IRREVOCABLE IMPLIED CONSENT: THE "ROACH MOTEL" IN CONSENT SEARCH JURISPRUDENCE†

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Introduction

One May morning, a security officer stopped Greg Morgan at the gates of Edwards Air Force Base.[1] Morgan, who worked as a civilian air traffic controller on the base, showed the officer his identification badge as required, but instead of permitting Morgan to continue on his way to work, the officer ordered Morgan to pull his Jeep Cherokee over to the side of the road.[2] There, the officer, reading from a script, requested that Morgan consent to a vehicle search.[3]

Morgan refused, explaining that he believed the search would make him late for work.[4] Two other security officers joined the first to confer at Morgan's vehicle.[5] One of the officers requested Morgan's license, registration, and proof of insurance, but then returned to conferring with his fellow officers.[6] Realizing that he would be late for work, Morgan exited his Jeep to find a phone to contact his employer.[7] When Morgan was ordered to stop, which he did, Morgan asked if he was under arrest.[8] The officer replied, "No," only to then shout, "Cover me," to his fellow officers and handcuff Morgan.[9]

Base security conducted a search of Morgan's person and vehicle and uncovered a semi-automatic pistol.[10] Morgan was detained and charged.[11] A municipal court later found that no probable cause existed to conduct a search or bring charges against Morgan; all state charges were then dropped.[12]

Morgan filed a complaint in federal court, stating that, among other claims, the

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† A "roach motel" is a device used to catch vermin by luring the vermin into a space where they cannot escape. The device was marketed under the slogan: "Roaches check in . . . but they don't check out."

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1. Morgan v. United States, 323 F.3d 776, 779 (9th Cir. 2003).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

security officers at the gate had violated his rights under the Fourth Amendment when they conducted a search of his person and vehicle without probable cause.[13] The district court dismissed all claims with prejudice, and Morgan appealed the dismissal to the Ninth Circuit.[14]

The Court agreed that the security guards lacked probable cause to conduct the search but found that probable cause was not necessary.[15] The Court held that a person may impliedly consent to a search by presenting himself at a military gate, and then remanded the case to the district court, to determine whether Morgan had impliedly consented to the search.[16] By his act of driving up to the secured entrance of Edwards Air Force Base, Morgan might have given his implicit consent to a search. This implicit consent would have made the search reasonable whether or not Morgan actually knew a search was imminent. The Ninth Circuit decision in *Morgan v. United States* ignored Morgan's explicit refusal of consent, suggesting that it was reasonable that once Morgan was within the grasp of base personnel, he could not reasonably expect to leave without their permission.

Morgan and similar cases expose the consent search doctrine's drift from a foundation based on actual consent by the searched party to focusing on the needs of law enforcement. This drift has made "consent search" a misnomer—law enforcement officials can conduct a search under the auspices of the consent search when clearly no consent has been granted. The consent search doctrine is applied in situations where the suspect has not provided consent, does not have the opportunity to correct erroneously given "consent," and it is apparent that consent has never been given. When the doctrine is applied in this fashion, it inadvertently empowers law enforcement agents to engage in potentially invasive and discriminatory practices.

This Note discusses the implications of an irrevocable implied consent search doctrine. Part I discusses the constitutional underpinnings of the consent search doctrine, how it compares to other exceptions to the Fourth Amendment, and why it is a popular doctrine among law enforcement agents. Part II discusses instances where implied consent can serve as permissible grounds for a search. Part III discusses the importance of withdrawal to the consent search doctrine. Part IV discusses the implications of an irrevocable, implied consent search doctrine. Part V discusses viable alternatives to irrevocable, implied consent.

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13. *Id.*
14. *Id.* at 780.
15. *Id.* at 782.
16. *Id.*

I. CONSENT SEARCH DOCTRINE: UNDERPINNINGS, COMPARISONS, AND POPULARITY

Consent searches are a category of searches that the Supreme Court deemed to be reasonable under the Fourth Amendment.[17] The Court has considered two ways of interpreting consent under the consent search doctrine: (1) consent given after an actual "knowing waiver" of a right to be free from an unreasonable search and (2) a "voluntariness" test that considers whether a reasonable officer would have construed the suspect's actions as consent.[18] While the Court settled on the later interpretation of the doctrine in *Schneckloth v. Bustamonte*,[19] both remain viable options in state law consent search jurisprudence.[20] Regardless of which interpretation is used, the consent search doctrine is unusual compared to other exceptions to the Fourth Amendment, because the suspect's, rather than the government's, expressed intent serves as basis for a search.[21] Perhaps due to its unusual nature, the consent search is a powerful and popular tool for law enforcement officials, as a suspect's consent is sufficient to justify a search of the suspect's person and property.

A. *Constitutional Underpinnings*

The Fourth Amendment prohibits unreasonable searches.[22] According to contemporary Supreme Court jurisprudence, this prohibition assumes that a search is unreasonable unless it is either backed by a search warrant based on probable cause[23] or falls into a reasonable exception.[24] Numerous exceptions have developed over time, including searches based on reasonable suspicion when there is a possibility of danger,[25] searches due to recognized special needs,[26] searches of

17. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

18. *See id.* at 223.

19. *Id.* at 248–49.

20. *See, e.g.*, State v. Johnson, 346 A.2d 66, 68 (N.J. 1975).

21. *Compare* United States v. Drayton, 536 U.S. 194, 207 (2002) (holding a search permissible based on the defendant's expressed intent to submit to a search), *with* Kentucky v. King, 131 S. Ct. 1839, 1858 (2011) (recognizing that a search is permissible if the government can articulate an exigent circumstance that serves as a basis for the search), Arizona v. Johnson, 555 U.S. 323, 333–34 (2009) (holding that a limited search was permissible due to law enforcement's concerns that the suspect was armed), Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 619–20, 624 (1989) (holding that search was permissible due to special needs articulated by the government), *and* Illinois v. Gates, 462 U.S. 213, 239 (1983) (holding that searches with warrants granted by magistrates, based on affidavits filed by law enforcement requesting permission to search, are permissible).

22. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

23. *See id.* ("[N]o Warrants shall issue, but upon probable cause . . . .").

24. *See* Missouri v. McNeely, 133 S. Ct. 1552, 1558 (2013) ("Our cases have held that a warrantless search of a person is reasonable only if it falls within a recognized exception.").

25. *See, e.g.*, *Johnson*, 555 U.S. at 330, 333–34 (citing Terry v. Ohio, 392 U.S. 1 (1968)) (holding that a limited search of outer clothing for weapons did not violate the respondent's Fourth Amendment rights).

26. *See, e.g.*, *Skinner*, 489 U.S. at 619–20, 624 (1989) (holding that the government was permitted to conduct blood and urine tests to respond to evidence of drug and alcohol abuse).

"closely regulated" businesses,[27] searches based on exigent circumstances,[28] and consent searches,[29] among others.[30]

B. The Consent Search Doctrine

Considering our nation's interest in individual freedom, it is not surprising that a search is reasonable if it is conducted with the permission of the person searched.[31] Such a search, if based on actual consent, could benefit private individuals and law enforcement officials by efficiently establishing innocence and saving the time it would take to secure a search warrant.[32] The Court, however, did not officially recognize a consent search exception to the Fourth Amendment until the 1920s.[33]

When it created the consent search exception, the Court relied on actual consent: a suspect would need to give a knowing and voluntary waiver of his or her Fourth Amendment rights before a search would be considered consensual.[34] The Court changed its attitude towards the consent search doctrine in *Bustamonte*, which established modern consent search jurisprudence, by shifting from actual consent

27. *See, e.g.*, New York v. Burger, 482 U.S. 691, 702–03 (1987) (holding that a New York statute allowing warrantless searches of automobile junkyards did not violate the Constitution); Donovan v. Dewey, 452 U.S. 594, 600–02 (1981) (holding that a warrant is not required when Congress has determined that warrantless searches are necessary to further a regulatory scheme, and the owner of the mines could not help but be aware that his property would be subject to periodic inspection).

28. *See, e.g.*, Kentucky v. King, 131 S. Ct. 1839, 1858 (2011) (recognizing that police may conduct a warrantless search if an exigency such as probable evidence destruction exists).

29. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973) (holding that consent to a search must be voluntary, determined by a totality of the circumstances).

30. Whether these exceptions were originally intended by the Framers is disputed. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 591 (1999) (claiming that the Framers never intended for the "reasonableness" clause to be separated from the "warrants" clause of the Fourth Amendment, making the exceptions springing from this clause invalid).

31. *See* United States v. Drayton, 536 U.S. 194, 207 (2002) ("In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.").

32. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227–28 (1973). *See generally* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.1 (5th ed. 2012).

33. *See* Amos v. United States, 255 U.S. 313, 317 (1921) (discussing a possible "waiver" of the right to be free from unreasonable searches); Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 36–37 (2008) (describing early Court consent search jurisprudence as "murky" and *Amos* as the first clear reference to a consent search doctrine by the Court). The Court may not have believed that such an exception was necessary. If the person "searched" maintained control over the presence of law enforcement, it would not be a search so much as an invitation construed under laws governing trespass. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 774 (1994) (suggesting that trespass laws originally held law enforcement officials in check).

34. *See* Zap v. United States, 328 U.S. 624, 628 (1946) (recognizing that right to be free from unreasonable search could be "waived"). The traditional definition of a waiver is an "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *see* LAFAVE, *supra* note 32, § 8.1(a).

to a voluntariness test.[35] Writing the majority opinion for the 6-3 decision, Justice Stewart decided that the suspect did not need to knowingly waive his rights for the search to be valid,[36] stating that such a waiver analysis only applied to rights that served as safeguards in a trial and that such a requirement would unduly inhibit law enforcement.[37] Rather, Stewart stated that the reasonableness of a consent search should be based on a test of voluntariness, assessing the "totality of the circumstances" to decide whether the suspect had consented to the search.[38] He suggested that courts, when considering voluntariness, look to both subjective factors, focusing on the characteristics of the suspect stopped, and objective factors, assessing the level of coercion used by law enforcement to attain consent.[39] The Court did not discuss whether the suspect had to explicitly consent to the search, but the functional nature of the test suggests that the Court did not believe this was required.

Bustamonte unmoored consent search jurisprudence from the original reasoning that made consent searches reasonable. Instead of focusing on the individual's right to consent as the basis for the doctrine, Stewart emphasized the balance between law enforcement officials' interest in conducting searches and the private citizen's fear of coercion.[40] This new focus on law enforcement interests moved the doctrine away from a subjective standard, focusing on a particular person's consent, to an objective standard, assessing whether the law enforcement officer's actions coerced the suspect into consenting to the search.[41] Though *Bustamonte* suggested that subjective factors could play a role in its "totality of the circumstances" test, studies show courts have largely ignored these factors.[42]

Since *Bustamonte*, the Court has pushed the doctrine farther towards a

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35. *See Bustamonte*, 412 U.S. at 222–27; LAFAVE, *supra* note 32, § 8.1(a).

36. *See Bustamonte*, 412 U.S. at 241.

37. *Id.*

38. *Id.* at 248–49.

39. *See id.* at 226. *But see* Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 198–213 (suggesting that the subjective standards no longer apply to the defendant and only favor the law enforcement agents conducting a search).

40. *See Bustamonte*, 412 U.S. at 227–28 (discussing the value of the consent search to law enforcement). The progeny of *Bustamonte* appear to shift the focus entirely from subjective factors of the search target to the objective views of the officer. *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 188–89 (1990) (holding that an officer may rely on the consent of someone who reasonably appears to have authority to consent to a police search, even if such authority is in fact illusory).

41. *See Bustamonte*, 412 U.S. at 227 (stating that "voluntariness" is assessed by looking at whether there was coercion during the exchange between the police and the suspect); Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 777–78 (2005) ("The Court went out of its way in [*Bustamonte*] to say that subjective as well as objective factors were part of the totality of the circumstances test . . . .").

42. *See* Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 221–22 (2001); Brian A. Sutherland, Note, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors that Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV. 2192, 2214–15 (2006).

government-oriented standard, stating that such a drift "reinforces the rule of law."[43] Courts now assess consent according to what a reasonable officer would assume to be consent, rather than according to whether the suspect actually consented.[44] The suspect granting consent technically maintains control, in most circumstances, over the scope and duration of the search after consent has been granted, but potential limits placed by the suspect on the scope of the search or withdrawal of consent are also assessed from the searching officer's perspective.[45] However, to academics and at least one court, the "knowing waiver" doctrine remains a viable option.[46]

C. The Odd Exception

Unlike most searches, which are based on the government's interests, the consent search reflects the expressed intentions of the suspect. In theory, the suspect conceeds to law enforcement's request for a search, making an otherwise unreasonable search reasonable.[47] The basis for the consent search seems constitutionally sound, even though it is different from other exceptions: if the Fourth Amendment is meant to protect against *unwanted* intrusion, consent to a search appears to avoid that concern.[48]

The other exceptions to the Fourth Amendment's prohibition on searches focus

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43. United States v. Drayton, 536 U.S. 194, 207 (2002) (asking whether a reasonable person would have felt coerced in the situation rather than whether the defendant would have felt coerced).

44. *See* Florida v. Jimeno, 500 U.S. 248, 249 (1991); *Rodriguez*, 497 U.S. at 185.

45. *See Jimeno*, 500 U.S. at 252 ("A suspect may of course delimit as he chooses the scope of the search to which he consents."); United States v. McWeeney, 454 F.3d 1030, 1035 (9th Cir. 2006) ("[The suspects] had a constitutional right to modify or withdraw their general consent at anytime . . . .").

46. *See* State v. Johnson, 346 A.2d 66, 68 (N.J. 1975); Strauss, *supra* note 42, at 252–53 ("One alternative that has oft-times been proposed for ensuring a voluntary consent is to reject the holding in *Bustamonte* and require that police officers tell individuals that they have the right to refuse consent, that such a refusal would not be held against them, and that any evidence found during the search can be used against them."); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 191–92 (1991); *see also* discussion *infra* Part IV.C.

47. The original understanding of the Fourth Amendment supports this analysis, as a law enforcement official who overstepped his authority while conducting a search would be liable for trespass; a citizen's consent to a search would nullify any liability and make the search legal. *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 949 (2012) ("[O]ur Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.").

48. *See* United States v. Drayton, 536 U.S. 194, 207 (2002). This analysis assumes that the citizen has actually given consent. There are a few critiques of the shift from focusing on actual consent (the "waiver" doctrine) to a "voluntariness" standard looking at the "totality of the circumstances." First, not seeking actual consent is less efficient under a law and economics analysis since the citizen is not actually choosing to permit the search. *See* Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2202–03 (providing efficiency analysis of the consent search doctrine). Second, the standard's current focus on the law enforcement agent's perspective rather the target's perspective fails to incorporate the inherently coercive nature of law enforcement requests. *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 188–89 (discussing the coercive nature of police requests); Strauss, *supra* note 42, at 236 ("Numerous scholars and even judges have made the very basic observation that most people would not feel free to deny a request by a police officer.").

on express representations made by the government. Search warrants are granted based on the government's interest in preventing and prosecuting crime.[49] Warrantless exceptions focus on protecting law enforcement agents from armed suspects,[50] permitting government leeway in areas of special sensitivity[51] or as part of a comprehensive government administrative regime,[52] or recovering evidence that might be lost permanently without an immediate search.[53] These exceptions are limited by judicial review of the facts supporting the declared government intent: government agents must explain to a judge what evidence gives probable cause to search for contraband, testify as to why a suspect was deemed dangerous enough for a *Terry* stop, explain the exigent circumstances justifying an intrusion, or provide evidence of either a special need or an established regulatory regime.

The foundations for most exceptions to the Fourth Amendment's warrant requirement thus focus on circumstances beyond the suspect's control. Probable cause and reasonable suspicion arise from law enforcement officers' assessment of the suspect prior to an official interaction. Determinations of exigent circumstances, special needs, and regulatory regimes exist beyond the will of most suspects. None of these doctrines consider what a searched suspect intended, focusing instead on the intentions and perceptions of law enforcement officers.

D. Popularity of Consent Searches

Consent searches may be an unusual exception to the Fourth Amendment, but they certainly are popular: over ninety percent of warrantless searches are conducted based on consent of the suspect searched.[54] There are a number of reasons for this popularity among law enforcement officials.[55]

First and perhaps most obvious, it does not hurt the government to ask for consent or make a consent argument for a search. If consent is denied, the government loses nothing. It can still apply for a warrant or conduct a search based on reasonable suspicion or special needs.[56] Consent is not just useful in the field, but also in the courtroom: considering the objective nature of the consent search doctrine, the State can always make the argument that it was reasonable for the officers to assume consent had been given for a search, regardless of whether the officers in the field actually believed consent existed at the time of the search.

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49. *See* U.S. CONST. amend. IV. ("[N]o Warrants shall issue, but upon probable cause . . . ."); United States v. Grubbs, 547 U.S. 90, 95 (2006) ("Probable cause exists when 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'") (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

50. *See, e.g.*, Arizona v. Johnson, 555 U.S. 323, 330, 333–34 (2009) (citing Terry v. Ohio, 392 U.S. 1 (1968)).

51. *See, e.g.*, Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 619–20, 624 (1989).

52. *See, e.g.*, New York v. Burger, 482 U.S. 691, 702–03 (1987).

53. *See, e.g.*, Kentucky v. King, 131 S. Ct. 1839, 1858 (2011).

54. *See* Simmons, *supra* note 41, at 773.

55. *See* Maclin, *supra* note 33, at 31 (listing a variety of reasons police favor consent searches).

56. *See* United States v. Aukai, 497 F.3d 955, 960 (9th Cir. 2007) (finding that even if the consent analysis is flawed, a search can still be permissible under an alternative theory).

Second, consent searches are convenient. Law enforcement agents do not need to spend time travelling to a courthouse and convincing a judge to provide a warrant,[57] nor do they need to wait until a suspect acts in a fashion that provides probable cause for an arrest or reasonable suspicion. Rather, a law enforcement agent can access a suspect's person and effects immediately by simply asking (explicitly or implicitly) to conduct a search.[58]

Third, consent permits searches that would otherwise be unreasonable.[59] Consent is a trump card in search jurisprudence—once a court finds that the suspect consented to a search and that consent is valid, it does not need to assess whether the government had any grounds to ask for a search in the first place. The scope of a consent search is also as flexible as the initial consent, permitting a law enforcement agent to search as far as the agent reasonably assumes the consent provided within the "totality of the circumstances."[60]

Fourth, consent searches allow for expansive discretion on the part of law enforcement officers. Other exceptions permit searches either when a suspect has behaved without prompting in way that creates a basis for a search, or through a system that removes discretion from the hands of law enforcement of security officials. Under the consent search doctrine, an officer may discriminate in whom he or she requests consent from, and the officer does not need to provide an explanation for why he or she made the request.[61]

Fifth, courts have accepted refusal of consent as probative evidence against the refusing party at trial.[62] Requesting consent does not hinder the government, and it can also occasionally be rewarded with additional evidence to use in its case.

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57. *See* LAFAVE, *supra* note 32, § 8.1.

58. *See* LAFAVE, *supra* note 32, § 8.1 n.9 ("If a valid consent is obtained, then clearly there is no additional requirement of probable cause for the search."). Some states, in interpreting their state constitutions, have placed additional requirements on officers that intend to conduct a consent search in some circumstances. *See* State v. Fort, 660 N.W.2d 415, 419 (Minn. 2003) (requiring reasonable suspicion during a traffic stop before an officer may ask for consent to a search unrelated to the traffic violation justifying the stop); State v. Carty, 790 A.2d 903, 912–13 (N.J. 2002) (same). Of course, when a police officer "asks" to conduct a search, that request may have special weight coming from a position of authority. *See* Nadler, *supra* note 48, at 188–89.

59. *See* LAFAVE, *supra* note 32, §8.1; Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (finding that searches conducted with the suspect's consent are inherently reasonable).

60. *See* Florida v. Jimeno, 500 U.S. 248, 249 (1991) ("The Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to [search a particular area]."); *Warrantless Searches and Seizures*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 44, 105 (2011) (stating that scope is determined by assessing what a reasonable person would have understood what the stated scope was); *see also* LAFAVE, *supra* note 32, § 8.1(c) (noting that consent granted with vague boundaries may lead to broad search authorization).

61. This discretion does have negative effects. An example would be the use of racial profiling by police officers. *See* George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 540 (2003) ("The consent search doctrine is the handmaiden of racial profiling."); Eamon Kelly, *Race, Cars and Consent: Reevaluating No-Suspicion Consent Searches*, 2 DEPAUL J. FOR SOC. JUST. 253, 272–75 (2009).

62. The Supreme Court found it acceptable for a state court to use denial of consent to conduct blood testing under an implied consent statute targeting drunk driving as probative evidence of guilt. *See* South Dakota v. Neville, 459 U.S. 553, 566 (1983).

Overall, the consent search is a powerful tool in the government's arsenal, and it is usually available at minimal cost to law enforcement. While the fact that consent searches significantly strengthen the government's ability to intrude into the lives of private people does not mean that the doctrine is necessarily unreasonable, this strength does suggest that comparably strong limits should be placed on the doctrine's use. There are two different ways to limit the consent search: the "knowing waiver" doctrine, requiring that the suspect consciously and intelligently gives up his or her right to be from unreasonable searches under the Fourth Amendment before consent is considered valid, and the voluntariness test that considers the totality of the circumstances. Though the Court embraced the more lenient voluntariness test in *Bustamonte*, both interpretations remain viable, and the later development of implied consent searches suggests that a re-estimation of the waiver test may be appropriate.

II. DEVELOPMENT OF IMPLIED CONSENT SEARCHES

Under some circumstances, a suspect may consent to a search implicitly. While implied consent to search would not fit comfortably under a knowing waiver analysis, it is coherent within the *Bustamonte* voluntariness test. There are a range of circumstances where the suspect may imply consent, including entering secured areas or entering into a contract where acceptance is conditioned on ongoing consent to be searched.

A. *Implied Consent and the Consent Search Doctrine*

Implied consent is a concept that arises in legal fields where consent plays a role, including contractual[63] and sexual relationships.[64] As such, it is not surprising that implied consent should appear in consent search jurisprudence. The Court's decision in *Bustamonte*, which rejected the requirement of a knowing waiver of rights and relied instead on a voluntariness test based on what a reasonable officer would have believed to be consent, made implied consent searches unavoidable.[65]

Courts have accepted implied consent in several forms. Often, courts look at the context of the situation to derive consent, focusing on individual actions within a

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63. *See, e.g.*, 19 WILLISTON ON CONTRACTS §54:14 (4th ed. 2013) ("[T]he granting of authority and consent to act may be implied from the parties' conduct, or other evidence of their intent.").

64. *See* Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 215 (1997) ("The marital exemption [to rape] was a tort-type defense premised on the theory that a woman's decision to marry implied consent to all sexual relations with her husband."); Note, *Acquaintance Rape and Degrees of Consent: "No" Means "No," But What Does "Yes" Mean?*, 117 HARV. L. REV. 2341, 2346–50 (2004) (discussing view that consent to some sexual activities serves as implied consent to intercourse).

65. By relying on a "totality of the circumstances" rather than actual consent, the Court removed the need for the suspect to vocalize their consent to the search—vocalizing consent is not even among the factors mentioned in the case. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226–27 (1973) (listing factors used to consider the "totality of the circumstances").

particular interaction with law enforcement. However, courts also have categories of per se implied consent: if a suspect enters a particular area or into certain agreements, he or she has implicitly consented to a search by the authorities controlling that area or the party with whom he or she formed the agreement.

B. Contextual Consent

Like other legal fields in which consent plays a role, courts will construe implied consent to a search based on context.[66] Some statements and conduct clearly imply consent, such as when police request entry into a home and the suspect waves them in,[67] or when a suspect mentions the particular location of evidence that the suspect knows the police are looking for.[68] In these situations, consent to a search is evident; the suspect is requesting that the police come inside or suggesting that the police look in a certain place. Courts have also found implied consent in situations where suspects failed to object to a search.[69] This is usually accepted as implied consent when law enforcement have received consent from a third party that has the apparent authority to consent to a search,[70] but courts have found implied consent in instances where there was no explicit consent offered by any party.[71]

C. Zones of Consent

Aside from contextual analysis, some courts have described certain secured areas as zones of implied consent.[72] Due to the visible security at checkpoints, anyone entering such a zone is considered aware that he or she is subject to a search at any time while they are within the zone, so by entering the zone, he or she

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66. *See* LAFAVE, *supra* note 32, § 8.2(*l*) n.345; *Warrantless Searches and Seizures*, *supra* note 60, at 100.

67. *E.g.*, United States v. Moreland, 437 F.3d 424, 428–29 (4th Cir. 2006) (finding that consent to enter home was implied due to defendant's standing invitation to law enforcement officers to come into the home when they wished).

68. *See, e.g.*, United States v. Rodriguez-Preciado, 399 F.3d 1118, 1131 (9th Cir. 2005) (finding that admission by defendant that evidence sought by the police was in the defendant's van implied consent to search the van).

69. *See Warrantless Searches and Seizures*, *supra* note 60, at 100 & n.246.

70. *See* United States v. Matlock, 415 U.S. 164, 171 (1974) (permitting person other than suspect to give consent to search); United States v. Morales, 861 F.2d 396, 399–400 (3d Cir. 1988) (finding implied consent where driver consented to search and defendant who was a passenger did not object).

71. *See, e.g.*, United States v. Jones, 356 F.3d 529, 534 (4th Cir. 2004) (finding implied consent when the defendant failed to object to a search of a locked metal box inside a duffel bag after the defendant consented to a search of the duffel bag generally); United States v. Mendoza-Gonzalez, 318 F.3d 663, 667 (5th Cir. 2003) (finding implied consent when the defendant failed to object to law enforcement officer's opening sealed boxes found in defendant's trailer). However, at least one scholar considers silence to be a problematic basis for a search. *See* Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 58–63 (1995) (critiquing the use of silence to imply consent to a search).

72. *See infra* notes 74–76.

has given implied consent to be searched.[73] This analysis does not fit a consent search standard that asks about actual consent. After all, a person who has never been through the security zone at an airport before and is unaware of the extensive security measures could not provide actual consent when surprised with a random, secondary search after stepping through the metal detectors. However, Transportation Security Administration ("TSA") officers could reasonably expect that most passengers would be aware of the possibility of a secondary search, suggesting that implied consent in this situation would fit comfortably into the voluntariness test.

Examples of possible implied consent zones include:

- *Airports*—When a passenger places his or her bags on the conveyor belt leading through the bag X-ray machine, he or she has given implied consent to a bag search, a search of their person, and any secondary searches that security personnel would deem necessary as long as the passenger remains within an airport terminal.[74]
- *Military Bases*—A potential visitor grants implied consent to a search of his or her person, vehicle, and effects by approaching the entrance to a military installation and continues to provide consent as long as he or she remains on military property.[75]
- *Prisons*—A potential visitor consents to a search of his or her person, vehicle, and effects by passing through a security checkpoint leading to a prison and continues to provide consent to search as long as the visitor or any of his or her effects remain on prison grounds.[76]

The zone of consent analysis may vary from jurisdiction to jurisdiction. Presence in the area can be treated as per se consent to a search, but at other times it is treated as one of many factors used to assess whether consent has been given.[77]

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73. There are supporters and critics of this approach to implied consent. *Compare* LAFAVE, *supra* note 32, § 8.2(*l*) (claiming that the approach is flawed and will result in people "consenting" who do not intend to give consent), *with* Thomas, *supra* note 61, at 549 (expressing support for this form of consent search).

74. *See* Torbet v. United Airlines, Inc., 298 F.3d 1087, 1089 (9th Cir. 2002); United States v. Lopez-Pages, 767 F.2d 776, 778–79 (11th Cir. 1985); United States v. Herzbrun, 723 F.2d 773, 776 (11th Cir. 1984); United States v. Doran, 482 F.2d 929, 932 (9th Cir. 1973).

75. *See* Morgan v. United States, 323 F.3d 776, 782 (9th Cir. 2003); United States v. Jenkins, 986 F.2d 76, 79 (4th Cir. 1993); United States v. Ellis, 547 F.2d 863, 866–67 (5th Cir. 1977); State v. Torres, 262 P.3d 1006, 1021 (Haw. 2011) (applying similar implied consent principles under the Hawaii state constitution); *see also* Ryan Leary, Comment, *Searching for the Fourth Amendment: In a Post-September 11th World, Does the Rationale of the Fourth Circuit in* United States v. Jenkins *Reduce the Fourth Amendment Protections of Individuals on Military Installations?*, 29 CAMPBELL L. REV. 111, 118–20 (2006) (discussing how the use of an implied consent analytic would impact privacy on military installations). While military bases are subject to their own code of law, the courts' use of consent search language indicates that these areas are still under the auspices of the Fourth Amendment.

76. *See* United States v. Prevo, 435 F.3d 1343, 1348–49 (11th Cir. 2006); United States v. Sihler, 562 F.2d 349, 350–51 (5th Cir. 1977).

77. *Compare Sihler*, 562 F.2d at 351 ("Requiring such consent . . . is no less reasonable in a prison than in any other governmental facility where to gain access one must submit to routine searches."), *with Prevo*, 435 F.3d at 1346 ("Of course, walls and posted signs cannot banish the Fourth Amendment from prisons, but the nature of

D. Conditional Consent

Finally, consent to a search can be given through contractual or quasi-contractual agreements. Under this reasoning, a privilege, such as driving or employment, is extended as long as the recipient consents to a search of his or her effects or person depending on the interest related to that privilege. Usually, if the recipient denies a search requested by the authorities, then the privilege is terminated and the recipient does not face further consequences. Conditional implied consent reflects restitution in contract law: if a party refuses to follow through with the conditions of the contract, it may not keep the benefit of its bargain.[78] Refusing to undergo a requested search is an explicit revocation of implied consent, and if the party refuses the search request, he or she loses the privilege related to the search. Conditional consent should be considered implied rather than explicit consent because it is often constructed through statute or created by policy after an agreement has been reached. The condition is not part of the original agreement.

Examples of conditional implied consent include:

- *Pat-down searches at sports stadiums*—A ticket holder implicitly consents to a pat-down search at the entrance of a sports stadium when he or she chooses to attend a major sporting event; the ticket holder may choose not to undergo the pat-down search, but the sporting authority may deny him or her entrance into the event even if the pat-down policy was implemented after the ticket holder purchased his or her tickets.[79]
- *Condition of employment*—Some employees implicitly consent to drug testing and searches of personal effects stored at work when they accept employment in certain industries.[80] An employee may deny consent to a drug test or search of personal effects, but his or her employer may then terminate the employment.
- *Driver's licenses*—All fifty states have implied consent laws that condition possession of a driver's license on consenting to a blood alcohol test upon request by law enforcement officials.[81] In many states, a driver may refuse

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inmate populations and the necessity of keeping contraband out of prison facilities does factor heavily in the determination of what is reasonable.").

78. *See* RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. a (1937) ("A person is enriched if he has received a *benefit* . . . . A person is unjustly enriched if the retention of the *benefit* would be unjust . . . . A person obtains *restitution* when he is restored to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.") (emphasis added).

79. *See* Johnston v. Tampa Sports Auth., 530 F.3d 1320, 1328 (11th Cir. 2008) (conditioning entry into a football game on consent to a pat down search).

80. *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 671–72 & n.2 (1989) (consent implied when drug testing is a condition of employment); United States v. Alfaro, 935 F.2d 64, 67 (1st Cir. 1991) ("When an employee, as a condition of employment, has agreed to be searched by his employer, it is questionable at best whether that employee may freely withdraw his consent, short of resignation.").

81. *See* Cheryl F. Hiemstra, Comment, *Keeping DUI Implied Consent Laws Implied*, 48 WILLAMETTE L. REV. 521, 522, 523 n.7 (2012) (listing state statutes); *see also* Phillip T. Bruns, Note, *Driving While Intoxicated and the*

to consent to the test, but the state will then revoke that driver's license.[82] However, some states criminalize a driver's refusal to take a blood test upon request or permit such refusals to be used as probative evidence of wrongdoing in criminal cases.[83] By adding these potential penalties, states have possibly moved beyond the conditional consent search doctrine in creating an area of irrevocable implied consent.[84]

III. VOLUNTARINESS AND WITHDRAWAL

The Supreme Court has provided suspects with the power to set and change the limits of consent during searches in progress, suggesting that suspects also have the authority to withdraw consent entirely. This power is essential for the voluntariness test, as the test is based on the ongoing "totality of the circumstances." However, this power is not essential under the alternative "knowing waiver" analysis.

A. *Withdrawal and the Totality of the Circumstances*

While it implicitly gave suspects the right to limit the scope of a consent search in *Bustamonte*,[85] the Court explicitly recognized this right in *Florida v. Jimeno*, stating that, though "[t]he scope of a search is generally defined by its expressed object,"[86] the "suspect may of course delimit as he chooses the scope of the search to which he consents."[87] Circuit courts have interpreted this power as ongoing throughout the search, including the right to "delimit" the search to nothing, effectively withdrawing consent.[88]

Right to Counsel: The Case Against Implied Consent, 58 TEX. L. REV. 935 (1980) (noting that as of 1980, "[a]ll fifty states and the District of Columbia employ implied consent statutes").

82. At least one court has upheld a state's implied consent law under a "special needs" analysis—the government has a powerful interest in preventing drunk driving and may take special measures to secure this interest through statute. *See* Fink v. Ryan, 673 N.E.2d 281, 287–88 (Ill. 1996). While this analysis is in line with the Supreme Court decision recognizing the prevention of drunk driving as a special government interest, *see* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (permitting state to set up roadside sobriety checkpoints that did not target specific drivers), it appears at odds with the typical special needs doctrine requirement that the search either be (1) based on reasonable, individualized suspicion or (2) conducted through a non-discriminatory system of searches like a sobriety checkpoint. *See infra* notes 142–44 and accompanying text.

83. *See infra* note 106 and accompanying text.

84. *See infra* Part IV.B.

85. Determining scope could be implied as part of the "totality of the circumstances." *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

86. 500 U.S. 248, 251 (1991).

87. *Id.* at 252.

88. *See* United States v. McWeeney, 454 F.3d 1030, 1034 (9th Cir. 2006) ("A suspect is free . . . to delimit or withdraw his or her consent at anytime."); United States v. Ho, 94 F.3d 932, 936 n.5 (5th Cir. 1996) ("A consent which waives Fourth Amendment rights may be limited, qualified, or withdrawn."); United States v. Carter, 985 F.2d 1095, 1097 (D.C. Cir. 1993) (recognizing constitutional right to withdraw consent to a search); *see also* LAFAVE, *supra* note 32, § 8.1(c).

Though a relatively simple concept, a suspect's ability to withdraw consent is an essential piece to the voluntariness test set forth in *Bustamonte*.[89] The voluntariness test looks at whether a reasonable officer could believe that a suspect has volunteered to a search.[90] While this means that a suspect could still be searched without providing actual consent, it also means that the officer must be open to the possibility that he was mistaken about the suspect's willingness to volunteer.[91] Since the test revolves around the ongoing "totality of the circumstances," an officer must consider an explicit denial or end of consent by the suspect as part of that "totality." Courts recognize the right's importance,[92] and the Ninth Circuit has gone so far as to consider consent no longer valid when officers interfere with a suspect's ability to withdraw.[93] It would be unreasonable for an officer to believe that a suspect is volunteering to a search when the suspect has explicitly stated that he or she does not want the search to continue.

B. Withdrawal Under the "Knowing Waiver"

Under the waiver approach to consent searches, a continuing right to withdraw consent is unnecessary. If a suspect has waived his or her right to be free from the search, it would be peculiar for that suspect to snatch the right back when it suited his or her purposes.[94] Opponents of the right to withdraw have used this argument to challenge the right's existence.[95]

IV. IRREVOCABLE IMPLIED CONSENT

Courts have recognized situations, however, where suspects have no right to withdraw: frequently appearing in situations where consent to a search is given implicitly, these are often instances of irrevocable implied consent. The irrevocable implied consent doctrine allows officers to rely on implied consent, but

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89. *See* LAFAVE, *supra* note 32, § 8.1(c) (arguing that *Bustamonte* should be read to permit the withdrawal of consent).

90. *See* Illinois v. Rodriguez, 497 U.S. 177, 185–86 (1990).

91. *See Jimeno,* 500 U.S. at 252 (implying that the suspect's power to delimit the search as he chooses requires assessing voluntariness throughout the search).

92. *See supra* note 88.

93. *See McWeeney*, 454 F.3d at 1036–37 (stating that removal of the ability to withdraw makes the search no longer consensual).

94. *See* Note, *Consent Searches: A Reappraisal After* Miranda v. Arizona, 67 COLUM. L. REV. 130, 157 (1967) [hereinafter *Consent Searches*] ("After a proper warning, the individual knows precisely what conduct on the part of the police he is being asked to permit. Therefore, he is able to make a waiver which will bind him prospectively and may not later revoke his consent."). The waiver would be similar to that act of waiving other rights, such as the right to counsel. *See* Faretta v. California, 422 U.S. 806, 835–36 (1975). This could raise questions about who had set the permissible boundaries of a consent search—would they need to be set from the start of the search? Or perhaps the scope of the search would be based on reasonableness, leading to potential tension within the doctrine itself between bright-line rules when giving consent and soft standards when defining scope. Either way, the waiver would be similar to waiving the right to counsel.

95. *See Consent Searches*, *supra* note 94, at 157.

denies the suspect the right to withdraw this consent during the search. Situations where irrevocable implied consent might arise include secured areas and driving under the influence ("DUI") stops. However, there are unavoidable conflicts between irrevocable implied consent and both doctrines used to determine consent search validity. There is also a possibility that irrevocable implied consent is a relative of "general warrants," the device the Framers created the Fourth Amendment to prevent.

A. Areas of Irrevocable Implied Consent

Entering into secured areas can imply consent to a search.[96] The logic is that a person passing through a security checkpoint or a guarded gate is aware of the area's secured nature and should expect to be subject to higher standards of security.[97] By choosing to enter the area, the person has theoretically agreed to be searched whenever and however security personnel would care to search them as no clear limit has been placed on the scope of the search.[98]

Some jurisdictions have gone beyond this implied consent analysis and have made it impossible to withdraw consent. Courts express concern that if a person may avoid a search by withdrawing consent, a terrorist or other dangerous individual will use this right to avoid detection and attempt to breach the area later.[99] While this is a legitimate concern, some courts have used it to turn secured areas into zones of irrevocable implied consent, creating a "roach motel" effect—if you walk in, you run the risk of not walking out again.[100] If a person does not have the right to withdraw consent, and the implied consent granted by entering (or even approaching) a secured area does not articulate a clear scope of permissible search, there is no apparent limit to the invasiveness of any searches conducted.[101]

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96. *See supra* notes 72–77 and accompanying text.

97. *See supra* notes 72–77 and accompanying text.

98. The scope is typically deemed the stated objective of the search. Florida v. Jimeno, 500 U.S. 248, 251 (1991). However, in an area of implied, often irrevocable consent, this objective becomes murky. Rather than looking for a specific item such as drugs, security personal are seeking for *any* possible contraband, and the list can be fairly extensive. *See, e.g.*, *Prohibited Items*, TRANSP. SEC. ADMIN, http://www.tsa.gov/traveler-information/prohibited-items (last visited Mar. 12, 2014). In at least one instance, the Supreme Court has required some suspicion before permitting a highly intrusive search in situations involving security issues. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985) (holding that a cavity search of a person passing through customs is only permissible if there is a reasonable suspicion of contraband).

99. *See* United States v. Prevo, 435 F.3d 1343, 1348–49 (11th Cir. 2006) (permitting revocation of consent would undermine efforts to keep contraband out of prisons); Morgan v. United States, 323 F.3d 776, 781 (9th Cir. 2003) (finding that preventing the revocation of consent was "vital to national security") (quoting United States v. Jenkins, 986 F.2d 76, 78 (4th Cir. 1993)); United States v. Herzbrun, 723 F.2d 773, 776 (11th Cir. 1984) ("[A]n unimpeded exit would diminish the risk to skyjackers and increase attempts."); *see also* Thomas, *supra* note 61, at 549 (arguing that it is acceptable to use consent search doctrine to search people seeking to enter "sites where catastrophic harm is possible" as "[n]o one has a right to be in these areas if he poses a risk to the public").

100. *See Prevo*, 435 F.3d at 1348–49; *Morgan*, 323 F.3d at 781; *Herzbrun*, 723 F.2d at 776; *see also* LAFAVE, *supra* note 32, § 8.2(*l*).

101. The scope of a search has both temporal and spatial limits. *See* LAFAVE, *supra* note 32, § 8.1(c).

B. Irrevocable Implied Consent on the Road

Implied consent searches appear to work differently on the road than in other zones of consent. For roadways, the state legislatures, rather than the courts, have created consent.[102] Consent is implied by a series of actions—receiving a driver's license and then driving a vehicle on a public road—rather than a single action such as entering a checkpoint.[103] The limits of the search are (relatively) clear: the police officer may test a driver's blood alcohol content.[104] There is typically a consequence for withdrawing consent (the driver's license will be revoked) but this consequence is only the loss of a privilege (driving) conditioned on the continued granting of consent.[105]

However, some states have placed an extra burden on withdrawing consent by criminalizing withdrawal.[106] Drivers who attempt to withdraw consent in these states do not just face the loss of their licenses but also fines and potential imprisonment.[107] The citizen loses his or her privilege to drive but also the more fundamental right of liberty. Making the cost of withdrawal a citizen's freedom transforms implied consent through contractual obligation into a relative of the searches conducted in airports, military bases, and prisons.[108]

An Alaskan court upheld an implied consent statute criminalizing withdrawal when challenged by defendants who refused to consent to blood alcohol testing after arrest, but were nonetheless subjected to the testing.[109] The court held that the defendants confused "consent" with "cooperation."[110] The statute required that the police officer have probable cause before making a request, and as the state already had the right to conduct searches without a suspect's cooperation, it also had the right to criminalize non-cooperation.[111] This holding allowed the state to

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102. States, through statute, have made consent to a blood alcohol content ("BAC") test upon request by a law enforcement official a condition of being licensed as a driver. *See supra* note 81 and accompanying text.

103. For specific examples of statutory authorization, see sources cited *supra* note 81.

104. *See supra* note 82 and accompanying text.

105. *See* Bruns, *supra* note 81, at 947 ("All of the implied consent statutes provide that upon refusal the state shall suspend the suspect's driver's license for a period of time, which may vary from as short as forty-five days to as long as one year."); *see also supra* note 82 and accompanying text.

106. For example, Alaska, Kansas, and Louisiana are states that have criminalized refusal to consent. *See* ALASKA STAT. § 28.35.031(e) (2010) ("Refusal to submit to a preliminary breath test at the request of a law enforcement officer is an infraction."); KAN. STAT. ANN. § 8-1025 (West 2013) (creating penalties for drivers that repeatedly refuse to consent to blood testing); LA. REV. STAT. ANN. § 32:661(f) (2013) (same); *see also* Taryn Alexandra Locke, Note, *Don't Hold Your Breath: Kansas's Criminal Refusal Law Is on a Collision Course with the U.S. Constitution*, 52 WASHBURN L.J. 289 (2013) (discussing the Fourth Amendment issues Kansas may face for criminalizing the withdrawal of consent).

107. *See, e.g.*, KAN. STAT. ANN. § 8-1025 (West 2013); LA. REV. STAT. ANN. § 32:661(f) (2013).

108. *See* Locke, *supra* note 106, at 318. ("If the driver consents to the test, he surrenders his Fourth Amendment right to refuse in order to assert his right to liberty; if he exercises his Fourth Amendment rights and refuses, he surrenders his right to liberty.")

109. *See* Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1451 (9th Cir. 1986).

110. *See id*. at 1450.

111. *See id.*

criminalize the defendant's right to withdraw consent because in the court's view, only cooperation—not consent—was at issue.

The court was correct in saying that the officer could conduct the test based solely on probable cause and the state could codify that power.[112] But the state did not codify the right to conduct a search based on probable cause, and it did not choose to use probable cause as the basis for the search of the defendant in this case. Rather, the state chose to use consent as the basis for the search. By choosing to base its search on consent instead of probable cause, the state should have proven that consent was given and existed throughout the search. The court was right to say that there was probable cause to conduct the search, but it was wrong to permit the state to bring in the consent search doctrine through statute and deny the defendant the right to withdraw consent.[113]

C. The Unavoidable Conflict

The irrevocable implied consent doctrine conflicts with both the knowing waiver doctrine and the voluntariness test.

Under a "knowing waiver" analysis, it is necessary that a suspect is protected from most "implied" waivers—the doctrine requires that the waiver be intentional and the burden is on the state to show that the waiver was made intentionally.[114] It would be acceptable to deny a citizen the right to withdraw under a "knowing waiver" doctrine—to allow a defendant to claim back a right they had freely given up whenever the proceedings went against them would be peculiar.[115] However, such a doctrine requires that the state prove that the waiver was given intentionally, not by the mere accident of wandering into a particular space or on to a roadway.[116] Allowing consent to be implied runs contrary to the nature of a knowing waiver since the knowing waiver is focused on "actual consent," not what the suspect's behavior implied to the officer conducting the search.[117]

Under a voluntariness test, implied consent works but the suspect must have the right to withdraw consent.[118] Consent exists under *Bustamonte* as long as the officer believes that the suspect is volunteering.[119] If the suspect makes clear that he or she is not volunteering at any time, by explicitly withdrawing his or her

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112. *See* Schmerber v. California, 384 U.S. 757, 769–72 (1966) (permitting forced testing due the concern that the evidence will diminish over time).

113. *See* Locke, *supra* note 106, at 315–16 (arguing that because the state chose to seek authority to search through consent rather than through probable cause, the validity of its searches should be subjected to the limitations of consent search jurisprudence).

114. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (explaining knowing waiver doctrine in the context of a defendant's right to counsel).

115. *See supra* note 94 and accompanying text.

116. *See Zerbst*, 304 U.S. at 464.

117. *See id.*

118. *See supra* Part III.A.

119. *See supra* Part III.A.

consent, then it is not reasonable for the officer to believe that consent still exists.[120] "Irrevocable" consent ruins the *Bustamonte* framework—if the suspect says that he or she is not volunteering for the search, the search is no longer authorized under the voluntariness test because the "totality of the circumstances" show that the suspect no longer consents.[121]

Though some academics may support irrevocable implied consent,[122] there is simply no version of consent searches where irrevocable and implied consent combine coherently. A "knowing waiver" permits irrevocability but not implied consent searches, and the voluntariness test permits implied consent searches but not irrevocability. Neither can permit both irrevocability and search by implication while remaining logically sound.

D. The New General Warrant?

Irrevocable implied consent searches do not work under any version of the consent search and should be avoided on that basis alone. However, there are also deeper implications. Combining irrevocable and implied consent potentially makes a doctrine similar to "general warrants"—warrants issued by British authorities during the Colonial period permitting British agents to search areas and people in them at will.[123] While scholars disagree about the original meaning of the Fourth Amendment and what the Framers meant by "unreasonable searches and seizures,"[124] it is undisputed that the Founders were, in some way, responding

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120. *See supra* Part III.A.

121. *See supra* Part III.A.

122. *See* Thomas, *supra* note 61, at 552.

123. As the Court described in *Steagald v. United States*:

> The Fourth Amendment was intended partly to protect against the abuses of the general warrant that had occurred in England and of the writs of assistance used in the Colonies. The general warrant specified only an offense . . . and left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched. Similarly, the writs of assistance used in the Colonies noted only the object of the search—any uncustomed goods—and thus left customs officials completely free to search any place where they believed such goods might be. The central objectionable feature of both warrants was that they provided no judicial check on the determination of the executing officials that the evidence available justified an intrusion into any particular home.

451 U.S. 204, 220 (1981) (citations omitted); *see* Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH. L. REV. 51, 61–62 (2010) (claiming that Fourth Amendment was only meant to be used to prevent general warrants); *see also* Minnesota v. Dickerson, 508 U.S. 366, 378 (1993) ("[T]his Court rightly 'has been sensitive to the danger . . . that officers will enlarge a specific authorization . . . into the equivalent of a general warrant to rummage and seize at will.'") (quoting Texas v. Brown, 460 U.S. 730, 748 (1983) (Stevens, J., concurring in judgment)).

124. At least one scholar states that the "unreasonableness" clause was never meant to be separated from the "warrants" clause—it was only meant to mean that illegal searches were not permitted, not to allow judges to decide whether a warrantless search was reasonable or unreasonable. *See generally* Davies, *supra* note 123.

to these "general warrants" when they created the Fourth Amendment.[125]

In their time, general warrants were more common than the irrevocable implied consent doctrine is now. Agents enforcing the law during the Framers' era did not have the authority to engage in warrantless searches,[126] and if an agent did enter a citizen's property without judicial authority or that citizen's actual consent, the agent could be sued for trespass.[127] Like a specific warrant, which is like our current warrant allowing law enforcement officials to search a specific person or place, a general warrant provided the necessary authority to search a citizen's property, such as a home or shipped goods. However, unlike the specific warrant, a general warrant did not require that an agent provide a factual basis to support his search.[128] Rather, a judge could issue a general warrant when there was no evidence that any citizen had broken the law, and an agent could search as he saw fit.[129] Many contemporary commentators viewed this as an unacceptable delegation of authority,[130] and the Founders, through the Fourth Amendment, sought to limit this power conveyed by legislatures and judiciaries.[131]

Irrevocable implied consent searches possess key similarities to the general warrant. Legislatures and judiciaries provide space where the agents enforcing laws may conduct a search with few, if any, limits.[132] When citizens enter a secure area or drive on the road, they subject themselves to this broad executive authority. If an agent is not required to explain why he or she wishes to conduct a search, then that agent has the discretion to use his power unreasonably.[133] These characteristics were precisely what the Founders were trying to prevent with the Fourth Amendment.

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125. *See supra* note 123.

126. *See* Davies, *supra* note 30, at 619–24 (explaining the limited power law enforcement had during the Framers' era).

127. *See id.* at 661–62 ("Misconduct by an officer was usually denoted a wrong, a trespass, or 'unlawful'—the language of private wrongdoing which indicated the officer was personally liable for it . . . ."). *See generally* George C. Thomas III, *Stumbling Towards History: The Framers' Search and Seizure World*, 43 TEX. TECH L. REV. 199 (2010) (arguing that the law of trespass was the fundamental protection against illegal searches and seizures during the Framers' era and that the Framers relied on the common law when shaping the Fourth Amendment).

128. *See* Davies, *supra* note 30, at 658–60 (describing the use of general warrants by customs officials to search items passing through customs at will); *see also supra* note 124.

129. *See* Davies, *supra* note 30, at 578–82 nn.74–84; *see also* David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 256–58 (2005) (stating that commentators criticized general warrants but focused primarily on the use of general warrants to search houses specifically).

130. *See* Steagald v. United States, 451 U.S. 204, 220 (1981); Davies, *supra* note 123, at 61 (claiming that the Fourth Amendment's *only* purpose was to ban general warrants). *See generally* Amar, *supra* note 33 (discussing historical context of the Fourth Amendment).

131. *See supra* note 123.

132. *See supra* Part II.

133. This broad discretion can lead to unchecked harassment. *See supra* note 61.

V. SOLUTIONS

The doctrine of irrevocable implied consent makes clear that the consent search doctrine has drifted not only from actual consent, but also from its foundation in the Fourth Amendment. Fortunately, the application of irrevocable implied consent doctrine is limited and can be replaced by doctrines that do not conflict with the principles of the Fourth Amendment. A few alternatives the courts could use to fix the consent search doctrine include: (a) requiring a knowing waiver before conducting a consent search; (b) relying on the special needs exception in areas that need heightened security if law enforcement officials need more discretion than probable cause provides to protect the space; or (c) permitting searched subjects to withdraw their consent during a search whenever the search is based on consent.

A. Alternative One: Knowing and Voluntary Waiver

The Court in *Bustamonte* rejected the requirement of a knowing waiver for a number of reasons, but primarily because it believed that requiring a knowing waiver would impede law enforcement.[134] However, it is not a police officer's actions and intentions that make the consent search reasonable but the will of the suspect. The *Bustamonte* approach ignores what really makes consent searches reasonable: the suspect's right to invite anyone, including law enforcement, to inspect his or her person or property.[135] The "knowing waiver" doctrine returns to this foundation. It focuses on the searched party—the party that is in fact consenting—rather than the searching officer.

The waiver approach is also more in line with the original Fourth Amendment understanding of searches. Traditionally, if a person was subject to an unreasonable search, he could sue the government agent conducting the search for trespass.[136] The trespass analytic reinforces the idea that courts did not originally rely on what the law enforcement officer considered reasonable but rather whether the suspect granted authority to the officer conducting the search.[137] Unlike *Bustamonte*'s voluntariness test, requiring a knowing waiver would ensure that the officer did in fact have authorization from the searched party before conducting a search, making it more fitting with the traditional understanding of searches.

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134. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 245–46 (1973). The popularity of consent searches among law enforcement officials suggests that the Court has been successful in avoiding this imposition. *See supra* Part I.D.

135. *See supra* notes 47–48 and accompanying text.

136. *See supra* note 127 and accompanying text.

137. While mistake of fact regarding consent is now a defense to tort liability, officers conducting illegal searches were held strictly liable. *See* Thomas, *supra* note 127, at 225 ("The emphasis on protecting liberty in framing-era seizure law can be seen in a host of doctrines that held complainants and officers strictly liable for making a mistake that resulted in the arrest, search, or prosecution of the wrong person.").

A knowing waiver analysis would limit or even eliminate implied consent searches. Implied consent searches emphasize the doctrinal drift from focusing on the searched party's intentions to the searching officer's understanding of the situation. This drift encourages officers to construe actions as consent, then to ignore indications that consent has not been given; after all, there is no benefit for the officer to find out whether an assumption of consent was correct. Implied consent has been stretched far, so far as to accept silence as grounds for consent.[138] Requiring a knowing waiver would reduce the number of implied consent searches by requiring an affirmative response from consenting parties. While this may not entirely eliminate the inherent coercion in the interaction between an officer and a citizen, it would hem in potential abuse by law enforcement.

Finally, requiring a waiver would provide security personnel and police officers on the road with the same authority that currently exists, but that authority would be based on a more sound doctrine. Unlike under an ongoing voluntariness test, irrevocable consent could be permissible under the waiver analysis,[139] just as it is permissible for a defendant to irrevocably waive his or her right to counsel.[140] Getting a waiver signed would be easy in these instances, either by having people sign the waiver at the local DMV when they get their license, at airport security when they check in at the airport, or at the entrance gate of a military base or prison. While the agents would still have significant discretion, the authorization for that discretion would come from the person searched rather than from a court or a legislature.[141]

B. *Alternative Two: Special Needs and Probable Cause*

Without disrupting *Bustamonte*, the courts could decide to not use the consent search doctrine in areas where it would be problematic for a person to revoke their consent.

The special needs doctrine could replace the consent search doctrine in secured areas.[142] The special needs doctrine limits authority that security officials have to conduct searches in the designated area. Under the special needs doctrine, the agent ensuring security may engage in a search when there is either (1) reasonable, individualized suspicion or (2) a non-discriminatory system in place to conduct

138. *See supra* note 71 and accompanying text.

139. *See supra* Part IV.C.

140. *See* Faretta v. California, 422 U.S. 806, 835–36 (1975).

141. How to verify "actual" consent is a separate issue. At least one critic has found that consent forms, used by some states, do not effectively certify that actual consent has been given free from coercion and make it more difficult for defendants to challenge involuntarily given consent. *See generally* Nancy Leong & Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS. L. REV. 751 (2013). While consent forms might be part of a larger solution, they would not fix the issue on their own.

142. The special needs exception applies when there is a "special need[], beyond the normal need of law enforcement." New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

searches of people passing through the designated area.[143] The special needs doctrine specifically cabins the discretionary power of the agents who are conducting the searches.[144] The Ninth Circuit has taken this approach, deciding to replace an irrevocable implied consent theory with a special needs theory in at least one circumstance.[145] In comparison, an agent in an area designated as a zone of implied consent has much broader discretion. If parties in the area have consented to a search, security agents may pick which parties they want to search with minimal explanation.[146]

As for blood alcohol testing at DUI stops, the Court has ruled that forced blood alcohol testing is permissible when there is probable cause that the suspect has been drinking and driving.[147] Many states actually already require that officers only conduct a search authorized under an implied consent *after* they have arrested someone for a DUI, meaning that the state could rely on probable cause as a basis for the search rather than consent.[148] In these states, the implied consent statutes provide little additional authority (since the probable cause justification exists).

The special needs alternative would be a viable solution, but it is not as satisfying as requiring a waiver for a few reasons. First, it does not take the opportunity to fix existing problems, such as remedying the break between contemporary consent search doctrine and the original understanding of the Fourth Amendment. Second, it places greater limitations on security personnel than would be preferable, as it might be necessary for TSA and military security to have more power within the sensitive areas that they protect.[149] Finally, it allows for the possibility that irrevocable implied consent might rise up in a different context further along in the future in a place where the special needs doctrine would be insufficient.

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143. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (permitting state to set up roadside sobriety checkpoints that neutrally targeted all passing drivers); *T.L.O.*, 469 U.S. at 341–42 (allowing searches in schools based on reasonable suspicion); *see also* Antoine McNamara, Note, *The "Special Needs" of Prison, Probation, and Parole*, 82 N.Y.U. L. REV. 209, 212–19 (2007) (providing a full explanation of the special needs doctrine).

144. *See* McNamara, *supra* note 143, at 216–19.

145. *See* United States v. Aukai, 497 F.3d 955, 961–62 (9th Cir. 2007) ("[I]t makes little sense to predicate the reasonableness of an administrative airport screening on an irrevocable implied consent theory . . . . To the extent our cases have predicated the reasonableness of an airport screening search upon either ongoing consent or irrevocable implied consent, they are overruled.").

146. This unfettered discretion stems from not requiring the agent to give an explanation for conducting the search and may result in issues such as racial profiling. *See* Thomas, *supra* note 61, at 540.

147. *See* Schmerber v. California, 384 U.S. 757, 770–71 (1966) (permitting forced blood testing after a drunk driving stop due to the concern that the evidence would diminish over time).

148. *See, e.g.*, ALASKA STAT. § 28.35.031(a) (2010) ("The test or tests shall be administered at the direction of a law enforcement officer who has probable cause to believe that the person was operating or driving a motor vehicle or operating an aircraft or a watercraft in this state while under the influence of an alcoholic beverage, inhalant, or controlled substance or that the person was a minor operating a vehicle after consuming alcohol.").

149. Under the "special needs" doctrine, a government agent must still articulate why he or she had a reasonable suspicion before conducting an individualized search. *See supra* notes 142–46 and accompanying text. This standard might be too strict to effectively protect sensitive areas.

C. Alternative Three: Undeniable Withdrawal

A third solution would be to always permit a person to withdraw his or her consent to a search. If a person has provided consent by entering into a particular area or by driving on the road, he or she may revoke consent by immediately leaving the area or by turning over his or her driver's license. By permitting withdrawal in every consent search situation, the doctrine can continue to rely on the "totality of the circumstances" voluntariness test from *Bustamonte*.

This solution, however, is the least satisfying of the three. It does not fix the problem that a person may not realize they are consenting in the first place and still provides security personnel with too much authority.[150] From a societal standpoint, a person who means harm might attempt to enter a space multiple times to check out security, withdrawing consent whenever he or she is stopped for a search.[151] Using this method to survey a highly secured area, a criminal organization could find weaknesses otherwise hidden.[152] By always permitting the opportunity for withdrawal, this solution undermines security personnel's authority in the secured space.

VI. CONCLUSION

Implied irrevocable consent searches, searches where law enforcement officials may imply consent while denying suspects the right to withdraw consent, are not common. They, however, represent a disruptive anomaly in consent search jurisprudence. They are at odds with any current understanding of consent, conflicting with both the *Bustamonte* voluntariness test and the knowing waiver doctrine. They break from the traditional understanding of what is a reasonable search and bear key similarities to the general warrants that the Founders sought to prevent with the Fourth Amendment. They are the delegation of complete authority to law enforcement to conduct searches at will only under the guise of consent. There may be valid reasons to support this expansive delegation, but such a delegation cannot be soundly based upon the consent search doctrine without distorting the doctrine's framework. Considering the undermining influence irrevocable implied consent searches pose to the consent search doctrine and the Fourth Amendment, they must be extirpated from the jurisprudence and replaced with a more palatable alternative.

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150. *See* LAFAVE, *supra* note 32, § 8.2(*l*) (claiming that the approach is flawed and will result in people consenting who do not intend to consent).

151. *See supra* note 99 and accompanying text.

152. *See supra* note 99 and accompanying text.