildes and Michael Heller, who through various meetings in their offices and cafes helped me develop the ideas for this Note. I must acknowledge the support I have received from Dean Jeffrey Lehman and Professor Kent Syverud, who have encouraged me to publish this Note. My friends Luis Fuentes-Rohwer, Emmeline V. Kim, and Rachel D. Barbour read this manuscript numerous times and made suggestions that vastly improved its quality. For their intelligence and editing skills, I am eternally grateful. I need also thank the participants of the *Michigan Journal of Race & Law* Symposium, *Toward a New Civil Rights Vision*, in Ann Arbor, MI (Oct. 13, 1995), most especially Professors Deborah Malamud and Sheri Lynn Johnson, for their comments on an earlier version of this Note. Many thanks to Todd Aagaard, Freeman Farrow, and the *Michigan Journal of Race & Law* for their inestimable editorial skills. Finally, but most importantly, I thank my wife Lora Faith Charles, without whose unwavering support none of this would have been possible.

B. <i>The Current Approach</i> .....	479
III. CONSENT .....	490
A. <i>Conceptual Framework</i> .....	492
B. <i>Consent Under the Fourth Amendment</i> .....	494
1. <i>Schneckloth v. Bustamonte</i> : Origins of the Consent-as-Coercion Doctrine .....	495
2. <i>Florida v. Bostick</i> : Implications of the Consent-as-Coercion Doctrine .....	500
3. <i>Wyman v. James</i> : Fictional Consent .....	503
4. <i>Consent in the Administrative Search Context</i> : The Need for Careful Scrutiny .....	506
C. <i>Consent in Public Housing: Some Possibilities</i> .....	508
CONCLUSION .....	511

## INTRODUCTION

Crime, the fear of crime, and violence have become issues of great concern in our society.<sup>1</sup> For many segments of the population, these issues are not just abstract concerns, but everyday realities.<sup>2</sup> As society is confronted with unprecedented safety concerns, the calls for action grow louder.<sup>3</sup> National, state, and municipal governments are pressured to respond, often with aggressive law enforcement programs or measures designed to deal with the problems of crime and violence and allay the fears of constituents.<sup>4</sup> In many cases, the

---

1. *Money Tonight: New York Legalizes Defense Sprays* (CNBC television broadcast, Nov. 1, 1996), available in 1996 WL 11488099 (noting that voters in the 1996 presidential elections stated that crime was "their number-one issue"); *Reducing Gun Violence: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong. (1994) (statement of Andrew L. Vita, Chief, Firearms Div. of the Dep't of the Treasury Bureau of Alcohol, Tobacco, and Firearms), available in 1994 WL 381890 (F.D.C.H.) (commenting that "violent crime continues to tear at the fiber of civilized societies" and that "the number of firearms used in armed robberies, assaults, and murders has escalated at an alarming rate and is now the number one concern of the American public"); *Suburban Voters' Fear of Crime Is Election Target*, THE FORTH WORTH STAR-TELEGRAM, Sept. 10, 1995, available in 1995 WL 9292300; cf. *Money Tonight: National Center for Health Statistics Data States that Americans are Increasingly Sedentary and Overweight* (CNBC television broadcast, Oct. 15, 1996), available in 1996 WL 11487959 (reporting a correlation between the fear of crime and weight gain).

2. For instance, in 1980 the United States Department of Justice reported that among African American men and women between the ages of twenty-five and thirty-four, homicide is the leading cause of death. William Julius Wilson, *The Urban Underclass in Advanced Industrial Society*, in THE NEW URBAN REALITY 129, 134 (Paul E. Peterson ed., 1985).

3. See, e.g., Ted Gest et al., *Violence in America*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 22, 22-24 (noting that a "scary orgy of violent crime is fueling another public call to action").

proposed measures raise difficult issues that threaten to push the boundaries of the Fourth Amendment.<sup>5</sup> As Professor Yale Kamisar noted, societal problems "have put enormous pressure on the Fourth Amendment. Very few people (and perhaps not too many judges) will worry about losses of privacy when the government claims that such losses are 'necessary' in order to win 'the war against drugs.'"<sup>6</sup>

If there is a place where issues of crime and violence are of particular solicitude, it is in the area of public housing.<sup>7</sup> In the last few years public housing has often been at the center of national attention.<sup>8</sup> Public housing has received much attention because of the high incidence of crime, violence, drug use, and various social disorders that are present in many public housing complexes.<sup>9</sup> The magnitude of the problem is best articulated by former Housing and Urban Development (HUD) Secretary Henry Cisneros:

---

4. See, e.g., Michael Kramer, *Clinton's House Rules*, TIME, May 9, 1994, at 55 (reporting that President Clinton advocates warrantless searches of housing projects because of the level of criminal activity in public housing); *Dateline NBC: Knock on Any Door: Federal Government One Strike Program Evicts Family from Public Housing* (NBC television broadcast, Nov. 10, 1996), available in 1996 WL 6704716; *Senators Kyl and Feinstein Re-Introduce Victims' Rights Amendment*, Gov't Press Releases, Oct. 1, 1996, available in 1996 WL 11125538 (noting Senators Kyl and Feinstein's proposed amendment to the United States Constitution "to establish and protect the rights of crime victims"); *Illinois to Receive Over \$1.8 Million to Redeploy 76 Police Officers on the Streets*, Gov't Press Releases, Oct. 7, 1996, available in 1996 WL 11125646 (reporting Senator Carol Moseley-Braun and Congressman Dick Durbin's announcement that Illinois will receive almost two million dollars to hire police officers to better combat crime).

5. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (holding that nonconsensual urinalysis testing of student-athletes is constitutional in school district with drug problems).

6. Yale Kamisar, *The Fourth Amendment: The Right of the People to Be Secure in Their Persons, Homes, Papers, and Effects*, in A TIME FOR CHOICES 31, 32 (Claudia A. Haskel & Jean H. Otto eds., 1991).

7. See, e.g., Joe Davidson, *White House Aims at Fighting Crime In Public Housing With New Program*, WALL ST. J., Jan. 31, 1994, at B9 (noting the Clinton administration's commitment to fighting violent crime in public housing); Mark Schaver, *Murder in the Projects: Louisville's Public Housing Is Hot Spot for Homicides*, COURIER-JOURNAL, Nov. 10, 1996, at 1A (noting that in Louisville, Kentucky the murder rate in public housing is more than eight times the murder rate in the rest of the city); Paul W. Valentine, *Taking Back Public Housing*, WASH. POST, Dec. 15, 1992, at B5 (detailing one method of dealing with Baltimore's public housing drug and violence problem).

8. See, e.g., Zachare Ball & Bill McGraw, *U.S. Threatens to Sue City over Public Housing Woes*, DETROIT FREE PRESS, Oct. 30, 1992, at 4B; Kevin G. Salwen, *White House Proposal Allows Searches Without Warrants in Public Housing*, WALL ST. J., Apr. 18, 1994, at A16; *Securing Buildings vs. Controlling Firearms: Rampant Gun Crime Demands Comprehensive Curbs*, L.A. TIMES, Apr. 19, 1994, at B6.

9. See, e.g., *Drugs and Public Housing: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 101st Cong. 1 (1989) [hereinafter *Drugs & Public Housing Hearing*] (statement of Senator Sam Nunn) (noting that "[d]aily news reports have documented in graphic and, in many cases, terrifying detail, the fact that drug dealers have turned many public housing projects into virtual no-man's lands where violence has become the only rule").

[T]he current public housing system is plagued by a series of deeply-rooted and systemic problems. Concrete high rises have become vacant shells, scarring the urban landscape. Other projects are beset by crime and gang activity. The very names of some places[—]Cabrini Green, Robert Taylor Homes, Desire—haunt the American imagination. Other problems exist in the 100-odd public housing agencies that are classified as troubled entities.

Change is needed. Far reaching reform is warranted.<sup>10</sup>

This Note explores how current Fourth Amendment doctrine is being shaped to accommodate modern social problems.<sup>11</sup> It is not directly concerned with the Fourth Amendment as a device that either hampers or facilitates criminal behavior per se or as a device regulating police-suspect behavior. Rather, this Note is interested in the Fourth Amendment as a civil device that addresses issues outside of the usual police-suspect domain.<sup>12</sup> As Professor Sundby stated, "Fourth Amendment issues increasingly do not concern unexpected police-suspect encounters where the police need fast and ready rules, but involve searches and seizures based on a preexisting legislative or administrative plan."<sup>13</sup> This Note explores how the Fourth Amendment deals with, and to some extent accommodates, preexisting legislative or administrative plans designed to tackle social problems.

---

10. *Public Housing Reform and Empowerment Act of 1995: Hearing on S. 1260 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 104th Cong. 80 (1995) (statement of Henry G. Cisneros, Secretary, U.S. Department of Housing and Urban Development); see also David Ramos, *HUD-dled Masses: Cisneros Wimps Out on Housing Reform*, NEW REPUBLIC, Mar. 14, 1994, at 12 (quoting Secretary Cisneros' statement that "[t]he most serious problem we have in America today is the concentrations of our very poorest populations in . . . specific neighborhoods").

11. In this regard this Note's purpose differs from the bulk of Fourth Amendment scholarship which is concerned with specifically cabining police behavior (or cabining criminal behavior), or how the Fourth Amendment forsakes individual rights in the name of more efficient law-making (or vice-versa). See, e.g., Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules & Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 492 (1990) (stating that a central concern of the Fourth Amendment is regulating arbitrary conduct); Jane Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 167-68 (1996) ("While the history of the Fourth Amendment is incredibly rich and complex, its animating purpose appears to be curbing arbitrary use of police power.").

12. Undoubtedly, the Fourth Amendment as a civil device is intertwined with the Fourth Amendment as a criminal device. However, this Note attempts to deal with the former, while drawing on the latter only when appropriate.

13. Scott E. Sundby, "Everyman's" *Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1786 (1994) (citation omitted).

Public housing is an exemplary model for such an examination. First, the problems of public housing are as much social problems as they are police problems. Second, the problems confronting Public Housing Authorities (PHAs) present the type of national emergency where calls to action threaten Fourth Amendment principles.<sup>14</sup> This sense of urgency provides the justification for proposed legislative or administrative responses. Third, the problems of public housing present an apparent clash between two equally compelling sets of values:<sup>15</sup> those of safety (or security) and those of privacy.<sup>16</sup>

In addressing the question of these clashing values and the substantive problems posed by public housing, commentators and policy-makers have proposed many solutions. However, it is with the two most controversial suggestions—conducting warrantless searches of public housing complexes and inserting consent to search clauses in leases of public housing residents—with which this Note is concerned. Interestingly, the most prevalent constitutional weapons in the fight to abate threats to public safety have been the doctrine of warrantless searches and seizures<sup>17</sup> and the

---

14. See, e.g., Andrew T. Pittman & Mark R. Slough, Commentary, *Drug Testing of High School Student Athletes After Vernonia*, 104 EDUC. L. REP. 15, 17 (1995).

15. See *Johnson v. United States*, 333 U.S. 10, 14–15 (1948) (discussing the clash of values issue); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 198 (1993) (stating as the “dilemma” of the Fourth Amendment the capacity to determine the importance of privacy versus personal security).

16. The Supreme Court has repeatedly held that the right to privacy deserves its greatest protection in one’s home. See, e.g., *Payton v. New York*, 445 U.S. 573, 589 (1980) (“The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home—a zone that finds its roots in clear and specific constitutional terms . . . .”); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (asserting the same conclusion); see also *United States v. Orito*, 413 U.S. 139, 142 (1973) (stating that the “Constitution extends special safeguards to the privacy of the home”); Jason Marks, *Mission Impossible?: Rescuing the Fourth Amendment from the War on Drugs*, 11 CRIM. JUST. 16 (Spring 1996) (“The autonomy and inviolability of the person and the home stand as the first principle of natural law.”).

17. The Supreme Court has established numerous exceptions to the usual Fourth Amendment requirement that a search or seizure must be based on probable cause and executed pursuant to a valid warrant. Some of these exceptions include: investigatory detentions, *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that a brief investigatory seizure does not need to be based on probable cause; reasonable suspicion is sufficient); search incident to an arrest, *New York v. Belton*, 453 U.S. 454, 461 (1981) (holding that police officers may conduct a warrantless search of a detainee following an arrest without probable cause or reasonable suspicion); *Michigan v. DeFilippo*, 443 U.S. 31, 35 (1979) (asserting the same conclusion); border searches, *United States v. Montoya de Hernandez*, 473 U.S. 531, 537–38 (1985) (holding that warrantless border searches are permissible because the United States government has the right to prevent contraband from entering this country); and searches in which the special needs of law enforcement personnel would make procuring a warrant impracticable, *O’Connor v. Ortega*, 480 U.S. 709, 720–22 (1987) (plurality opinion) (holding that a

doctrine of consent searches and seizures.<sup>18</sup> The availability of these doctrines is related to the fact that the Supreme Court has significantly expanded the areas in which warrantless searches are constitutionally permitted in order to facilitate more efficient law enforcement,<sup>19</sup> and the fact that the Court has viewed the doctrine of consent searches and seizures as a necessary tool of law enforcement.<sup>20</sup> Accordingly, it applies a minimal standard for determining when consent has been constitutionally acquired.<sup>21</sup>

It is thus not surprising that solutions to the ills of public housing have centered around those two tools. This Note focuses on proposed solutions to address the Fourth Amendment concerns raised by warrantless searches of public housing complexes and the use of consent-to-search clauses as constitutional responses to in-dominable social problems in public housing. This Note specifically addresses two issues: first, are warrantless searches of housing projects a viable constitutional tool? Second, may public housing authorities avoid the grasp of the Fourth Amendment by inserting consent clauses in the leases of public housing residents?

Part I provides a brief overview of the history of public housing in the United States and develops the social setting in which the problems of public housing arose. Part II analyzes warrantless administrative searches under the Fourth Amendment. This part is especially concerned with exploring the dynamics of a constitutional scheme that tries to strike a balance between a compelling public need and an equally compelling privacy interest. Part III examines the issue of consent-to-search clauses and to what extent these clauses raise Fourth Amendment concerns.

## I. HISTORY OF PUBLIC HOUSING

The existence of public housing in the United States is a direct result of the federal government's concerns regarding the substandard conditions and general uninhabitability of housing available in most major cities.<sup>22</sup> Surprisingly, public housing was not authorized particularly as alternative housing for poor Americans; the proponents of public housing were primarily concerned with eradicating the social disorders<sup>23</sup> and the danger to public welfare that were as-

---

state may search an employee's office without a warrant when investigating work-related misconduct as long as the search is reasonable).

18. For discussion on consent searches, see *infra* Part III.

19. See sources cited, *supra* note 17.

20. See *infra* Part III.

21. See *infra* Part III.

22. ROBERT MOORE FISHER, 20 YEARS OF PUBLIC HOUSING 8-12 (1959) (discussing the pros and cons of public housing in justifying a federally aided low-rent program).

23. *Id.* at 9.

sociated with slum housing.<sup>24</sup> Public housing became low-rent housing because it was thought that people who lived in slum housing did so because they could not afford better housing.<sup>25</sup>

Public housing in this country has always been controversial.<sup>26</sup> The reasons for the controversy have generally been threefold: (a) public housing has generally provided housing for the poor; (b) public housing has raised serious questions regarding the proper role of the federal government; and (c) public housing has generally been perceived as providing housing primarily for racial minorities, specifically Black and Latina/o Americans, who constituted a disproportionate proportion of the poor.<sup>27</sup>

Bubbling below the surface of the public housing discussion is the role of race in public housing. Although public housing was not necessarily designed to deal with the housing needs of racial minorities, race always played a major role in the public housing context.<sup>28</sup> First, racial minorities constituted a disproportionate number of poor Americans.<sup>29</sup> Second, housing facilities of Blacks and other minorities were disproportionately substandard,<sup>30</sup> not only because minority groups were disproportionately poor, but also because they were often the victims of housing discrimination.<sup>31</sup> Third, the migration of Blacks from the South to Northern cities caused

---

24. Fisher reports that Senator Wagner, co-author of the Wagner-Steagall Act, which served as authority for the first low-rent public housing projects, made it clear that the purpose of the Act was not to rehouse "everybody who has a low income, but only persons of low income who live in unsanitary and unsafe and unhealthy conditions which are detrimental to morals, to health, and also to safety." *Id.* at 11. Fisher also notes that the findings that formed the preliminary paragraphs of the bill, although deleted, stated as reasons making the bill necessary the existence "in urban and rural communities throughout the United States slums, blighted areas, or unsafe, insanitary [sic], or overcrowded dwellings, or a combination of these conditions, accompanied and aggravated by an acute shortage of decent, safe, and sanitary dwellings within the financial reach of families of low income." *Id.* at 9.

25. *Id.* at 9-10.

26. LEONARD FREEDMAN, *PUBLIC HOUSING: THE POLITICS OF POVERTY* 7-11 (1969).

27. *Id.*

28. *Id.* at 132-34.

29. *Id.* at 132.

30. *Id.* at 133.

31. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding discriminatory housing practices in the form of restrictive covenants violative of the Fourteenth Amendment); A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 50 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989); FREEDMAN, *supra* note 26, at 134; JOHN YINGER, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *HOUSING DISCRIMINATION STUDY: INCIDENCE AND SEVERITY OF UNFAVORABLE TREATMENT*, at xiv-xv (1991) (detailing unfavorable treatment and discrimination experienced by Blacks and Latinos in the housing market); see generally HOUSING AND HOME FINANCING AGENCY, *PUBLIC HOUSING ADMINISTRATION, OPEN OCCUPANCY IN HOUSING PROGRAMS OF THE PUBLIC HOUSING ADMINISTRATION* (1955).

shortages of decent housing in the North.<sup>32</sup> Fourth, government agencies themselves engaged in intentionally discriminatory practices.<sup>33</sup> Last, public housing was the object of liberal reformers who used the forum of public housing to conduct social experiments on integration.<sup>34</sup> Thus, almost from its genesis, public housing has been embroiled in racial issues.

A chief concern in public housing is violence.<sup>35</sup> The problem of violence in low-income housing, however, is not a recent development. Indeed, public housing was designed to be a remedy for the violence that was characteristic of slum housing. The proponents of public housing argued that the creation of public housing would solve the epidemic of violence associated with slum living.<sup>36</sup> Given that these were the very ills that public housing was designed to eradicate, it is quite ironic that public housing is now perceived as the source of the pathologies that were once thought to be caused by slum and substandard housing.

Perhaps predictably, the concentration of a poor and socially isolated class of people with limited economic opportunities in re-

---

32. FREEDMAN, *supra* note 26, at 136-37; see also KARL E. TAEUBER & ALMA F. TAEUBER, *NEGROES IN CITIES* (1965) (discussing some aspects of the great black migration). Nicholas Lemann stated that:

Between 1910 and 1920 the first wave of 572,000 blacks moved from the South to the North, almost always to cities. In the twenties 913,000 left; in the thirties 473,000; in the forties 1.7 million, 18 percent of the black population of the South; in the fifties 1.5 million; in the sixties 1.4 million. The number of blacks who moved north, about 6.5 million, is greater than the number of Italians or Irish or Jews or Poles who moved to this country during their great migrations.

Nicholas Lemann, *The Origins of the Underclass*, ATLANTIC MONTHLY, June 1986, at 31, 39. See generally CARTER G. WOODSON, *A CENTURY OF NEGRO MIGRATION* (1918).

33. See, e.g., FREEDMAN, *supra* note 26, at 135-36. See generally HOUSING DESEGREGATION AND FEDERAL POLICY 197-207 (John M. Goering ed.) (1986).

34. Freedman points out that:

It was the hope of the pioneers of public housing that their program would play an important part in reversing the segregation trend. These pioneers were liberals whose desire to undertake an attack on bad housing conditions was an expression of their total system of values. Those values were intrinsically hostile to racial prejudice and discrimination. Through public housing they sought to build integrated communities that could serve as models for the larger society.

FREEDMAN, *supra* note 26, at 137.

35. See, e.g., Patrice Gaines, *Fighting Cold Wars at Home*, WASH. POST, Jan. 12, 1995, at J1 (noting the extent of the problem); Vernon Loeb, *Residents Lose Faith in System*, WASH. POST, Feb. 16, 1995, at J1 (noting that even security guards are not safe in housing projects).

36. FISHER, *supra* note 22, at 8-12.

stricted living accommodations produced violent results.<sup>37</sup> Crime and the fear of crime are some of the most acute problems facing public housing today.<sup>38</sup> These problems are present in all segments of society, but in the words of Senator Allan Cranston of California, "our low-income housing is most profoundly affected. Daily we hear reports of open drug markets, heavily armed drug dealers, shadow buyers, and violent death. . . . Drug-related violence is stultifying the lives of the vast majority of residents . . . ."<sup>39</sup>

Crime is not a new problem in public housing developments; by some accounts, crime has been common in public housing since the 1960s.<sup>40</sup> However, in recent years the level and intensity of the violence has accelerated to epidemic proportions.<sup>41</sup> Many public housing projects are considered drug markets where heavily armed drug dealers openly ply their trades.<sup>42</sup> It is not uncommon to hear public housing complexes being referred to as "war zones"<sup>43</sup> or to hear reports of residents living in constant fear.<sup>44</sup> In short, as summed up by Senator Sam Nunn, public housing has become a magnet for drugs and crime.<sup>45</sup>

The factors that have engendered crime in cities, and particularly in public housing, are varied and complex.<sup>46</sup> According to William Julius Wilson, the problems of crime and other pathologies—teenage pregnancy, welfare dependency—prevalent in the inner cities and in public housing are due to "shifts in the American economy from manufacturing to service industries, which have produced extraordinary rates of joblessness in the inner city and ex-

---

37. See *infra* notes 38–43 and accompanying text (discussing how those factors contributed to the present state of public housing).

38. W. VICTOR ROUSE, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, *CRIME IN PUBLIC HOUSING: A REVIEW OF MAJOR ISSUES AND SELECTED CRIME REDUCTION STRATEGIES*, iv (1978).

39. *Drugs in Federally Assisted Housing: Hearing on S. 566 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong. 1 (1989) [hereinafter *Federally Assisted Housing Hearing*] (statement of Senator Cranston).

40. See generally Susan J. Popkin et al., *Sweeping Out Drugs and Crime: Residents' Views of the Chicago Housing Authority's Public Housing Drug Elimination Program*, 41 *CRIME & DELINQ.* 73, 73–99 (1995).

41. See generally LANGLEY C. KEYES, *STRATEGIES AND SAINTS: FIGHTING DRUGS IN SUBSIDIZED HOUSING* (1992).

42. See *Drugs & Public Housing Hearing*, *supra* note 9, at 3 (statement of Senator Roth); *Federally Assisted Housing Hearing*, *supra* note 39, at 1 (statement of Senator Cranston).

43. JAMES GARBARINO ET AL., *NO PLACE TO BE A CHILD* 1 (1991); *Drugs & Public Housing Hearing*, *supra* note 9, at 1 (statement of Senator Nunn).

44. *Federally Assisted Housing Hearing*, *supra* note 39, at 1.

45. *Drugs & Public Housing Hearing*, *supra* note 9, at 1 (statement of Senator Nunn).

46. William Julius Wilson, *The Urban Underclass in Advanced Industrial Society*, in *THE NEW URBAN REALITY* 129, 134 (Paul E. Peterson ed., 1985).

acerbated conditions generated by the historic flow of migrants, and to changes in the urban minority age structure and consequent population changes in the central city."<sup>47</sup> The confluence of those factors has produced many destructive effects, one of which is the proliferation of violent crime.

Another factor contributing to crime in public housing, is the physical configuration of public housing buildings.<sup>48</sup> Researchers and architects who have focused on the physical characteristics of public housing have long maintained that the architectural design of public housing has contributed to its vulnerability to crime and various social disorders.<sup>49</sup> In the 1950s and early 1960s, instead of continuing to build the low-rise apartments or townhouses characteristic of the early projects, developers began to build high-rise, cost-efficient housing in poor, high-crime neighborhoods.<sup>50</sup>

These new buildings lacked secured lobbies that would restrict access to elevators, stairwells, or apartments, thus inviting strangers to enter the buildings at will. Developments were built without "defensible space" or shared public areas that tenants could monitor from within their own apartments. The lack of shared public areas contributed to the tenants' sense of insecurity, and disempowered them from staking a territorial claim in the safety of their environment. It is not surprising that, as one of the first steps in restoring public housing in this country, HUD has embarked on a demolition campaign, replacing old high-rises, architecturally-flawed buildings, with the town houses of old.<sup>51</sup>

Demolishing and restructuring may, to some extent, help ameliorate the problem of crime. However, if the findings of William Julius Wilson are correct—that the majority of the problems facing public housing are due to endemic sociological forces<sup>52</sup>—other chal-

---

47. *Id.* at 159.

48. See generally OSCAR NEWMAN & KAREN A. FRANCK, U.S. DEPARTMENT OF JUSTICE, *FACTORS INFLUENCING CRIME AND INSTABILITY IN URBAN HOUSING DEVELOPMENTS* (1980).

49. Gilbert A. Rosenthal, *Reviving Distressed Communities*, J. HOUSING, July-Aug. 1994, at 21; see also Jerry Demuth, *More Amenities Built into Rehabbed Public Housing*, CHI. SUN-TIMES, Nov. 1, 1996, at 4 (reporting that government officials and developers of new public housing concentrate more on architecture to attract mixed-income families).

50. See generally Popkin et al., *supra* note 40, at 73-99.

51. See, e.g., John Ritter, *Public Housing is Making an About-Face*, USA TODAY, Nov. 15, 1996, at 8A (reporting that low-income high-rises across the United States are being razed to make room for low-rises, town houses, and single-family dwellings); *Harper's Index: Units of Public Housing the Federal Government Plans to Demolish by the Year 2000: 100,920*, PORTLAND OREGONIAN, Nov. 17, 1996, at L15; Gary Martin, *Program is Razing Some of the Worst Housing Projects*, SAN ANTONIO EXPRESS-NEWS, Aug. 30, 1995, available in 1995 WL 9500209.

52. See Wilson, *supra* note 46, at 134.

lenges to lowering the incidence of crime in public housing remain.<sup>53</sup> These barriers include the amelioration of problems like illicit drugs, drug trafficking, illicit weapons, and weapons use. The inquiry to which we must now turn is what constraints the Constitution, specifically the Fourth Amendment, place upon state actors attempting to deal with these problems.

## II. FROM CAMARA TO ACTON: ADMINISTRATIVE SEARCHES<sup>54</sup> AND THE WARRANT(LESS) REQUIREMENT

As Fourth Amendment concerns increasingly shift from police-suspect encounters to administrative and legislative schemes designed to address broad social problems,<sup>55</sup> the current trend seems to be toward making the Fourth Amendment as unobtrusive and accommodating as possible in the face of competing societal concerns.<sup>56</sup> Consequently, it is not surprising that, confronted with the problems facing public housing, many have argued for an accommodation between Fourth Amendment privacy rights and the compelling public need to make public housing projects safer for its

---

53. See, e.g., Lisa Chedekel, *Trials, Triumphs of Moving From Hartford Projects*, HARTFORD COURANT, Nov. 17, 1996, at A1 (noting that although public housing residents may move from the housing projects to private homes, some of the problems they faced in the projects still remain).

54. Administrative searches include governmental inspections of residences and businesses for code violations other than those made by law enforcement officers in connection with criminal prosecutions. John W. Collins & Sandra N. Hurd, *Warrantless Administrative Searches: It's Time to Be Frank Again*, 22 AM. BUS. L.J. 189, 190 (1984). Unless otherwise noted, this Note's use of the term "administrative search" does not refer to administrative searches of businesses.

55. Sundby, *supra* note 13, at 1786 (stating that "Fourth Amendment issues increasingly do not concern unexpected police-suspect street encounters where the police need fast and ready rules, but involve searches and seizures based on a preexisting legislative or administrative plan").

56. See, e.g., Maclin, *supra* note 15, at 236-39 (1993) (commenting that the Court sees Fourth Amendment claimants as second-class citizens and has refused to give the Fourth Amendment the primacy that it deserves because the Court is so concerned with making sure that police officers can effectively carry-out their duties); Cornelius J. O'Brien, Recent Decisions, *Constitutional Law—Fourth Amendment—Warrant and Probable Cause Requirements*, 34 DUQ. L. REV. 1167, 1193 (1996) (noting that the "primary usefulness" of the Court's current Fourth Amendment approach is "in overcoming absolute individual liberties to serve the moral judgment of those in office or popular consensus"); Marc A. Stanislawczyk, Note, *An Evenhanded Approach to Diminishing Student Privacy Rights Under the Fourth Amendment: Vernonia School District v. Acton*, 45 CATH. U. L. REV. 1041 (1996) (commenting that the Court's current Fourth Amendment jurisprudence, which is designed to balance individual rights against governmental needs, has resulted in diminishing individual rights); see also Christian J. Rowley, Note, *Florida v. Bostick: The Fourth Amendment—Another Casualty of the War on Drugs*, 1992 UTAH L. REV. 601.

residents.<sup>57</sup> Some have maintained that given the importance of the public need presented, the Fourth Amendment can and should accommodate warrantless searches of public housing projects.<sup>58</sup>

This part explores the constitutional bases for that argument. Underlying Part II is the assumption that there is a trend within the Court to make the Fourth Amendment more malleable to fit solutions to pressing societal concerns.<sup>59</sup> Part II begins by examining *Camara v. Municipal Court*,<sup>60</sup> the case that supposedly serves as the constitutional foundation for this trend.<sup>61</sup> Part II then argues that this trend is the result of the modern Court's choice of one of two competing interpretations of *Camara* and the administrative search exception. Part II examines three Supreme Court cases that have explored the dynamics involved in balancing a compelling public need against the privacy rights of the individual to show that, under the Court's current interpretation, warrantless searches of public housing would most likely pass constitutional muster. However, this Part concludes that *Camara* is capable of a competing interpretation that would not allow warrantless searches of public housing under the administrative search exception. Unfortunately, that interpretation is ignored by the current Court. Finally, this Part offers

---

57. See, e.g., Darryl Fears, *Poor Residents Join Forces to Wipe Out Drugs, Violence*, ATLANTA J. & CONSTITUTION, Nov. 26, 1994, at B6 (reporting that the problems of public housing have so perplexed President Clinton that he "told public housing directors to consider warrantless searches, gun sweeps and swift evictions of residents who commit crimes"); Vincent Lane, *Public Housing Sweep Stakes*, POL'Y REV., Summer 1994, at 68 (explaining why warrantless "building sweeps" are necessary); see also Erika R. George, Recent Development, *The Fourth Amendment's Forcing of Flawed Choices: Giving Content to Freedom for Residents of Public Housing Resident—Pratt v. Chicago Housing Authority*, 848 F. Supp. 792 (N.D. Ill. 1994), 30 HARV. C.R.-C.L. L. REV. 577, 589-91 (1995) (arguing that an overwhelming focus on individual liberty may prevent courts from adequately dealing with the social and economic conditions faced by public housing residents); Jason S. Thaler, Note, *Public Housing Consent Clauses: Unconstitutional Condition or Constitutional Necessity?*, 63 FORDHAM L. REV. 1777, 1805 (1995) (maintaining that "the severity of conditions that exist in public housing projects provide [sic] compelling justification to allow sweeps based on consent clauses"); Steven Yarosh, Comment, *Operation Clean Sweep: Is the Chicago Housing Authority 'Sweeping' Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103, 1122 (1992) (arguing that given the conditions existing in public housing, some accommodation for housing sweeps is necessary).

58. See sources cited, *supra* note 57.

59. The second half of part II confronts this assumption explicitly, discussing three cases—*Terry v. Ohio*, 392 U.S. 1 (1968), *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995)—that open the door to the proposition that a compelling public need may routinely outweigh compelling privacy rights of individuals.

60. 387 U.S. 523 (1967).

61. See, e.g., Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988); Sundby, *supra* note 13; see also Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473 (1991).

reasons why the privacy interest of public housing residents must be given primacy over the supposedly compelling public need *du jour*.

To set the constitutional context for this discussion, let us first turn to the text of the Fourth Amendment itself. The Fourth Amendment is written in two clauses.<sup>62</sup> The first clause (the "Reasonableness Clause") protects against unreasonable searches and seizures.<sup>63</sup> The second clause (the "Warrant Clause") regulates the manner and purpose in which warrants are to be issued.<sup>64</sup> Determining the relationship between these two clauses has historically been an area of difficulty for the Supreme Court.<sup>65</sup> The conventional interpretation argues that the Reasonableness Clause is defined in part by the Warrant Clause,<sup>66</sup> i.e., a search conducted in the absence of consent and without a warrant is per se unreasonable. The alternative view argues for an independent reading of the two clauses.<sup>67</sup> A search conducted without a warrant would not be per se unreasonable; rather, the absence of a warrant would be but one of many factors determining reasonableness. The Court's current preference favors (if unenthusiastically) the conventional interpretation that a warrant is required for searches and seizures<sup>68</sup>

---

62. U.S. CONST. amend. IV reads:

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

See also Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389 (1989).

63. See 2 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1(a), at 3-5 (3d ed. 1996); see also Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994).

64. LAFAVE, *supra* note 63, at 3-5.

65. See Maclin, *supra* note 15, at 202; Sundby, *supra* note 61, at 383 (stating that "the United States Supreme Court has struggled continually, and unsuccessfully, to develop a coherent analytical framework. . . . Many of the Court's present fourth amendment ills are symptoms of its failure to meet [the] basic challenges presented by the fourth amendment's text."); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468-75 (1985) (noting that "[t]he fourth amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities," partly because the Court has continued to adhere to the warrant requirement in theory, but not in fact).

66. For an argument espousing the conventional interpretation, see Maclin, *supra* note 15; see generally John M. Copacino, *Suspicionless Criminal Seizures After Michigan Department of State Police v. Sitz*, 31 AM. CRIM. L. REV. 215, 221-24 (1994) (describing conventional and alternate interpretations).

67. For an argument presenting the alternative view see Amar, *supra* note 63, at 757-819; see generally Copacino, *supra* note 66, at 221-24 (describing conventional and alternative interpretations).

unless the search or seizure falls under one of the exceptions to the warrant requirement.<sup>69</sup>

### A. Camara's Legacies

Before 1967, administrative searches—that is searches of residences and businesses for code violations—were not subject to the warrant requirement because they were not viewed as “searches” within the Fourth Amendment meaning of the term.<sup>70</sup> Consequently, housing inspectors were free to conduct warrantless inspections, and inspectees were powerless to stop the searches, often facing the threat of imprisonment if they dared refuse. Thus, in *Camara v. Municipal Court*,<sup>71</sup> Roland Camara was arrested and awaiting trial on the criminal charge that he violated the San Francisco Housing Code by refusing to allow a warrantless inspection of his residence.<sup>72</sup> An inspector for San Francisco Department of Public Health, alerted by the building manager that Camara was using the rear of his leasehold as a personal residence in violation of the building occupancy permit, sought access to Camara’s apartment.<sup>73</sup> Camara thrice rebuffed the entreaties of inspectors for the Department of Public Health who sought to inspect his apartment, because they did not have a warrant.<sup>74</sup>

Camara was arrested and released on bail. He subsequently brought suit in California state court seeking a writ of prohibition against the criminal court, arguing that the ordinance authorizing a

---

68. See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967) (stating that warrantless searches “are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions”); see also Bookspan, *supra* note 61, at 479; Wayne R. LaFave, ‘Seizures’ Typology: *Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REFORM 417, 451 (1984) (remarking that the Court “has often stated a ‘preference’ for searches pursuant to warrant”). Although the current law dictates that a warrant is preferred, some commentators argue that given the many exceptions to the warrant requirement there is not much left to the rule that searches and seizures must be accompanied by a warrant. See, e.g., Bookspan, *supra* note 61, at 503.

69. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976). For a laundry list of exceptions to the warrant requirement, see Project, *Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993–1994*, 83 GEO. L.J. 665, 692 (1995) (discussing exceptions to the warrant requirement in a chapter on warrantless searches and seizures).

70. See, e.g., *Frank v. Maryland*, 359 U.S. 360, 373 (Whittaker, J., concurring).

71. 387 U.S. 523 (1967).

72. *Id.* at 525. *Camara* overturned an earlier decision, *Frank v. Maryland*, 359 U.S. 360 (1959), in which a homeowner was convicted of violating a municipal code for refusing to permit a municipal health inspector to enter and inspect his premises without a search warrant.

73. *Camara*, 387 U.S. at 526.

74. *Id.* at 527.

warrantless inspection of his premises was unconstitutional. The California courts rejected his argument and he appealed to the United States Supreme Court. Agreeing with *Camara*, the Supreme Court held that the building inspector should obtain a search warrant, barring exigent circumstances, once the occupant has denied him entry.<sup>75</sup> The Court concluded that administrative searches were indeed subject to the warrant requirement because searches "conducted without a warrant lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . . ."<sup>76</sup>

The issue in *Camara* (and in *Frank*, which *Camara* overruled) is the same one over which we continue to struggle today; essentially, to what extent can the Fourth Amendment be enlisted in the fight to resolve pressing social concerns?<sup>77</sup> In *Camara*, the City of San Francisco argued that the Fourth Amendment should not stand in the way of the "health and safety of entire urban populations," which would be jeopardized were the state unable to conduct warrantless inspections of premises so that hazards may be discovered and eradicated.<sup>78</sup>

Although the *Camara* Court rejected the state's argument, it was not because the Court found the argument entirely unsympathetic.<sup>79</sup> The Court, however, seemed leery of holding that state actors can invade an individual's home without regard for the Constitution, and without review by an uninterested and detached magistrate.<sup>80</sup>

---

75. *Id.* at 539.

76. *Id.* at 534.

77. In *Camara*, Justice White implied that the essential issue is what role the Fourth Amendment will play in the states' efforts to deal with important social concerns. *Id.* at 525.

78. *Id.* at 533. A similar argument was made, and accepted, in *Frank*, 359 U.S. at 371-72. As this Note will discuss, *infra*, the argument continues to be made today with increasing success.

79. In an analysis, *infra*, this Note suggests that the Court defers to the states' public need argument.

80. The Court stated:

Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. . . . The practical effect of this system is to leave the occupant subject to the discretion of the official in the field.

*Camara*, 387 U.S. at 532. In that regard the *Camara* majority would agree with Professors Maclin and Sundby's contention that underlying the Fourth Amendment's warrant requirement is an issue of trust. See Maclin, *supra* note 15, at 248 (stating that "the central purpose of the Fourth Amendment . . . is distrust of discretionary police power"); Sundby, *supra* note 13, at 1777 (stating that "the jeopardized constitutional value underlying the Fourth Amendment [is] that of 'trust' between the government and the citizenry").

By the same token, the Court was not interested in erecting the Fourth Amendment as a roadblock to the state's ability to meet the needs of the public.

The Court found itself in a quagmire. It realized that the Fourth Amendment applied to administrative housing inspections—the direct implications of privacy interests<sup>81</sup> would not allow the Court to so easily dismiss the plaintiff's claim that administrative inspections were protected under the Fourth Amendment.<sup>82</sup> But the Court also realized that traditional probable cause would not have permitted<sup>83</sup> the area searches that it felt were so necessary.<sup>84</sup> A compromise was needed.

Up to this point in the Amendment's history, the Court regularly emphasized the supremacy of the Warrant clause.<sup>85</sup> Although the Court had never (nor has ever) said that a warrantless search is per se invalid under the Fourth Amendment,<sup>86</sup> it had always maintained a strong preference for a warrant.<sup>87</sup> Faced with the strength of the privacy interests of the plaintiffs, and (perhaps in the mind of the Court) the equally strong public need interest of the state, *Camara* developed a compromise. *Camara* found its compromise in a reasonableness balancing test.

While holding that a warrant is required for administrative inspections, the Court jettisoned the traditional standard for probable cause—which required individualized suspicion that a person had either committed or was in the process of committing a crime—for a more flexible standard of reasonableness.<sup>88</sup> The Court noted that the constitutional mandate of the Fourth Amendment is

---

81. "[W]e cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.'" 387 U.S. at 530.

82. "Appellant has argued throughout this litigation that § 503 is contrary to the Fourth . . . Amendment[] in that it authorizes municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein." *Id.* at 527.

83. "The fourth amendment would have precluded the government's power to conduct area housing inspections, a power all agreed was necessary, if probable cause required a showing of specific violations for each inspection." Sundby, *supra* note 61, at 392.

84. The *Camara* Court argued that to reject the argument that warrantless inspections are not governed by the Fourth Amendment "does not justify ignoring the question whether some other accommodation between public need and individual rights is essential." 387 U.S. at 534. Later on in the opinion the Court states: "There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspection of all structures." *Id.* at 535–36.

85. See *id.* at 528–29; Sundby, *supra* note 61, at 386.

86. See generally Copacino, *supra* note 66, at 221.

87. Sundby, *supra* note 61, at 386.

88. *Camara*, 387 U.S. at 534–35; Sundby, *supra* note 61, at 392.

not that there be probable cause, but that there be reasonableness.<sup>89</sup> The Court developed a balancing test to determine what should be considered reasonable; in order to determine what constitutes a reasonable intrusion into the individual's Fourth Amendment's interest, the public need to search must be balanced against the individual's privacy interest.<sup>90</sup>

*Camara* held that government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable cause requirements—individualized suspicion—as long as their searches are based upon “reasonable legislative or administrative standards . . . .”<sup>91</sup> The Court thought that a reasonableness standard would effectively balance the need to search against the degree of intrusion upon the individual's privacy interest.<sup>92</sup> It decided that area searches are permissible where administrative searches are concerned and that certain factors, such as the passage of time, the nature of the building to be searched, or the condition of the entire area, can be used to justify the probable cause to search.<sup>93</sup>

The *Camara* Court rested its holding upon three premises. First, it was persuaded by the long history of judicial acceptance of these inspection programs.<sup>94</sup> Second, it thought that the inspection programs were conducted pursuant to a compelling public interest that could not be effectively served any other way.<sup>95</sup> Third, because the inspection was not aimed at discovering evidence of crime, the Court reasoned that in comparison to a more traditional search, an administrative search “involved a limited invasion of the urban citizen's privacy.”<sup>96</sup>

There are several reasons why *Camara* is a significant opinion.<sup>97</sup> First, *Camara* embodies the current (and perhaps long-standing)

---

89. *Camara*, 387 U.S. at 534–35 (stating probable cause to search would exist only if the search was reasonable, if there was evidence to believe that something would be found at the place being searched).

90. *Id.* at 539. *Camara*'s balancing test may not be limited to a search made pursuant to a warrant, but might also apply to warrantless searches under the recognized exceptions. The Supreme Court has said repeatedly that the level of required probable cause is the same for both searches and warrants. Thus, an administrative search case that falls under the exigent circumstances exception will be evaluated under the more deferential reasonableness test, not the more demanding traditional probable cause test.

91. *Id.* at 538.

92. *Id.*

93. *Id.*

94. *Id.* at 537.

95. *Id.*

96. *Id.*

97. See LaFave, *supra* note 11, at 464 (discussing the importance of *Camara*'s Fourth Amendment doctrine).

struggle over the meaning of the Fourth Amendment. To the question of whether the Fourth Amendment is dominated by the Warrant Clause or by the Reasonableness Clause, *Camara* answers that both have a role to play.<sup>98</sup> Second, the *Camara* majority dealt with the issue of the proper role of the Fourth Amendment in the face of pressing public needs, to which it again answered that both the privacy rights of individuals and the public need must be given effect.<sup>99</sup> Hence, they brought administrative searches within the ambit of the Fourth Amendment. Third, the legacies of *Camara*, the reasonableness inquiry and balancing test, are currently the dominant methods for resolving Fourth Amendment conflicts.<sup>100</sup> Consequently, *Camara* set the framework within which these issues are to be discussed.

Turning to the specific issue at hand, the modern implications of *Camara*'s balancing test with respect to warrantless searches in public housing projects are not very clear. *Camara* may be interpreted as having spawned two distinct legacies: on one hand, the *Camara* majority was clearly responsive to the state's interest when that interest involved a compelling public need. Within the opinion is the notion that an individual's privacy interest must at times give way to the public's need.<sup>101</sup> This first interpretation, which this Note denominates the "public need reinforcing interpretation," is the dominant interpretation of *Camara*.

On the other hand, there is a competing interpretation—which this Note terms the "privacy reinforcing interpretation"—of *Camara*'s balancing test standard. It is this interpretation which has been ignored by the current Court. *Camara* can also be interpreted as having reaffirmed the concept that the supremacy of one's right of privacy, particularly in one's own home, continues to reside at the very core of the interests protected by the Fourth Amendment, even in the face of compelling public needs. *Camara*'s willingness to bring administrative inspections within the control of the Fourth Amendment, in spite of a compelling public need, can (and perhaps should) be interpreted to mean that there is a presumption of individual privacy that government action must overcome.<sup>102</sup> Moreover, even where the government is able to rebut that

---

98. Perhaps with a slight edge to the supremacy of the Warrant Clause.

99. *Camara*, 387 U.S. at 533–34, 538–40.

100. See LAFAVE, *supra* note 63, at 635.

101. *Camara*, 387 U.S. at 535–40.

102. "The final justification suggested for warrantless administrative searches is that the public interest demands such a rule . . . . Of course, in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration." *Id.* at 533.

presumption, at least within the administrative search context, the least that the individual is entitled to is a warrant (granted by a neutral and detached magistrate), albeit on less than traditional probable cause, but a warrant nonetheless.

### B. The Current Approach

The Court's current approach has virtually ignored *Camara's* privacy reinforcing interpretation.<sup>103</sup> In three opinions, *Terry v. Ohio*,<sup>104</sup> *New Jersey v. T.L.O.*,<sup>105</sup> and *Vernonia School District 47J v. Acton*,<sup>106</sup> the Court has all but determined that the Fourth Amendment need not be a concern where the state presents a compelling public need. This section first describes how the Court has established the supremacy of the public need reinforcing interpretation of *Camara*. Using the three cases mentioned above, it shows how the public-private analysis gives great deference to the public interest portion of the analysis. This section then articulates what it sees as the danger of such an approach, and sets forth reasons why the approach is detrimental to the rights of public housing residents.

We begin with *Terry v. Ohio*.<sup>107</sup> Although *Terry* is not an administrative search case, it is instructive for our purposes because it demonstrates how the Court continued *Camara's* redefinition of the probable cause standard and the use of a balancing test to accommodate state solutions to perceived threats to safety.

*Terry* involved a "stop and frisk" of three men by a plainclothes police officer.<sup>108</sup> The officer could not articulate at first why he decided to observe the men.<sup>109</sup> But he continued to watch them until he suspected that they were "casing" a store and planning a robbery.<sup>110</sup> The officer approached the three men and patted them down. Two of the three were carrying concealed weapons.<sup>111</sup> The men were arrested and each was charged with carrying a concealed weapon.<sup>112</sup>

---

103. See Wayne R. LaFare, *Being Frank About the Fourth: On Allen's "Process of 'Factualization' in the Search and Seizure Cases"*, 85 MICH. L. REV. 427, 446 (1986) (commenting that the "Court's discussion of the 'persuasive factors' in the balance leaves something to be desired, and reflects just how easy it would be for courts to run amuck with this balancing test and, in the process, to balance the fourth amendment away").

104. 392 U.S. 1 (1968).

105. 469 U.S. 325 (1985).

106. 115 S. Ct. 2386 (1995).

107. 392 U.S. 1 (1968).

108. *Id.* at 5-7.

109. *Id.* at 5.

110. *Id.* at 6.

111. *Id.* at 7.

112. *Id.*

*Terry* presented two issues: (a) whether stops and frisks are subject to the Fourth Amendment,<sup>113</sup> and (b) whether the officer in the case unreasonably interfered with the suspects' Fourth Amendment rights.<sup>114</sup> The *Terry* Court did not have much difficulty in deciding that stops and frisks were searches and seizures under the Fourth Amendment.<sup>115</sup> What is interesting about the Court's Fourth Amendment analysis is the effect and weight the Court chose to give to the individual's right of privacy.

The Court determined that even though the officer interfered with *Terry*'s Fourth Amendment right to personal security, the key determination is whether that interference was unreasonable.<sup>116</sup> The Court then stated that in order to assess the reasonableness of the Officer's conduct it was necessary to balance the governmental interest against the constitutional interests of the individual.<sup>117</sup> One would think that such a grave individual interest, so eloquently defined by the Court,<sup>118</sup> would be given great weight in the balancing process. But it was not. Instead the Court found the public interest involved very compelling. The Court stated that in applying the balancing test "we consider first the nature and extent of the governmental interests involved."<sup>119</sup> The interests include the gov-

---

113. "Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when [the officer] 'seized' *Terry* and whether and when he conducted a 'search.'" *Id.* at 16.

114. "We must decide whether at that point it was reasonable for [the] Officer . . . to have interfered with petitioner's personal security as he did." *Id.* at 19.

115. The Court noted that "[t]here is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution. We emphatically reject this notion." *Id.* at 16.

116. *Id.* at 15.

117. The Court stated that:

In order to assess the reasonableness of Officer *McFadden*'s conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails."

*Id.* at 20-21 (citations omitted).

118. The actual words of the Court were as follows:

It is simply fantastic to urge that such a procedure [a stop and frisk] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

*Id.* at 16-17 (citations omitted).

119. *Id.* at 22.

ernmental interest in the prevention and detection of crime<sup>120</sup> as well as "the more immediate interest of the police officer" to protect himself and to protect potential victims of crime.<sup>121</sup> By themselves, these are quite compelling interests. But consolidated under the rubric of "public need," the individual cannot win.<sup>122</sup> Consequently, the Court determined that the officer was reasonable in interfering with Terry's Fourth Amendment privacy right and that Terry lost the balancing test.

The Court in *Terry* does not quite explain, however, why Terry lost the balancing test. Although the Court talks about reasonableness and permissive intrusions, to best understand why Terry lost out on the balancing test it is important to probe deeper into the Court's reasoning and identify its primary concerns. In both *Terry* and *Camara*, the respective majority opinions hint at the importance of accommodating a compelling public need.<sup>123</sup> *New Jersey v. T.L.O.*<sup>124</sup> is more straightforward.

*T.L.O.* presented a situation similar to *Terry*. In *T.L.O.* a high school freshman was caught smoking in the bathroom by a teacher who then took her to the principal's office for violating the school's rule against smoking in lavatories.<sup>125</sup> The student was confronted by the Assistant Vice Principal and denied that she had been smoking. The Assistant Vice Principal demanded to see her purse.<sup>126</sup> Upon opening the purse, he noticed rolling papers indicative of marijuana.<sup>127</sup> He then performed a more thorough search of the purse which revealed marijuana, a pipe, plastic bags, large sums of one dollar bills, and letters implicating her in marijuana dealing.<sup>128</sup>

The relevant issues in *T.L.O.* were whether warrantless searches conducted by public school officials are within the purview of the Fourth Amendment,<sup>129</sup> and whether the particular warrantless search in *T.L.O.* was reasonable.<sup>130</sup> In language analogous to the language in *Terry v. Ohio*,<sup>131</sup> the Court determined with little difficulty that high school students have legitimate expectations of privacy

---

120. *Id.*

121. *Id.* at 23.

122. See Bookspan, *supra* note 61, at 508.

123. *Terry*, 392 U.S. at 20-27; *Camara*, 387 U.S. at 533, 536-39.

124. 469 U.S. 325 (1985).

125. *Id.* at 328.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 332-33, 337.

130. *Id.* at 333-37.

131. 392 U.S. 1, 16-17 (1968).

with respect to personal property taken to school.<sup>132</sup> The difficult question was whether their privacy interests were sufficient to prevent searches of their property without a warrant.<sup>133</sup>

Once again, quoting *Camara*,<sup>134</sup> the Court maintained that determining what is reasonable depended upon the outcome of the balancing test.<sup>135</sup> The refreshing part of the opinion is the honesty that the Court displays in discussing what it sees as the clash of the important interests of the individual and of the school.<sup>136</sup> The Court is not bashful in noting its concern for the public need.<sup>137</sup> Moreover, the Court is also somewhat explicit that its outcome in the case is dictated by its public need reinforcing concern.<sup>138</sup> Consequently, the Court held that the balancing test favored the school administrator's warrantless search of T.L.O.'s purse as reasonable under the circumstances.<sup>139</sup>

132. The Court emphatically supports the privacy rights of children in the schools, just as they did the rights of suspects on public streets. *New Jersey v. T.L.O.*, 469 U.S. 325, 336–38 (1985).

133. *Id.* at 338.

134. *Camara v. Municipal Court*, 387 U.S. 523, 536–37 (1967).

135. *T.L.O.*, 469 U.S. at 337 (stating that “[o]n one side of the balance are arrayed the individual’s legitimate expectations of privacy and personal security; on the other, the government’s need for effective methods to deal with breaches of public order”).

136. “Against the child’s interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.” *Id.* at 339.

137. In this case, the needs of school teachers and administrators. *See id.* at 339–40.

138. The Court states:

How, then, should we strike the balance between the schoolchild’s legitimate expectations of privacy and the school’s equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.

....

We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

*Id.* at 340–41 (citation omitted).

139. *Id.* at 347.

The balancing test was most recently used in *Vernonia School District 47J v. Acton*<sup>140</sup> with similar results. *Acton* (and *Camara*) best represents the concerns of this Note. *Acton* is far removed from the quintessential Fourth Amendment police-suspect case. On its facts, *Acton* is the most direct progeny of *Camara*. The case features an administrative scheme, designed ex ante, to deal with a compelling public need. Unlike *Terry*, however, *Acton* does not express the concern about police discretion which typically dominates Fourth Amendment jurisprudence. Also unlike *Terry* (and *T.L.O.*), there is not the problem of a government agent on the verge of discovering potentially incriminating evidence, but without the probable cause required to conduct a more intrusive search. *Acton* presented a *Camara*-like situation that called for a *Camara*-like solution.

At issue in *Acton* was the constitutionality of the Vernonia School District Student Athlete Drug Policy.<sup>141</sup> The Policy required all students wishing to participate in the district's athletic programs to consent to a urinalysis at the beginning of each season, for the purpose of determining the presence of illicit drugs.<sup>142</sup> The Policy also required students to consent to random drug testing.<sup>143</sup>

Once again, the Court determined with ease that the Fourth Amendment is implicated in such searches. The Court held that "state-compelled collection and testing of urine . . . constitutes a 'search' subject to the demands of the Fourth Amendment."<sup>144</sup> The more crucial issue was whether the search was reasonable.

Predictably, the Court announced that "whether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"<sup>145</sup> But what is the quantum of state interest sufficient to overcome an individual's privacy rights?<sup>146</sup> The Court defines a compelling public interest as "an interest which *appears important enough* to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy."<sup>147</sup> The

---

140. 115 S. Ct. 2386 (1995).

141. *Id.* at 2388.

142. *Id.* at 2389.

143. *Id.*

144. *Id.* at 2390 (citation omitted).

145. *Id.* (quoting *Skinner v. Railway Labor Executive's Ass'n*, 489 U.S. 602, 617 (1989)).

146. The Court did not rely on one clear theory in determining whether the privacy interest should be protected. Rather, the Court relied on an amalgamation of theories. Before engaging in the balancing test, the Court intimated that the search could be upheld as a "special needs" exception, and that the search in question did not involve a significant invasion of privacy. 115 S. Ct. at 2391.

147. *Id.* at 2394-95.

Court found "[d]eterring drug use by our Nation's schoolchildren" important enough to overcome the students' privacy interests, given the destructive effects of drugs.<sup>148</sup>

The staggering effects of the accommodative sacrifices that are to be made at the altar of the public need are sufficiently demonstrated by *Terry*, *T.L.O.*, and *Acton*. If these cases are to serve as binding precedent, the privacy interest of public housing residents could be seriously undermined. Present-day situations in some public housing projects present at least as compelling a public need rationale as was presented by these cases.<sup>149</sup> In the modern world of public housing, the public health is much less endangered by faulty wiring and the accumulation of garbage than by the proliferation of drugs and firearms.<sup>150</sup> Against the great weight and significant public interests of curbing drug use, curtailing the proliferation of firearms in the projects, and obtaining secure, safe, and decent housing for public housing residents, these cases would not give the privacy interest of the public housing resident a fighting chance.

There are additional reasons to be concerned. One can view these cases as standing for the proposition that the greater the public need or potential public harm, the lesser the quantum of probable cause (or reasonable suspicion) required to conduct a search.<sup>151</sup> The impact of these cases is further exacerbated by the prospect that the

---

148. *Id.* at 2395.

149. 1993 CHICAGO HOUSING AUTHORITY ANNUAL REPORT 2 ("For the past twenty-five years, Chicago's public housing residents have lived in communities that have disintegrated under the weight of poverty and crime.").

150. For example, the average crime rate for Chicago Housing Authority (CHA) developments in 1993 was 7.7 crimes per 100 persons, based on the 1991 population (86,547). See 1993 CRIME INCIDENCE IN CHICAGO HOUSING AUTHORITY DEVELOPMENTS 5.

151. This interpretation may be necessitated by the balancing test required by the Court. "In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed . . ." *Camara v. Municipal Court*, 387 U.S. 523, 535 (emphasis added). The Court also asserts that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.* at 537. The Court maintains that "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539. The implication is that the greater the public need the more it will weigh in the probable cause determination, thereby decreasing the probable cause required. See LaFave, *supra* note 103, at 447 (discussing this possibility); see also Sundby, *supra* note 61, at 394 (arguing that "[a]llowing reasonableness to define probable cause expanded the range of acceptable government behavior beyond intrusions based on individualized suspicion to include activities in which the government interest outweighed the individual's privacy interests").

greater the public need the more likely it is that the Court will allow a tremendous intrusion upon the privacy rights of the individual.<sup>152</sup>

Some commentators, fearing these results, have argued that the error of these cases is the emphasis they place on the reasonableness inquiry and the balancing test as methods of determining reasonableness. Consequently, commentators attribute this error to the *Camara* Court primarily, and to its progeny (*Terry*, *T.L.O.*, and *Acton*) generally.

As noted earlier, *Camara* is capable of another interpretation—the public need reinforcing interpretation—which dictates that at times the private interest does need to give way to a compelling public need. Not surprisingly, that statement does not engender much controversy from judges, commentators, or activists. What seems to be controversial is the Court's reasonableness inquiry, as embodied in the balancing test. The truth is that some mistrust the Court's method of determining reasonableness to protect individual privacy rights.<sup>153</sup>

---

152. See, e.g., *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting). Justice Jackson stated that:

[I]f we are to make judicial exceptions to the Fourth Amendment . . . it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped [sic] and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and indiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

*Id.*; see also Amar, *supra* note 63, at 802 (arguing that "serious crimes and serious needs can justify more serious searches and seizures"). For criticism of the balancing test see *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 635, 639 (1989) (Marshall, J., dissenting) (noting that "[p]recisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great," and commenting on the malleability of a balancing search); see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 944 (1987) (arguing that "complacency blinds us to serious problems in the mechanics of balancing"); Kamisar, *supra* note 6, at 33 (noting that it is not surprising that the government interests prevail when the balancing test is used. "This is usually the result when the Court utilizes what dissenters aptly called 'a formless and unguided "reasonableness" balancing inquiry.'""); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. Rev. 1173, 1188–89 (1988) (maintaining that use of the balancing test contributes to the erosion of Fourth Amendment rights); Sundby, *supra* note 61, at 400 (arguing that the balancing test favors government intrusion).

153. See, e.g., O'Brien, *supra* note 56, at 1192 (commenting that "[t]he *Vernonia* decision is an illustration of the inadequacy of the Court's balancing test to preserve the Fourth Amendment rights of individuals").

As a practical matter, there are problems with the Court's balancing method. In the public housing context, for example, the mechanics of the balancing test are difficult to administer. The balancing test requires that one weigh the public need against the individual's privacy interest. One must be able to separate the individual's privacy interest(s) from the government's interest(s), place them on opposite sides of an (imaginary) constitutional scale, and with a sagacious constitutional eye, scrupulously ascertain which side is most weighty. Even if we engage in the fiction that such an analysis is possible, in the difficult set of cases with which we are concerned—i.e., those involving conflicts between compelling public needs and compelling individual privacy rights—one problem still remains: in the context of warrantless searches of public housing projects, there are no clearly separable interests.

The public housing resident is often simultaneously the target of governmental investigation and the recipient of governmental protection. In a case where the resident is the victim of a crime, for example, the resident's and the state's interests are closely aligned. The state seeks to apprehend the perpetrator of the crime to protect the public, vindicate the public laws, and bring the criminal to justice. The victim presumably wants to see the law-breaker apprehended and convicted for similar and personal reasons. In such cases the public's interest and the individual's interest are parallel.

Conversely, when the resident is the target of a criminal investigation ostensibly arising from his activities around the public housing project, he does not see his fate aligned with that of the government.<sup>154</sup> He is not concerned with the vindication of the public laws or the protection of the public; he is primarily concerned with staying out of the grasp of the state—and if he is brought to trial, avoiding conviction. He sees his interests as antagonistic to those of the public, and by proxy, the government. In that instance the Fourth Amendment's purpose is clear: it ensures that the government can protect the public and enforce its laws without infringing upon the privacy interests of the individual.

Unfortunately, the issue of warrantless searches of public housing does not provide such a neat division of interests. Consequently, a traditional Fourth Amendment balancing test is not fully

---

154. Because this hypothetical assumes that a crime is committed, one might argue that an innocent resident would not have the same feelings as a not-so-innocent resident. However, such an argument would ignore the dual and conflicting relationship of certain segments of the population with the police (e.g., African Americans). See Angela Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 438 (1997) (exploring this dual relationship by explaining that racially discriminatory traffic stops negatively impact both those African Americans who are factually guilty and those who are factually innocent).

workable. Public housing residents are both the targets of warrantless searches and the recipients of their potential protection. As the object or target of a governmental investigation, the public housing resident is interested in the protection of the privacy of his home, and in making sure that he is accorded the full complement of rights due a citizen living in a democratic society. These interests are arguably antagonistic to the means that the government seeks to use—a warrantless search. However, as the subject of governmental protection, the resident's interests are also more or less aligned with the governmental interest because the government seeks to protect the resident's personal safety. This phenomenon is demonstrated by the fact that the majority of public housing residents in Chicago favored warrantless searches of their public housing complexes in spite of the fact that they would have to bear, at the very least, the costs incident to the loss of privacy.<sup>155</sup>

Even if it were possible to divide the private and public interests clearly, balancing them fairly would present problems. First, there seems to be a sense that the harm to an individual's privacy interest is more of a psychic harm, whereas if the public need to conduct a search is frustrated, the harm is thought to be more physical, more palpable. Second, there is also a sense that the individual benefits whenever the public need for a search is fulfilled. Hence, individuals are at least partially compensated for whatever harm they suffer from violation of their (psychic) privacy rights.

There is a third and related problem, which is most likely inherent in the nature of the balancing process itself. Balancing an individual's right of privacy (or right to be free from government interference) against the public interest is essentially an invitation to engage in an exercise in balancing comparative harms. Fundamentally, the relevant inquiry is who will be harmed the most, the individual (if the search in question is permitted) or the public interest (if the search is not permitted)? This is an exercise in which the individual begins with an abstract disadvantage. It is one individual against the public. Why should the privacy rights of one individual outweigh a need of the entire public?<sup>156</sup>

---

155. See Lane, *supra* note 57, at 70 (noting that eighteen of nineteen building presidents and an "overwhelming majority of residents" supported building sweeps). But see *Pratt v. Chicago Housing Authority*, 838 F. Supp. 792 (N.D. Ill. 1994) (noting that some Chicago Housing Authority project residents opposed warrantless searches because of the burden on their right to privacy).

156. See, e.g., Sundby, *supra* note 13, at 1765 (making a similar point); see also Amitai Etzioni, *Balancing Act: Don't Sacrifice the Common Good to Personal 'Rights,'* CHI. TRIB., May 16, 1994, § 1, at 11 (arguing that although there may be detrimental effects on individual rights, warrantless sweeps are necessary for the common good of public housing residents).

While acknowledging that there are problems with the Court's reasonableness test and balancing act approach, this Note's criticism is a much narrower one. Its contention is simply that the current approach has misinterpreted *Camara*. *Camara* has erroneously been given effect only as a public need reinforcing mechanism. The context within which *Camara* arose has been ignored, and the balance that *Camara* struck has been abandoned. *Camara*'s privacy reinforcing component has all but disappeared from the Fourth Amendment landscape.

*Camara* is best understood, and best categorized, as an administrative search case. Administrative searches involve planned searches by government (although non-police) personnel pursuant to a predetermined scheme designed to deal with a societal problem.<sup>157</sup> This scenario is different from the police search designed to uncover evidence of criminal activity.<sup>158</sup> In that respect *Camara* is different from *Terry*. *Terry* involved the usual police-suspect encounter within the context of the criminal law. The search there was "unplanned" and the concern for police discretion and safety paramount and possibly understandable. The Court in *Terry*, while holding that brief stops constitute searches, could have easily disposed of the warrantless search under its doctrine of exigent circumstances or special needs (safety of the officer). Instead, the Court invoked the *Camara* reasonableness balancing test.

*Camara* and *Acton* did not involve a police-suspect encounter. The searches were planned pursuant to legislative and administrative schemes, respectively. The concern was social and the methods chosen were administrative or civil. The *Camara* opinion itself demonstrates that the Court understood that administrative searches were contextually different from the usual police-suspect encounters.

First, the Court acknowledged that the purpose of administrative searches were not to uncover criminal activity.<sup>159</sup> Second, the Court recognized that these types of cases almost always involved a clash of important interests, that of the public and that of the individual.<sup>160</sup> Third, the Court realized the difficulty of obtaining

---

157. See, e.g., *Federally Assisted Housing Hearing*, *supra* note 39, at 103, 117-26 (statement of Vincent Lane, Chairman, Chicago Housing Authority) (describing the CHA administrative searches of public housing complexes).

158. An administrative search can turn up evidence of criminal activity, akin to the police search. However, the emphasis of the administrative search is not criminal, but social. In the public housing context, for example, an administrative search for lease violations may turn up evidence of drug-dealing. Yet, the purpose of the search is not to find evidence of drug-dealing, but rather to insure the habitability of the housing complex for all residents.

159. *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967).

160. *Id.* at 534-35.

individualized suspicion. Fourth, and most importantly, the Court understood that the planned nature of the searches allowed government officials the ability to plan on acquiring a warrant with little difficulty. Emphasizing the need for an intermediary to review the government's justification for the administrative search scheme, *ex ante*, the Court ruled that the government would have to acquire a warrant, albeit on less than probable cause.<sup>161</sup> Following the way highlighted by *Camara*, one can see why *Acton* is so troubling.

Many commentators find *Acton* unsatisfactory,<sup>162</sup> and justifiably so. The opinion is lacking in both analysis and result. The Court wants us to believe that school children who participate in athletics have a reduced expectation of privacy because, *inter alia*, "they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average," etc.<sup>163</sup> The Court then argues that state-compelled urinalysis is really not such a big deal; it is just like using the restroom, "which men, women, and especially school children use daily."<sup>164</sup> Finally, the Court emphasized the importance of deterring drug use by the nation's schoolchildren.<sup>165</sup>

It is unfortunate that the Court got so carried away by this "immediate crisis of great[] proportions,"<sup>166</sup> otherwise known as the public need, that it failed to conduct a satisfactory analysis. Following the dictate of *Camara*—that the public need and the privacy right of the individual must be given effect—the analysis is quite simple.

---

161. For a discussion of the responsibilities of judicial officers with respect to administrative warrants, specifically administrative warrants for housing inspection programs, see LaFave, *supra* note 97, at 465 (suggesting that there are two roles for judicial officers in passing upon administrative warrants: "(1) a general determination of the reasonableness of the inspection program; and (2) a specific determination of whether the particular inspection requested fits within that program"). Although a warrant can be issued on less than probable cause, a judicial officer performing these two roles provides the resident some protection against arbitrary searches.

162. See Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint*, 94 MICH. L. REV. 2553, 2580 (1996). See generally Irene M. Rosenberg, *Public School Drug Testing: The Impact of Acton*, 33 AM. CRIM. L. REV. 349 (1996); Carla E. Laszewski, Note, *Gone to Pot: Student Athletes' Fourth Amendment Rights After Vernonia School District 47J v. Acton*, ST. LOUIS U. L.J. 575 (1996); Jennifer L. Malin, Comment, *Vernonia School District 47J v. Acton: A Further Erosion of the Fourth Amendment*, 62 BROOK. L. REV. 469 (1996); Stanislawczyk, *supra* note 56.

163. *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2393 (1995). As some commentators have noted, this Fourth Amendment diminishment of student privacy rights in the public schools is in contradiction with the way students' rights have been viewed with respect to other areas of the Constitution. See, e.g., Rosenberg, *supra* note 162, at 363 (noting that the *Acton* majority ignored other doctrines of constitutional law dealing with the rights of children); Malin, *supra* note 162, at 503-05 (commenting that constitutional developments in students' rights with respect to free expression, privacy, and due process conflict with the Court's holding in *Acton*).

164. *Acton*, 115 S. Ct. at 2393.

165. *Id.* at 2395.

166. *Id.*

The first inquiry is whether the warrantless searches are part of an administrative scheme. The next inquiry is whether traditional probable cause is unattainable given the circumstances. Where traditional probable cause is attainable, *Camara* demands that it be acquired in the administrative context. Even if traditional probable cause is impracticable, however, the solution is not a blanket, random search, but a warrant on less than traditional probable cause.

As the Fourth Amendment figures increasingly in attempts to deal with indomitable social problems, it is important for the Court to settle on a workable framework. The *Camara* framework seems to provide the most promise, especially in the context of public housing.

### III. CONSENT

As mentioned in Part I, the Court has found in the doctrine of consent searches and seizures an important tool in the fight to eliminate threats to public safety. It is not surprising that the consent doctrine has been invoked as an axiomatic device necessary to win the war against drugs and crime in public housing complexes.

The idea of consent searches and seizures gained national prominence when President Clinton and his administration suggested bypassing the Fourth Amendment altogether, through the insertion of consent clauses in public housing lease agreements, in order to conduct warrantless searches of public housing complexes.<sup>167</sup> The Clinton Administration developed a multiple-point

---

167. President's Radio Address, 30 WEEKLY COMP. PRES. DOC. 822, 823-24 (Apr. 16, 1994). The President's suggestion was a reaction to a recent ruling issued in *Pratt v. Chicago Housing Authority*, 848 F. Supp. 792 (N.D. Ill. 1994), where a District Court Judge, Warren Andersen, ruled the Chicago Housing Authority's building sweeps unconstitutional. In September of 1988, the Chicago Housing Authority (CHA) began what it called "Operation Clean Sweep" (Sweeps). The Sweeps were characterized by systematic door-to-door searches of every apartment in a targeted building, in pursuit of drugs, illegal residents, and unlicensed firearms. See *Federally Assisted Housing Hearing*, *supra* note 39, at 103, 117-26 (statement of Vincent Lane, Chairman, Chicago Housing Authority). The program was created in response to the high levels of violent crime in federally-financed public housing projects, as well as the public outcry calling for a quicker response to the epidemic of violence. *Id.*

On April 7, 1994, the Sweeps were halted when Judge Andersen ruled that the CHA's search policy violated the Fourth Amendment and enjoined CHA officials from continuing these searches. *Pratt*, 848 F. Supp. at 793. Following the court order, President Clinton instructed Attorney General Janet Reno and Secretary of Housing and Urban Development Henry Cisneros to develop law enforcement measures that would be both constitutionally valid and effective in reducing crime in public housing projects. See President's Radio Address, *supra*.

option plan.<sup>168</sup> Of the options developed, one of the most popular and controversial is the recommendation that consent clauses be inserted in leases of public housing residents. In a letter to the President, Attorney General Janet Reno and Secretary of Housing and Urban Development Henry Cisneros wrote:

A search is lawful if it is conducted pursuant to an uncoerced consent. Leases in housing projects, as elsewhere, typically include a standard consent clause permitting the housing authority to conduct routine maintenance inspections and to enter the tenant's apartment in case of emergency. Where crime conditions in the housing development make unit-by-unit inspections essential, similar lease consent clauses could be employed to authorize periodic administrative inspections of tenants' units for unlicensed or unauthorized firearms.<sup>169</sup>

The proposed use of consent clauses in public housing leases thus presents the question of whether the insertion of these consent clauses will serve to effectively bypass the Fourth Amendment. Part III contends that although consent is an important accommodative tool, the consent inquiry as currently articulated by the Supreme Court is a fictitious and inutile inquiry in the administrative context.

This Note argues that the rules that the Court has developed for use in the police-suspect context should not be carried over into the administrative context, because the justifications that gave rise to those rules—e.g., need for police discretion, unpredictably of police-suspect encounters, etc.—are not applicable in the administrative context. This Note maintains that the Court's consent inquiry reflects a concern for one of two competing values. On one hand, there is concern that "the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice."<sup>170</sup> On the other hand, the Court does not want to handicap the police unnecessarily or unduly to limit the investigative tools that the police have available to them. This Note argues that the Court's current consent inquiry is a genuflect to the latter value, while ignoring the former.

Without passing upon the merits of the Court's consent inquiry—that is, whether focusing on cabining police behavior is an appropriate normative inquiry—this Note admits that the inquiry is

---

168. Cisneros and Bryson Briefing on Public Housing Sweeps (Apr. 16, 1994), *available in* 1994 WL 130857.

169. 140 CONG. REC. S4660 (1994).

170. *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1972).

sensible in the police-suspect context. In other words, if the Fourth Amendment guards against anything, it must at least guard against abusive police behavior.<sup>171</sup> However, in the administrative context, the inquiry can and should mean more. Consent to search agreements in the administrative context should be analyzed in terms of discrete units of explicit bargains in which the original terms, as evidenced by the text of the Fourth Amendment and current Fourth Amendment doctrine, are renegotiated. The essential issue is whether there are any constitutional limits to the extent of the renegotiations.

Part III.A develops the intellectual framework within which the discussion takes place. Part III.B maps the Court's current formulation of the consent doctrine, specifically highlighting the Court's concern with developing rules that work in the police-suspect context. This Part also argues that the Court's current consent inquiry cannot be carried over to the administrative context because the justifications undergirding the Court's current inquiry, which are concerned with police-suspect behavior, are not present in the administrative context. Part III.C provides other, more constitutional alternatives.

### A. Conceptual Framework

Before discussing the Court's consent doctrine, it is necessary to establish the intellectual context. In a classic article, entitled *Two Models of the Criminal Process*,<sup>172</sup> Professor Herbert Packer describes two competing models of the criminal justice system, that permit one "to recognize explicitly the value choices that underlie the details of the criminal process."<sup>173</sup> He called these two models the Crime Control Model and the Due Process Model.<sup>174</sup>

According to Professor Packer, the Crime Control Model "is based upon the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process."<sup>175</sup> The necessary elements of the Crime Control Model are efficiency, speed, and finality.<sup>176</sup> Efficiency is the method

---

171. That may not be all it guards against. In the context of police-suspect encounters, however, a consent doctrine that protects individuals from having the police beat out of them an agreement to search their person or a particular place, for example, cannot be thought to be unreasonable.

172. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

173. *Id.* at 5.

174. *Id.* at 6.

175. *Id.* at 9.

176. *Id.* at 10.

whereby the "criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime;"<sup>177</sup> speed demands police-suspect interactions be kept informal and uniform;<sup>178</sup> and finality requires that once a person has been convicted, opportunities for disturbing that conviction be kept at a minimum.<sup>179</sup>

In the Crime Control Model, the police operate as important and central actors.<sup>180</sup> They perform the initial investigation and screening to determine those who they have reason to believe are guilty or innocent, an important function in the Model.<sup>181</sup> Because they are the sole arbiters of probable guilt or innocence, if the Crime Control Model is to be effective, the screening process operated by the police must be reliable, or least it must be perceived to be reliable.<sup>182</sup> As Professor Packer states, the Model "places heavy reliance on the ability of investigative . . . officers, acting in an informal setting in which their distinctive skills are given full sway, to elicit and reconstruct a tolerably accurate account of what actually took place in an alleged criminal event."<sup>183</sup>

Professor Packer explains that the Due Process Model is evanescent and a bit more difficult to grasp.<sup>184</sup> The model emphasizes the importance of protecting the factually innocent at least as much as convicting those who are guilty.<sup>185</sup> Its constituent elements are a distinctive distrust of the informal, nonadjudicative, and police-initiated fact-finding process;<sup>186</sup> the "concept of the primacy of the individual[;] and the complementary concept of limitation on official power."<sup>187</sup>

The essence of the Due Process Model, however, is the conception that the Fourth Amendment is an integral part of the Constitution. A violation of the Fourth Amendment is a violation of

---

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 10-11.

182. *See id.* at 11.

183. *Id.* at 14.

184. "The ideology of due process is far more deeply impressed on the formal structure of the law than is the ideology of crime control; yet an accurate tracing of the strands of which it is made is strangely difficult." *Id.*

185. *Id.* at 15. Professor Packer notes: "The Due Process Model . . . comes eventually to incorporate prophylactic and deterrent rules that result in the release of the factually guilty even in cases in which blotting out the illegality would still leave an adjudicative fact-finder convinced of the accused's guilt." *Id.* at 18.

186. *Id.* at 14-15.

187. *Id.* at 16.

the Constitution.<sup>188</sup> Professors Maclin and Sundby remind us that “integral to the Constitution and our societal view of government is a reciprocal trust between the government and its citizens”<sup>189</sup> and a concomitant “distrust of discretionary police power.”<sup>190</sup> The Due Process Model seeks to preserve that trust by rejecting the Crime Control Model’s reliance on informality and reflects a distrust of police discretionary powers by being mistrustful of police investigatory procedures.<sup>191</sup>

Borrowing from Professors Packer, Maclin, and Sundby, the Due Process Model can be summed up as reflecting the notion that the Constitution, and more specifically, the Fourth Amendment, requires that certain formal processes are observed before state power can be legitimately exercised over an individual.<sup>192</sup> Moreover, because of its suspicious regard for official assertions of power, the model regards with a dim eye state failures to observe these formal processes.<sup>193</sup> It is with both of these models in mind that we now turn to the Court’s consent doctrine.

#### B. Consent Under the Fourth Amendment

This section explores the Court’s current consent doctrine using *Schneckloth v. Bustamonte*,<sup>194</sup> *Florida v. Bostick*,<sup>195</sup> and a hypothetical based on *Wyman v. James*.<sup>196</sup> It argues that the Court’s current consent doctrine is oriented toward the Crime Control Model, which is most relevant to the police-suspect context.

---

188. “Because the Due Process Model is basically a negative model, asserting limits on the nature of police power and on the modes of its exercise, its validating authority is judicial and requires an appeal to supra-legislative law, to the law of the Constitution.” *Id.* at 22.

189. Sundby, *supra* note 13, at 1777 (citation omitted).

190. Maclin, *supra* note 15, at 248.

191. Packer, *supra* note 172, at 13–22.

192. Professor Packer notes that:

Power is always subject to abuse, sometimes subtle, other times, as in the criminal process, open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, on this model, be subjected to controls and safeguards that prevent it from operating with maximal efficiency.

*Id.* at 16; *see also id.* at 18.

193. *Id.* at 16.

194. 412 U.S. 218 (1973).

195. 501 U.S. 429 (1991).

196. 400 U.S. 309 (1971).

1. *Schneckloth v. Bustamonte*: Origins of the  
Consent-as-Coercion Doctrine

Consent is an attractive option as a law-enforcement technique because it is a specifically established exception to the warrant and probable cause requirements of the Fourth Amendment.<sup>197</sup> The Supreme Court has interpreted consent to search rather broadly.<sup>198</sup> Although consent is constitutionally valid only when it is given voluntarily,<sup>199</sup> the essential issue is determining what voluntariness means within the Fourth Amendment.

That issue was first addressed by the Supreme Court in *Schneckloth v. Bustamonte*.<sup>200</sup> In *Bustamonte*, the defendant's car was stopped when an officer observed that one of the headlights and a license plate light were burned out.<sup>201</sup> The defendant was one of six passengers in the car.<sup>202</sup> After stopping the car, the officer asked another passenger (who stated that his brother owned the car) if he would consent to a search of the vehicle.<sup>203</sup> The second passenger responded, "Sure, go ahead."<sup>204</sup> As a result of the search, the officer found checks earlier reported to have been stolen, and the defendant was charged with possessing a check with the intent to defraud.<sup>205</sup>

The central question raised by *Bustamonte* was whether the second passenger voluntarily consented to the search of the car.<sup>206</sup> The Court stated that the test for establishing voluntariness is whether consent was "the product of an essentially free and unconstrained choice by its maker,"<sup>207</sup> a question of fact to be determined from all of the surrounding circumstances.<sup>208</sup> The Court determined that there were two competing factors involved in ascertaining the voluntariness of consent.<sup>209</sup> First, the legitimate need for the type of

---

197. *Davis v. United States*, 328 U.S. 582, 593-94 (1946).

198. The person consenting does not have to be informed that she has the right not to consent; *Bustamonte*, 412 U.S. at 248-49. The waiver of consent does not necessarily have to be knowing and intelligent. *Id.* at 241. The fact that person giving consent is under the influence of drugs or intoxicated or emotionally impaired does not necessarily render consent involuntary. *United States v. Rambo*, 789 F.2d 1289, 1297 (8th Cir. 1986); *United States v. Gay*, 774 F.2d 368, 377 (10th Cir. 1985).

199. *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996).

200. 412 U.S. 218 (1973).

201. *Id.* at 220.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 219-20.

206. "The precise question in this case, then, is what must the prosecution prove to demonstrate that a consent was 'voluntarily' given." *Id.* at 223.

207. *Id.* at 225.

208. *Id.* at 226-27, 248.

209. *Id.* at 227.

search for which consent is being sought must be considered.<sup>210</sup> Second, there must be an absence of coercion.<sup>211</sup> Given the fact that the government interest will almost always be legitimate, by default, the major factor governing the consent inquiry is essentially whether the consent-seeker has engaged in any coercive behavior that would render the giving of consent involuntary.<sup>212</sup>

The focus on coercion was not by any means a foregone conclusion.<sup>213</sup> Although the Supreme Court had earlier decided, in *Davis v. United States*,<sup>214</sup> that consent is an established exception to the warrant and probable cause requirements of the Fourth Amendment,<sup>215</sup> and had also held in *Bumper v. North Carolina*<sup>216</sup> that consent must be freely and voluntarily given in order to be valid,<sup>217</sup> it was not until *Bustamonte* that the Court was provided with an opportunity to define the meaning of consent and voluntariness within the Fourth Amendment.<sup>218</sup> Having no Fourth Amendment precedent from which to draw, the Court turned to the Fifth Amendment coerced-confession cases and Fourteenth Amendment Due Process cases, where the problem of coercion had been addressed as early as 1936 in *Brown v. Mississippi*.<sup>219</sup>

210. *Id.*

211. *Id.*

212. The *Bustamonte* Court stated:

Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the state attempts to justify a search on the basis of consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

*Id.* at 248; see also 3 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1(a), at 602 (3d ed. 1996) (maintaining that this result is necessitated by the Court's exclusive focus on voluntariness without regard for the importance of unknowing surrenders of Fourth Amendment rights).

213. The Court was also presented with the argument that consent is only validly procured where the consent-giver knows that he has a right to refuse consent. *Bustamonte*, 412 U.S. at 223, 232–34, 248–49. Had the Court agreed with that argument, knowledge of the right to refuse consent, as opposed to coercion, would have been the capstone of the constitutional violation.

214. 328 U.S. 582 (1946).

215. *Id.* at 593–94; *Bustamonte*, 412 U.S. at 219.

216. 391 U.S. 543 (1968).

217. *Id.* at 548.

218. *Bustamonte*, 412 U.S. at 219.

219. 297 U.S. 278 (1936). In *Brown*, three Black men, “all ignorant Negroes,” were beaten and hanged by a mob of White men, including police officers, until they confessed and agreed to a version of the crime as dictated by their torturers. *Id.* at 278–83. The defendants were tried and convicted in the state courts of Mississippi. *Id.* at 279–80. The defendants attempted to exclude their confessions at the trial court, the only evidence against them, and also attempted to have the convictions overturned on appeal, all to no avail. *Id.* They then successfully appealed to the United States Supreme

The definition of voluntariness in the confession cases, the Court noted, "reflected an accommodation of the complex of values implicated in police questioning of a suspect."<sup>220</sup> At one end of the spectrum are the values reflected in the Crime Control Model, such as "the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws."<sup>221</sup> At the other end of the spectrum are the values underlying the Due Process Model, specifically "the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice."<sup>222</sup> Thus, the purpose of the voluntariness definition in the coerced confession cases is an attempt to accommodate the values of the Crime Control Model, as well as the values of the Due Process Model.

Without quite examining whether the balance struck by the coerced confession cases can be carried over to the Fourth Amendment domain, and without deciding whether the definition of voluntariness as the absence of coercion (designed to respond to the peculiar evil of physically coerced confessions) can be molded to respond to the perceived evils being protected against by the Fourth Amendment's consent doctrine, the Court incorporated wholesale the Fifth Amendment's concern for coercion into the Fourth Amendment.<sup>223</sup> It is beyond the scope of this Note to address the issue of whether the Fourth Amendment's consent doctrine is animated by different values than the Fifth Amendment's coerced confessions doctrine. This Note's inquiry is much narrower. It only intends to show that the Court's Fourth Amendment consent doctrine reflects the bias toward the Crime Control Model found at present in the Supreme Court's Fifth Amendment coerced confession jurisprudence.<sup>224</sup>

---

Court, arguing that the convictions, procured on the basis of coerced confessions, were not consistent with due process as required by the Fourteenth Amendment. *Id.* at 287.

220. *Bustamonte*, 412 U.S. at 224-25.

221. *Id.* at 225.

222. *Id.*

223. *Id.* at 227.

224. I will not devote much space here to the proposition that the coerced confession cases are biased in favor of the Crime Control Model, given the plethora of commentary essentially positing the same assertion. See Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 6 ("It appears . . . that a majority of the Justices have embarked on a campaign to replace the basic idea that the Fourth Amendment sets out an enforceable right with the notion that the amendment merely authorizes the courts to regulate . . . the most blatant instances of police misconduct."); Sheri L. Johnson, *Confessions, Criminals and Community*, 26 HARV. C.R.-C.L. L. REV. 327, 341 (1991) (noting that "the due process/crime control balance is clearly shifting" in favor of the "growing crime control contingent"); Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth*

As mentioned above, the *Bustamonte* majority's focus on coercion was not at all dictated by the facts of the case or by Fourth Amendment precedent.<sup>225</sup> The Court was presented with the very compelling argument that consent in the Fourth Amendment context is a waiver of a person's right.<sup>226</sup> For consent to be legitimate, the consent-seeker must demonstrate that the consent-giver intelligently and knowingly waived that right.<sup>227</sup> Consciously or subconsciously, the Court rejected the consent-as-waiver argument because it did not want to adopt a Due Process Model definition of consent.<sup>228</sup> The Court noted that it had defined consent as a waiver "in the context of the safeguards of a fair criminal trial."<sup>229</sup> Stating that "[t]here is a vast difference between those rights that protect a fair criminal trial

---

*Amendment Seriously*, 77 CORNELL L. REV. 723, 795 (1992) (asking if the majority in *Bustamonte* sacrificed the values of the Due Process Model for those of the Crime Control Model); Charles J. Ogletree, Jr., *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991) (criticizing the Court's deference to the Crime Control Model). Compare *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991) (Rehnquist, J.) (holding that coerced confessions are subject to the harmless error analysis because "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promote[] public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error") (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)), with *Packer*, *supra* note 172, at 9 (noting that the Crime Control Model is animated by the view that the "failure of law enforcement to bring criminal conduct under tight control" will result in "a general disregard for legal controls"), *Packer*, *supra* note 172, at 10-11 (stating that the goal of the Crime Control Model is to screen suspects, the probably innocent from the probably guilty, determine guilt, and dispose of persons convicted of crime), and *Packer*, *supra* note 172, at 15 (maintaining that the Crime Control Model is "more lenient in establishing a tolerable level of error" and "accepts the probability of mistakes up to the level at which they interfere with the goal of repressing crime, either because too many guilty people are escaping or . . . because general awareness of the unreliability of the process leads to a decrease in the deterrent efficacy of the criminal law"). But see Daniel G. McAuley, Jr., Comment, *Rehnquist Loses Battle but Wins War of Harmless Error: Arizona v. Fulminante*, 19 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175 (1993) (arguing that *Fulminante* furthers not only the values of the Crime Control Model, but also some of the Due Process Model).

225. See *supra* note 213 and accompanying text.

226. *Bustamonte*, 412 U.S. at 235.

227. *Id.*

228. The Court stated:

A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided.

*Id.* at 241.

229. *Id.* at 235.

and the rights guaranteed under the Fourth Amendment,<sup>230</sup> the Court dismissed the waiver argument.<sup>231</sup>

The Court's fear is precisely the aim of the Due Process Model.<sup>232</sup> As Professor Packer argued, not only is the Due Process Model concerned with the overall fairness of the criminal process, it specifically "insists on the prevention and elimination of mistakes to the extent possible,"<sup>233</sup> and demands in its most rigorous form that "as long as there is an allegation of factual error that has not received an adjudicative hearing in a fact-finding context,"<sup>234</sup> all of the possible doctrines and defenses that serve to prevent the use of the criminal law from being brought to bear on the individual, thereby enhancing his/her chances of being found legally innocent, must be brought into play.<sup>235</sup> That is the aim of the Due Process Model, which the Court explicitly rejected in *Bustamonte*.<sup>236</sup>

The Court seems to favor the Crime Control Model because it apparently believes that the Crime Control Model best responds to the contextual needs of the police-suspect domain. In *Bustamonte* the Court explained that "[i]n situations where the police have some evidence of illicit activity . . . a search authorized by a valid consent may be the only means of obtaining important and reliable evidence."<sup>237</sup> More poignantly, the Court noted that adopting a consent-as-waiver definition would be unresponsive to "the circumstances that prompt the initial request to search"<sup>238</sup> in the first place. Conse-

---

230. *Id.* at 241.

231. *Id.* at 246. For a particularly pointed criticism of the Court's "crabbed" definition of consent in *Bustamonte*, see Maclin, *supra* note 224, at 792-95.

232. Compare Professor Packer's description of the Due Process Model, beginning *supra* note 185, with the Court's reasoning for rejecting the consent-as-waiver definition, *supra* note 228.

233. Packer, *supra* note 172, at 15.

234. *Id.* at 14.

235. *Id.* at 17.

236. Throughout the opinion, the Court rejects the values of the Due Process Model in favor of those of the Crime Control Model. Compare *Bustamonte*, 412 U.S. at 231-32 ("Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur . . . under informal and unstructured conditions. The circumstances that prompt the initial request to search may . . . be a logical extension of investigative police questioning."), and *id.* at 229 (noting that the adoption of the consent-as-waiver argument "would, in practice, create serious doubt whether consent searches could continue to be conducted"), with Packer, *supra* note 172, at 10-13 (noting the Crime Control Model's preference for informal processes and to have as few restrictions as possible placed upon police administrative and investigatory fact-finding).

237. *Bustamonte*, 412 U.S. at 227.

238. *Id.* at 232 ("The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime.").

quently, "[i]t would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could" administer the requirements of a consent-as-waiver regime.<sup>239</sup> Given the consent doctrine's Crime Control bias, the only necessary inquiry—in ascertaining whether consent has been lawfully given—is whether consent has been obtained as a result of the consent-seeker's unlawful coercive tactics. *Florida v. Bostick*<sup>240</sup> is illustrative.

## 2. *Florida v. Bostick*: Implications of the Consent-as-Coercion Doctrine

In *Bostick*, two officers boarded a bus en route to Atlanta from Miami that stopped at Fort Lauderdale.<sup>241</sup> Unfortunately for Bostick, the police officers, without articulable suspicion,<sup>242</sup> picked him out and asked him for his identification and ticket.<sup>243</sup> Although the officers did not find anything remarkable with respect to Bostick's ticket and identification, they nevertheless, after identifying themselves as police officers, asked for his consent to search through his luggage.<sup>244</sup> Needless to say, they found illicit narcotics and arrested Bostick.<sup>245</sup>

The issue presented in *Bostick* was whether "a police encounter on a bus . . . constitutes a 'seizure' within the meaning of the Fourth Amendment."<sup>246</sup> Put differently, the issue can be restated as whether Bostick consented to carrying on this tête-à-tête with the police officers. The Court quickly sets out its broad objective: "Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks them a few questions[,] [s]o long as a reasonable person would feel free 'to disregard the police and go about his business.'"<sup>247</sup> The Court's task, as it saw it, was to de-

239. *Id.* at 245.

240. 501 U.S. 429 (1991). *Bostick* is not a consent-to-search case. However, the focus here is not on consenting to searches, but on consensual encounters. *Bostick* is interesting because it illustrates very nicely how the consent inquiry fails to recognize the coercion experienced by the person giving consent.

241. *Id.* at 431–32.

242. Although the majority maintained that the officers did not have an articulable suspicion for picking out Bostick, the dissent noted that "at least one officer who routinely confronts interstate travelers candidly admitted that race is a factor influencing his decision whom to approach. . . . Thus, the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable." *Id.* at 441–42 n.1.

243. *Id.* at 431–32.

244. *Id.*

245. *Id.* at 432.

246. *Id.* at 433.

247. *Id.* at 434 (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)).

termine whether a reasonable person in Bostick's situation would, in essence say to the police officers, "go fly a kite, I do not want to talk to you."<sup>248</sup>

As articulated by the Court, this is quite a broad inquiry. However, no sooner does the Court state this broad objective than it engages in the truer and narrower consent inquiry: "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."<sup>249</sup> The focus is quickly shifted from the coercive forces faced by a reasonable person in Bostick's situation to the coercive conduct of the consent-seeker, in this case the officers. This shift in focus by the majority changes the relative significance of the issues.

The majority found "[t]wo facts [that] are particularly worth noting. First, the police specifically advised Bostick that he had a right to refuse consent. Second, at no time did the officers threaten Bostick with a gun."<sup>250</sup> Notice how the Court's inquiry automatically forces it to focus not on the coercive forces faced by Bostick but on whether, in seeking consent, the consent-seekers behaved coercively toward the consent-giver. The fact that Bostick was on a bus and his liberty was constrained does not warrant much importance. Nor does the fact that the bus' departure was most likely imminent play a significant role in the calculation. On the contrary, the majority maintained that:

[T]he mere fact that Bostick did not feel free to leave the bus did not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick's movements were "confined" in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.<sup>251</sup>

The Court's justification for not finding that a seizure occurred confuses choice with consent. The Court's justification can be summarized as such: because Bostick chose to board a bus, a vehicle with an inherent problem of confinement, he therefore consented to the confining characteristics of the bus. So, the Court maintains, "Bostick's freedom of movement was restricted by a factor independent of police conduct—*i.e.*, by his being a passenger on a bus.

---

248. *Id.* at 433–34.

249. *Id.* at 434.

250. *Id.* at 432.

251. *Id.* at 436.

Accordingly, the 'free to leave' analysis on which Bostick relies is inapplicable.<sup>252</sup> One can imagine a similar argument being made in the public housing context: because these residents chose to live in public projects so fraught with violence that warrantless searches are necessitated, they consented to the necessity of the searches.

The dissenters took a different approach that deserves to be analyzed. First of all, the dissenters laid claim to the proper scope of the inquiry. Justice Marshall, writing for the dissenters stated: "I agree that the appropriate question is whether a passenger who is approached during . . . a sweep 'would feel free to decline the officers' requests or otherwise terminate the encounter.'"<sup>253</sup> He then goes on to posit what he thinks are the relevant facts necessitated by the inquiry.

Justice Marshall's analysis is a two-step approach. First, he describes the nature of the police activity,<sup>254</sup> and second, he ascertains the effect of the police behavior on Bostick.<sup>255</sup> In addition, Justice Marshall attacks the majority's consent analysis as equating choice with consent. Justice Marshall found the majority's analysis problematic because it enables the consent-seeker to capitalize on the

---

252. *Id.*

253. *Id.* at 444.

254. Justice Marshall maintains: "At issue in this case is a 'new and increasingly common tactic in the war on drugs': the suspicionless police sweep of buses in intrastate or interstate travel." *Id.* at 440. He describes the modus operandi of police sweeps: "Typically under this technique a group of state or federal officers will board a bus while it is stopped at an intermediate point on its route," *id.* at 441, sometimes they flash their "badges, weapons or other indicia of authority, the officers identify themselves and announce their purpose to intercept drug traffickers," *id.* These sweeps are often conducted without articulable suspicion as they are often conducted dragnet style. *Id.* Moreover, "[b]ecause the bus is only temporarily stationed at a point short of its destination, the passengers are in no position to leave as a means of evading the officers' questioning." *Id.* at 442. Especially because the "officers typically plac[e] themselves in between the passenger selected for an interview and the exit of the bus." *Id.* Justice Marshall then concludes that "[t]hese facts alone constitute an intimidating 'show of authority.'" *Id.* at 446 (citations omitted).

255. Justice Marshall contends that Bostick was faced with two choices. First, he could have remained seated and refused to answer the questions of the officers. "But in light of the intimidating show of authority that the officers made upon boarding the bus, respondent reasonably could have believed that such behavior would only arouse the officers' suspicions and intensify their interrogation." *Id.* at 447. Justice Marshall goes on to point out that "[i]ndeed, the officers who carry out bus sweeps like the one at issue here frequently admit that this is the effect of a passenger's refusal to cooperate." *Id.* Moreover, "a passenger unadvised of his rights and otherwise unversed in constitutional law *has no reason to know* that the police cannot hold his refusal to cooperate against him." *Id.* at 447 (emphasis in original). Justice Marshall argues that although Bostick's second choice would have been to leave the bus altogether, "doing so would have required [Bostick] to squeeze past the gun-wielding inquisitor who was blocking the aisle . . . hardly . . . a course that [Bostick] reasonably would have viewed as available to him." *Id.* at 448.

predicament of the consent-giver,<sup>256</sup> and it allows a certain class of people to be preyed upon either because of unintended and unforeseen result of their decisions, or because of circumstances beyond their control.<sup>257</sup>

### 3. *Wyman v. James*: Fictional Consent

A consent-as-coercion inquiry is problematic in another respect. Because such an inquiry allows the fact-finder to substitute his judgment in lieu of the supposed consent-giver's judgment, the resulting consent cannot be anything else other than fictional. A hypothetical based upon the facts of *Wyman v. James*<sup>258</sup> provides a useful example.

In *Wyman*, a parent brought suit against the New York Department of Social Services challenging the Department's policy of denying AFDC benefits to mothers unless they allow warrantless periodic visits of their homes by a caseworker.<sup>259</sup> The issue presented was whether the state can constitutionally require the mother, Ms. James, to permit warrantless periodic visits to her home if she wanted to receive AFDC benefits.<sup>260</sup>

Changing the facts of *Wyman* a little, suppose that the State of New York notices a dramatic increase in crack-addicted infant births. Not only is there an increase throughout the state, but the tragedy is most particularly acute among women receiving AFDC. Responding to the outcry, the Governor of New York decrees that henceforth new AFDC recipients must consent to periodic warrantless searches of their homes by caseworkers as a condition of receiving the largesse of the state. Moreover, current recipients must do the same if they wished to remain on the dole.

As one currently receiving AFDC benefits, Ms. James receives a call from a caseworker. The caseworker informs Ms. James that if

---

256. Justice Marshall asserts that the majority's argument that "Bostick's freedom of movement was restricted by a factor independent of police conduct—i.e., by his being on a bus," *id.* at 436, "borders on sophism and trivializes the values that underlie the Fourth Amendment," *id.* at 450. Justice Marshall asserts that the purpose of "officers who conduct suspicionless, dragnet-style sweeps [is to] put passengers to the choice of cooperating or of exiting their buses and possibly being stranded in unfamiliar locations. It is exactly because this 'choice' is no 'choice' at all that police engage in this technique." *Id.*

257. Justice Marshall maintained that the majority's argument would allow the class of bus passengers—as opposed to people on the streets or at airport terminals—to be preyed upon because of the "considerably confining environment" of a bus. *Id.* at 449.

258. 400 U.S. 309 (1971).

259. *Id.* at 313–14.

260. *Id.* at 310.

she wishes to continue receiving AFDC benefits a home visit will be required. Ms. James replies that she does not want to allow the visit, although she does not feel that she has a choice—if she does not receive the benefits she and her children will starve. When the caseworker comes for the visit, while renewing her earlier objections, Ms. James nevertheless reluctantly allows the caseworker in the house. During the visit, the caseworker notices evidence of crack cocaine use in the James home and informs the police. Based upon the complaint, the police obtain a search warrant. While executing the search warrant the police find crack and crack paraphernalia. Mrs. James is arrested and prosecuted.

On appeal, she challenges the trial court's denial of her motion to suppress the evidence found in the home on the ground that the caseworker's visit was an unconstitutional search. The state defends and triumphs by maintaining that the search was constitutional pursuant to consent validly acquired. Mrs. James loses in the Court of Appeals, appeals to the Supreme Court, which grants certiorari. Suppose the Court agrees with Mrs. James that the home visit by the caseworker constitutes a search for Fourth Amendment purposes,<sup>261</sup> and the central issue on appeal is whether the search was consensual. Why should the state prevail as a normative matter?

The best answer is probably provided by Professor Stuntz.<sup>262</sup> He furnishes two possibilities. On one hand, by focusing on the conduct of the police (recall *Bostick* as an example) one can argue that the State should win because innocent people in the state of New York have an interest in reducing the level of crack-addicted births, and permitting the searches facilitates that goal.<sup>263</sup> In addition, they also value freedom from arbitrary police conduct. Therefore, judicial scrutiny is necessary to assure that police action is reasonable.<sup>264</sup> If the police action is reasonable, then the fruit of the search should be admissible.<sup>265</sup>

On the other hand, by focusing on the administrative scheme, the search is arguably constitutional because if the state were to suspend benefits to the beneficiaries they would be worse off than if the

---

261. In *Wyman v. James*, the Court was not convinced that the visits could be characterized as searches and maintained that even if the home visits could be viewed as bearing certain characteristics of searches, they are not within the purview of the Fourth Amendment. *Id.* at 317.

262. William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553 (1992).

263. *Id.* at 562.

264. *Id.*

265. Under the Court's current doctrine, Professor Stuntz's approach is correct. See *Arizona v. United States*, 115 S. Ct. 1184 (1995) (holding that the purpose of the exclusionary rule is to deter unconstitutional public conduct); *United States v. Calandra*, 411 U.S. 338, 447 (1974) (making essentially the same conclusion).

state were to conduct the search. That is, the harm that would come from losing their benefits would be greater than the harm that would result from an administrative search.<sup>266</sup>

Fundamentally, Professor Stuntz's options leave us with two conclusions. First, in the police-suspect context, police conduct is "reasonable" whenever the net social freedom is improved.<sup>267</sup> Second, in the administrative context, the conduct of the state should be judicially approved whenever the Court finds it in the best interest of the beneficiary to do so.<sup>268</sup> That is, the Court should find that Mrs. James consented to the search because, if the Court proscribes the home visits and the state suspends benefits, Mrs. James would be worse off than she would be if the searches are allowed. Professor Stuntz justifies the result on the basis of his theory that this is the result that the parties—the government and Mrs. James—would have adopted if they had been able to negotiate in advance.<sup>269</sup> He maintains that such a result reflects an implicit bargain between the consent-giver and the government.<sup>270</sup> This is what the consent inquiry has come to. At its best, the inquiry reflects the fact-finder's judgment about what is necessary for society, and/or the fact-finder's judgment about what the consent-seeker would have done *ex ante*.

Many commentators have criticized the majority's analysis in *Bostick*<sup>271</sup> and in *Wyman*.<sup>272</sup> That is not the object of this Note. As with the issue of administrative searches discussed in Part II, this Note only seeks to highlight the fact that if consent as an inquiry is to serve as a meaningful accommodative tool, the search for coercive-

---

266. *Id.* at 564.

267. That is, the net social freedom is improved whenever the cost of abating the behavior in question is less than the harm caused by the behavior being abated and the police intrusion. *Id.* at 553–61; see also Packer, *supra* note 172, at 10 (stating that the ultimate claim of the Crime Control Model is that "the criminal process is a positive guarantor of social freedom") (citation omitted).

268. Stuntz, *supra* note 262, at 564–67.

269. *Id.* at 555.

270. *Id.*

271. See, e.g., Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis After Hodari D. and Bostick*, 28 AM. CRIM. L. REV. 799 (1991); Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979 (1993); Maclin, *supra* note 224, at 799; Michael J. Reed, Jr., Comment, *Florida v. Bostick: The Fourth Amendment Takes a Back Seat to the Drug War*, 27 NEW ENG. L. REV. 825 (1993); Christian J. Rowley, Note, *Florida v. Bostick: The Fourth Amendment—Another Casualty of the War on Drugs*, 1992 UTAH L. REV. 601.

272. See, e.g., Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991); Ginny Kim, Note, *Unconstitutional Conditions: Is the Fourth Amendment for Sale in Public Housing?*, 33 AM. CRIM. L. REV. 165 (1995); Johnathan Romberg, Essay, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 FORDHAM URB. L.J. 1051 (1995).

ness should not focus on the question of whether the consent-seeker has exhibited any undue influences. Rather it should focus on the choices facing the individual giving consent and the probable coercive forces that may be acting upon him—including any undue influences exerted by the consent-seeker.

#### 4. Consent in the Administrative Search Context: The Need for Careful Scrutiny

Consent in the administrative context gives rise to different values and circumstances than consent in the police-suspect domain.<sup>273</sup> Justice Marshall's criticism of *Bostick* notwithstanding,<sup>274</sup> the majority's analysis is quite consistent with the Crime Control Model's emphasis on police discretion.<sup>275</sup> As already argued, discretion is important because the model wishes to respond to the unpredictable needs of the police-suspect domain.<sup>276</sup> Because the concern for police discretion and the need to provide rules that the police can apply in unpredictable circumstances are not present in the administrative context, the Court should be very cautious before exporting the current consent doctrine, wholesale, into the that domain. On the other hand, consent searches in the administrative context are often planned and predictable events. Consequently, it is possible for the would-be consent givers to enter into *explicit* ex ante bargains that would govern the terms of these searches.

In many ways the argument with respect to consent involves the doctrine of unconstitutional conditions.<sup>277</sup> If valid consent involves something more than the actions of the consent-seeker (e.g., if the consent-as-waiver argument ever prevails) it then becomes more difficult to ignore the coercion faced by the consent-giver.<sup>278</sup> Hence,

---

273. For an interesting discussion of the differing values in the police-suspect context and the administrative context see Stuntz, *supra* note 262.

274. For an interesting exposition on Justice Marshall's dissent in *Bostick*, see Maclin *supra* note 224, at 799–811.

275. See Packer, *supra* note 172, at 7–13. It would not be much of a stretch to maintain that the model's motto, *au fond*, is "discretion, discretion, until coercion." As a corollary one should add, "and no coercion without force."

276. See *supra* Section III.B.

277. The doctrine of unconstitutional conditions holds that "even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights." Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1987).

278. The focus here is on the part of the unconstitutional conditions doctrine that is concerned with the coercive actions of government. See, e.g., Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1419–20 (1989) (describing how one approach to the doctrine of unconstitutional conditions "locates the harm of rights-pressuring conditions on government benefits in their coercion of the

judicial scrutiny of a suit brought by a public housing resident challenging the validity of a consent to search clause would involve more than an examination of the actions of the defendant Local Housing Authority for coercion<sup>279</sup> and a finding for the defendant without regard for the coercive forces faced by the resident.<sup>280</sup> An analysis of the circumstances from which consent is to be given in public housing may help to reveal potentially coercive situations. Justice Marshall's two-step analysis in *Bostick* serves as a useful guide.<sup>281</sup>

It is also wise to heed Justice Douglas's advice expressed in his concurrence in *Thorpe v. City of Durham*.<sup>282</sup> Justice Douglas' statements are appropriate to this situation. He maintained:

The recipient of a government benefit, be it a tax exemption, unemployment compensation, public employment, a license to practice law, or a home in a public housing project, cannot be made to forfeit the benefit because he

---

beneficiary. Coercion . . . does not take the form of force or fraud; the beneficiary who accepts or rejects a conditioned benefit ostensibly expresses some kind of voluntary choice between the benefit and the right." *Id.*

279. See, e.g., *United States v. Gonzalez*, 71 F.3d 819, 828 (11th Cir. 1996) (stating that the absence of official coercion is the sine qua non of effective consent); *United States v. Barbour*, 70 F.3d 580, 585 (11th Cir. 1995) (holding that a defendant who signed a consent to search form and waived his Miranda rights did so voluntarily, and that the "fact that [the] defendant suffers a mental disability does not, by itself, render a waiver involuntary; there must be coercion by an official actor. . . . Absent any evidence of psychological or physical coercion on the part of the agents, there is no basis for declaring [the defendant's] statements and consent to search involuntary.").

280. See, e.g., Thaler, *supra* note 57, at 1792 (commenting that "[t]he presence of limited choices and unequal bargaining power, by themselves . . . do not constitute duress" sufficient enough to be of troubling consequence).

281. The first step is to analyze the nature of the administrative activity. If proposed consent searches are anything like the sweeps conducted by the Chicago Housing Authority, then there is indeed cause to fear. One commentator describes the sweeps as an operation in which "CHA officials and Chicago police officers staged a military-like assault on one of the CHA's . . . buildings," sealed off "all building entrances and secured the stairways, hallways, and other common areas. Then, both police and CHA officials conducted door-to-door searches for weapons, drugs, unauthorized residents, and unsafe and unsanitary conditions." *Id.* at 1778-79. The second step is to ascertain the effect of the activity on the individual. A profile of the typical public housing resident discloses that such a resident is most likely minority, female, elderly and on a subsidized income. The statistical profile of the Chicago Housing Authority for 1991-92 revealed that 91% of the occupants residing in family housing were African-American; 30% were females aged 20 to 61, whereas only 7% were males aged 20 to 61; the remaining residents were children, and only 10% of the adult residents were employed. CHICAGO HOUSING AUTHORITY STATISTICAL PROFILE (on file with the *Michigan Journal of Race & Law*).

The question courts should ask is if, given a person's situation (i.e., class, gender, race), has s/he made a free and unconstrained decision when the choice was between no housing or living in government subsidized housing and having to submit to warrantless searches of his/her home at the discretion of the housing authority?

282. 386 U.S. 670 (1967) (per curiam).

exercises a constitutional right. . . . “[T]he right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee’s submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution.”<sup>283</sup>

Given the importance of housing as a basic need, and the demographics of those who inhabit public housing, requiring public housing residents to consent to warrantless searches in exchange for the benefit of living in public housing without strict judicial scrutiny may force them to forego their Fourth Amendment protections in exchange for discretionary government benefits. Such a situation may trigger the application of the Court’s unconstitutional conditions doctrine.<sup>284</sup> Consequently, it is important that any consent-based regime be carefully scrutinized.

### *C. Consent in Public Housing: Some Possibilities*

Notwithstanding the state of current consent doctrine,<sup>285</sup> how should a consent regime operate in the context of public housing? Presumably, if consent clauses became standard practice—if they are routinely incorporated into public housing leases—they would most likely be executed within certain shared parameters. That is, they would reflect the circumstances under which they were obtained.

---

283. *Id.* at 678–79 (citations omitted).

284. See, e.g., *Dolan v. Tigard*, 512 U.S. 374 (1994) (applying the doctrine of unconstitutional conditions to the area of eminent domain); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (using the doctrine of unconstitutional conditions to strike down a patronage system); *Branti v. Finkel*, 445 U.S. 507 (1980) (finding that it is an unconstitutional condition for the government to terminate an employee because of the employee’s party affiliations); *Perry v. Sindermann*, 408 U.S. 593 (1972) (maintaining that the government cannot deny a benefit to a person because of his constitutionally protected speech); *Garrity v. New Jersey*, 385 U.S. 493, 497, 500 (1967) (holding that where defendants were given the choice to either “forfeit their jobs or to incriminate themselves . . . [t]he option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. . . . There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.”).

285. After *Bostick* one must ask if the consent inquiry has any bite. In truth, it is misleading to speak of a consent inquiry. Although the Court purports to engage in a very broad inquiry, stating as its aim a grand objective—whether consent was the product of an essentially free and unconstrained choice by its maker—in reality it engages in a much narrower examination: has the consent-seeker engaged in coercive conduct in obtaining consent? As a consequence, the inquiry is not so much a search for coerciveness as it is a search for undue influence on the part of the consent-seeker. The consent inquiry does not scrutinize the coercion faced by the consent-giver that is not the making of the consent-seeker. Consequently, those issues are never analyzed. What is referred to as a “consent inquiry” is essentially a search for coercive behavior on the part of the police.

First, they would be in writing; second, they would inform tenants of their legal options; and third, they would demarcate the scope of the searches that are permitted under these clauses with varying degrees of specificity. These three basic requirements should and must be met. Beyond these shared characteristics, consent in the context of public housing can take the form of four distinct regimes.<sup>286</sup>

Under one regime—the unconditional consent regime—signing a consent form would be a requirement for obtaining public housing. Prospective tenants would be told that they have a right to refuse consent. However, if they refuse to sign the consent form their application for a unit will be summarily rejected. Under a second regime—the conditional consent regime—signing the consent form would not be the sine qua non of approval for a unit. The prospective tenants would be informed *ex ante* that they have the option to consent in advance of searches of their units. If they refuse to do so they will still be allowed to move into the unit. A third regime would be a majority-rule (or super-majority rule), where a whole housing complex—or different buildings within a complex—would be governed by the outcome of an annual vote of the residents. If the residents vote in favor of warrantless searches each resident would be subject to those searches for one year, until the next vote. Thus “consent” would be irrevocable, at least for one year. The last regime, and the one that this Note favors, is one in which different complexes within a city, or different buildings in a complex, would be reserved for residents who wish to consent to warrantless searches, within the parameters stated above.

The essential question presented by each regime is whether the consent procured by that regime’s consent-seeking mechanism can be considered uncoerced for Fourth Amendment purposes. One way of addressing that question is to inquire into the relationship between the doctrine of consent and the Fourth Amendment, within the framework of a constitutional democracy. As grandiose as this inquiry sounds, it need not be so. One need only borrow from what has already been developed by political theorists and political philosophers, and shape accordingly for the present purposes.

The idea of consent is an important concept in a democracy because governance through consent is the most efficient<sup>287</sup> and the

---

286. That is not to say that any number of these four regimes cannot be blended together to form another variation. For example, any regime involving consent clauses as part of public housing lease agreements will generally be organized in one of the four ways, or by some combination of the four.

287. See, e.g., Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 762 (1995) (“Power relies on the consensus to govern because without consent it cannot govern efficiently.”).

most legitimate<sup>288</sup> method of governance. For consent to be truly legitimate, it must be neither fraudulently acquired nor procured through manipulation.<sup>289</sup> There are three axiomatic principles in determining if consent was properly procured. First, the consent-giver must be adequately informed so as to prevent the manipulation of his/her consent.<sup>290</sup> Second, consent given under the express or implied threat of coercion or actual use of force is not legitimate.<sup>291</sup> Third, it is presumed that the consent-giver is an autonomous individual capable of giving consent and whose decision is to be respected by the consent-seeker.<sup>292</sup> Government action on the basis of fictional consent simply serves to "override the real-life dissent of actual people."<sup>293</sup>

Applying these three principles to the four regimes described above, it becomes clear why the fourth regime is the least objectionable. The unconditional consent regime is problematic in light of the doctrine of unconstitutional conditions. As illustrated by the *Wyman* hypothetical, it is difficult to argue that a resident "consents" to a search when the choices are between housing and constitutional rights. Given that other less problematic options are available, it is not necessary to entertain that fiction. The conditional consent regime is less objectionable, but as a practical matter it is ineffectual. Presumably, residents who would consent to a warrantless search are most likely not the residents responsible for the drugs, guns, and violence.

The majority-rule regime is probably the most intellectually elegant of the four. A problem with this regime, however, is the fact that a majority (or super-majority) of residents, if they vote in favor of warrantless searches, are waiving the rights of minority. One may

288. See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 30 (2d ed. 1986) ("Legitimacy, being the stability of a good government over time, is the fruit of consent to specific actions or to the authority to act; the consent to the exercise of authority . . .").

289. See, e.g., Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 374 (1995) (stating that popular "consent is fraudulent if the consent given is dictated or controlled by the political authority whose legitimacy rests on the democratic approval of the populace").

290. See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

291. See Gey, *supra* note 289.

292. See, e.g., Robert Justin Lipkin, *Liberalism and the Possibility of Multi-Cultural Constitutionalism: The Distinction Between Deliberative and Dedicated Cultures*, 29 U. RICH. L. REV. 1263, 1289 (1995) (stating that "deliberative consent requires individual autonomy, and autonomy refers to the operation of each individual's capacity for practical reasoning"); R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397, 1397 (1995) ("Making legal right and duties contingent on consent . . . serves human dignity.").

293. Roderick T. Long, *Immanent Liberalism: The Politics of Mutual Consent*, in *THE JUST SOCIETY* 16 (Ellen Frankel Paul et al. eds., 1995).

wonder if that arrangement is any different than private organizations such as homeowners' associations, community associations,<sup>294</sup> or condominium associations, which require their residents to conform to a certain behavioral norm.<sup>295</sup>

A debate over the similarity or lack thereof of the two situations is avoided with the fourth regime. This option avoids the problem of the unconditional consent regime by providing residents will real choices. If a prospective resident is otherwise eligible for an apartment, one will be provided irrespective of that person's decision to consent to a warrantless search. It avoids the problem of the conditional consent regime by placing all residents who wish to establish a like-minded community in the same complex—or building as the case may be. This regime comes closest to treating the public resident as if she were a resident of private housing.<sup>296</sup> Private housing residents routinely face the safety versus security issue as well as a host of other housing issues. The major difference is that more choices are often available to such people because of their class, and sometimes because of their race and gender. This regime attempts to provide a certain modicum of choice to the public housing resident. That choice has too often been exercised by public actors (legislators, judges, advocates, and academics). It is now time for public housing residents to have legitimate choices, and for their wishes to be respected. If consent is to serve as a useful accommodation tool there must be legitimate choice.

## CONCLUSION

It is easy to sympathize with those attempting to provide safety and security for public housing residents. Unfortunately, two of the mostly widely advocated proposals for effecting safe and secure public housing—warrantless searches and consent searches—raise troubling Fourth Amendment concerns. It is unnecessary, however, for public housing residents to be given a Hobson's choice; they need not choose between their right to privacy and their right to safety. This Note argues that, at a minimum, consent for warrantless

---

294. See generally Marvin J. Nodiff, *Decision-Making in the Community Association: Do the Old Rules Still Apply?*, 52 J. MO. B. 141 (1996) (discussing the unique roles and functions of homeowners, community associations, and third parties in community association law).

295. One commentator describes condominium associations as "mini-governments" with the power to enforce rules and regulations, adopt budgets, collect assessments, and perform other functions. Paul S. Jacobsen, *Standing of Condominium Associations to Sue: One For All or All For One?*, 13 HAMLINE L. REV. 15, 17 (1990).

296. That is, the prospective public housing resident is now confronted with similar choices as her non-public housing resident counterpart.

searches should be obtained in writing, should inform tenants of their legal options, and should delineate the scope of the searches to which consent is being given. A variety of options available to public housing authorities meet these criteria, including unconditional or conditional consent clauses in leases, annual votes by buildings and complexes to allow or not allow warrantless searches, and specifying certain complexes or buildings for residents who wish to consent to warrantless searches.