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The Consent Search Warning Argument:

Procedural Justice and What a Warning Might Do for Police Legitimacy

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Abstract

In 1966, the Supreme Court delivered the landmark *Miranda v. Arizona* decision that created the Miranda warning, which reminds citizens of their rights to remain silent and have an attorney present during custodial interrogations. However, through *Schneckloth v. Bustamonte* in 1973, the Court decided not to create a mandatory warning that reminds citizens of their right to refuse a consent search. Through these cases and the others discussed, the Court has often argued over whether or not these types of warnings impair police work, whether the contexts surrounding these instances amount to coercion, and whether or not a warning is constitutionally necessary. This paper explores the practicality and voluntariness premises but does not discuss whether or not a consent search warning should be considered constitutionally mandatory. After reviewing the research, consent searches inherently involve some amount of compulsion but are not impractical, as some have claimed. Since research shows that a warning would not influence a significant change in the amount of consent searches or make these situations any more voluntary, any argument for or against a warning should not be based solely on those grounds. Instead, this paper introduces a new aspect: procedural justice. A warning could have an impact in the areas of procedural justice and police legitimacy. Accordingly, police agencies and other police regulatory entities should adopt consent search warning rules in order to increase their own legitimacy and citizens' perceptions of procedural justice.

Keywords: consent search, procedural justice, *Schneckloth v. Bustamonte*, Miranda warning

The Consent Search Warning Argument:

Procedural Justice and What a Warning Might Do for Police Legitimacy

Issues of police relations with the public have recently become a pressing concern. Highly publicized cases of police shootings have dominated the mainstream media, and one could hardly watch the news in the past two years without mention of the Black Lives Matter movement. While these headlines have mainly focused on police use of force, these issues have brought to light tensions among police and the communities they serve, particularly with minorities. Weitzer (2002) shows that incidents of police misconduct can have lasting negative effects on public confidence in the police, particularly among African-Americans. Often times, government agencies try to mend these controversies by changing police leadership, promoting the hiring of more minority police officers, or implementing more independent police review boards. This thesis discusses another possibility that could help alleviate tension between police and the public: consent search warnings.

Tensions between police and minority citizens are not limited to issues of use of force. While the news headlines in recent months have focused on highly publicized cases of police shootings of unarmed minorities, efforts to relieve tensions in the wake of these controversies should not overlook other areas of concern besides use of force. One such area is the consent search.

In 2011, of the U.S. residents age sixteen or older, 62.9 million had at least one contact with the police in the prior twelve months, and half of those most recent cases were police-initiated (Langton & Durose, 2013). The percent of these residents with police contact was higher in this year than in 1999, 2002, 2005, and 2008 – the previous years that the study was conducted (Langton & Durose, 2013; Eith & Durose, 2011). The percentage of individuals that have come

in contact with police has risen, and police can legally seek consent to search the person, their car, their house, etc. in all of these cases.¹ Finding an exact, reputable number of consent searches conducted annually is difficult, (if not impossible), but scholarly estimates have often found that the number is quite large. Some significant findings estimate that consent searches amount to the majority of all types of searches conducted annually. While some jurisdictions require a certain standard, like reasonable suspicion, to seek consent, others have adopted policies for police to ask for consent in all traffic stops (Nadler, 2003). Many people might dismiss the threatening nature of this possibility in the belief that they do not have anything illegal to hide from police, but consent searches are instances where police are seeking a waiver of constitutional rights that protect citizens from unreasonable government intrusion into private aspects of life.

In a quarter of the street stops that were included in the 2011 data, people believed the police behaved improperly, but less than 5% of any type of stop resulted in a formal complaint. Additionally, when drivers were searched, they were significantly less likely to believe the police behaved properly regardless of their race, sex, or age (Langton & Durose, 2013). These findings are alarming in that, although, many people might find their stop to be handled improperly, only a small portion of people stopped will actually file a complaint so that their unpleasant encounter is more likely to be formally addressed. Although instances of police involved shootings are more attractive to the mainstream media headlines, the prevalence of police-initiated contact, perceived mishandling of those instances, and the unlikeliness that citizens will file a formal complaint reveal a more likely threat to police-public relations.

¹ Based on the federal standard. Some jurisdictions require standards like reasonable suspicion for police to request consent to search, as will be discussed later.

In 1946, the Supreme Court decided that consent searches were a valid waiver of Fourth Amendment rights (*Zap v. U.S.*, 1946.; *Davis v. U.S.*, 1946). Thus, police can seek a citizen's permission to conduct a search even when there is no probable cause or search warrant.² In 1966, the Supreme Court made a landmark decision in *Miranda v. Arizona* that introduced the Miranda warning, an informed warning addressing Fifth, Sixth, and Fourteenth Amendments rights. Since this decision, police have been required to give this warning during custodial interrogations. When *Schneckloth v. Bustamonte* made its way to the Court in 1973, the Supreme Court decided not to create such a rule for consent searches to afford comparable protections of Fourth Amendment rights. The Supreme Court has reviewed different cases related to the implementation of warnings and has often based their opinions on their practicality (whether they impair police work), how voluntary the situation is, and if warnings are constitutionally required. While this thesis will mention the last premise, its focus is not to discuss if warnings should be interpreted as constitutionally required. The focus, instead, is examining truth behind some of the other claims. After applying empirical evidence, consent searches are not impractical as some have argued. Additionally, there are some inherent coercive aspects that factor into search consent. Despite this, data shows that warnings are not effective in eliminating this coerciveness. Because of this, an argument for requiring consent search warnings should not be based on these claims. This thesis differs from other papers on the subject by dismissing these

² The Fourth Amendment requires probable cause for police to obtain a search warrant in order to conduct a search. There are, however, legal exceptions to obtaining a warrant. For instance, exigent circumstances (like destruction of evidence) or other types of searches (like a search incident to arrest) would be legal exceptions if probable cause still exists. Searches based off of consent are also legal exceptions to obtaining a warrant. Additionally, police are allowed to conduct a limited pat-down of a person to search for weapons if there is reasonable suspicion (a lower threshold than probable cause) that they might be armed and have committed, are committing, or will commit a crime (i.e. a "Terry-stop," "Terry-search," or "stop-and-frisk"). Laws surrounding stops are separate. For example, for a traffic stop, police would still need a legal reason for stopping someone (i.e. probable cause, reasonable suspicion) and could legally conduct a search if any of the above standards were met. Police are allowed to talk to people on the street and ask them questions, but people are not required to answer the questions (Kanovitz, 2012).

arguments and introducing a new one. By applying the principles of procedural justice, a consent warning could have a positive effect in the areas of public opinion and legitimacy in the police.

Supreme Court Case Law

Prior to exploring specific research findings on the subject, a brief recap of Supreme Court case law on consent searches and police warnings will reveal the main arguments surrounding the topics. There is a plethora of Supreme Court cases that are relevant to this topic. In sake of succinctness, only a limited number of cases whose central constitutional question directly relate are discussed. These cases were specifically chosen because they question either whether or not an informed warning should be required in certain circumstances or on what basis consent is considered voluntary. Those cases are *Miranda v. Arizona* (1966), *Schneckloth v. Bustamonte* (1973), *Florida v. Bostick* (1991), *Ohio v. Robinette* (1996), *Dickerson v. U.S.* (2000), and *U.S. v. Drayton* (2002).

The creation of a required warning of constitutional rights by police began in 1966 through *Miranda v. Arizona*. In four separate cases, defendants Ernesto Miranda, Michael Vignera, Carl Calvin Westover, and Roy Allen Stewart, confessed to crimes without being warned of their constitutional rights. In a landmark case, the Supreme Court voted 5-4 that confessions by suspects in custodial interrogations are not admissible unless the officer reminds the suspects of their constitutional rights and ensures that they understand them. Specifically, those rights are their rights to remain silent and to have an attorney present. If the suspect chooses to invoke their rights, questioning must stop. The Court mandated the issue of a warning, now commonly known as the Miranda warning or Miranda rights, for officers to issue when conducting a custodial interrogation.

Chief Justice Warren delivered the opinion of the Court, holding that during custodial interrogations individuals are significantly deprived of certain freedoms, jeopardizing Fifth Amendment protections. According to Warren, Fifth Amendment protections are so fundamental that safeguards need to be enacted in order for people to fully understand the adversarial nature of the encounter. That is, that the person they are speaking to does not necessarily have their best interests in mind. The Court considered custodial interrogations to be inherently coercive. Warren stated that the only way to assure that individuals know their rights and understand them is through a warning and no amount of circumstantial evidence could similarly prove this understanding. Protecting Fifth Amendment rights, according to the majority opinion, enhances the integrity of the future court proceedings. However, four of the Justices on the Court did not agree with the majority. Much of the dissenting opinions asserted that creation of this warning cannot justly be read in the Constitution, and that the Court created a new law in this perceived misreading of the Constitution. In Justice Harlan's dissenting opinion, he argued that these rules enacted are not to protect people from brutality or coerced confessions, but instead to "negate all pressures" and that "there can be little doubt that the Court's new code would markedly decrease the number of confessions" (*Miranda v. Arizona*, 1966, p. 505; *Miranda v. Arizona*, 1966, p. 516). Drawing on the significant role confessions play in solving some crimes, Harlan called this decision a "hazardous experimentation" (*Miranda v. Arizona*, 1966, p. 517). Discussion of *Miranda*'s exact impact in law enforcement and the truth behind Justice Harlan's claims are later discussed.

A similar debate came into question through *Schneckloth v. Bustamonte* (1973). Bustamonte and five other passengers were pulled over. The officer then asked for consent to search the vehicle, to which one of the passengers consented. Stolen checks were found in the car. The

defense then argued that the checks should be inadmissible. The question then became on what standard the prosecution needs to prove consent was voluntary – if proving that the defendant knew of his right to refuse consent was necessary. The Court decided that the standard for voluntary consent was reasonableness based on the totality of the circumstances and the prosecution does not necessarily need to prove the defendant knew of their right to refuse consent.

Like *Miranda*, the Court was similarly conflicted in their 6-3 decision in *Schneckloth*; however, this time the majority ruled against creating a warning for consent searches. The Court held that while knowledge of one's rights is a factor to consider in assuring voluntariness, this factor is not determinative by itself. Drawing on how vital the practice of consent searches is to law enforcement – especially when officers lack probable cause for a search – Justice Stewart stated in his opinion that creating a *Miranda*-type warning for consent searches would be “thoroughly impractical” (*Schneckloth v. Bustamonte*, 1973, p. 231). He asserted that requiring proof of a defendant's knowledge of their right to refuse consent would impair prosecution of cases where the state is unable to prove this knowledge but also finds no evidence of coercion. Stewart also argued that although the *Miranda* court noted that custodial interrogations are inherently coercive, there is no logical rationale to believe that consent searches share that quality (*Schneckloth v. Bustamonte*, 1973).

Justice Brennan, in his dissenting opinion, noted his disbelief that citizens could rightfully waive a constitutional right lacking knowledge of their ability to do so. Justice Marshall agreed with this consideration in his dissenting opinion, and furthered his discussion that the question of this case was not whether or not actions taken by the police interfered with the defendant's voluntariness, but whether or not a lone question seeking search consent validates a search. He

supported his discussion on that matter by arguing that consent means a “knowing choice,” and that knowledge of any alternatives of a matter establishes a decision. Justice Stewart’s opinion challenged these claims, stating that courts do not overlook whether or not one had knowledge of their right to refuse consent; circumstantial evidence and factors such as low intelligence or other indicative factors of one’s knowledge of their right refuse have traditionally been considered in assessing the totality of the circumstances (*Schneckloth v. Bustamonte*, 1973). Taking into consideration the perspective courts often by this standard, later discussion of empirical findings will evaluate the effectiveness of this standard of voluntariness. Marshall contended that assuming that proof of one’s knowledge of the right is required; this burden of proof should rest on the prosecution’s shoulders, essentially through police providing a search consent warning. Using the example of the FBI’s routine use of consent search warnings in the past, Marshall dispelled Stewart’s claim that such warnings would be impractical. He further argued that the argument of practicality is focused on the police benefitting from the ignorance of the public. It is the nature of the Constitution to protect citizens’ rights and, thus, it eliminates some measure of convenience for the police (*Schneckloth v. Bustamonte*, 1973). Further examination of this debate over the practicality of effective warnings will employ research on *Miranda*’s implications and examples of consent search warnings.

Decades later, the debate over voluntariness of consent reappeared in *Florida v. Bostick* (1991). Officers conducting a routine bus sweep asked Bostick for consent to search his luggage and actually did inform him of his right to refuse. After consenting, the officers found drugs in his luggage. The question before the Court was whether or not the police could randomly ask bus passengers for search consent, given a reasonable person feels free to leave. Again reaffirming the reasonableness standard based on the totality of the circumstances, the Court decided that a

reasonable person would have felt free to end the encounter – meaning the consent to search was valid so long as, on remand, the Florida Supreme Court later found Bostick’s consent voluntary based on this standard.

In the opinion of the Court, Justice O’Connor argued that the focus of the issue at hand was not whether or not a reasonable person would have felt free to leave since, given they were seated on a bus intending to depart, passengers would have no intention of leaving the bus if police were not present. Instead, O’Connor argued that the correct focus was whether or not a reasonable person would have felt free to terminate the encounter. The Court consequently decided that the officers’ conduct gave no inclination that the passengers did not have a right to not cooperate. The dissent all but agreed with the majority’s focus on whether or not a reasonable person would have felt free to terminate the encounter, but argued that the better question would have been whether they would have felt free to do so without a reminding of their rights. The dissenters stated that a reasonable person would not feel free to terminate the encounter if they were not advised of their rights, given the show of authority by the officers through their positioning on the bus, and display of their guns and badges (*Florida v. Bostick*, 1991).

The Court again considered a similar question in *Ohio v. Robinette* (1996). Robinette was pulled over for speeding, for which the officer had Robinette step out of the car to be issued a verbal warning in front of the officer’s dash cam. After Robinette returned to the car and the officer returned his paperwork, the officer then asked for consent to search the car. Robinette consented, and drugs were found in the car. The issue at hand was primarily focused on how the officer phrased his question, “One question before you get gone.....?” (*Ohio v. Robinette*, 1996, p.35). On appeal, the Ohio District Court of Appeal and the Ohio Supreme Court both agreed

that the evidence found in the car should be suppressed since the officer had not informed Robinette that he was free to leave prior to seeking consent. The Ohio Supreme Court subsequently required officers to issue a warning prior to asking for consent to search. The U.S. Supreme Court overturned this decision by reaffirming their decision in *Schneckloth* that officers do not need to inform citizens they are free to go before seeking search consent. Thus, the Court again ruled that voluntariness of one's statements were based on reasonableness and measured by the totality of the circumstances. Again, the Court's rationale was that it would be unrealistic for officers to be required to issue a warning of one's rights. Justice Stevens was alone in his dissent by disagreeing that a reasonable person would have felt free to go given the circumstances, and that an answer to the question was implicitly sought before the defendant was free to leave. Stevens agreed with the Ohio courts that most people would assume they were not free to leave until the officer was done asking questions. Justices Stevens and Ginsburg, in their dissenting and concurring opinions, respectfully, stated that the Constitution does not require warning of Fourth Amendment rights but also does not prohibit them. If legislatures in states were to adopt such policies, they would not be unconstitutional. Furthermore, they both stated that if state courts determine their state constitutions to require such warnings it would not be against the *Robinette* decision or the U.S. Constitution. However, the Ohio Supreme Court chose not to keep the warning rule (*Ohio v. Robinette*, 1996).

In 2000, the Court's previous decision in *Miranda* came into question again as they decided whether or not to uphold that precedent in *Dickerson v. U.S.* The defendant, Dickerson, was interrogated by FBI agents in relation to bank robbery and gave incriminating statements without being read his Miranda rights. The government argued that his statements should still be admissible in court since 18 U.S.C. Section 3501 – Congressional legislation passed shortly after

Miranda – stated confessions are admissible so long as they were made voluntarily. The question before the Court then was if Congress could supersede the Supreme Court’s decision through legislation. Was the *Miranda* decision constitutional law or court-made law? The Court decided that the *Miranda* decision was a constitutional right and that Congress could not overrule it through legislation. Interestingly, the Court claimed that the previous totality of circumstances standard was more problematic for law enforcement and courts in practice. The Court further decided not to overturn the *Miranda* decision as it became deeply rooted in American culture and the Court did not find compelling rationale to overturn the decision. As a result, Dickerson’s statements were not admissible.

Finally, *U.S. v. Drayton* (2002) was a chance for the Court to examine similar circumstances as *Bostick*. In this case, bus passengers Brown and Drayton were asked by officers conducting a routine bus sweep for consent to search their persons. Brown consented, and drugs were found as a result of the search. He was then taken into custody. Police asked for consent from Drayton, and he raised his hands up, seemingly signaling consent. Again, drugs were found on Drayton and he was taken into custody. The question that came before the Court was whether or not the consent to search was valid (i.e. voluntary) if officers had not reminded the defendants they could refuse to cooperate. The majority held that the Fourth Amendment does not require such a reminder and, thus, the search was valid.

The majority anchored much of its decision on the *Bostick* framework. Applying the test of whether or not a reasonable person would feel free to terminate the encounter with the officer, the Court noted that the police did not take any action that would have alluded to anything other than a voluntary encounter. The mere presence of an officer or the fact that the officer likely has a gun and a badge, as the majority argued, did not amount to coercion. Furthermore, the Court

declared that just because Brown was arrested did not make Drayton or anyone else on the bus seized. Justice Kennedy argued that, if anything, the fact that Brown was arrested should have raised Drayton's awareness of the consequences of police finding contraband on Drayton during a consensual search. In the dissenting opinion, Justice Souter pointed to the fact that when the officers boarded the bus, one stood in the back of the bus, one sat in the driver's seat, and one walked down the aisle to talk to the passengers. During this time, the bus driver was off the bus with all of the passenger's tickets. Given the totality of these circumstances and again applying the reasonableness standard, Justice Souter argued that no reasonable person would have felt free to terminate this encounter (*U.S. v. Drayton*, 2002).

Provided the arguments both for and against informed warnings, the Court has often debated over three primary premises: whether or not warnings should be read into the Constitution, whether or not certain situations or actions taken by the police are coercive (whether observably or inherently), and, finally, whether or not warnings hinder the capability of the police. Since the duty of interpreting the Constitution rests with the courts and the Supreme Court has historically taken a stance against consent search warnings, this thesis will not explore the constitutionality of a consent warning. Instead, sociological research is used to explore if a warning is impractical, and if the police conduct or the situation itself is coercive.

The Debate over Voluntariness of Consent

The Supreme Court has made many claims and has held opposing views by different Justices on how a reasonable person might have felt or how they would have reacted in certain situations presented before the Court in varying cases. Indeed, this issue could be questioned logically; why would a reasonable person, presumably knowing if a search is going to result in the unfolding of

incriminating evidence, ever consent to a search? Drawing on what Supreme Court Justice Frankfurter once said in *Culombe v. Connecticut* and Justice Stewart reinforced in the *Schneckloth* opinion, observing a “but-for” cause of voluntariness is truly inadequate as the majority of people would not give incriminating statements if it wasn’t for an official government action (*Schneckloth v. Bustamonte*, 1973). Practically speaking, it is very unlikely that somebody will walk into a police station and confess to a crime the police are not yet aware of. More likely, on the other hand, is that a person confesses during a police interrogation. With this in mind, this thesis does not consider voluntariness in this “utopian” sense, but rather, observes different pressures that factor into the issue of voluntariness. As Justice Stewart wrote in the *Schneckloth* decision, a voluntary decision will be considered “an essentially free and unconstrained choice by its maker” (*Schneckloth v. Bustamonte*, 1973, p. 225). Numerous experiments in social psychology and other empirical evidence present the argument that people often feel like they must cooperate with the officer, indicating a constrained choice by the decision maker.

Compliance with Authority

Compliance with authority is something that one learns at a young age. Young students listen to their teachers, people obey doctors’ orders, and employees listen to their employers. In many situations, compliance with authority is a logical sense to form decisions and take actions. In other situations, however, compliance has become so common and impulsive that it no longer makes sense. Perhaps you been driving and mindlessly following traffic laws out of habit instead of deliberately thinking about every single action. That is because certain behaviors are often scripted, and those scripts become influenced by social roles. Authority and subordinate social roles create certain scripts that influence how people are supposed to act in certain situations.

This explains why people do not always think about every action or decision they make and often act without conscious choice. The reason people do this is that it can have positive effects without necessitating complex cognitive processes, such as the example of mindlessly obeying traffic laws while driving. However, it can also have negative consequences (Nadler, 2003).

To begin, compliance with authority might be best exemplified by Stanley Milgram's famous experiment. Subjects were told to ask a confederate a series of questions and deliver an appearing real shock with increased intensity if the confederate incorrectly answered the subsequent question. If the subject tried to refuse to deliver the shock, the researcher, dressed in a white lab coat, kept encouraging the subject to continue. Most of the subjects continued all the way to the highest intensity shock, but all of the subjects continued after the confederate was seemingly being hurt by the shocks ("danger" was written on buttons in the higher-intensity shocks) (Milgram, 1963). This study has notoriously shown that people often act against their best interests and against their beliefs to comply with authority. While in this study, people complied with an authority figure wearing a white lab coat, comparatively, in consent search cases the authority figure is wearing a badge and a gun.

Another famous experiment observed if people would confess to something they knew they did not do. Kassin and Kiechel (1996) set up an experiment which participants were asked to type on a keyboard to supposedly measure reaction time, but not hit the "ALT" key (as that was said to have ruined the test). After a preset amount of time, the computer was set to stop working. The experimenter then accused the participant of pressing the ALT key. Participants were previously split into groups based on slow- and fast-paced reaction time groups (i.e. how fast the words were read during the typing portion). Once the experimenter accused the participant of pressing the ALT key and supposedly ruining the experiment, a confederate in the

room then either claimed they saw the participant press the key or didn't see the participant press the key. Of the seventy-five total participants, 69% signed a confession that they pressed the key (indicating to the researchers that they complied with authority), 28% told a second confederate outside the room that they had pressed the key (indicating to the researchers that they internalized the false confession), and 9% later confabulated to the experimenter false facts about how exactly they supposedly pressed the key. Subjects in the fast-paced group where the confederate claimed they saw the participant press the key were most likely to confess, internalize, and confabulate to pressing the key. Subjects in the slow-paced group where the confederate did not claim they saw the participant press the key were least likely to do either of these.

Through this experiment, Kassin and Kiechel (1996) showed that although none of the participants pressed the ALT key, around two-thirds of them confessed to doing so and some actually came to believe that they did so. A small portion of the participants even confabulated a story in coherence with their false belief. Although the outcome to confessing in this experiment was very low-risk, it does show that people sometimes will act against their presumed best interests to comply with authority (in this case the research experimenters). Even though it does not prove that any or all criminal confessions are coerced or involuntary, it does provide a reason to question the voluntariness of such acts in the face of authority.

The Actor-Observer Bias

One phenomenon that could also affect decisions is the actor-observer bias. That is, when explaining other people's behavior, people are often inclined to overlook invisible situational factors that could influence one's behavior in lieu of more overt internal factors. For instance,

one study showed recordings of confessions through the perspective of either the suspect or the interrogator. Higher amounts of coercion were perceived when the subjects observed the confession through the perspective of the suspect instead of the interrogator. In another experiment, subjects were shown to be more likely to overestimate the amount of beeps they heard in a laboratory setting if subjects before them also overestimated the amount of beeps they heard. Furthermore, outside observers came to believe that they would not be as influenced as the subjects were. Over several decades, one study asked subjects to write essays on content that they disagreed with. Compliance, in that case, was extremely high. In another, subjects were asked hypothetically if they would write an essay on something they disagreed with. In that case, the majority of participants predicted they would not. Thus, these studies show Nadler's point that by changing perspectives people are often inclined to misjudge the amount of autonomy people place in others' decisions and even inaccurately predict how they would act in a given situation. These findings represent disconnect between how observers perceive one's actions as voluntary and how the actor perceives those actions. People often overjudge one's perception of an "unconstrained" choice (Nadler, 2003).

Kagehiro (1988) highlights the fact that when judging the voluntariness of search consent, courts take the perspective of the observer. Accordingly, Kagehiro tested the differences between observer and consenter in a consent search by having subjects read and respond to different vignettes describing police requesting search consent of a home through either the perspective of observer or consenter. Additionally, Kagehiro tested if differences occur when the consent is requested specifically (with more details) or nonspecifically (providing less or vague details), and declaratively (as a statement) or interrogatively (as a question). This was accomplished by changing how the consent is requested differently across the groups. The most notable results

were that observers overestimated the consenters' perceived choice to revoke consent and the perceived permitted scope of the consented search. They also underestimated the likelihood that consenters would request more information about the search. Finally, when the request was phrased as a question instead of a statement, observers perceived the consenters as having more of a choice to give consent, and consenters were more likely to ask additional information or withhold consent. Thus, it can be inferred by the results of this experiment that courts are likely to overestimate the perceived ability to revoke consent and the scope of the search, and underestimate the likelihood that citizens would request more information about the search. This raises the question of what the citizen thought they were consenting to compared to what the search actually entailed.

It is important to note that the different methods of requesting consent in the previous study were not perceived as coercive to the experiment participants. However, other aspects of consent-seeking situations, like tone of voice, were not tested (Kagehiro, 1988). Although the subjects in this experiment did not perceive the statements as coercive, the actor-observer bias shows that the perception others view one's voluntariness is often questionable.

Social Validation

In addition to the actor-observer bias and people's general compliance with authority, social validation often constrains the decision making process as well. People sometimes make decisions in ambiguous situations by following others' decisions. If other people have already made a certain decision, or at least appeared to have, then one is more likely to make that decision. Again, this is not an elaborate cognitive process but more likely an automatic response to a situation. For instance, if you were walking down the street and just finished a can of pop

you might be faced with the decision to throw the pop can on the ground or wait until you find a recycling can. If it looks like other people have already littered, social validation theory argues you would be more likely to litter as well. One does not necessarily need to observe others doing an act, the perception of others doing it or even imagining others doing it is enough to influence one to comply – even if that is not what they intended to do (Nadler, 2003).

Support for this theory stems from Solomon Asch's well-known experiment on conformity. Subjects were asked to observe lines drawn on a board and determine which lines were the same lengths. When asked alone, subjects answered almost every one correctly. Asch gave the same test to other subjects but had several confederates give the same false answer prior to the subject giving their answer. In the vast majority of cases, the subject conformed to the group and gave an answer they knew was wrong but corresponded with the rest of the group (Asch, 1955).

Additionally, research shows that people often falsely predict that they would not fall victim to social influence if they were in the Asch experiment despite research showing that these predictions underestimate the reality of social influence in research subjects' responses to this experiment. Again, this study shows a similar point as before: people's decisions are affected by those around them even though many people will doubt the influence others have on them (Wolosin, Sherman, & Cann, 1975). This point again shows that the Court needs to realize that people do not always act according to their best interests. In the instance of the *Drayton* case, the police sought search consent from other passengers on the bus before confronting Brown and Drayton. Those passengers gave their consent, and no other passengers on the bus made any hesitation to comply with the officers. Social validation theory would lead one to believe that Brown and Drayton would mindlessly feel compelled to comply with the officers in this scenario because others have been observed to do so. The Court's current standard for voluntariness does

not employ empirical evidence showing social influence on one's decisions. To truly establish voluntariness in decision making, people must be more empowered to make a decision despite social influence that could guide them into a potentially dangerous decision.

Other Factors Constricting Voluntariness

There are additional factors that influence compliance. Empirical evidence shows that physical distance affects compliance, with less distance between people indicating higher rates of compliance. Particularly, evidence shows that people prefer to keep more distance from high-status people, like a police officer or authority figure. One interrogation tactic is to slowly move closer to a person while questioning them to highlight this discomfort. Other situations where people prefer to keep more distance during interactions include being backed into a corner, high stress situations, or being in an environment with a low ceiling – all of these factors are presumably present on routine “bus sweeps” such as the *Drayton* case. All of these factors are shown to lead to higher rates of compliance (Nadler, 2003).

Time is another factor that has been shown to influence decision making and compliance. This factor is relatable to almost anyone that has ever ordered food at a restaurant or had to make other split-second decisions. When an officer seeks consent from a suspect the countdown begins for the suspect's response. If the suspect avoids answering the question or otherwise evades a response they could likely be viewed as uncooperative. However, the pressure of time does not permit adequate cognitive processes for decision making. Studies show that when pressured by time, people prematurely end their decision making process before analyzing relevant information which they may have considered not given a time constraint (Nadler, 2003). Relatedly, police from a town in New Jersey once sent out consent forms to households with

teenage children asking for permission to enter the house if police received a report of underage drinking at that residence in an effort to curb underage drinking. Of the 2,700 consent forms sent, twenty were signed and returned. Comparing this small percentage of consent actually granted compared to the large percentage of consent granted for other searches implies that more time allows for a better decision making process and, in this case, could result in less consent granted (Hanley, 1994). It is important to note, however, that high rates of consent do not stand alone as evidence of coercion and that, in this study, consent was sought for permission to enter one's one at an unspecified time – notably more invasive than a search of one's person or car during a specific instance. Despite this fact, this example does show the influence of time in decision making. An informed consent warning would not likely eliminate any influence of time pressure for an on-the-spot decision about whether or not to grant an officer permission to search; however, it would likely slow down the pace of the encounter and relieve the citizen of some of the stress related to the encounter. This would be accomplished through requiring the officer to pause and deliver a scripted warning.

Discussion of the many factors and various studies about compliance and the very question of voluntariness itself are not to suggest that police act unethically or that their behavior is in itself coercive. Merely, as Nadler (2003) says, it's to emphasize the fact that, "an atmosphere interpreted as non-coercive or voluntary from the perspective of the police can at the same time be experienced as coercive and non-voluntary from the perspective of a reasonable (innocent) person who is the target of police suspicion" (p. 199). Many of these factors discussed are not the result of police brutality, but these studies indicate a certain level of inherent compulsion that constrains one's ability to make a free decision. People are naturally inclined to comply with authority. This is provoked through social validation, limited time to make decisions, or close

distance during interactions. The actor-observer bias also shows that courts are likely to underestimate the influence these factors have on decisions. These findings offer insight on one of the Court's basis for the consent warning argument. They do not suggest that a warning should be created without looking into other implications of a warning.

The Debate over Practicality of a Warning

Drawing from *Miranda*'s Impact

Exploring the impact *Miranda* has had on police effectiveness can help to predict what effect a consent search warning might have. Understandably, the *Miranda* decision was highly controversial and met with profound criticism. Immediately following the decision, several different studies sought to examine just what implications *Miranda* had on policing. A 1967 study by Yale Law School on the confession rate in New Haven, Connecticut found little impact in the number of confessions obtained immediately following the *Miranda* decision. Studies in Washington D.C., Los Angeles, and Pittsburg found similar results. A study conducted in Detroit found that the amount of confessions actually increased after *Miranda*. Further studies in areas such as Denver, Knoxville, Los Angeles, and other cities near the time of the *Schneckloth* decision in the 1970's found similar results. On the contrary, some writings in the 1980's suggested that these early *Miranda* evaluations understated its effect on law enforcement. Overall, the consistency of those findings contradicted what the *Miranda* dissenters and the *Schneckloth* majority claimed: warnings would be impractical and significantly harmful to police effectiveness (as cited in Gallini, 2013).

Unfortunately, much of the research on the effectiveness of *Miranda* in policing happened in the years soon following the decision, and empirical evaluations of the topic since then have

essentially became fruitless (Gallini, 2013; Time & Payne, 2002). Some scholars argued that the findings of these previous studies only examined short-term implications of the *Miranda* decision and, thus, should not be current cornerstone arguments in the *Miranda* controversy (Time & Payne, 2002; Thomas, 1996). Additionally, researchers have debated over the accuracy of these findings as some factors have not been constant across the boards. Those factors include counting all interrogations or only custodial interrogations, or counting total confession rate or only among suspects interrogated. However, once these factors are accounted for in the data, the studies overall do not reflect evidence of a *Miranda* effect (Thomas, 1996).

An additional study conducted while the Supreme Court was hearing *Dickerson* focused on Virginia police chiefs' opinions regarding *Miranda* and its implications on policing instead of just examining interrogations and police effectiveness in solving crimes. By reevaluating *Miranda* decades after the decision and at a time when the precedent was under question again by the Court, this study was able to consider how those in position to influence police officers – gatekeepers to the criminal justice system – perceived the effect *Miranda* had on their abilities to do their job. Although the opinions were somewhat mixed, the majority of the chiefs surveyed did not consider *Miranda* to significantly impair their ability to do their jobs and also supported the Supreme Court to uphold the *Miranda* precedent when deciding *Dickerson*. This study did not examine data related to crime rates or trends in confessions, but it showed that the majority of chiefs in this state did not perceive *Miranda* as having long-lasting effects to significantly impair their law enforcement duties (Time & Payne, 2002). In combination with the previous studies, the evidence suggests that the *Miranda* decision has not had a long-term impact of critically hindering police effectiveness.

This is not to say that *Miranda* has not affected policing at all. Leo has written many times about the nature of police interrogations and the related history of police professionalization. Deception, he argues, has replaced coercion. Police once relied on using the “third degree,” or physical coercion, to elicit confessions. However, through professionalization, changing public attitudes, and changing legal doctrine, the focus shifted to psychological tricks during the early- and mid-twentieth century. This use of deception and manipulation has been more effective and fairer than physical violence, according to Leo (Leo, 1992; Leo, 1996). *Miranda* has had no significant impact on police effectiveness in obtaining confessions and very few confessions are inadmissible at trial due to a *Miranda* violation. This is partly because police have effectively adapted to *Miranda* through ways of minimizing its significance, negotiating it, or avoiding it (Leo, 2008). The irony of *Miranda*, Leo (1996) argues, is that police have remained effective in interrogations but have also transformed their power in the interrogation room. *Miranda* has influenced police to become more creative and efficient while symbolically showing that they take civil rights seriously. All in all, it influenced police professionalization.

If we are able to learn anything from *Miranda*’s impact it is that warnings have not had any significant impact on cooperating with the police. Although the initial fear of the Court’s decision was that police would no longer be able to obtain confessions, there has been no evidence that points to any significant change in the amount of confessions. Even with additional rules, police are able to shift their tactics and remain effective. They’ve even used *Miranda* as a symbol of their own professionalization.

Consent Search Warning Examples and Available Data

Many have argued over whether or not a consent search warning would be impractical. Since this is not constitutionally required as the Miranda warning is, the debate in this area is often speculative. Despite the previous ruling in *Schneckloth*, there are some places in the country that do require a consent search warning of various types. One example is the state of New Jersey, which has some of the strictest standards for consent searches in the country. Officers there cannot request search consent unless there is reasonable suspicion that contraband might be found (*State v. Yanovsky*, 2001). Furthermore, for the prosecution to prove that consent was voluntary, it must provide evidence that the defendant had the knowledge of the right to refuse consent (*State v. Johnson*, 1975). As a result, the New Jersey State Police adopted a written consent search waiver where citizens would read about their right to refuse, provided they fully read the waiver. As an interesting note, *State v. Johnson* and *Schneckloth* were only separated by a couple of years, and the section of the New Jersey State Constitution which the Supreme Court of New Jersey based its decision is almost identical to the Fourth Amendment of the U.S. Constitution (Thomas, 2009).

Another example of a currently enacted consent search warning rule is from St. Paul, Minnesota, where the rule has existed since 2001. After citing racially-disproportionate amounts of stops and searches, the St. Paul Police Department and the St. Paul Chapter of the NAACP came to an agreement that included the creation of a consent search warning in order to bridge race-relations (Estrada, 2001). The warning, which is required in all instances where the police lack a warrant, probable cause, or legal exceptions to those instances and printed on the back of officers' Miranda warning cards, reads as follows:

I would like to search you (or your vehicle)

You should know that you have the right to refuse to allow me to search you and your vehicle

If you do grant me permission you may stop the search at any time

If I find anything illegal, you will likely be arrested and prosecuted

Do you understand what I have just told you?

May I search you? May I search your vehicle? (U.S. Department of Justice, 2001, p. 3)

Unfortunately, there have not been much publically available data on evaluations of this policy, leaving little room to consider the successfulness of a search consent warning in the real world. However, St. Paul is not alone in adopting warnings like this. A few North Carolina cities have begun mandating that officers receive written consent forms from a suspect prior to a consent search. In 2012, Fayetteville began this trend, followed by Durham in 2014, and Carrboro and Chapel Hill in 2015 (Baumgartner, 2015). Around the same time in Texas, Austin adopted a similar policy, and Dallas now requires its officers to obtain written or recorded consent (Goldstein, 2013; Nicklas, 2012). All of the written warnings appear similar to St. Paul's in that they require officers to inform citizens of their right to refuse consent or withdraw it at any time. Most of these cities also take it a step further and require supervisors to later review each form or recording. These cities all cited racial bias in police stops and consent searches as reasons that influenced these policies, as well as attempting to eliminate cases where defendants later claimed they never gave consent (Goldstein, 2013; Nicklas, 2012; Baumgartner, Epp, & Shoub, 2015a; Baumgartner, Epp, & Shoub, 2015b).

Given how new these policies are, a plethora of data is not publically available for all of these cities to evaluate the successfulness of their policies. Some of the cities have reported that they will not be keeping record of some statistics, such as the amount of refused consent forms, so potential future analyses might also be limited (Nicklas, 2012). Analyses of Fayetteville and Durham's policies have been published. In Fayetteville, there was a significant drop in the amount of consent searches since written consent was required. This drop was not accompanied by significant changes in the amount of other searches, like probable cause, but was accompanied by a drop in the crime rate (Baumgartner et al., 2015b). In the second North Carolina city to enact the policy, Durham, there was little change in the overall amount of searches since the significant drop in consent searches was met by a larger increase in probable cause searches. While in Fayetteville there was no indication of a "substitution effect," researchers suggest that in Durham consent searches were substituted by probable cause searches (Baumgartner et al., 2015a).

These policies clearly have differing results, and these analyses are not determinative in the effect that requiring written consent to search has on the overall search rate. Fayetteville's policy appears more successful since consent searches were not replaced by different types of searches. In Durham, where researchers believe consent searches were replaced by probable cause searches because of the policy, the question arises: Why didn't police just use probable cause searches to begin with if probable cause was evident? Some police administrators have indicated that probable cause is not an "exact science" and is subjective. Thus, officers' opinions of probable cause could change as they may have to become less reliant on consent searches. Although these two studies differ in their results and, clearly, more research is needed to be able to draw any conclusions on the implications of search consent warnings, these studies in

combination do show that requiring consent search warnings could result in changes in the rates of other types of searches. These changes may or may not induce changes in the overall amount of searches that police conduct.

Recalling that prior to the U.S. Supreme Court deciding *Ohio v. Robinette*, the Ohio Supreme Court previously ruled that such a warning was required in Ohio through their decision in *State v. Robinette*. Researchers took advantage of the roughly two years in which Ohio officers were required to give the *Robinette* warning by examining the effects that verbal consent warnings had on searches. A study during this era did not find any significant changes that resulted from the *Robinette* warning in Ohio. However, the amount of times officers requested search consent did slightly increase, although not significantly. Thus, this fluctuation could be random, but it does challenge the *Schneckloth* Court's intuitive claim that required warnings would dissuade officers from using search consent as a reliable policing tool (Lichtenberg, 2004).

Another closely related study of the Ohio Highway Patrol during this time also found no significant change in consent granted to search after issuing a warning. In this study, researchers interviewed citizens that were targets of police consent searches in Ohio. In concurrence with the findings, many subjects admitted that, despite the warning, they still felt like they "had to" comply with the officer's request to search (Lichtenberg, 1999). Overall, the available data challenges the Supreme Court's claims that warnings would critically impair the police. The data suggests that warnings are not "thoroughly impractical."

Some arguing for the creation of a consent warning have used this research as a cornerstone argument, but that interpretation of the data does not reflect the entirety of the situation. As subjects in the study in Ohio indicated, they still felt compelled to comply with the officers

despite the warning. It appears that warnings are not enough to overcome any inherent coerciveness. Learning from *Miranda*, this might be because officers learn how to work some of the previous factors discussed in their favor to induce cooperation. Other papers arguing over consent warnings lack in combining the available data to fully understand a warning's effectiveness. For this reason, this thesis introduces a new area to the argument.

A New Approach: Procedural Justice

Other implications of an informed consent warning to search deal with perceptions of justice and public opinion of police. As recently as 2011, data showed that more drivers subject to searches thought the police behaved properly if they asked permission prior to the search (Langton & Durose, 2013). Numerous studies have shown that legitimacy plays a crucial role in compliance with the criminal justice system (Mazerolle, Antrobus, & Bennett, 2013; Tyler, Fagan, & Geller, 2014). Public perception of police acting fairly is shown to influence higher levels of trust and legitimacy in the police. Accordingly, Tyler's process-based model of legitimacy shows that using procedurally fair practices increases the public trust and legitimacy in the police. Police legitimacy is often defined as trust in the police and perceived obligation to obey the police. Citizens often are limited in their ability to judge actions by the police so their judgments are often based on their amount of trust in the police. Thus, people see the police as legitimate when they choose to obey the police because they trust the police (Nix, Wolfe, Rojek, & Kaminski, 2015). Research related to Tyler's process-based model and the concept of procedural justice will show that an informed consent warning could increase public perceptions of trust and legitimacy in police.

Tyler's model distinguishes between two types of justice: instrumental and normative. Instrumental justice is the perception of favorable outcomes while normative justice is concerned with a perception of a fair procedure that results in a fair outcome. Several studies by Tyler have shown that people are often more concerned with the notion of normative justice than instrumental justice. That is, people are more concerned with a perception of fair procedures and fair outcomes than a favorable outcome. Tyler further broke-down types of normative justice as procedural justice – concerned with the perceived fairness of procedures – and distributive justice – concerned with the perceived fairness of outcomes. Data supports Tyler's claim that procedural justice is the strongest indicator of trust and legitimacy, although distributive justice also plays a role (Engel, 2005; Nix et al., 2015). While some research indicates that race or environmental factors are indicative of perceptions of trust and legitimacy in police, other studies have also suggested that perceptions of fairness have the most influence in these areas (Engel, 2005; Nix et al., 2015). Further discussion of relevant studies will help to clarify the weighing influence that different factors have in public approval of police.

Several studies by Tyler have indicated that citizens are more concerned with concepts of normative justice than instrumental justice. One study conducted in Oakland did indicate that citizens were concerned with both instrumental and normative justice, however. A different study has shown that citizens' evaluations of previous police encounters were the greatest influences of attitudes on the police. To further evaluate Tyler's model, Engel (2005) tested the process-based model on traffic-stop data. Engel's findings supported Tyler's theory that citizens were mostly concerned with normative justice but also found that they are interested in instrumental justice as well. Interestingly, citizens who were searched or had their cars searched were less likely to view the traffic-stop as legitimate. In combination with other studies by the

same author, data supports that the majority of these searches were consent searches, which were shown to be less successful in finding incriminating evidence. The authors then suggest that police agencies should encourage officers to take efforts to explain their actions during traffic-stops in addition to scrutinizing their standards on consent searches, in order to increase public perceptions of police legitimacy (Engel, 2005). This could also be accomplished through a consent search warning.

Another study by Nix et al. (2015) tested the influence that perceptions of neighborhood evaluations of police had on individual perceptions of police legitimacy and trust to further evaluate Tyler's theory. They concluded that perceived collective efficacy is a significant indicator for trust in the police; however, perception of procedural justice is a more important determining factor. Furthermore, perceptions of procedural justice were confirmed to be more important than neighborhood context, prior victimization, or even distributive justice. Thus, this study did confirm Tyler's process-based model in that perception of procedural justice is the primary influence of trustworthiness of police, but it suggested that this influence does not override other factors shown to influence trust in police such as perceptions of collective efficacy.

According to empirical evidence supporting Tyler's theory, the frequency of police-initiated encounters or the intrusion of those encounters is less indicative of legitimacy than perceptions of procedural justice during those encounters. However, as citizens are stopped by police more, the levels of normative justice are likely to decline. Thus, the fact that somebody was stopped by the police or the intrusion of that stop was less influential of the person's evaluation of police legitimacy than how fair they perceived the procedures during the stop (Tyler et al., 2014).

In summation, Tyler's process-based model has been supported by research to show that when people perceive the procedures and outcomes of police encounters as fair, public trust and sense of legitimacy in the police increases. The key components of procedural justice include officers treating citizens with respect, giving them opportunities to share their views, and making fair decisions. Although Tyler suggests that perceptions of procedural justice should trump other factors in influencing public evaluations of police, research has indicated that other factors are still relevant. However, procedural justice is the most determining factor (Engel, 2005; Nix et al., 2015). When specific encounters are viewed as procedurally fair, that does not just influence that encounter to be viewed as legitimate, but also has been shown to influence general views of police and could have long-term effects on legitimacy (Mazerolle et al., 2013).

So what exactly does procedural justice have to do with consent searches? Gau (2012) answered that question through analyzing data from the Bureau of Justice Statistics on traffic stops. Recalling earlier discussion of the high volume of traffic stops annually, Gau saw these incidents as a significant example of police-initiated contact. Gau found that requesting consent significantly affected how motorists viewed the stop. When police requested consent, motorists were found to believe that the police were less fair (meaning there was a procedural injustice), and even viewed the reason for the stop as less legitimate. These findings show that consent searches have a direct relation to procedural justice and police legitimacy.

The process-based model shows that a procedural safeguard like a consent warning could have an impact on public opinion of the police. Because Tyler's model focuses on the *perceived* fairness and not the *actual* fairness of procedures, whether or not a warning would change the fairness of the procedure in actuality is not the concern. Additionally, whether or not the procedure ends in an actual search should not have as much effect on the perceived legitimacy as

how fair the procedure is viewed, according to the model. Whatever impact a warning would have on the rate of consent searches and whatever impact this would have in relation to the issue of actual voluntariness in the situation notwithstanding, as citizens are uniformly afforded an additional opportunity to invoke their rights it would be difficult to support an argument that citizens would perceive the procedure as any less fair than without the warning. There is a possibility that a warning would have no significant impact on the procedural justice, and without the proper research indicating that it would increase the perceived fairness this possibility cannot rightfully be ruled out indefinitely. However, this is not likely the case. It's more likely that a warning would increase the perception of fair procedures since one of the key components of procedural fairness is police taking into consideration the interests of citizens and giving them the opportunity to share their views. A consent search warning focuses on this component.

As Gau's study found, requesting consent significantly impaired the procedural justice and perceived legitimacy of those traffic stops. To understand how to lessen this blow one must focus on the manner in which consent is requested. A warning incorporates the key components of procedural justice by offering the opportunity for a more fair decision and involving the citizen's point of view. Ensuring the citizen is knowledgeable of their rights via a warning symbolically shows the officer is seeking to incorporate their point of view and best interests, similar to what was seen with *Miranda*. It also shows that the decision by the citizen to withhold consent is a right and that police requesting consent is not a decision by the officer to search that cannot be challenged. Thus, it could rightfully mean that the citizen sees any consequential decision by the officer with increased fairness.

There are still limitations to this argument. How people respond to these changes could differ by community and race. For instance, research has consistently shown since 1995 that whites have significantly more confidence in the police than blacks, and in 2014, only 16% of blacks anticipated police-public relations to improve in the next year (Drake, 2014; Pew Research Center, 2014). Additionally, an investigation by the Department of Justice (2015) found substantial racial bias and police misconduct by the Ferguson Police Department (which has been at the forefront in the past few years for a police legitimacy crisis). The corresponding report by the Department of Justice noted how the city's emphasis on revenue collection instead of public safety and racial bias in policing resulted in widespread distrust in the police. The report suggested, among other things, that police in Ferguson stop consent searches for a little while and increase citizens' involvement in police decision making. In a community like Ferguson, public trust in the police could be so broken that citizens might not respond significantly to a consent search warning. As the report suggested, a community like Ferguson would require several policy changes to increase police legitimacy. However, when citizens in a community like Ferguson have so little trust in the police they are consequently further inclined to resist police actions. Policies like a consent search warning could help increase citizen cooperation by affording citizens an opportunity to take part in police decisions and actions.

The benefits of a consent search warning in the area of police legitimacy could also have diminishing returns. For instance, the police in Newark, New Jersey, were recently found to have prevalent unconstitutional practices (U.S. Department of Justice, 2014). Like Ferguson, Newark is a community that could have large distrust in the police that would be difficult to mend. Additionally, Newark would have to follow New Jersey's consent search warning rule. Therefore, the benefits to procedural justice could have diminishing returns over time and could

also vary across communities and by race. More research is needed to fully understand the relationship between procedural justice and a consent search warning, and New Jersey appears to be the perfect place for such studies. Particularly, differences between communities like Newark and Camden could provide answers to some questions. Camden has recently been found to have increasing police-public relations after years of public mistrust (Zernike, 2014). Research involving these communities and others in the state could show the differences across communities and between racial groups.

Implementation of an effective warning has the shared benefit to citizens by likely increasing the procedural justice of police encounters and to police through increased public opinion. However, creation of a consent warning perhaps was not the original intention for Tyler's model. Merely, extending this model to the discussion of informed warnings should serve as an application of procedural justice. Further studies are needed to better understand the relationship between a warning and procedural justice. But, analogously comparing a consent warning to *Miranda*, warnings have encouraged the police to become more creative and efficient. The *Miranda* warning has influenced police professionalism while increasing fairness in the interrogation room. A consent search warning could continue that trend and increase trust and legitimacy in the police.

Conclusions

The Supreme Court has taken different stances related to warnings of Fourth and Fifth Amendment rights. Standards related to both of these areas prior to 1966 were both rooted in reasonableness viewed by assessing the totality of the circumstances. After *Miranda v. Arizona*, the Court established a required warning during custodial interrogations that they chose not to

overturn more recently in *Dickerson v. U.S.* In both of those cases, the Court decided that the *Miranda* decision was constitutionally based. Conversely, the Court has rejected creating a similar warning for consent searches, a stance the Court has reaffirmed time and time again since *Schneckloth v. Bustamonte*. In the examples discussed, the majority in each Supreme Court decision determined that a reasonable person would have felt free to terminate each interaction with the police through evaluating the totality of the circumstances. The Court also reiterated in those cases that the Fourth Amendment does not require such a warning. Absent actions by the police that amount to a degree of coerciveness, the Court has been unwilling to determine consent in these cases discussed to be involuntary based on a perceived inherent coerciveness in the nature of these situations. The Supreme Court has also historically held the view that required warnings related to Fourth Amendment protections are impractical.

The consistency of these decisions suggests that the Supreme Court's stance on consent search warnings is not likely to change. The Fourth Amendment, as the Court argues, does not require these warnings. It does not prohibit them either. As an alternative to trying to influence Supreme Court Justices to change their historical stance on the issue, it is more practical that police agencies, legislatures, or other agencies regulating police draw on their ability to make significant change in adding protections of constitutional rights with the extra benefit of increasing public opinion of the police. Furthermore, if police agencies take it upon themselves to change their own policy they can take ownership of the consent search phenomenon without the need for courts to take over.

Ignoring any arguments about the constitutional backing of these decisions, empirical evidence can be applied to examine the rationale that Supreme Court Justices have based their varied opinions over the years. In the argument over practicality of warnings, data surrounding

the impact of the *Miranda* decision and data included in the different examples of consent search warnings in practice around the country have not found any significant change in cooperation with the police. These findings suggest that effective warnings are not impractical as some Justices have argued.

In relation to the standard of reasonableness based on the totality of circumstances, social psychological research has shown that compliance with authority, social validation, and factors like limited time or physical distance often influence people's decisions – many times not in the direction of one's best interests. Additionally, empirical evidence has found that when observing decisions by others, observers are often inclined to overestimate the voluntariness the decision-maker has. These findings challenge the nature of reasonableness and such claims that consent searches are entirely voluntary in the absence of any inherent coercion. Especially given the role courts take as an observer in situations of consent to search, research suggests that this perception can often be skewed. While these findings challenge some claims made by Supreme Court Justices in past decisions, they also do not indicate that a consent search warning would eliminate the influence many of these factors have in the concept of voluntariness. In combination with the data found on *Miranda* and consent search warnings in practice, the research here indicates no significant change in the rate that people consent to searches is likely even with a warning. Despite this, creation of a warning should not be intended to decrease any amount of consent searches. Instead, the intent is to ensure more safeguards for constitutional rights, empower the decision making process, and create a better informed public.

A consent search warning could have the benefit of increased trust in the police. According to Tyler's process-based model, when people feel like police treat them politely, consider their opinions or best interests, and make fair decisions, public opinion of the police in general

heightens. Public sense of legitimacy in the police increases when procedures and outcomes related to police encounters are perceived as fair. A consent search warning is not likely perfect in creating a utopian fairness. Instead, it is more likely to increase the perception of fair procedures during police-public encounters. Application of Tyler's model suggests that a consent search warning would promote better public opinion of the police in general. In a time of news headlines filled with cases of police shootings and other scandals, this issue should become paramount in community relations with police. While a consent search warning is not the only method of achieving this goal, given the historical racial disparities related to consent searches, addressing this issue would be a significant step.

Consent searches would not likely create a perfect system, but just as the Constitution does not necessitate a perfect trial, only a fair trial, this would not create a perfect system, only promote a more fair system. Many of these factors observed in the social psychology of consent voluntariness might not be overcome by such a warning. As we saw with the implications of *Miranda* and other examples of consent search warnings, people's willingness to comply with officers did not significantly change as a result of these warnings. More likely, though, these warnings have promoted a more fair system for police and public interactions. Just as the *Miranda* majority argued that their decision in that case would enhance the integrity of the future court proceedings on the matter, so too would consent search warnings. As Tyler's model shows, when people feel as though they are treated with dignity and respect by the police and that their opinions and best wishes are considered, their confidence in the police increases. The police have been dealt a great hand in their professional expertise in law enforcement. While consent search warnings would not likely be giving the public a "better hand," they would be easing the police's "poker face" and help establish a more fair game.

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