"Light Him Up": Addressing the Dangerous Intersection of Traffic Stops and Consent

GEOFFREY S. CORN*

ABSTRACT

The legitimacy of policing has and remains an important topic of public interest, as well it should be. When members of a community lose trust in those entrusted to enforce the law, it chips away at the very foundation of a rule of law-based society. And, as the American public mood has confirmed, legitimacy can often be as much about perception as it is about reality. While calls to "abolish the police" are both misleading and unrealistic, the more salient desire to enhance the actual and perceived legitimacy of policing and, in so doing, enhance public trust and confidence in law enforcement and the broader criminal justice system are goals worthy of effort. One aspect of this enhancement process should focus on the ease by which Supreme Court jurisprudence related to traffic stops and consent intersect to provide a fertile field to cultivate pretextual and abusive police practices. This jurisprudence provides a proverbial "green light" for police to utilize traffic stops as pretexts to seek consent to search individuals they have no good cause to otherwise search. And, when coupled with the ease by which the validity of consent can be established, these type of traffic stops subject too many individuals to consent-based "fishing expeditions" by police. Because the jurisprudential foundation for this intersection of authorities is unlikely to be modified, lawmakers should consider other mechanisms to strike a more "legitimate" balance between law enforcement authority and the protection of individuals from pretextual use of that authority. This article proposes such a mechanism, one drawn from the experience of military search and seizure law: imposing a heightened burden on the State to prove valid consent when that consent is the product of a traffic stop unrelated to the request for the consent. Such a rule will mitigate the risk of pretextual traffic stops by limiting the existing incentive to use them as the first step in conducting consent searches. By doing so, this new practice will mitigate the consequences of traffic stops and thus enhance the perceived legitimacy of the exercise of this authority.

---

* The George R. Killam Jr. Chair of Criminal Law and Director of the Center for Military Law and Policy, Texas Tech University School of Law; Lieutenant Colonel, U.S. Army (Retired), and formerly Special Assistant for Law of War Matters and Chief of the Law of War Branch, Office of the Judge Advocate General, United States Army; Chief of International Law for U.S. Army Europe; Professor of International and National Security Law at the U.S. Army Judge Advocate General's School. A special note of thanks to my research assistants, Marco Nava (Lieutenant, Houston Police Department) and Jonathan White, whose diligence and professionalism reflect great credit on South Texas College of Law Houston.

TABLE OF CONTENTS

I. LET'S FACE IT

Let's face it, no municipality is going to abolish the police. Frustration over incidents of abusive or discriminatory treatment of citizens is justified, but considering the literal tens of thousands of police/citizen interactions every day, these incidents cannot support such radical measures. Nonetheless, calls for abolishing or the more limited proposals to defund police are ignored at the peril of law enforcement legitimacy. Accordingly, what *is* justified is careful scrutiny of the legal framework that has contributed to this perception of illegitimacy.

Legitimacy, after all, is central to mission effectiveness of any law enforcement agency.[1] This is something the U.S. military has come to understand more comprehensively than ever before.[2] Why? Because there is simply no escaping the reality that the malicious or derelict actions of a few can nullify the positive performance of the vast majority of a force struggling to accomplish a difficult mission.[3] As a result, legitimacy has been elevated to a fundamental principle of

1. *See* Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men's Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 753 (2014) ("Legitimacy has become a focus of concern in recent years because popular legitimacy increasingly has been linked to citizen behaviors that are important to the success of policing.") (citation omitted).

2. Major Adam Wolrich, *Giving the Referee a Whistle: Increasing Military Justice Legitimacy by Allowing Military Judges to Reject Plea Agreements with Plainly Unreasonable Sentences*, 228 MIL. L. REV. 124, 138 (2020) ("Legitimacy is especially important in military justice. The history of military justice is, in fact, intertwined with its search for legitimacy—the military justice system has evolved largely in reaction to concerns related to its perceived unfairness.").

3. *See* Donald J. Guter, John D. Huston & Rachel VanLandingham, *The American Way of War Includes Fidelity to Law: Preemptive Pardons Break that Code*, JUST SEC. (May 24, 2019), https://www.justsecurity.org/64260/the-american-way-of-war-includes-fidelity-to-law-preemptive-pardons-break-that-code

joint U.S. military operations alongside traditional principles such as objective, offensive, and economy of force. According to Joint Publication 3-0, *Joint Operations,* "Legitimacy . . . is based on the legality, morality, and rightness of the actions undertaken. Legitimacy is frequently a decisive element . . . ."[4] This doctrinal publication also emphasizes that legitimacy is not only the result of actual compliance with the law, but also *perceived* compliance.

In the realm of policing, perception has increasingly become reality. Critics of police speak of an epidemic of police killings of Black and Brown citizens.[5] But the data suggest that the situation is much more complicated. It is true that Black and Brown citizens are more likely to be the victims of homicidal police violence.[6] Perhaps even more troubling are statistics that indicate the use of deadly force is much more likely against an actually unarmed Black or Brown citizen than a similarly unarmed white citizen. But the raw numbers of police shootings fail to account for the reasons why deadly force was employed.[7] As military lawyers who assess the legality of combat actions understand, the test for legality is not a *post hoc* assessment of actual facts, but an *ex ante* assessment of the reasonableness of a shooters judgment. This means that mistakes are rarely conclusive proof of illegality. Instead, the critical—and often difficult—question to answer is whether, under the circumstances, the mistake was within the realm of reasonable judgment.[8]

The pervasiveness of contemporaneous recordings of police shootings should ideally aid in a credible assessment of this critical question. But the focus on the moment of decision does not tell the whole story. Another important aspect of actual and perceived legitimacy is what led to the ultimately fatal encounter in the first place. The answer to this question is often two words: traffic stop. Indeed, anyone who has watched television programs such as *Cops* or even fictional programs such as *Southland* understands how routine it is for a police traffic stop to initiate police/citizen contact.[9]

The law that provides the foundation for a police officer's decision to "light up" a citizen behind the wheel of an automobile has arguably been most responsible for undermining law enforcement legitimacy.[10] Why? Because this legal foundation tolerates, and as a result incentivizes, the use of traffic stops as a

---

[https://perma.cc/93RS-UB63]; Geoffrey S. Corn & Rachel E. VanLandingham, *Strengthening American War Crimes Accountability*, 70 AM. U. L. REV. 309, 327 (2020) (discussing the essential role adherence to the law during combat plays in gaining troop compliance and accountability).

4. CHIEFS OF STAFF, JOINT OPERATIONS, JP 3-0, PRINCIPLES OF JOINT OPERATIONS app. A, at A-4 (2018), https://perma.cc/NF68-NAMJ.

5. Tyler et al., *supra* note 1, at 755–56.

6. *See* Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL'Y 53, 67–69 (2016).

7. *Id*. at 67–68.

8. *Id*. at 69.

9. Tyler et al., *supra* note 1, at 766.

10. *Id*. at 775.

subterfuge for wholly unrelated investigations.[11]And this exploitation of subterfuge motive is further incentivized by the law dictating the validity of consent, which makes it remarkably easy for police officers to rapidly expand the lawful scope of a simple traffic stop to a general search of the automobile.

This essay will question the logic of a legal framework that creates such a powerful incentive for pretextual traffic stops. It will argue that reconsidering this legal framework is more acute now than ever before. The essay will also explore several options to better balance the legitimate law enforcement needs of society with the imperative that law contribute to the actual and perceived legitimacy of law enforcement operations.

II. "LIGHT HIM UP . . . ."

A traffic stop may be a nuisance for some, but for too many it generates tremendous fear. This is not because the likelihood of being issued a citation for a minor regulatory offense is terrifying. While most people would prefer not to have to pay a fine and deal with the impact on their insurance rate, that consequence is relatively trivial. Instead, it is because traffic stops are widely understood to be the initial step in what may evolve into much more extensive police action. And for many Americans, most notably Black and Brown Americans, a traffic stop likely generates fear that the encounter may escalate into a confrontation creating a genuine risk of violence.[12]

Some may assert these fears are exaggerated, citing the literal tens of thousands of police/citizen encounters that occur on any day and the proportionally minute number of incidents that escalate to the use of force by police, especially lethal force.[13] But such a response is non-responsive to the realities of large segments of our society who perceive reality quite differently. For them, broad national statistics do little to offset fear derived from community experience, public interest in incidents of police abuse, historical narratives, and the overall sense of an imbalance of power between them and the police officer behind them with lights flashing.[14]

As noted in the introduction, legitimacy is not based solely on actual respect for law and morality, but also on *perceived* respect. Accordingly, so long as police actions perpetuate the perception of illegitimacy, whether or not this perception is based on actual illegitimacy is largely irrelevant. It is the perception

---

11. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 345 (1998).

12. *See id*. at 347–53.

13. ERIKA HARRELL & ELIZABETH DAVIS, U. S. DEP'T OF JUST., BUREAU OF JUST. STAT., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018, at 5 (2020), https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf [https://perma.cc/U3DS-GEGA] ("Among the 61.5 million U.S. residents age 16 or older in 2018 who had contact with police during the prior 12 months, 1.3 million (2%) experienced threats or use of force from police."); Julie Tate et al., *Fatal Force*, WASH. POST (June 1, 2020), https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/ [https://perma.cc/HP8G-576V] ("990 people were shot and killed by police in 2018.").

14. Tyler et al., *supra* note 1, at 752.

itself that perpetuates and exacerbates the divide between police and the public they devote themselves to serving and protecting.[15]

One of the lessons of military operations is the tragedy of such a disconnect between perception and reality. When illegitimacy is based on actual disregard for law and morality, the importance of curing these defects is equally actual and acute. But when perception deviates from reality, the negative impact can be just as corrosive. The difference is that the cure is much harder to assess and implement. If police, like soldiers on a battlefield, are generally complying with the law but nonetheless perpetuating a perception of illegitimacy, the response is almost completely binary: either ignore this perception and continue "business as normal," or look for ways to rebut the perception by modifying what might very well be lawful behavior.

For an institution devoted to serving and protecting the public, only the latter option provides a credible response. Rebuilding must begin with a candid acknowledgment of how the legal framework for operations may actually set the conditions for the perception of illegitimacy. Only such an assessment can inform positive policy, legislative, and perhaps even jurisprudential efforts to enhance legitimacy.

A. "Don't Ask; Don't Tell. . . ."

That a traffic stop qualifies as a seizure triggering the reasonableness requirement of the Fourth Amendment is beyond dispute.[16] Accordingly, any such stop without a justification that satisfies the substantive test for reasonableness violates the Fourth Amendment, presumptively "prohibiting evidentiary use of any seized 'fruits' of the search."[17] But the density of traffic codes provides a litany of such justifications for traffic stops.[18] Indeed, it is a rare driver who will travel from point A to point B without committing some traffic infraction. Even something as trivial as the pervasive "rolling stop" or a broken license plate illumination light triggers lawful traffic stop authority.

If the only consequence of traffic stops in response to such infractions were the issuance of a traffic citation, public criticism should be limited to the number and kind of traffic laws. But the fact that traffic stops routinely escalate into more serious encounters[19] is a reflection of what too many people suspect: that police are exploiting such stops as a pretext for investigating suspicion that would not justify the stop standing alone.[20]

Got a hunch someone is up to no good? Light him up. Recognize the driver or passenger as someone who has been in trouble before and just feel like checking

15. *Id.*
16. Whren v. United States, 517 U.S. 806, 809–10 (1996).
17. *Id.*
18. *Id.* at 818.
19. People v. Pena, 163 N.E.3d 1, 12 (N.Y. 2020) (Rivera, J., dissenting).
20. FRANK R. BAUMGARTNER, DEREK A. EPP & KELSEY SHOUB, SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE 11 (2018).

it out? Light him up. This is not the result of some inherent flaw in the notion of allowing police to enforce traffic laws; it is instead an inherent part of their responsibility to serve the community by responding to violations of a wide array of criminal and regulatory infractions. But it is also the result of the expansive scope of authority inherent in the test for when such stops qualify as reasonable within the meaning of the Fourth Amendment.

The Supreme Court laid the foundation for this broad scope of authority in its 1996 decision in *Whren v. United States*.[21] In *Whren*, plainclothes policemen patrolling a "high drug area" in an unmarked vehicle observed a truck driven by petitioner Brown waiting at a stop sign at an intersection for an unusually long time; the truck then turned suddenly, without signaling, and sped off at an "unreasonable" speed. The officers stopped the vehicle, assertedly to warn the driver about traffic violations, and upon approaching the truck observed plastic bags of crack cocaine in petitioner Whren's hands. Petitioners were arrested.[22]

Prior to trial, Whren moved to suppress the crack cocaine, arguing that the plainclothes officers exploited the traffic stop as a pretext for investigating their hunch the occupants of the vehicle were involved in criminal activity. Based on the facts of the case, this seemed like a credible argument. After all, how many plainclothes officers in unmarked vehicles conduct traffic stops based on a genuine and singular interest in enforcing the traffic code? Not many.[23] Specifically, the Court noted that,

> The difficulty is illustrated by petitioners' arguments in this case. Their claim that a reasonable officer would not have made this stop is based largely on District of Columbia police regulations which permit plainclothes officers in unmarked vehicles to enforce traffic laws "only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others."[24]

But Justice Scalia's framing of the issue subtly shifted the focus of the Court's inquiry from whether the officers involved in the stop abused their authority to conduct a suspicion-less seizure to whether courts should look beyond the objective reasonableness of an asserted traffic stop motive no matter how implausible that motive may appear:

> In this case we decide whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.[25]

---

21. *Whren*, 517 U.S. at 812–13.
22. *Id.* at 808.
23. *Id.* at 815.
24. *Id.* (citing Metropolitan Police Department, Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992), reprinted as Addendum to Brief for Petitioners).
25. *Id.* at 808.

The Court's answer to this question was emphatic: the reasonableness of a traffic stop, like any other seizure, is assessed objectively: so long as the objective facts provide justification for the seizure, the officer's subjective motive becomes irrelevant.[26] Specifically, the Court indicated that inquiry into such a subjective pretextual motive is invalid once the objective justification for the traffic stop is established:

> We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.[27]

When coupled with the density of traffic codes, *Whren* unquestionably opens the door to what the Court characterized as pretextual traffic stops. But while the Court acknowledged Whren's assertion that such pretext rendered traffic stops unreasonable, it rejected the invitation to create a rule necessitating any assessment beyond determining the objective basis for the stop:

> But although framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations. Its whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons. Petitioners' proposed standard may not use the word "pretext," but it is designed to combat nothing other than the perceived "danger" of the pretextual stop, albeit only indirectly and over the run of cases. Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.[28]

This focus on the objective reasonableness of a seizure was consistent with the Court's approach to interpreting the Fourth Amendment.[29] Specifically, the Court noted, "[N]ot only have we never held, outside the context of inventory search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have

---

26. *Id*. at 813 (citing United States v. Robinson, 414 U.S. 218 (1973)).

27. *Id*.

28. *Id*. at 814.

29. *Id*. at 812 (citing United States v. Villamonte-Marquez, 462 U.S. 579 (1983), United States v. Robinson, 414 U.S. 218 (1973), Gustafson v. Florida, 414 U.S. 260 (1973), and Scott v. United States, 436. U.S. 128 (1978), as decisions where an officer's subjective intent did not invalidate the officer's objectively justifiable behavior).

repeatedly held and asserted the contrary."[30] Indeed, the Court noted that where probable cause of a traffic infraction exists, that alone is sufficient to render the stop reasonable:

> It is of course true that in principle every Fourth Amendment case, since it turns upon a "reasonableness" determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause. . . .
>
> Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests-such as, for example, seizure by means of deadly force . . . .[31]

Whren's categorical rejection of inquiry into the subjective motives of an officer conducting a traffic stop indicates that it is highly unlikely the Supreme Court will limit this broad authority for police to initiate seizures.[32] And the Court's primary rationale—that trying to discern the actual pretextual motive for every police traffic stop will lead judges down a proverbial rabbit hole that will produce more harm than good—remains as compelling today as it did when the case was decided. While there are no doubt situations when such a stop is in fact purely pretextual, providing courts with a workable mechanism to discern such police conduct seems near impossible.

Yet, as the Petitioner emphasized, his case raised an equally compelling consideration: the need to limit the ability of police to exploit this broad scope of automobile seizure authority to engage in suspicion-less searches. According to the opinion, "Petitioners urge as an extraordinary factor in this case that the 'multitude of applicable traffic and equipment regulations' is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop."[33] Of course, Whren lost the battle over whether the solution to this problem was a case by case inquiry

30. *Id.*

31. *Id.* at 818.

32. *See generally* Mark M. Dobson, *The Police, Pretextual Investigatory Activity, and the Fourth Amendment: What Hath* Whren *Wrought?*, 9 ST. THOMAS L. REV. 707, 734–42 (1997) ("Much of *Whren*'s implications for the future have already been mentioned. The *Whren* Court, by rejecting the 'would have' test proposed by the petitioners, dismissed Burkoff's subjective motivation theory and LaFave's objective authorization approach. Indeed, in choosing the 'could have' test, the Court adopted the most extreme objective approach possible to the pretext issue. As long as the police can come up with some objective facts that would validate their activity, then they are constitutionally justified in undertaking the action. Such an approach is not likely to curb arbitrary and invasive police activity. Instead, it is likely to encourage it.").

33. *Whren*, 517 U.S. at 818.

into the motives of the police officer who initiates a seizure, as reflected in the Court's response to his asserted concern:

> But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.[34]

Accordingly, it is clear that any such limitation is unlikely to come from a reconsideration or qualification of the *Whren* holding. Instead, what is needed is to consider how the intersection of *Whren* and the Court's jurisprudence on *consent* may offer an opportunity to enhance the protection against exploitation of what are in fact pretextual traffic stops. After all, it is rarely the traffic stop itself that leads to the perception of police abuse; as noted earlier if the only consequence of a "pretextual" stop was issuance of a citation, it would be annoying but tolerable. It is instead the exploitation of the stop to pursue suspicion that does not qualify as reasonable within the meaning of the Fourth Amendment—exploiting the stop to act on a hunch—that seems both pervasive and problematic.

B. Well, if You Don't Have Anything to Hide . . .

It is unsurprising police routinely request consent to search automobiles after conducting a traffic stop, especially when they have a hunch or a feeling the driver or a passenger may be up to no good. Instinct, after all, is a powerful motivator; when police instinct tells them to dig a bit deeper, it is only logical that they will seek to do so. And when consent results in discovery of contraband completely unrelated to the purpose for the stop, the confluence of the objective reasonableness of the traffic stop with the reasonableness of the consent search and the authority to seize contraband that comes into plain view means the relatively trivial penal consequence of a traffic stop will blossom into something far more serious.

In the abstract, there is nothing problematic about police seeking consent in order to pursue an instinct or hunch. Of course, such a purely subjective feeling that an individual is engaged in criminal activity or is in possession of criminal contraband does not itself justify a search.[35] Indeed, that type of *unreasonable* suspicion will not even justify a seizure to dig a bit deeper.[36] A seizure will only

---

34. *Id.* at 818–19.

35. Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (citing Beck v. Ohio, 379 U.S. 89 (1964)) (asserting that the Court has consistently rejected allowing intrusions upon constitutional rights based on mere inarticulate police hunches).

36. *Id.* ("Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.").

be justified when police are able to transform purely subjective "unreasonable" suspicion into reasonable suspicion by identifying some articulable objective factor to validate the suspicion.[37] And even then, the suspicion will not justify a search for evidence—only a cursory inspection to rule out danger to the officer or others in proximity or a brief seizure to investigate further in an effort to establish probable cause.[38] It is therefore obvious why consent is such a powerful weapon in the police officer's investigatory arsenal: without consent, the scope of a traffic stop would often be restricted to addressing the traffic infraction.

If the law imposed a difficult burden on police to justify consent that transforms a traffic stop into a general search responsive to an instinct or hunch, it might create a disincentive for police to engage in pretextual stops. But the reality is quite the opposite: the ease of securing consent is arguably as broad as the authority to conduct the traffic stop itself. This is a consequence of the Supreme Court's landmark decision in *Schneckloth v. Bustamante*.[39] That case involved a police officer who obtained consent to search the suspect's automobile. The officer requested the consent but did not inform the suspect that he had a right to decline to grant the request. Schneckloth argued that notification of this right was an essential condition for valid consent—an argument that prevailed at the Ninth Circuit. However, the Supreme Court saw it differently and held that notice of a right to decline a request for consent is just one of the totality of circumstances considered when assessing whether consent was voluntary, the test the Court adopted for valid consent.[40]

The *Schneckloth* opinion emphasized the importance of consent as an investigatory tool in the police arsenal, acknowledging that restricting the ease with which police obtain consent might very well result in many crimes going undiscovered.[41] More importantly, the Court emphasized the nature of the right being waived by consent: the right to be free from police intrusion into a zone of privacy.[42] Contrasting the waiver of this right with waiver of what the Court

37. *Terry*, 392 U.S. at 21 (citing Camara v. San Francisco, 387 U.S. 523 (1967)) ("[T]here 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 22 (citing *Beck*, 379 U.S. at 96–97) ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

38. *See Terry*, 392 U.S. at 28–29 (explaining that a police officer's reasonable suspicion justifies only a search for the protection of the officer and must be limited and reasonably designed only to find weapons or things that could endanger the officer).

39. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

40. *Id.* at 232–33 ("[W]e cannot accept the position of the Court of Appeals in this case that proof of knowledge of the right to refuse consent is a necessary prerequisite to demonstrating a 'voluntary' consent. Rather it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced.").

41. *Id.* at 243 ("[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may ensure that a wholly innocent person is not wrongly charged with a criminal offense.").

42. *Id.* at 242 (quoting Wolf v. Colorado, 338 U.S. 25 (1949)).

characterized as "fundamental trial rights" led to the conclusion that such a waiver need only be voluntary and not based on being informed of the consequence of waiving the right.[43] People, after all, expose their activities to the public all the time. Therefore, unlike the waiver of a fundamental trial right, there is no justification for indulging a "presumption" against waiver with the accordant heightened standard imposed on the government to prove waiver.[44]

Accordingly, pursuant to *Schneckloth*, a police officer seeking consent is never required to notify the individual that: 1. She has a right to decline consent; or 2. Choosing to decline the request does not result in actionable suspicion. Will it make the officer more suspicious? Undoubtedly. But that alone would not provide the officer with the requisite probable cause to justify an automobile search without consent pursuant to the automobile exception to the warrant requirement.[45] So long as the consent is voluntary based on the totality of the circumstances, it will be valid no matter how speculative the officer's cause may be for seeking the search opportunity.[46]

The test for voluntariness adopted by the *Schneckloth* Court was drawn from the test for voluntary confessions: did police overbear the free will of the suspect?[47] And like the confession context, proving consent was involuntary as the result of such overbearing is extremely difficult. Indeed, absent some threat of physical harm or unlawful conduct—or an assertion of a right to search if consent is denied—police will almost always be permitted to rely on consent.[48]

It defies logic to expect police *not* to seek consent when they have an instinct or hunch a driver or passenger of a car is up to no good. But how do they get to the point of requesting that consent? Easy: "light him up!" It is the objectively

---

43. *See id.* at 241–49 (contrasting waiver requirements for rights that protect individual's privacy under the Fourth Amendment with rights that protect a fair criminal trial).

44. *Id.* at 247 ("In this case, there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, . . . the specter of incommunicado police interrogation in some remote station house is simply inapposite. There is no reason to believe . . . the response to a policeman's question is presumptively coerced; and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person's response.").

45. Florida v. Bostick, 501 U.S. 429, 437 (1991) (citing INS v. Delgado, 466 U.S. 210, 216–217 (1984)) ("We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.").

46. *Schneckloth*, 412 U.S. at 225, 248 (asserting that proving consent requires demonstrating it was voluntarily given and voluntariness requires a choice made in the absence of duress or coercion).

47. *Id.* at 225–26 (quoting Colombe v. Connecticut, 367 U.S. 568, 602 (1961)) ("'The ultimate test remains . . . the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? . . . If it is not, if his will has been overborne . . . the use of his confession offends due process.'").

48. *Id.* at 234 (citing Bumper v. North Carolina, 391 U.S. 543, 548–50 (1968)) ("In Bumper, a 66-year-old [African American] widow, who lived in a house located in a rural area at the end of an isolated mile-long dirt road, allowed four white law enforcement officials to search her home after they asserted they had a warrant to search the house. We held the alleged consent to be invalid, noting that '(w)hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.'").

reasonable traffic stop that offers the police officer the opportunity to request consent; and it is the ease of satisfying the voluntariness test for consent that allows the officer to expand the traffic stop to a general search. If that search leads to the discovery of contraband, the suspect will have little chance of avoiding the criminal consequences: the traffic infraction rendered the stop reasonable; the consent rendered the search reasonable; and the plain view doctrine rendered the seizure of the contraband reasonable.[49]

Perhaps the ease with which police may transform a traffic stop into a general search through the use of consent is one of the reasons why the sight of flashing lights in the rear-view mirror generates so much angst. But why should this be so? Why would anyone grant consent in such a situation? For the *Schneckloth* Court, one answer was that the citizen may seek to negate any police suspicion by voluntarily establishing innocence.[50] And this may in fact be true in some situations. But one or two viewings of a television program like *Cops* demonstrates that people who *actually do* have something to hide routinely consent to police searches of automobiles following a traffic stop. If this were not pervasive, it is unlikely the use of traffic stops to request consent would be so common.

But like the authority to initiate the stop itself, the Supreme Court's consent jurisprudence substantially bolsters the incentives for police to use this tactic to pursue their instincts. The combined effect of these two seminal decisions framing the scope of police authority to stop a motorist and then use the stop to seek—and often obtain—consent for a general search raises serious questions about policing legitimacy. In isolation, each decision was controversial; but the combination of both arms police with a powerful weapon to pursue their hunches, increasing the incentive for police to engage in pretextual stops.

C. Was This What Voluntary Meant?

In *Schneckloth*, the Supreme Court answered a narrow question: was notice of a right to refuse consent an essential requirement for that consent to be valid?[51] As noted above, the Court answered that question in the negative, emphasizing that voluntariness is based on the totality of the circumstances and not on any single factor. But by tethering the meaning of voluntary consent to voluntary confessions, did the Court lay the foundation for a tactical rule that exceeded the scope of its strategic objective?

---

49. Horton v. California, 496 U.S. 128, 136–37 (1990) (citing Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971)) (establishing the requirements for warrantless seizure of evidence observed in plain view as the item being in plain view, of immediately apparent incriminating character, and the officer be lawfully located where the object can be seen with lawful right of access to the object).

50. *Schneckloth*, 412 U.S. at 228 ("If the search . . . proves fruitless, that . . . may convince the police that an arrest . . . is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and . . . is a constitutionally permissible . . . aspect of effective police activity.").

51. *Id.* at 232.

It is unlikely the analogy to confession law was intended to indicate that the identical factors would lead to identical results when assessing voluntariness. After all, the context and conditions of an interrogation are far different from those of a traffic stop encounter where police seek consent to search an automobile. One substantial difference is that in the interrogation context, the suspect will often have already been informed of *Miranda* rights and executed a voluntary waiver of those rights. Because of this, the nature of police pressure must be substantial to demonstrate an involuntary confession. As the Court noted in *Missouri v. Seibert*,[52] "giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver."[53]

Even in situations where a *Miranda* waiver is not one of the factors considered in assessing the voluntariness of a confession, police overbearing must be substantial to overcome the practical inference that the choice to cooperate with police was voluntary.[54] Of course, an interrogation normally involves something more than a short-duration encounter. In that context, where the duration of the interaction is more than fleeting, it seems logical why focusing on a multitude of factors is necessary to assess voluntariness. But a request for consent during a traffic stop has very little in common with an interrogation. First, the interaction is relatively fleeting: the officer will normally request consent at the initial approach or when issuing the citation. Second, there is no notice of a right that is closely related to the assessment of the voluntariness of the consent. Third, unlike confession practice and the role of *Miranda* warnings in that practice, most people are in no way familiar with the law related to consent. Confession law, or more specifically the *Miranda* rule, is a ubiquitous part of popular culture. Indeed, it is hard to surf through channels at any time and not encounter a program involving police investigations and the reading of *Miranda*. Even the Supreme Court acknowledged this when it noted in *Dickerson v. United States* that, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[55]

There is no analogous understanding of the rights related to consent. Indeed, it is likely a person stopped for a traffic infraction and asked for consent to search would be under a common lay perception that there really is no choice. What suggests otherwise? How many times has the individual observed through television or movies an analogous interaction where the reaction to an officer's request for consent is categorical denial instead of relatively rapid acquiescence?

52. Missouri v. Seibert, 542 U.S. 600, 608–09 (2004).
53. *Id.*
54. State v. Dean, No. CA2013–03–007, 2014 WL 545737, at *3 (Ohio Ct. App. 2014).
55. Dickerson v. United States, 530 U.S. 428, 430 (2000).

When the Supreme Court decided *Schneckloth*, did it anticipate that challenging the validity of consent would necessitate the same type of "unusual stamina" the Court conceded was required to successfully challenge the voluntariness of a confession? Any answer to this question would be speculative, but the different contexts of consent and confessions justify asking whether the test should be applied differently; and the most acute aspect of that question relates to the role of deception in the totality of the circumstances.

In the confession context, it is well established that deception is *a* factor in the totality of the circumstances and rarely a dispositive factor.[56] Deception may be the straw that breaks the proverbial camel's back, as in the seminal voluntariness decision of *Spano v. New York*, but rarely is it dispositive of voluntariness.[57] But should the same value be accorded to deception in the context of a consent request during a traffic stop? Considering how persuasive deception may be in that context, perhaps the answer is no.

Consent is a waiver of the right to privacy protected by the Fourth Amendment, a point that was central to the Supreme Court's rejection of Schneckloth's argument that the standard for waiving fundamental trial rights should apply to assessing the validity of consent. But this also means that precisely what is being waived is different in the consent context than in the confession context. When police question a suspect, the central issue is whether the decision to submit to questioning and continue to answer questions is the product of free will.

III. HOW TO MANAGE THE DANGERS OF PRETEXT: A LESSON FROM THE BARRACKS

It is the premise of this article that the authority to conduct traffic stops, coupled with the ease of obtaining consent, allows police to essentially transform such a stop into a general search. So long as the stop is objectively reasonable and the consent is voluntary within the meaning of *Schneckloth* and its progeny, there is no basis to assert a Fourth Amendment violation. Nonetheless, this common police practice should be the focus of scrutiny because of the relationship between this type of traffic stop expansion and the perceived legitimacy of law enforcement efforts. Such scrutiny could influence the adoption of laws or policies intended to strike a more credible balance between police authority and investigatory traffic stops.

While an alleged or even established pretextual motive for a traffic stop will not, as noted above, run afoul of the Fourth Amendment,[58] the exploitation of traffic stops to pursue consent-based searches contributes to a perception of police

56. Spano v. New York, 360 U.S. 315, 323 (1959).

57. United States v. Ricks, No. 4:18CR197, 2019 U.S. Dist. LEXIS 59608, at *11–12 (E.D. Tex. 2019).

58. Whren v. United States, 517 U.S. 806, 812–813 (1996) (citing United States v. Robinson, 414 U.S. 218 (1973)) ("In United States v. Robinson, we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search,' and that a lawful post arrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches.") (citation omitted).

authority that subjects the public to random searches.[59] As a result, it is legitimate to question whether the scope of this constitutional authority should be qualified through statute or policy in a way that creates a disincentive for police to utilize pretextual traffic stops as a tactic to seek consent based on a hunch. And such qualification need not be binary: prohibiting the request for consent during traffic stops or allowing the practice to continue with no limitation. Instead, analogy to a very different context where lawful authority offers a substantial opportunity for pretextual abuse might prove useful in formulating a qualification to this practice that strikes a credible balance between the legitimate interests of law enforcement and individual liberty.

Most people would be surprised to learn the members of the armed forces (for purposes of this discussion, a soldier in the Army) are protected by the Fourth Amendment even when living in military barracks.[60] Like any other citizen, official intrusion into an area within the soldier's reasonable expectation of privacy qualifies as a search and accordingly must be reasonable.[61] And like the civilian context, when government officials—in most cases a military commander or a military law enforcement agent—engage in conduct that qualifies as a search to discover evidence of a crime, the normal requirements of justification and authorization apply to assess the reasonableness of a search.[62] The justification is no different than in the civilian context: the search must be based on probable cause.[63] The authorization requirement may, like in the civilian context, come in the form of a search authorization issued by a military magistrate or a military judge, but it

59. *Id.* at 818–19 (acknowledging petitioner defendant's argument that the multitude of traffic and vehicle equipment regulations make it extraordinarily difficult to obey them all, which permits police to choose almost anyone to stop and investigate and asserting that it is outside the authority to limit the size or effect of codes of law); Jordan B. Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 745 (2015) ("The control, stigma, and condemnation that stems from exercises of police authority and discretion can jeopardize perceptions of personal security in entire communities. These feelings are only exacerbated when police officers have discretion to engage in aggressive policing tactics for any suspected violation of an ordinance or law—civil or criminal. Under such circumstances, civilians who are vulnerable to over policing are pressured to negotiate their everyday behavior in public spaces to avoid being subjected to controlling, aggressive, and harmful policing tactics. For instance, in traffic contexts this might mean that people of color refrain from driving on particular streets at particular times, or refrain from driving at all at particular times, to avoid being subjected to pretextual traffic stops and other demeaning police interactions.").

60. *See* United States v. Thatcher, 28 M.J. 20, 22 (C.M.A. 1989) ("It is time-honored precedent of this Court that a servicemember possesses a Fourth-Amendment right to protection against unreasonable searches and seizures."); *see also* Sharon Finegan, *Closing the Inventory Loophole: Developing A New Standard for Civilian Inventory Searches from the Military Rules of Evidence*, 20 GEO. MASON L. REV. 207, 229–30 (2012) (quoting United States. v. Thatcher, 28 M.J. 20, 22 (C.M.A. 1989)); MIL. R. EVID. 311(a)(2).

61. *See* MIL. R. EVID. 311(a)(2).

62. *See* United States v. Rendon, 607 F.3d 982, 991 (4th Cir. 2010) ("Although an inspection may properly be designated to confiscate contraband, it may not serve as a search undertaken pursuant to a particularized suspicion of a person or a crime. Such searches are governed by Military Rules of Evidence 314 and 315 and by the more generally applicable principles of the Fourth Amendment. And if such a search is conducted through the subterfuge of an inspection, a violation of the Fourth Amendment can result.") (citations omitted); *see also* MIL. R. EVID. 313(b)(2).

63. MIL. R. EVID. 315(a).

may also take the form of an authorization issued by the commander with authority over the area to be searched.[64] These requirements, derived from the Fourth Amendment, are enumerated in the Military Rules of Evidence, rules established by the President pursuant to the authority delegated by the Uniform Code of Military Justice.[65]

What would not surprise most people is that service-members are routinely subjected to inspections initiated by commanders to ensure the mission readiness of the military unit.[66] Military inspections take many forms, including inspections of barracks, inspection of unit areas generally, and even mandatory urinalysis testing of members of the unit. An inspection, unlike a search for evidence, may not be motivated by a suspicion of wrongdoing.[67] Instead, the motivation must be twofold: first, to validate compliance with all laws and regulations; second, to deter service-members from engaging in activity inconsistent with laws and policies.[68] Thus, the ideal outcome of any inspection is that no evidence of violation or wrongdoing is discovered. In contrast, the ideal outcome of a probable cause search is to discover the suspected evidence or contraband.

When an inspection is conducted for legitimate purposes—to ensure the health, welfare, and mission readiness of a military unit—the ideal outcome of *not* discovering contraband means that *if* contraband is discovered, it may be used as evidence in military criminal trials (courts-martial).[69] This is because the lawful exercise of inspection authority indicates that the discovery of the evidence was an incidental—as opposed to primary—result of the inspection. However, like the broad authority to conduct a traffic stop, the authority to order inspections is relatively unlimited. And like the traffic stop, that authority can be subject to abuse. A commander who suspects wrongdoing by a service member or in the unit generally can easily bypass the more demanding probable cause and authorization requirements for an evidence search and simply order an inspection. If the discovery of the suspected contraband could then be used as evidence in a court-martial, why would a commander ever follow the evidentiary search requirements? In other words, like the traffic stop, inspections are ripe for abuse as the result of a pretextual motive.

Recognizing this problem, the Military Rules of Evidence provides a rule that is designed to protect service-members from pretextual abuse of the commander's broad inspection authority. Military Rule of Evidence (MRE) 313 specifically addresses inspections:

---

64. MIL. R. EVID. 315(d).

65. 10 U.S.C. § 836.

66. Finegan, *supra* note 60, at 230 (2012) ("[I]nspections conducted in order to maintain discipline and order are a routine part of a servicemember's life.").

67. MIL. R. EVID. 313(b)(2); Finegan, *supra* note 60, at 229 ("The rule further emphasizes that inspections are not permitted for the purpose of finding evidence of criminal activity on the part of the servicemember.").

68. MIL. R. EVID. 313(b).

69. MIL. R. EVID. 313(a).

> Lawful Inspections. An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle.[70]

The rule then indicates that:

> Evidence obtained from lawful inspections and inventories in the Armed Forces is admissible at trial when relevant and not otherwise inadmissible under these rules. An unlawful weapon, contraband, or other evidence of a crime discovered during a lawful inspection or inventory may be seized and is admissible in accordance with this rule.[71]

However, to guard against pretextual abuse, the rule then creates a presumption of inadmissibility for such evidence in certain circumstances:

> The prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule if a purpose of an examination is to locate weapons or contraband, and if: (i) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (ii) specific individuals are selected for examination; or (iii) persons examined are subjected to substantially different intrusions during the same examination.[72]

This rule reflects a compromise between the legitimate interests of the command in conducting inspections and the equally legitimate interest of the service-member in being protected from a pretextual inspection that is, in fact, a subterfuge search. The balance is reflected in the fact that the rule imposes no absolutes: a commander may conduct a legitimate inspection even after receiving a report of criminal wrongdoing in the unit, or may—in the course of an inspection—subject a service-member to a substantially different intrusion in terms of scope and/or duration as compared to others subject to inspection, or direct the inspection to specific service-members. But these situations trigger suspicion that the inspection was, in fact, a pretext to conduct a search without satisfying the normal cause and authorization requirements. That suspicion, in turn, results in the imposition of presumptive invalidity of the inspection with a corresponding burden imposed on the prosecution to rebut that presumption. To overcome this burden, the prosecution must affirmatively prove the inspection was *not* ordered pursuant to a pretextual motive.

The relationship between this approach to guard against pretextual military inspections and the traffic stop/consent scenario may not seem obvious, but it

70. MIL. R. EVID. 313(b).
71. MIL. R. EVID. 313(a).
72. MIL. R. EVID. 313(b)(3)(B).

does exist. Like the inspection ordered following the report of criminal misconduct, when police obtain consent that is unrelated to the objective basis for a traffic stop, it raises analogous suspicion that the stop was used as a pretext to gain access to the suspect in order to request that consent. And, like the inspection, if consent is obtained the initial stop will blossom into a general search.

As noted above, in the traffic stop/consent context there is very little constraint on police utilizing their authority to engage in a search without good cause, even assuming they are in fact seeking evidence of criminal activity. What this relationship between traffic stops and consent indicates is that it is not merely the pretextual stop that is troubling, but the exploitation of the stop to secure what is normally quite easy to secure: consent. The combination of these two authorities creates a troubling "license" for police to engage in what amounts to an inspection: a suspicion-less exploration of the area within the scope of consent, which in the case of the traffic stop will normally include the entire car. But of course, it is not a true inspection within the definition of MRE 313 because the motive for the exploration is the discovery of evidence; the exact motive that distinguishes an inspection from a genuine search.

MRE 313's approach to the risk that inspections will be abused is to impose a presumption of invalidity in three situations which objectively indicate that the motive may have been to discover evidence. In the context of a traffic stop, it is the request for consent itself that calls into question the genuine motive for the stop. Would the method adopted to check abuse of military inspections provide a template for checking police exploitation of the combined authority to stop motorists for traffic offenses and then obtain consent to search? Perhaps. Moreover, such an approach is an appropriate option for lawmakers in light of the low likelihood the broad police authorities derived from Supreme Court decisions will be modified.[73]

---

73. *See generally* Dru Brenner-Beck, *Borrowing Balance, How to Keep the Special-Needs Exception Truly Special: Why A Comprehensive Approach to Evidence Admissibility Is Needed in Response to the Expansion of Suspicionless Intrusions*, 56 S. TEX. L. REV. 1, 69 (2014) (asserting that Rule 313 provides a framework with a clear and convincing standard of proof adaptable to civilian law enforcement which would encourage police to better document and plan valid searches while discouraging pretext stops) ("The existence of Rule 313 provides a framework to challenge in the same way that the Supreme Court's prophylactic rule in Miranda provided the framework to challenge unwarned custodial confessions. The structure of the proposed rule also creates incentives for police to plan and implement their special-needs searches to meet the requirements of the exception. The heightened burden to rebut the presumption will encourage documentation of valid search programs, in the same way that military commanders have incorporated the requirements of Rule 313 into the planning of unit inspections. . . . This is a true example of the rule of law being the best tool to reconcile the needs of security and liberty."); *cf.* Finegan, *supra* note 60, at 239 ("Rather than focusing solely on the policies in place authorizing the government to conduct these searches, the Military Rules of Evidence provide specific procedures that ensure the inspections are not used as pretext to conduct an illegal search. By placing the burden on the government to show that an inspection was conducted for legitimate purposes, and holding it to a clear and convincing standard of proof, the military has devised a method of safeguarding Fourth Amendment protections for its servicemembers in courts-martial proceedings. Adapting this rule for use in determining the legality of inventory searches in the civilian justice system would ensure that constitutional protections are preserved and that suspicionless administrative searches are not used to circumvent those protections.").

IV. CONSENT, PRESUMPTIONS, AND BURDENS

Because consent is an exception to the normal warrant and probable cause requirements for rendering a search reasonable, the burden of proving the validity of consent is always on the government.[74] In practice, this is not a difficult burden to satisfy. Since the *Schneckloth* decision, proof that the consent was more likely than not voluntary is all that is required. Normally, the scope of the consent is implied from the request, which in the case of an automobile will rarely be interpreted narrowly.[75] Instead, a request for, and grant of, consent will normally extend to the entire automobile.

As noted above, the test for valid consent is voluntariness. But in practice, that test is presumptively satisfied with evidence the suspect granted consent. In other words, the grant of consent, absent some evidence of police overbearing, is a virtual ticket to the admissibility of any evidence discovered by the subsequent search. This means that a defendant bears a practical burden to produce evidence that raises a plausible issue of coercion. Thus, while the government may bear the ultimate burden of persuasion, it is a burden that is easily satisfied in most cases and one that imposes an implied burden of production on the defendant. Indeed, court decisions holding consent was coerced are few and far between.[76]

Because a warrantless search is already presumptively unreasonable, the presumptive invalidity of an inspection in certain situations is inapposite to the consent search situation. However, it is the heightened burden required to justify the inspection as legitimate that provides a potentially useful mechanism for limiting the exploitation of traffic stop/consent authority. Specifically, when prosecutors rely on consent to justify a search that leads to discovery of evidence in a car subjected to a traffic stop, a clear and convincing proof requirement could be imposed to assess the voluntariness of the consent. This requirement, by necessitating clear proof of a voluntary decision to allow police to conduct a search, would arguably place greater probative value on evidence of police deception or manipulation in securing the consent.

One of the likely reasons why it is so difficult to challenge the voluntariness of consent is because police rarely have to engage in conduct that would qualify as coercive under the traditional due process voluntariness test. As noted, violation

---

74. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (citing Bumper v. North Carolina, 391 U.S. 543, 548 (1968)) ("[T]he State concedes that '(w)hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.'").

75. United States v. Sanchez, No. CR 18-03-BLG-SPW, 2019 U.S. Dist. LEXIS 64315, at *4 (D. Mont. 2019) ("The permissible scope is generally defined by its expressed object. *Jimeno*, 500 U.S. at 251. When somebody consents to the search of a car, that consent is construed broadly to include the search of containers contained within the car. *Id*. As the Supreme Court recognized, '[c]ontraband goods rarely are strewn across the trunk or floor of a car.' *Id*. (quoting *United States v. Ross*, 456 U.S. 798, 820 (1982)). Therefore, when somebody consents to a search of their car for contraband, he should expect the officers to search compartments and containers within the car. This includes the interior of the car, the glove box, and the trunk. *Cannon*, 29 F.3d at 477.").

76. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 221–22 (2001).

of this test requires evidence that indicates police overbore the free will of a suspect. In the confession context, short of actual or threatened physical harm, this normally requires proof of relentless, long-duration questioning that exploits the fatigue and sense of isolation of the suspect. It is clear why such evidence will rarely be implicated in relation to a request for consent: it is highly unlikely that type of long-duration interaction will be utilized to obtain consent.

Instead, most roadside encounters where police request consent following a traffic stop are so short in duration that they occur during the scope of the traffic stop itself. But this does not mean that police tactics used in obtaining consent do not potentially raise concerns about the genuine voluntariness of the consent. This is not because of outright coercion, but instead because of a combination of influences: the inherent (albeit not unlawful) coercive effect of the stop itself; the general citizen ignorance of the law of consent; the exploitation of the absence of any obligation to notify the suspect of a right to decline the request; and police suggestion that denial of consent creates an inference of guilt. Thus, in the abstract, the *Schneckloth* Court's rejection of notice of a right to decline the consent request as an essential requirement for establishing valid consent is understandable. With voluntariness established as the test for consent, no single factor could be dispositive. But in practice, this opened the door for police to leverage a suspect's ignorance or misunderstanding of fundamental constitutional rights to obtain consent with relative ease. Such ignorance or misunderstanding is not, of course, attributable to the police. But when police conduct reinforces such misunderstanding, it should call into question the true voluntariness of the consent.

Particularly perturbing are police statements made in the course of obtaining consent that suggest a denial of consent will either provide police with a basis to search or indicate the suspect has something to hide. These statements are ploys to exacerbate and exploit a suspect's common misunderstanding of rights in that situation. Such statements are obviously intended to at best confuse, and at worst deceive, the suspect into believing denial of consent will only aggravate his or her plight. Why else would police tell a suspect that denial of consent makes no sense if there is nothing to hide? The inference to the average person is clear: if I deny consent, it will confirm the police officer's suspicion and lead to more trouble, perhaps in the form of the officer initiating a search without consent or even initiating an arrest.

Such statements appear to have little chance of undermining a claim of voluntary consent if and when the interaction becomes the focus of judicial inquiry in the form of a motion to suppress. A brief, otherwise non-coercive interaction will rarely be assessed as coercive merely because of the use of such dialogue by the officer. It should therefore be no surprise that such tactics are routinely used by police when seeking consent. But if the burden of persuasion on the question of voluntariness were raised to a clear and convincing standard, such manipulative tactics would be subject to more rigorous scrutiny.

Imposing a more demanding test for assessing the voluntariness of consent would not mean that consent could never be valid following a traffic stop. What it

would mean is heightened scrutiny of police tactics that result in consent, and greater judicial discretion to find a lack of voluntariness, especially when evidence indicates police exploited a suspect's ignorance or confusion. This change might actually lead police to be more cautious with the type of dialogue they engage in when requesting consent, or perhaps make it common practice to inform the suspect of the right to decline the consent request. This would, in turn, enhance confidence in the voluntariness of consent when obtained. But it would also increase the likelihood that suspects would deny the request, which would, in turn, mitigate the existing incentives for using traffic stops as a pretext to obtain consent.

Importantly, like MRE 313, not all situations would trigger this heightened burden on the prosecution.[77] Two requirements would be necessary. First, the encounter began as a routine traffic stop. Second, the request for consent was unrelated to either the traffic offense or any other information the officer obtained during the identification check. These two requirements would limit the increased burden to only those situations where the request for consent supports the inference that the police officer is using consent to engage in a search based solely on some hunch. If the stop was initiated based on reasonable suspicion the driver or passenger was engaged in criminal activity, then the request for consent to confirm or negate that suspicion would be logical and appropriate. The same would apply if the request for consent was based on a suspicion that evidence related to the traffic stop was in the car or if during the identification check new information came to light creating a reasonable suspicion. In these situations, the normal preponderance standard would apply in assessing the validity of consent.

However, when a request for consent appears purely incidental to the reason for the traffic stop or any new information obtained after the stop, heightened scrutiny is justified. Why? Because it protects citizens from the danger that currently exists of police using pretextual traffic stops to engage in suspicion-less searches. While the potential of pretextual motive for the stop is not something that can be challenged based on existing jurisprudence, this should not mean that leveraging such a stop to engage in such a search need be beyond scrutiny. A clear and convincing burden of persuasion to establish the voluntariness of consent would, like the analogous burden imposed in MRE 313, serve as a check on the exploitation of Fourth Amendment authorities in a way that undermines the legitimacy of the balance between privacy and public security that amendment is intended to strike.

---

77. 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.2(c) (6th ed. 2020) ("[S]ome authority is to be found seeming to require more than a preponderance of the evidence at least under certain circumstances. In particular, at least some courts have found the higher clear-and-convincing-evidence standard appropriate when the prosecution's claim is that the search was consented to, that the evidence was obtained after a voluntary abandonment of it by the defendant, that a Terry stop was justified, or that the illegally obtained evidence would inevitably have been lawfully discovered. The policy judgment underlying these cases—that a higher standard is appropriate in situations where it would be particularly easy for the police to manipulate events or fabricate an interpretation of events which could not be effectively challenged by the defendant—does not conflict with the Saltzburg reasoning that the preponderance standard should suffice as to such issues as whether the police had probable cause.") (emphasis omitted).

V. CONCLUSION

This Essay began by highlighting the importance of actual and perceived police legitimacy; an importance that is perhaps more significant today than in any time previously. The exploitation of broad traffic stop authority derived from the combination of traffic codes loaded with minor offenses and the *Whren* Court's categorical rejection of considering an officer's subjective motive when assessing the reasonableness of a stop, is central to the perception of legitimacy. For most citizens, a traffic stop is the most likely encounter they will have with police engaged in law enforcement. When police conduct traffic stops, it is unsurprising that they would seek consent to address any suspicion of wrongdoing they might have, even if that suspicion in no way qualifies as reasonable within the meaning of the Fourth Amendment.

In the abstract, engaging in this tactic is not necessarily problematic. After all, if a citizen chooses to waive the right to require police have good cause before conducting a search, why should the police not be permitted to take advantage of the opportunity? But in practice, it is the ease with which the voluntariness of consent is established that allows police to exploit a pretextual traffic stop to engage in an otherwise unlawful search. By using a little sleight of hand—the "I assume you have nothing to hide" narrative—police can exploit not only the broad authority to initiate the traffic stop, but the equally permissive test for establishing the voluntariness of consent.

It is well established that voluntariness of consent does not require police to provide notice of the right to decline the request; notice is just one factor in the totality of the circumstances. Drawing from confession voluntariness analysis, deception is rarely sufficient to establish that a suspect's will was overborne. But in the consent context, it is all too easy for police to exploit a suspect's ignorance of the consequence of denying consent by simply suggesting that only someone with something to hide would so deny. When coupled with the broad authority to initiate a traffic stop, this exploitation becomes all the more troubling and contributes to the perception that vehicle occupants are at the mercy of a police officer who, based on a hunch, decides to "light them up."

The Military Rule of Evidence governing the admissibility of evidence obtained during the course of a military inspection, provides a template for how to mitigate against the risk of pretextual abuse resulting from these combined stop and consent authorities. By imposing a heightened burden on proving the legitimacy of an inspection, the rule is specifically intended to create a disincentive for commanders to exploit their broad inspection authority and engage in a subterfuge search. Adopting this approach to impose a heightened burden of persuasion on the issue of the voluntariness of consent will ideally produce an analogous disincentive for police to engage in pretextual traffic stops in order to gain the opportunity to obtain consent. In doing so, it will strike a more credible balance between legitimate police investigatory authority and the citizen's protection against general searches, and will therefore contribute to enhanced police legitimacy.