POLICE ACCOUNTABILITY AND THE PROBLEM OF REGULATING CONSENT SEARCHES

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Consent doctrine rests on a legal fiction. It protects a broad realm of police conduct not because people in fact feel free to withhold consent, but because it is deemed essential to law enforcement. The assumption that consent is voluntary has been widely criticized, but the other assumption undergirding consent doctrine—that consent searches are essential to good police work—has received less attention. I argue that good police work is too often narrowly equated with finding contraband and making arrests, and that we need a better metric for determining whether "too much" evidence would be lost and "too many" searches would be forgone if consent rules were reformed. Criteria should include not only efficiency at combatting crime but also safeguarding public and police safety, promoting fairness and equal treatment of civilians, contributing to improved police-community relations, and providing transparency and accountability. Evaluating and improving consent doctrine also requires addressing the question of which institutions are best suited to gather relevant data and to implement reform.

Consent doctrine provides fertile ground for an evaluation of various institutional approaches to supervising police conduct. It provides an opportunity to examine the scaffolding: the built-in advantages and disadvantages of various institutional approaches to police reform. At the same time, it highlights the impossibility of considering these institutional questions without reference to concrete context. In the realm of policing, noticeable shifts in governmental approaches and priorities are often visibly tied to the change in political regimes. These fluctuations illustrate the perils of treating each institution's role as fixed, but they also highlight the essential role of each institution as well as the ways in which some institutions can step up as others step back. I will approach the regulation issue by considering three intertwined questions: First, what kinds of regulation will effectively limit police misuse of consent searches? Second,

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what data will help illuminate the nature and scope of the problem? And third, what entities can best achieve these regulatory and data-gathering goals?

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I. INTRODUCTION

There is a palpable disconnect between the practical importance of consent searches and the attention these searches garner from courts and scholars. Although there is no reliable data on the prevalence of consent searches (and this dearth of data is itself part of the problem), there is consensus that the vast majority of searches—perhaps 90% or more[1]—are conducted under color of consent doctrine.[2] Consent is the most frequent justification offered for searches that lack a warrant, probable cause, or reasonable suspicion.[3] Consent obviates the need for law enforcement to conform to nearly all the carefully enunciated rules that apply to nonconsensual searches.[4] Critics routinely refer to it as a

1. *See* Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FL. L. REV. 509, 511 (2016) (observing that "multiple scholars have estimated that consent searches comprise more than 90% of all warrantless searches by police . . . .").

2. *See, e.g.*, Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 869–70 (2014).

3. Gerard E. Lynch, *Why Not a Miranda for Searches?*, 5 OHIO ST. J. CRIM. L. 233, 235 (2007).

4. *See, e.g.*, Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 30 (2008).

"major loophole"[5] and an "efficient end run"[6] around the Fourth Amendment that "either satisfies or waives whole swaths of constitutional text."[7]

Yet courts have provided little guidance on how to regulate this massive exception that nearly swallows up the rule of the Fourth Amendment. To the contrary, the Supreme Court's few forays into consent search doctrine have sown confusion and misdirection. Other institutions have occasionally stepped in to fill the gap, and the history of those efforts is instructive. Most notably, states have relied on their own constitutions to provide firmer guidance to police—providing some fascinating comparisons of the results of differing jurisdictional and doctrinal approaches to the problem.[8] But at bottom, the history of the regulation of consent searches is notable mainly for its gaps, its failures, and a pervasive lack of attention to the subject on every level of government.

Consent doctrine provides fertile ground for an evaluation of various institutional approaches to supervising police conduct. The overall story thus far is mainly one of neglect, but it also contains some interesting interventions. It's an opportunity to examine the scaffolding: the built-in advantages and disadvantages of various institutional approaches. But it also makes clear the impossibility of considering these institutional questions without reference to concrete context. In the realm of policing, noticeable shifts in governmental approaches and priorities are often visibly tied to the change in political regimes.[9] These fluctuations illustrate the perils of treating each institution's role as fixed, but they also highlight the essential role of each institution as well as the ways in which some institutions can step up as others step back.

I will approach the regulation issue by considering three intertwined questions. First, what kinds of regulation will effectively limit police misuse of consent searches? Second, what data will help illuminate the nature and scope of the problem? And third, what entities can best achieve these regulatory and data-gathering goals? Before considering these three questions, it is important to understand the current state of affairs and the governmental actions and inactions that created it.

II. CONSENT DOCTRINE'S QUEASY CONSTITUTIONAL STATUS

A. The Court's Normative Rationale

Ostensibly, the rationale for consent doctrine is set forth in the Supreme Court's landmark decision in *Schneckloth v. Bustamonte*.[10] *Schneckloth's* rea-

5. *Id.* at 33 n.29 (citing testimony of Dr. James J. Fyfe to the New Jersey Senate Judiciary Committee).

6. Stoughton, *supra* note 2, at 869.

7. *Id.*

8. *See infra* Part IV.

9. *See, e.g.*, Devlin Barrett, *Justice Department Ends Program Scrutinizing Local Police Forces*, WASH. POST (Sept. 15, 2017), https://www.washingtonpost.com/world/national-security/justice-department-ends-program-scrutinizing-local-police-forces/2017/09/15/ee88d02e-9a3d-11e7-82e4-f1076f6d6152_story.html?noredirect=on&utm_term=.5accf286926c; *see also* Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He's Exceeding Expectations*, INTERCEPT (Mar. 20, 2018 2:59 PM), https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/.

10. 412 U.S. 218 (1973).

soning is based on a queasy blend of normative and empirical assumptions, many of them implicit. The majority made a choice between two possible frameworks for understanding consent in the Fourth Amendment context. The lower court had approached consent as a species of waiver.[11] In this view, the Fourth Amendment right, like other rights, is personal and can be waived. To waive a right, it is necessary to understand what one is giving up and to affirmatively choose to forgo one's right. The Supreme Court chose a different path: it determined that consent searches were admissible if they were reasonable.[12] Reasonableness requires a balancing of a number of factors and knowledge of the right to refuse consent is just one of that multiplicity of factors. The upshot is that, under *Schneckloth*, one can voluntarily consent to a search without understanding one's right to refuse consent.[13] In dissent, Justice Marshall referred to the Court's peculiar notion of voluntariness, in which even a subject who proves his lack of knowledge may nonetheless have consented "voluntarily."[14]

Not only does the Court define consent to permit unknowing acquiescence, it also suggests that capitalizing on ignorance of the rights of citizens may be a societal good.[15] As with police questioning, two competing concerns must be accommodated in determining the meaning of a "voluntary" consent: the legitimate need for such searches and the equally important goal of assuring the absence of coercion. In situations where the police have some evidence of illicit activity but lack probable cause to arrest or search, a search authorized by valid consent may be the only means of obtaining important and reliable evidence.[16]

In other words, the Court begins with the normative goal of legalizing consent searches where possible and crafts a test that it believes will maximize this goal even if it means capitalizing on ignorance of rights.[17] The Court's troubling normative goals are aided by the unsupported empirical assumption that consent searches will often be the only way to obtain "important and reliable evidence."[18]

The *Schneckloth* court simply assumed without evidence[19] that without consent searches, much important evidence would be lost. In fact, it is far from clear (in light of the experience of several states and localities, which will be discussed below[20]) that a waiver standard would produce fewer consent searches, and equally far from clear that fewer consent searches would be detrimental

11. *Id.* at 221.

12. *Id.* at 232–33.

13. *Id.*

14. *Id.* at 285 (Marshall, J., dissenting).

15. *Id.* at 229–30.

16. *Id.* at 277. The Court doubled down in Ohio v. Robinette, 519 U.S. 33, 39–40 (1996), holding that police were not required to inform suspects that the forcible, nonconsensual portion of a traffic stop had ended and that their continued compliance would be regarded as consensual, despite the lack of any indicia of this shift that would be visible to a non-law enforcement eye.

17. *Schneckloth*, 412 U.S. at 227.

18. *Id.*

19. *Id.* at 231–32.

20. *See infra* Subsection III.A.1.

to the pursuit of criminal justice. There is growing evidence that the current consent search regime *is* detrimental to certain central criminal justice goals—in particular there is evidence that the burden of discretionary consent searches falls most heavily on black and Latino residents.[21]

Given the broad, nearly untrammeled discretion that consent searches afford to law enforcement, statistics on the advantages and disadvantages of consent searches are hard to come by and yet essential to the evaluation of the doctrine's practical effects. An unfortunate hallmark of consent doctrine is a broad ignorance on the part of policymakers and courts about the underlying data. A recurring theme emerges from the literature: there are no good statistics on how often consent searches occur. What is striking is that the dearth of statistics is not framed as a job undone; it is regarded as proof of the insuperable challenge of gathering such information in the future.

B. The Court's Regulatory Approach

When the Supreme Court weighs in on a pervasive police practice, its normative approach to the practice at issue is only one of the important choices it makes. It must also choose what type of guidance its approach will provide. What kinds of rules are best suited to regulating consent searches? The Court in *Schenkclothe* opted for a voluntariness analysis, in which each case is decided based on a range of factors, no one of which is necessarily determinative on its own.[22] It rejected a bright-line test, such as a rule that unless police obtained an affirmative waiver, lack of consent would be presumed—assuming without evidence that such an approach would be impractical.[23] As Judge Gerald Lynch noted, the case-by-case voluntariness approach was pronounced "hopelessly inadequate in the *Miranda* context,"[24] in which the Court replaced it with a bright-line rule requiring *Miranda* warnings.

The problem with *Schneckloth*, at least as it has been applied, is not only that it rejects a clear, predictable, bright-line rule. The problem is that it also fails to take advantage of the benefits of a case-by-case approach. One advantage of a case-by-case analysis is that it is capable of being more narrowly tailored and responsive to particular circumstances. A well-tailored consent analysis could home in on factors that contribute to a coercive environment without creating a blunderbuss rule that sweeps too broadly (as *Miranda* is often accused of doing). For example, a case-sensitive consent rule could take into account age, language difficulties, mental disabilities, race, gender and other factors that might heighten the coercive aspects of consent requests. Racial disparities in consent searches, in particular, present a major regulatory challenge that consent law has, thus far, avoided facing.[25] This is not the path the courts

21. Maclin, *supra* note 4, at 34 n.30.

22. *Id.*

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

24. Lynch, *supra* note 3, at 235.

25. Especially in light of the Court's pretext jurisprudence, the Fourth Amendment approach may not be sufficient to rein in racially disparate consent searches. The problem may require a Fourteenth Amendment

have chosen to follow, however. Indeed, Marcy Strauss's review of every consent search case published in a three-year period found "only a handful of cases" in which courts analyzed the suspect's individual, subjective characteristics at all.[26]

And so *Schneckloth* set consent law down a certain path, fueled by a certain set of normative and empirical assumptions, among them that consent searches are essential to law enforcement, and that they are important enough to justify the sacrifice of clarity and predictability.[27] Nearly a half century later, it is long past time to revisit these assumptions. It is not fruitful to discuss in the abstract whether too many or too few consent searches are occurring. The discussion requires attention to the metrics of good policing. As even the *Schneckloth* majority concedes, the appropriate metric cannot simply be high clearance rates. The Fourth Amendment places limitations on the lengths to which police can go to solve crime.[28] But what factors belong on the other side of the scales? More equitable policing? More concern for transparency? More effort to build community relations? To determine what institutions are best suited to regulate consent searches, both empirical data and a normative metric for analyzing it are essential.

III. WHAT WOULD A BETTER REGIME REQUIRE?

The critiques of consent doctrine are legion. Few would argue that the legal notion of consent in this context maps on to common understandings of consensual encounters.[29] Consent functions as a legal fiction: it protects a broad realm of police conduct because it deems it essential to law enforcement, not because people in fact feel free to decline in the face of a request by a law enforcement official.[30] The creation and protection of this fiction represents a normative choice, but it is a choice that draws authority from a series of dubious empirical assumptions. Most prominently, the Court's consent doctrine is premised on two such assumptions: that without consent searches, too many crimes will remain unsolved, and that warning people of their right to refuse will lead to a precipitous drop in consent searches. The Court's approach in *Schneckloth*, like much constitutional criminal procedure, also reflects an em-

approach to encompass claims of disparate treatment. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996) (holding that racial disparities are a Fourteenth Amendment rather than a Fourth Amendment concern).

26. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 222 (2001); *see also* Burke, *supra* note 1, at 531–32.

27. Strauss, *supra* note 26, at 258.

28. Schneckloth v. Bustamonte, 412 U.S. 218, 242–43 (1973).

29. *See* Burke, *supra* note 1, at 513 (noting the widespread consensus that there is a disconnect between doctrine and reality).

30. *See, e.g.*, Maclin, *supra* note 4, at 27 (describing consent doctrine as "surreal"); *see also* Janice Nadler & J.D. Trout, *The Language of Consent in Police Encounters*, *in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW (2012); Justin Peters, *How About a Friendly Frisking?: The Myth of the "Consensual" Police Encounter*, SLATE (Nov. 30, 2012 2:02 PM), http://www.slate.com/blogs/crime/2012/11/30/stop_and_frisk_florida_is_there_such_thing_as_a_consensual_police_encounter.html.

pirical lacuna: a lack of information about racial disparities in the initiation and conduct of consent searches. Consent doctrine at the time of *Schneckloth* and since[31] has had little to say about who would bear the burden of consent searches,[32] and the legal scholarship on racial disparities in policing has only recently come to focus on this issue.[33]

The normative and empirical questions that undergird the constitutional consent regime are closely intertwined. To determine what a better regime would look like, we need to address a series of questions relevant to whether "too much" evidence would be lost and "too many" searches would be forgone if a different consent regime existed. This requires identifying a metric for assessing these evaluative questions, determining what sorts of information are necessary for addressing the relevant empirical issues, and considering what institutions are best suited to achieving these goals.

A. Tailoring Consent Searches to Normative Justifications

Taken at face value, consent doctrine is concerned with preventing coercion and creating the conditions for voluntary choice. One possible normative goal is to attain a more truly voluntary regime, in which civilians feel empowered to withhold consent. It is worth observing that it is not clear whether consent searches actually serve any valuable purpose for civilians.[34] As Gerald Lynch aptly noted, "confession is said to be good for the soul, but the same has not been said about permitting the police to rummage through one's possessions."[35] George Thomas referred to consent doctrine as increasing "the value of the ability to sell snake oil."[36] But for present purposes, let us assume that there is a realm of consensual searches that is worth preserving, not just to advance law enforcement goals, but to enable civilians to freely choose to forgo their Fourth Amendment rights. What sort of regime would better achieve this goal? Several questions arise. Is the problem that civilians are unaware of their right to refuse consent? If they were informed of this right, would they then feel free to exercise it? Would other barriers remain? And finally, to what extent do race and other demographic factors impact the interaction and affect civilians' real or perceived ability to withhold consent?

31. In a series of cases involving minority suspects, the majority of the Court has failed to acknowledge the role race might play in either the police decision to request consent or the civilian's decision to acquiesce. *See, e.g.*, Florida v. Bostick, 501 U.S. 429 (1991); INS v. Delgado, 466 U.S. 210 (1983); United States v. Mendenhall, 446 U.S. 544 (1980).

32. *See, e.g.*, Lynch, *supra* note 3, at 241 (observing that while the Court's confession jurisprudence was motivated partly by a desire to "overturn perceived unjust or racist convictions[,] [n]o such motive drives an inquiry into consent searches").

33. *See, e.g.*, Strauss, *supra* note 26, at 242–43 (discussing disparate racial impact of consent searches). *See generally* Jose Felipe Anderson, *Accountability solutions in the Consent Search and Seizure Wasteland*, 79 NEB. L. REV. 711 (2000); Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a Reasonable Person*, 36 HOW. L.J. 239 (1993).

34. *See* Strauss, *supra* note 26, at 265–68.

35. Lynch, *supra* note 3, at 237.

36. George C. Thomas III, *The Short, Unhappy Life of Consent Searches in New Jersey*, 36 RUTGERS L. REV. 11 (2009).

1. Warnings and Waiver

In the years since the *Schneckloth* decision, some tentative answers to these questions have become available. One especially fruitful source of information exists on the question of the efficacy and effect of warnings—a natural comparison group created by the state of New Jersey.[37] Two years after the Supreme Court's adoption of a totality of the circumstances approach in *Schneckloth*, New Jersey took a different path under its state constitution.[38] As is often the case, the state constitutional provision at issue was nearly identical to the Fourth Amendment, but the New Jersey Supreme Court interpreted it to require a waiver analysis (the very analysis that the U.S. Supreme Court had rejected).[39] It held that the state had the burden of showing that the consent was voluntary, and that this showing must include proof that the civilian had knowledge of the right to refuse consent.[40] In practice, New Jersey state police sought to meet this requirement by developing a consent to search form, stating that the individual had been advised of the right to refuse consent and to withdraw consent at any time.[41]

A quarter century later, in *State v. Carty*,[42] the New Jersey Supreme Court reviewed the efficacy of its consent regime and concluded that even informed consent was inadequate to protect privacy rights in a highway stop. Essentially, the court declared consent searches of motorists unconstitutional.[43] It held that a consent search on the highway violates the state constitution unless the officers had reasonable suspicion prior to requesting consent.[44] The court's rationales fell into two main categories: First, a concern about untrammeled discretion and abuse of discretion, to which I will return below.[45] Second, a determination that warnings don't effectively overcome the inherently coercive nature of a request for consent, and that "where the individual is at the side of the road and confronted by a uniformed officer . . . it is not a stretch of the imagination to assume that the individual feels compelled to consent."[46]

Whether this compulsion is a function of a failure to understand the actual content of the warnings, or a function of the effects of the power differential even for those who do understand the content of the warnings, is not easy to disentangle. Law professors Leong and Suyeishi reviewed consent forms and appellate opinions from forty-four states, concluding that the forms do little to improve civilians' understanding of their rights, especially when the suspect is

37. *Id.* (discussing New Jersey's jurisprudence).
38. N.J. CONST. art. I, pt. 7.
39. Thomas, *supra* note 36, at 7.
40. *Id.*
41. *Id.*
42. 790 A.2d 903, 905 (N.J. 2002).
43. *Id.*
44. *Id.*
45. *Id.* at 911.
46. *Id.* at 910.

frightened, not fluent in English, poorly educated, or otherwise impaired.[47] But understanding does not guarantee voluntariness in any case. A recent study of consensual roadside searches by the Illinois ACLU concluded that the motorists studied feared the consequences of a refusal to grant consent, such as the issuance of a traffic citation, or a delay caused by further interrogation or by the introduction of a drug sniffing dog to the scene.[48] As Seth Stoughton notes, there remains a difference between "the lack of a legal requirement to consent and the lack of a social expectation of acquiescence, and it seems likely that the social pressure will largely survive even when the individual has been informed" of the lack of a legal obligation.[49]

In short, warnings are not a panacea. They may not effectively transmit their legal message that acquiescence is voluntary, and even if they do, they may not convince civilians that they are in fact free to decline.[50] In addition, they may serve a cleansing function similar to the role *Miranda* warnings have come to serve. That is, they may come to function as the sole measure of whether a search is consensual, discouraging courts from conducting a more thorough inquiry.[51] Nevertheless, warnings may serve other important purposes, such as increasing perceptions of legitimacy. Currently the evidence on the effects of consent warnings on perceptions of legitimacy is mixed.[52]

2. Regulation of Racially Disparate Impact

As noted above, statistics on consent searches are scarce. Nevertheless, several studies have shown that the burdens of consent searches are by no means equally distributed, and critics have noted the "ease with which" consent

47. Nancy Leong and Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS. L. REV. 751, 751 (2013).

48. *Racial Disparity in Consent Searches and Dog Sniff Searches*, ACLU ILLINOIS (Aug. 13, 2014), https://www.aclu-il.org/en/publications/racial-disparity-consent-searches-and-dog-sniff-searches [hereinafter ACLU Study].

49. *See, e.g.*, Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990's: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839 (1996).

50. And indeed, the perception that a refusal to consent might have deleterious consequences may be entirely accurate, either because the officer will turn to other means of investigation, or because the officer may experience the refusal as a threat to his authority and retaliate. *See, e.g.*, Strauss, *supra* note 26, at 243 (noting that for black civilians, refusing to accede to even polite police requests may have deadly consequences).

51. This was one conclusion of Leong and Suyeishi's study of appellate court opinions. *See* Leong & Suyeishi, *supra* note 47, at 787.

52. *See* Alec Kraus, The Consent Search Warning Argument: Procedural Justice and What a Warning Might Do for Police Legitimacy (Mar. 30, 2016) (unpublished honors thesis, Western Michigan University) (available at https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=3715&context=honors_theses); Jacinta M. Gua, *Consent Searches as a Threat to Procedural Justice and Police Legitimacy: An Analysis of Consent Requests During Traffic Stops*, 24 CRIM. JUST. POL'Y REV. 759 (2013) (finding that requesting consent led to motorists to believe that the police were less fair and the reasons for the stop less legitimate); Robin Shepard Engel, *Citizens' Perception of Distributive and Procedural Injustice During Traffic Stops with Police*, 42 J. RES. CRIME & DELINQUENCY 445 (2005) (finding that instrumental justice was at least as important as procedural justice: motorists who actually had cars searched were less likely to view stops as legitimate).

doctrines "can be pressed into service as tools of racial profiling."[53] The Illinois ACLU study, based on information collected to comply with the Illinois Traffic Stop Statistical Study Act of 2003, found that in 2013, for example, black and Hispanic motorists were almost twice as likely as white motorists to have their vehicles consent-searched during traffic stops, yet white motorists were 49% more likely than black motorists, and 56% more likely than Hispanic motorists, to be found with contraband.[54] Disparities have been similar every year since data collection began in 2004.[55] Similarly, studies by the New Jersey Attorney General's office concluded that minority motorists were disproportionately subject to consent searches.[56] These statistics, alarming as they are, fail to measure another aspect of consent searches: their scope and execution. Unlike a *Terry* stop or a search based on probable cause, a consent search is as broad as the officer chooses it to be, subject only to the subject's willingness to define its parameters or to withdraw consent as it progresses.[57] Although the *Schneckloth* court posited that a consent search might "result in considerably less inconvenience for the subject" than a more extensive search or a full-fledged arrest,[58] consent searches are often "intrusive and publicly humiliating,"[59] and the level of intrusion can easily escalate, given the amorphous and poorly defined limitations on the reasonableness of the search. Racially disparate deployment of consent doctrine has been cited as a primary rationale for, among others, the New Jersey Supreme Court's decision to require reasonable suspicion for all highway searches,[60] and for numerous local policies requiring warnings and written consent. We will return to the question of remedies in the next Part.

B. Better Police Work

Consent search doctrine tends to portray the government's interest as a monolithic quest to obtain important and reliable evidence of illicit activity.[61] But it is extraordinarily unhelpful to think about the Fourth Amendment as a zero-sum game in which regulating the police power is necessarily detrimental to the goals of keeping the peace and pursuing justice. A better set of questions is: What metrics should be employed to determine whether police are aiding in those broad goals? Do these metrics differ for various law enforcement entities? What currently available information sheds light on how those goals can be best achieved? And what are the best routes for obtaining any additional relevant information?

53. Stoughton, *supra* note 2, at 871–72.

54. ACLU Study, *supra* note 48.

55. *Id.*

56. *See* REPORT OF THE NEW JERSEY SENATE JUDICIARY COMMITTEE'S STUDY OF RACIAL PROFILING AND THE NEW JERSEY STATE POLICE (June 11, 2001), http://www.njleg.state.nj.us/RacialProfiling/sjufinal.pdf.

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

58. *Id.* at 228.

59. ACLU Study, *supra* note 48.

60. State v. Carty, 790 A.2d 903, 909 (N.J. 2002).

61. *See, e.g.*, *Schneckloth*, 412 U.S. at 243.

Good police work might be assessed according to several overlapping criteria. These include efficiency at combatting crime, safeguarding public and police safety,[62] promoting fairness and equal treatment of civilians, contributing to improved police-community relations, and providing transparency and accountability. The relevance of these metrics will vary by institution. All these metrics bear on the evaluation of consent searches.

1. Investigating and Combatting Crime

The *Schneckloth* decision is premised on the importance of preserving the ability of police to search and question, and on the assumption that an explicit waiver requirement would interfere with that ability.[63] There is conflicting evidence on whether a waiver requirement would decrease consent searches, with several studies showing no significant drop in the number of searches conducted.[64] Moreover, the experience of two North Carolina municipalities that adopted explicit waiver requirements highlights the peril of viewing the question so narrowly.[65] Fayetteville saw a significant drop in consent searches after instituting a waiver requirement.[66] But this drop must be evaluated alongside two other statistics. First, the police did not pick up the slack by conducting other searches in lieu of consent searches.[67] Second, the overall crime rate in Fayetteville dropped during this period.[68] Durham, which also adopted an explicit waiver requirement, also saw a significant drop in consent searches, but little change in the overall number of searches, since this drop was accompanied by a large increase in the number of probable cause searches.[69] These two experiences highlight the complexities of adopting a metric for good police work, even when the focus is on efficiency and efficacy. The lack of a substitution effect in Fayetteville might support the *Schneckloth* court's assumption that the opportunity to search will be lost if consent is too hard to obtain, but that begs the question of whether the searches lost were worth saving—especially in light of the overall drop in the crime rate. One possible interpretation of the Durham experience is that consent searches that are worth doing can

62. Although this article will not discuss police safety in more detail, see Stoughton, *supra* note 2, at 869–75 (arguing that there rarely are exigencies that require consent searches).

63. *Schneckloth*, 412 U.S. at 244.

64. *See, e.g.*, FRANK R. BAUMGARTNER ET AL., SUMMARY OF DURHAM STOPS AND SEARCHES BEFORE AND AFTER WRITTEN CONSENT POLICY REFORM ON OCTOBER 1, 2014 (July 13, 2015) (positing that in Durham, North Carolina, police substituted probable cause searches for consent searches once warnings made consent searches more difficult); *see also* I.D. LICHTENBERG, VOLUNTARY CONSENT OR OBEDIENCE TO AUTHORITY: AN INQUIRY INTO THE "CONSENSUAL" POLICE-CITIZEN ENCOUNTER (1999) (finding that during the two-year period in which Ohio officers gave warnings, there was no significant drop in consent searches, with many civilians reporting that they still felt they "had to" comply).

65. *See* Kraus, *supra* note 52.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

often be justified by probable cause or reasonable suspicion,[70] and that consent searches simply offer a less time-consuming way for officers to conduct the searches than doing the work involved in developing reasonable suspicion or probable cause. In short, to talk about "good policing" requires thought to what types of searches are worth preserving, and why, and to what sorts of police efficiencies ought to be encouraged or discouraged.

Fayetteville's crime drop, whatever its causes, points to another aspect of the good policing calculus; one that is often overlooked in debates which focus narrowly on hit rates and arrest rates. Aggressive, intrusive policing has been linked to a number of detrimental outcomes for both individuals and communities, and these outcomes may be deleterious to the maintenance of safety and the pursuit of justice.[71]

2. Promoting Fairness, Equality, Legitimacy, and Transparency

Constitutional criminal procedure is court-centric and tends to treat police-civilian encounters as dyadic and isolated events. On the level of individual encounters, it is easy to miss, or at least avert one's eyes from, the larger sociological landscape, in which consent searches may be used as an aggressive tool against entire communities or neighborhoods. Although there is little evidence about the longitudinal and community-wide effects of consent searches in particular, there is growing evidence that aggressive policing of black and Latino neighborhoods has deleterious effects on the health and well-being of individuals and the communities in which they live.[72] Unsurprisingly, many of these effects are counterproductive to the legitimate goals of policing. Residents of heavily policed neighborhoods who view police as violating their dignity, privacy, mobility, and right to equal treatment, may be less likely to view police as legitimate, and less likely to cooperate with law enforcement.[73] Moreover, disrespectful and aggressive policing may adversely affect the health, education, and job prospects of residents, and may even have a criminogenic effect.[74] In short, it is inaccurate to view aggressive policing as a net plus for law enforcement—it may be deleterious to the central goals that policing is meant to achieve.

To improve accountability, in other words, it is necessary to identify the normative goals of policing and determine how best to achieve them. This latter inquiry requires data—and there is an appalling lack of data about consent searches. To improve the situation will require creating and enforcing rules for

70. An additional variable here is the level of proof demanded for probable cause. George Thomas predicted that as consent doctrine changes to make consent searches harder to justify, the threshold of probable cause or reasonable suspicion will become lower. Thomas, *supra* note 36, at 11.

71. *See, e.g.*, Amanda Geller, Jeffrey Fagan, Tom Tyler, Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321 (2014).

72. *Id.*

73. *See, e.g.*, Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMPIRICAL STUD. 751 (2014).

74. *See, e.g.*, Geller et al., *supra* note 71.

data reporting and sharing. It will require resources for the analysis and dissemination of data. It will also require institutional incentives toward transparency, toward seeking and incorporating input from affected groups—including community groups—and toward reform.

IV. WHAT INSTITUTIONS ARE BEST POISED TO REFORM CONSENT SEARCHES?

The history of consent search doctrine thus far is instructive. A watershed Supreme Court set the stage. The Court made normative choices, both about the rationale for consent doctrine and about the standard of review, and these choices have had enormous practical consequences.[75] The choices were based, at least in part, on untested empirical assumptions. Subsequently, state courts and localities have conducted their own experiments in regulating consent searches, creating useful comparison groups, adding to the store of knowledge, and highlighting the need for more data.[76] At the same time, community groups, civil rights organizations, and others have contributed to a growing awareness of the racial imbalances that infect the criminal investigatory regime, and of their impact on effective policing and other criminal justice goals, providing the impetus for change.[77] In short, although the pace of change in the consent context has been fairly glacial, change has occurred, and it has been the result of a complex medley of actions: state, local, and federal; public and private; legislative, judicial, and executive. It is tempting, especially for those steeped in constitutional criminal procedure, to imagine that a different Supreme Court decision would have changed the course of consent law for the better, but subsequent developments cast some doubt on this assertion. In any event, such a conclusion cannot be stated with any certainty. The tentative takeaway is that each institution has a role to play, depending both on its inherent structural capabilities and on the political context in which the parameters of institutional decision-making unfold.

A. The Federal Role

Federal institutions—particularly the Supreme Court and Congress—are uniquely poised to adopt rules that offer uniformity and predictability in the creation of legal norms and practices, or to create standards that encourage experimentation and allow discretion. The Supreme Court in *Schneckloth*, of course, took the latter route. There are few scholars who defend the Supreme Court's approach—the problem is not just that the Court eschewed uniform rules but that it used its bully pulpit to encourage police to capitalize on civilians' ignorance and lack of access to information.[78] But its hands-off approach

75. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

76. *See, e.g.*, ACLU Study, *supra* note 48.

77. *See, e.g.*, Brett Parker, *Consent Searches and the Need to Expand* Miranda *Rights*, STANFORD POL. (Sep. 23, 2015), https://stanfordpolitics.org/2015/09/23/consent-searches-need-expand-miranda-rights/.

78. In *Schneckloth*, the Court encouraged police to capitalize on ignorance of the law, exacerbated by an unacknowledged power differential. In *Ohio v. Robinette*, I would argue, the Court encouraged police to capi-

did encourage other institutions, such as the New Jersey Supreme Court under its state constitution, to step in and act as laboratories for alternative approaches.[79] And this experiment has provided important information.

The strengths and weaknesses of Congressional intervention have been particularly salient in the last couple of years. Federal statutes like 42 U.S.C. § 14141[80] are among the most promising vehicles for addressing the excesses of consent searches. For many reasons,[81] it is difficult to imagine an effective state or local level response to the sorts of encounters described in the Ferguson Report (for example, "ped checks" based on no articulable suspicion, and focused almost entirely on black residents of the municipality).[82] But enforcement of § 14141 is subject to the vagaries of Department of Justice policy and priorities, as the recent change of administrations has made abundantly clear.[83]

The federal government is uniquely positioned to play one essential role in the regulation of consent (and police encounters more generally): the collection of nationwide, uniform data. Currently, the major national database on police-civilian encounters focuses only on deadly force.[84] Moreover, it relies on voluntary reporting.[85] Federal legislation could require mandatory reporting, including reporting on the demographics of consent searches. This would provide a rich trove of information, enabling researchers to tackle such questions as: Do waiver requirements lead to the loss of important evidence? What is the effect of waiver regimes on the incidence of probable cause searches? What is

talize on the civilian's lack of information about police procedure. It may be factually impossible for a civilian to know when the police have concluded the forcible nonconsensual portion of an encounter, absent any duty for police to inform. *But see* LICHTENBERG, *supra* note 64 (study found that during the two years in which the Ohio Highway Patrol gave "Robinette" warnings, prior to the Supreme Court's decision, there was no significant drop in the number of consenting subjects).

79. N.J. CONST. art. I, pt. 7.

80. The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (2012).

81. There are multiple reasons to assume a federal response was the most viable option. Among them, the DOJ found that many of the objectionable rules had the purpose of generating local revenue and no public safety purpose. *Investigation of the Ferguson Police Department*, U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIVISION 9–15 (Mar. 4, 2015) [hereinafter Ferguson Report]. The DOJ also found that discriminatory intent undergirded many of the longstanding practices it documented. *Id*. at 7–75. It documented a longstanding refusal to evaluate or correct these practices and rules. *Id*. at 76. And after the report was issued, the municipality displayed extreme reluctance to agree to its recommendations. *Government Sues Ferguson after City Tries to Revise Justice Department Deal*, CHI. TRIB. (Feb. 10, 2016) http://www.chicagotribune.com/news/nationworld/midwest/ct-ferguson-justice-department-plan-20160209-story.html.

82. Ferguson Report, *supra* note 81, at 18 ("ped check" or pedestrian check, was a legal-sounding phrase often used by police to describe the act of "stopping a person with no objective, articulable suspicion.").

83. *See* Brentin Mock, *What Jeff Sessions Can and Can't Do About Police Consent Decrees* (Apr. 4, 2017), https://www.citylab.com/equity/2017/04/what-jeff-sessions-can-and-cant-do-about-police-consent-decrees/521811/.

84. *See* Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sep. 8, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/?utm_term=.b20c813b1d1f.

85. *Id.*

the effect on the crime rate overall? What is the racial, ethnic, and gender distribution of the incidence of consent searches?

B. The State Role

Although federal intervention holds out the best hope for creating uniform national standards and repositories, it is also cumbersome and subject to the vagaries of national politics. State legislatures can move with a bit more agility. They are also able to work in closer alignment with local criminal justice priorities. Moreover, as Kami Chavis Simmons persuasively argues, states can work in concert with federal initiatives, implementing federal standards while retaining the flexibility to tailor them to local needs.[86] Crucially, states can also experiment with various approaches, sharing and comparing outcomes, determining which approaches are best tailored to local conditions, and informing the development of national policy.[87]

In the consent context, state courts in particular have played an important role in evaluating and testing regulatory approaches.[88] Notably, the New Jersey Supreme Court has interpreted the state constitution to require precisely the waiver approach the U.S. Supreme Court rejected, creating a twenty-five-year experiment in the comparative efficacy of a warning and waiver regime.[89] Ultimately, the court concluded that such a regime was an ineffective means of apprising motorists of their right to refuse or reining in the abuse of consent searches.[90] Its analysis was confined to the traffic stop context, in which the ability to pull over motorists for infractions is virtually unlimited.[91] It specifically noted the problem of racially disparate use of consent searches, noting that "one does not have to be terribly cynical to assume the police are more likely to request consent from young Latinos or young black men."[92] The court has now embarked on a new regulatory experiment: banning consent searches of motorists entirely and requiring that all such searches be conducted based on reasonable suspicion or probable cause.[93] The results of this approach ought to be illuminating.

Another important source of information is state court opinions applying federal law. This source is particularly important in a totality of the circumstances regime like the one mandated by the Supreme Court in *Schneckloth*. Leong and Suyeishi examined appellate opinions from forty-four states to investigate what role consent forms played in apprising civilians of their right to

86. Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 375 (2011).

87. *Id.* at 381.

88. *See, e.g.*, State v. Carty, 790 A.2d 903 (N.J. 2002).

89. *Id.* Similarly, the Ohio Supreme Court ruled, prior to the U.S. Supreme Court's decision in *Ohio v. Robinette*, that a warning was required, leading to a two-year period in which the state of Ohio required the "Robinette" warning. *See* Ohio v. Robinette, 653 N.E.2d 695 (Ohio 1995).

90. *See Carty*, 790 A.2d at 907.

91. *Id.* at 910.

92. *Id.*

93. *See id.*; *see also* State v. Yanovsky, 733 A.2d 711 (2001).

refuse consent.[94] Consistent with New Jersey's experience, they found that signed forms did not equal voluntary consent, and the presumption was particularly problematic "with respect to racial and ethnic minorities, immigrants, and nonnative English speakers."[95] But in addition, the Leong and Suyeshi study yielded interesting findings on the effect of consent forms on judicial review. Courts tended to treat the forms as a ceiling rather than a floor: the presence of a signed consent form discouraged courts from closely examining the voluntariness of the consent based on the totality of the factors, and insulated law enforcement from later invalidation of the search.[96]

One recurring thread through all the recent consent search literature is the problem of racial disparities in the use of consent searches. The seriousness of this concern is only partially captured by the question of who is approached for a consent search. Police have enormous discretion about whom to search, but in addition, consent searches pose an even greater regulatory problem: the question of the scope, duration, and intensity of the search once it commences. Unlike *Terry* stops, which are, at least in theory, regulated in scope and duration, consent doctrine provides no such limits. Limiting the search falls to the civilian, who must withhold, limit or withdraw consent in order to limit the scope. Addressing these questions about inception, scope and duration requires data, especially given the Supreme Court's *Whren* decision,[97] which indicates that the most fruitful argument against racial disparities in policing is a Fourteenth Amendment allegation of racially disparate treatment. In this regard, state statutes have the potential to play an essential role in the regulation of consent searches. As mentioned above, a mandatory federal repository for uniform statistics would be ideal, but states need not wait for this to occur. The Illinois Traffic Stop Statistical Study Act, passed in 2003 and subsequently expanded in scope, made possible the ACLU's study of racial patterns in the use of consent searches by all Illinois police agencies.[98] The California Racial and Identity Profiling Act,[99] which took effect on July 1, 2018, has the potential to make similar studies feasible.[100]

C. Local Roles

Many of the strengths of state-level approaches apply to local level interventions as well, including the relative suppleness of the institutional machinery, and the ability to investigate and respond to local conditions. There is also

94. Leong & Suyieshi, *supra* note 47.

95. *Id.* at 763.

96. *Id.* at 765.

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

98. As a result of this law, local entities submit annual reports outlining traffic stops statistics. *See, e.g.*, ILLINOIS TRAFFIC STOPS STATISTICS ACT REPORT FOR THE YEAR 2004, NORTHWESTERN UNIVERSITY CENTER FOR PUBLIC SAFETY, July 1, 2005, http://www.idot.illinois.gov/assets/uploads/files/transportation-system/reports/safety/traffic-stop-studies/2004/2004%20illinois%20traffic%20stop%20summary.pdf.

99. AB-953 Law enforcement: racial profiling (2015).

100. *See also* The Connecticut Racial Profiling Prohibition Project, undertaken pursuant to the Alvin W. Penn Racial Profiling Prohibition Act (Public Act 99-198).

considerably more flexibility to craft remedies for identified problems on this level. For example, the St. Paul, Minnesota police department acted in conjunction with the St. Paul Chapter of the NAACP to create a printed consent warning, similar to a Miranda warning, and Austin, Texas took a similar step.[101] Variations in local consent regimes can be instructive, particularly if localities adopt a means of tracking results.

Several North Carolina cities have required consent warnings, leading to some fascinating results, as discussed above (for example, a significant overall drop in searches in Fayetteville, as compared to a drop in consent searches in Durham, accompanied by an equal rise in probable cause searches).[102]

Local approaches can also address issues of review and supervision in a granular fashion. Most of the cities using consent forms require supervisors to review each form.[103] With the increased use of body cams and dash cams, the question arises whether police ought to be required to record requests for consent (either via audio or video), and whether such recordings should be mandatorily reviewed by supervisors.[104]

Notably, a number of the local initiatives have been taken in concert with civil rights organizations or community groups. One crucial aspect of consent search reform (and all police accountability reform, for that matter) is the importance of community dialogue.[105] Given the vast disparities in the incidence and conduct of consent searches among neighborhoods, local governance initiatives have the ability and responsibility to gather evidence about how consent searches impact particular communities, and how best to address negative impacts in a way that garners community support and reaches the community effectively.

Finally, consent searches present a challenge that may seem nearly intractable—they rest on a fiction that is convenient for law enforcement but at odds with the reality of police-civilian encounters as most of us experience them. It is quite likely that there is no way to ameliorate the inherently coercive nature of a police request for cooperation. This is not to say that coercive aspects cannot be regulated at all, but if the goal is to create a truly voluntary regime, culture, experience, and even logic may militate against achieving this goal. Moving closer to this goal will require community outreach and education to inform civilians of their rights, as well as local and departmental policies and practices designed and implemented to ensure law enforcement respects those rights.

101. *NAACP Agreement: Saint Paul Police Department Implements Partnership with Communities of Color*, STPAUL.GOV, https://www.stpaul.gov/departments/police/administration-office-chief/naacp-agreement (last visited Sept. 30, 2018).

102. *See supra* Subsection III.B.1.

103. *See, e.g.*, *IAG Support Section*, L.A. POLICE DEP'T, http://www.lapdonline.org/internal_affairs_group/content_basic_view/8786 (last visited Sept. 30, 2018).

104. *See* Leong & Suyeishi, *supra* note 47, at 792–93 (arguing that law enforcement should be pressed to use video and audio recordings).

105. *See generally* BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION (2017).

V. CONCLUSION

Regulation of consent searches is a hard problem but not an intractable one. It is a problem that requires a multi-governmental set of solutions. This multi-layered approach should draw on the strengths of the various institutions, allowing for a fluidity that accommodates the inevitable ebb and flow of political will in one institution or another. One key to moving forward is to shift the frame in order to avoid the simplistic, self-defeating notion that the interests of law enforcement and the interests of the community are on opposite sides of the ledger.