Consent, Dignity, and the Failure of Scattershot Policing

Janice Nadler

1. INTRODUCTION

Law enforcement officers often work under conditions that afford them a great deal of individual discretion about how to exercise their power to police. In this chapter, I explore how Fourth Amendment doctrine, as formulated by the U.S. Supreme Court, and as interpreted and applied by lower courts, influences law enforcement policy and individual officers' exercise of this discretion. It does so not only by articulating specific rules for conduct, but by expressing opinions and values about the power relationships between law enforcement officers and those they police. I argue that the Court's Fourth Amendment jurisprudence has encouraged the aggressive targeting of large numbers of people for stops and searches, the vast majority of whom are innocent of any crime. Many of these searches are premised on the highly questionable notion that the individuals targeted have freely consented to a search of their persons, vehicles, or belongings. The result is a set of law enforcement practices that maximize unpleasant and frightening encounters between civilians and police; the vast majority of these encounters uncover no crime, yet collectively they are gradually cultivating a popular attitude of fear and resentment, rather than a willingness to cooperate with legal authorities. In order to repair what is now an atmosphere of bitterness and distrust toward the police in some communities, law enforcement agencies and officers should follow the lead of the handful of state supreme courts that have limited the ability to conduct consent searches on a scattershot and arbitrary basis. I conclude that rather than leveraging their broad discretion into a fishing expedition for criminal activity based on little or no reasonable suspicion, law enforcement agencies should leverage the cooperation of ordinary people who share their aim to reduce crime and build safer communities.
2. LEGAL RULES AND LAW ENFORCEMENT PRACTICES

Legal rules and law enforcement practices respond to and shape each other. Police departments seeking to make contraband arrests, for example, can increase the volume of arrests by using to their advantage legal rules governing when they can stop individuals, search property, and enter places. When investigating a specific crime, law enforcement agencies can acquire a suspect's statement by leveraging legal rules about waiver of rights to remain silent and to have counsel present. Ever mindful of what the legal rules require and prohibit, law enforcement agencies develop policies, train officers, and institute practices that comply with the rules (or at least permit a plausible claim of compliance) and simultaneously satisfy institutional goals regarding making arrests and gathering evidence. The legal rules are themselves derived in large part from Supreme Court decisions and lower and state court decisions interpreting the standards articulated by the Court. At the same time, the Supreme Court examines existing law enforcement practice in each case that comes before it and uses that practice as a starting point for the decision it makes about the reasonableness of the practice in question.

Broadly speaking, the Court's interpretation of what the Fourth Amendment requires and permits is what shapes the circumstances under which police stop citizens and conduct searches. Similarly, Fifth Amendment jurisprudence shapes police practices in the interrogation room. I will argue in this chapter that as a matter of current practice, the Court tends to take the perspective of law enforcement, and so the rules of engagement created by the Court are sometimes based on highly questionable assumptions about what citizens in these situations believe and understand. The result is a jurisprudence of stops, searches, and confessions that imagines a marketplace of free exchange between police officers and citizens, in which the police officer invites the citizen to participate in a search or to offer a statement, and the citizen mulls the offer as a customer would mull the opportunity to purchase a Persian rug. The reality as experienced by citizens is quite different, as I will discuss in detail.

3. THE JURISPRUDENCE OF CONSENT AND WAIVER

When a suspect makes an incriminating statement to police, or when a citizen grants permission to an officer to search her car, the court reviews the circumstances of the statement or the grant of consent to search to ensure it was voluntarily made. Judges understand that police rely heavily on the consensual encounter technique to discover evidence of ordinary criminal wrongdoing, and that police rely heavily on incriminating statements made by suspects.
accused of serious crimes. At the same time these police-citizen interactions pose challenges to the boundaries of the Fourth and Fifth Amendments. When is a street encounter between an officer and a citizen a consensual one, and when does it rise to the level of a seizure under the Fourth Amendment? When is an individual's grant of permission for an officer to search his bag voluntary and when is it mere acquiescence to legitimate authority? When is a suspect's statement a knowing and voluntary waiver of his right to remain silent under the Fifth Amendment, and when is it a result of submission to the pressures of custodial interrogation?

The lower courts analyze these issues every day, and the Supreme Court has formulated a set of standards to assist lower courts and law enforcement agencies in delineating where voluntary action ends and compulsion begins. The Court has held that police requests to stop and talk or to search persons or bags or vehicles are not coercive per se for purposes of the Fourth Amendment. And the Court has held that government interrogation of a suspect in custody is inherently coercive, but that coercion is dispelled as a matter of law when the suspect is advised of her right to remain silent and her right to have counsel present. There are now large bodies of law governing when a seizure occurs, when a consent search is voluntary, and when an incriminating statement is made voluntarily. But in an effort to guide law enforcement in the continual process of bumping up against the boundaries of the Bill of Rights, the Court has decided to disregard a basic social truth: as a general matter, when law enforcement officers make a request, people feel enormous pressure to say yes. When a police officer asks to please see a driver's license and registration during a traffic stop, the driver does not deliberate about whether to grant or decline this request - she understands that "no" is not an option. When an officer approaches a pedestrian walking down the sidewalk and says, 'I have a few questions to ask you;' most people do not think they would feel free to leave or say no to the officer; this commonsense truth is actually supported by empirical evidence.1 Survey evidence similarly supports the notion that when an officer approaches a bus passenger to ask questions, most people do not think they would feel free to refuse.2 Law enforcement officers generally have authority over citizens, and citizens in turn feel compelled to submit to that authority, even when, as in the sidewalk and bus scenarios just mentioned, they have a legal right to refuse.3 In the words of Richard Uviller, a police request for consent "however gently phrased, is likely to be taken by even the toughest citizen as a command. Refusal of requested 'permission' is thought by most of us to risk unpleasant, though unknown, consequences."4

The commonsense wisdom that it is best to submit to police requests is a matter of perceptions of power and social authority, not a matter of information
and the logic of legal rules. Even when people are explicitly told they have a right to refuse to comply with the officer's request, many still feel compelled to do so, because of the inherent authority of the officer making the request. Thus, Ohio motorists stopped on the interstate consented to have their vehicles searched at the same rate regardless of whether or not the officer advised them of their right to refuse consent. Indeed, even the now-famous *Miranda* warnings, in which suspects are advised of their right to remain silent and to have an attorney present, apparently have had very little, if any, influence on the rate at which suspects decide to talk to the police.6 In the station house, suspects sometimes feel enormous pressure to talk, despite having heard the *Miranda* warnings. Many succumb to these pressures. Some succumb even when they are innocent, and the confession they give is false.

In all of the situations just discussed, the lawfulness of the officer's act of stopping, or searching, or obtaining a statement from the citizen turns on the question of whether the citizen voluntarily assented to the stop or search or confession. Even though citizens sometimes feel enormous pressure to assent, judges often do not recognize these pressures, instead focusing on the propriety of the officers' conduct. By ignoring the situational pressures inherent in almost any police-citizen encounter, judges systematically deny the reality experienced by ordinary citizens and the social meaning underlying the law enforcement request to stop, to search, or to confess. Judges who systematically ignore the compulsion inherent in these police-citizen encounters thereby construct a collective legal myth of autonomy and free choice that provides support for the proliferation of the police practice of approaching and searching innocent people in large numbers. Depending on the nature of the threat at hand, the social and political costs of law enforcement officers' approaching, questioning, and searching citizens might or might not be worthwhile. But the U.S. Supreme Court has declined to engage in any serious analysis of this question and instead has accorded a great deal of deference to the government's claim that a reasonable person in the situation would not have felt restricted in his freedom of movement or his ability to refuse the officer's request. Implicit in these deferential judgments, however, are unrealistic assumptions about how ordinary people perceive their freedom to resist when a law enforcement officer seeks their cooperation and compliance. I explore these assumptions in more detail in the next section.

4· BUS SWEEPS AND THE LANGUAGE OF CONSENT

When police officers ask someone whether they can take a look in their bags or in their car, there are two key legal issues that the reviewing court must decide: 1) whether the consent to search was voluntarily given, and 2) whether
the person who consented to the search was unlawfully seized at the time consent was
given. Both questions require the judge to decide, under the totality of the
circumstances, whether a reasonable person would have felt free to refuse or to walk
away. To decide the consent question, courts examine, among other things, the manner
in which the police requested consent to search. Following the lead of the Supreme
Court, lower courts examine whether the police spoke to the citizen in a polite manner,
and whether the police asked for permission in the form of a question. In so doing,
courts often analyze the encounter in question as if the conversation that took place
has a fixed meaning that can be readily gleaned without reference to the context.

Yet it is implausible to conclude, as the Court does, that the language of the
exchange itself dispels inferences of coercion. Consider the following example. In
*United States v. Drayton*, seven police officers boarded a Greyhound bus during a
scheduled stopover. The driver had collected all of the passengers' tickets and gone
into the terminal to complete paperwork. On the bus, one police officer knelt
backward in the driver's seat; one police officer stood at the back of the bus, where he
could see everyone; and one officer began questioning passengers about their
destinations and their bags. As he asked questions, the officer stood over the seated
passengers and leaned down toward them, placing his face twelve to eighteen inches
from theirs. He held up his badge and explained that he was conducting a drug
interdiction and said that he would like their cooperation. He then asked for
permission to search their bags.

During oral argument in the case, Justice Scalia made clear his view that the
police officer was merely making a request, and the words the officer used would
"counteract" contextual cues suggesting compulsion. Specifically, Justice Scalia
asked, "Why ... is it that the most immediate expression of the police officer does not
counteract whatever other indications of compulsion might exist under the
circumstances? ... There's a policeman in the front of the bus. Who cares? He ... has
made it very clear that he's asking for your permission." To answer Justice Scalia's
rhetorical question, the bus passengers are the ones who care, because they could not
help but notice the following: the driver and tickets were absent; one police officer
was now in the driver's seat; the police had effectively commandeered the bus. The
bus was apparently going nowhere until the police got what they wanted, which, in
their own words, was the passengers' "cooperation" in their drug interdiction mission.
But Justice Scalia and the majority in *Drayton* appeared to see the matter differently
- interestingly, they seemed to take the perspective of the officer, who was, after all, just
trying to follow the law. The officer's act of asking permission "counteract[s] ... other
indications of compulsion." According to this view, the authority of armed police
officers fades away when they merely
follow the rules of the game show *Jeopardy* and express their desire to search in the form of a question.

It is only through the prism of the officer's perspective, then, that the Court could sensibly declare that when an armed police officer approaches and asks to search, "the presence of a holstered firearm ... is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."

Rather, for judges viewing the encounter from the perspective of the police, the polite tone of voice used by the officers gives rise to the inference that the citizen was free to decline to talk to the officers or to decline the request to search. Indeed, the Court has not only approved but actually lionized the exchange that takes place between police and citizens in consent searches:

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 of 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.

5· WORKING AROUND THE U.S. SUPREME COURT'S UNREALISTIC NOTION OF CONSENT

Ever since *Drayton*, lower courts interpreting the federal Constitution have had no choice but to follow the lead of the Supreme Court. In doing so, those courts routinely and mechanically point to the police officer's polite tone of voice as a key basis for finding that the defendant voluntarily consented to being searched. In one recent case, the police pulled over a car and arrested the driver for driving without a license. The officer then asked the passenger whether he had any drugs, and asked, "Well, do you mind if I check?" The passenger did not answer and did not gesture. The officer ordered the passenger out of the car. The passenger complied, placing his hands in the air. The police officer then searched the passenger and found drugs. Incredibly, the court held that the passenger had consented voluntarily to the search by raising his hands in the air. Apparently, when the officer uttered the magic words "Well, do you mind if I check?" this rendered the remainder of the encounter voluntary.

Although lower courts applying the Fourth Amendment have little choice but routinely to find consent searches voluntary under the tightly constrained precedent that the Supreme Court has constructed, state courts are free to interpret their own state constitutions to require a higher level of scrutiny of consent searches, and a few have done so. For example, some states have held
that the prosecution must prove that the person consenting knew that she had a choice in the matter.\textsuperscript{14} Further, in some jurisdictions, a police officer making a traffic stop is prohibited from requesting consent to search unless he or she has a "reasonable and articulable suspicion" to believe that a crime is occurring.\textsuperscript{15} The Supreme Court of Hawaii has gone further and applies a similar "reasonable suspicion" standard for requesting consent during any police encounter, not just traffic stops.\textsuperscript{16}

It is interesting to compare the perspective-taking strategy of the few state courts that have interpreted their state constitutions as granting broader protections regarding consent searches with the perspective-taking strategy of the U.S. Supreme Court. The Supreme Court routinely takes the perspective of law enforcement officers and has made it very clear that the considerations about social authority and pragmatic implicature are to be ignored in consent search cases, no matter how compelling those considerations might be. Instead, it has signaled to lower courts that when police phrase their goal in the form of a question and speak in a polite tone of voice, that is a request that as a matter of law can be freely refused, regardless of whether the context of the conversation suggests otherwise. This, after all, is the most we can expect law enforcement officers to do to minimize the coercive nature of the encounter.

On the other hand, the few state courts that provide broader protection under state constitutional law tend to take the perspective of the citizen, rather than the officer. Where the U.S. Supreme Court asks whether the officer has used a polite tone of voice and phrased utterances in the form of a question, this group of state courts instead recognize and describe the subjective experience of being targeted by the government. The New Jersey Supreme Court, for example, begins with the observation that because it is nearly impossible to drive without eventually unwittingly committing some infraction of the vehicle code, virtually anyone driving can be stopped and asked for consent to search. To the New Jersey court, this in itself presents a policy problem, because "treating all citizens like criminals in order to catch the malefactors among us represents an unwise policy choice, an outlook favoring crime prevention over all of our other values."\textsuperscript{17} The New Jersey court was concerned that the exercise of broad police discretion would "invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches."\textsuperscript{18} The New Jersey court then boldly proclaimed the truth that the U.S. Supreme Court has steadfastly denied: "Many persons, perhaps most, would view the request of a police officer to make a search as having the force of law."\textsuperscript{19} By interpreting their own state constitutions as requiring more than what the U.S. Supreme Court takes the Fourth Amendment to require,
these state courts have rebalanced the scale of the costs and benefits of consent searches.

6. CUSTODIAL INTERROGATION AND VOLUNTARY WAIVER

Like the Fourth Amendment inquiry about whether the citizen's consent to search was made voluntarily, the Fifth Amendment inquiry about a suspect's decision to make an incriminating statement also inquires about voluntariness. However, unlike the consent search analysis, which examines all of the surrounding circumstances of each individual case, the *Miranda* standard for voluntariness first asks whether the suspect was in custody and being interrogated at the time he made the incriminating statement. If he was, then before taking a statement the officers must first dispel the coercive atmosphere of custodial interrogation by advising the suspect of his rights. In the majority opinion in the *Miranda* case, the Court took the perspective of the suspect and recognized that there are fixed features of the custodial interrogation context that threaten to overbear a suspect's will. By looking at the situation of custodial interrogation through the eyes of the suspect, the Court recognized that the informal pressure to speak during custodial police questioning could rise to the level of compulsion under the Fifth Amendment.

In recent years, the Court has narrowed the reach of *Miranda* to some extent, by circumscribing the conditions under which the warning requirement has been violated. Recently, in *Howes v. Fields*, the Court was faced with the question of whether a suspect was in custody when he was interrogated while he was an inmate in jail. The suspect was serving a forty-five-day sentence for disorderly conduct when he was escorted by a corrections officer to a room in another part of the building and interrogated about a sex crime by armed sheriff's deputies for five to seven hours, until about 2:00 a.m. The suspect was told in the beginning of the interview that he could leave and return to his cell whenever he wanted. Several hours later in the interview, he told deputies several times that he no longer wanted to talk to them, but they did not return him to his cell in response to these requests. Because the officers never gave the suspect his *Miranda* warnings, the question of whether he was in custody at the time he made a statement was crucial - if there was no custody, then there was no requirement for warnings. The Court ultimately concluded that the suspect was not in custody, because a reasonable person in his situation would feel at liberty to terminate the interview and leave.

The conclusion and reasoning in *Fields* are remarkably analogous to the conclusion and reasoning in Fourth Amendment consent search and seizure cases. In the Fourth Amendment cases, the Court identifies as the crucial
question whether a reasonable person in the same situation as the citizen would feel free to terminate the police encounter or refuse the request to search, and the answer is almost always yes. In its Fifth Amendment analysis in *Fields*, the Court identified the same issue as key for making the determination of whether the suspect was in custody - would a reasonable person in the suspect's situation feel free to terminate the interview and leave? Like the Court's analysis in *Drayton*, the reasoning in the *Fields* opinion has an air of unreality. More than once, the suspect told his interrogators that he did not wish to speak with them anymore, but this request was never heeded. Yet, the Court found that a reasonable person in his situation would feel free to terminate the interview. Once again, the Court relies on questionable assumptions about what citizens in police encounters perceive about their freedom to extricate themselves from the situation.

7. THE COST TO INNOCENT PEOPLE SUBJECT TO "CONSENT" SEARCHES

In Fourth Amendment cases involving consent searches and seizures, and in Fifth Amendment cases involving statements offered during custodial interrogation, the Court has insisted upon building a set of standards based upon unrealistic assumptions about human psychology. The standards constructed guide law enforcement practices, not only because of the specific rules of police conduct inherent in these standards, but also because of the values expressed by the standards and their underlying rationale. Law enforcement practices that evolve from Supreme Court decisions about constitutional criminal procedure have consequences that reach beyond the individual cases that the Court decides. Criminal procedure case law creates incentives that encourage specific law enforcement practices. In this section, I explore some of the costs of the law enforcement practices that have evolved in response to the Supreme Court's Fourth Amendment jurisprudence.

Consent searches are now a routine method of crime control in many localities, where suspicionless searches of large numbers of people have become common. Police departments and other law enforcement agencies provide training for their officers on obtaining consent, using tactics similar to the training that salespeople receive in inducing customers to buy things they do not want. Consent searches require no justification: they may be done pursuant to an officer's hunch, or for no reason at all. In some places, officers have adopted a practice of requesting consent to search during every traffic stop. Because of unsystematic or nonexistent record keeping, it is very difficult to estimate the frequency of consent searches accurately. One estimate
concludes that more than 90 percent of warrantless police searches are consent searches. But the underlying number of searches is unknown, though the number is likely to be increasing, especially since the September 11 terrorist attacks. In a single Florida city, the local police have routinized bus sweeps, assigning a special squad of officers to conduct daily consent searches on intercity buses making stopovers at the bus station. In a typical year, the officers board and search buses containing more than twenty-six thousand passengers, all of whom become potential search targets. In another Florida city, one police officer testified that he had personally conducted consent searches of more than three thousand bags just in the previous nine months. In Ohio, one officer testified that in the past year he made 786 requests to search motorists whom he had stopped for routine traffic violations.

The policy and practice of conducting scattershot consent searches ought to be permitted only if the costs are justified. The costs are arguably high, however, because the vast majority of people subjected to consent searches are innocent of any crime. For those innocent people subject to consent searches, there are psychological costs. The scattershot approach to consent searches directly affects many thousands of innocent people every year who possess no illegal drugs or guns and are not engaged in illegal activity. Yet they find themselves in a position where a police officer has approached them and wants them to submit to a search. In the view of the Supreme Court, this involves a simple yes/no decision, and the only issue is one about information. The Court has struggled with questions like Do most people have enough information about the legal rules to know whether they are free to decline the officer's request? If they do not, should it be the officer's job to provide it to them? Or would we prefer to encourage people to gather this information on their own? In the Court's collective mind, the citizen is imagined as a dispassionate legal analyst, using information about standards for probable cause and reasonable suspicion. The citizen concludes that she has a choice and then communicates her preference to the officer. But in reality, social interactions are not merely questions of deductive logic, and the problem does not primarily involve information. The citizen who has been stopped by an officer of the law is now involved in a social interaction with a person who possesses a great deal of power over her. To be sure, as a strategic interaction it is governed by law and logic, but as a social interaction it is also governed by principles of pragmatics and social authority, as well as emotional arousal.

Taking the sole perspective of the law enforcement officer has blinded the Court to seeing the ways in which scattershot consent searches, as social interactions, can be costly. Yet, some of these costs are not difficult to discern. For example, the New Jersey Supreme Court has engaged in an explicit weighing
of the costs and benefits of suspicionless consent searches. Among the costs it identified is subjecting "travelers on our State highways ... to the harassment, embarrassment, and inconvenience of an automobile search following a routine traffic stop." As another example from Ohio, a survey of citizens stopped and searched on highways revealed that a large majority felt negatively about the experience. Here are some examples of individuals' reactions to consent searches, expressed sometimes months or even years later:

I don't know if you ever had your house broken into or ripped off ... [it's] an empty feeling, like you're nothing.

It was embarrassing. It pissed me off ... they just treat you like a criminal and you ain't done nothing .... I think about it every time I see a cop.

I feel really violated. I felt like my rights had been infringed upon. I feel really bitter about the whole thing.

I don't trust [the police] anymore. I've lost all trust in them.

When routine police practice involves rummaging through the vehicles and personal belongings of innocent motorists, repeated hundreds and thousands of times, it leaves in its wake a Rood of shaken people, whose sense of personal security is shattered.

8. CONSENT SEARCHES IN THE CONTEXT OF OTHER LAW ENFORCEMENT PRACTICES

These routinized requests for consent searches, in conjunction with permissive rules about traffic stops, custodial arrests, and strip searches, paint a disturbing picture of police power. To illustrate this claim, consider the following. The Supreme Court has declared that the police can stop any vehicle using a pretextual justification such as a cracked taillight or failure to use a turn signal in order to follow up on a hunch or just to have a look at the car and its occupants. The officer's motivation for making the traffic stop is legally irrelevant, so long as the officer can point to a violation of a traffic regulation observed at the time of the stop. Because traffic regulations are so numerous, and because at times, safe driving entails the violation of one or more traffic regulations (such as exceeding the speed limit to keep pace with the Row of traffic), the practical upshot is that nearly any driver can be stopped by police at nearly any time, on the basis of a hunch or worse.

Having ordered a vehicle to stop, and in the absence of probable cause or at least reasonable suspicion of a crime (other than the traffic violation), the police are not permitted to accomplish much through physical force. But they are permitted to ask questions unrelated to the traffic violation without having
to inform the motorist that she is now free to leave, even if the motorist is under the impression that the questioning is part of the initial traffic stop. The motorist is motivated to minimize the time involved in the stop and so is eager to show the officer that there are no grounds to suspect criminal activity. The officer leverages this motivation by asking the motorist whether he has anything illegal in the car and immediately follows up with "Then you don't mind if I take a look?" This tactic leverages the constitutional rules of criminal procedure. First, the police are free to pose any questions they want, and they do not need individualized suspicion to ask for permission to search. Second, once a person consents to be stopped or to be searched, the Fourth Amendment does not apply.

When asked by police for consent to search their vehicle, most drivers agree, oftentimes because they feel they have no choice. If any contraband is found in the car, such as a pipe containing marijuana residue, the officers can arrest occupants of the vehicle. Even if no contraband is found, the Supreme Court has declared that the police can make a custodial arrest anyway, so long as they can find some type of offense punishable by a fine, such as driving without a seat belt. Once someone is arrested, the Supreme Court has declared that the government can strip search the citizen, no matter what the circumstances of the arrest or how minor the offense charged. Thus, even if a person is arrested for failing to pay a fine, he can be held for days, transferred to multiple holding jails, and subjected to multiple nude strip searches, involving a supervised delousing shower and inspection of the genitals and bodily orifices.

Nor is this frightening chain of events limited to contacts that are initiated in traffic stops. At first glance, government stops of pedestrians would seem more difficult because law enforcement does not have at its disposal the complex vehicle and traffic codes from which it can cherry-pick suspected violations. The Supreme Court has declared that law enforcement can indeed stop and frisk individuals, but only if the officer has articulable reasons to suspect that criminal activity is afoot. Under this standard, it would seem unlikely that police could stop and frisk pedestrians at will; nonetheless, this practice is now common and the frequency of these stops is increasing, at least in some places. In New York City, for example, the police department's own records reveal their officers stopping and frisking of close to 700,000 individuals in a single recent year, and the number has increased every year for the past several years. New York Police Department policy requires officers to record the reasons for each stop and frisk they make. Critics charge that police officers use thin pretexts for conducting warrantless, consentless searches on a massive scale. Police department records arguably bear this out: the two most frequent justifications for stops and frisks, noted in about half the stops, are 1) the citizen's making
"furtive movements" and 2) the citizen's being present in a "high-crime area." More than 80 percent of those stopped are black or Latino, and these residents are more likely to be stopped than whites both because most stops occur in black/Latino neighborhoods regardless of crime rates, and because even in white neighborhoods, black and Latino residents are more likely to be stopped than whites. Despite this extraordinarily high volume of stops and frisks, arrests take place in only about 5 percent of all documented stops. Similar practices have been documented in other U.S. cities.

9. THE FOURTH AMENDMENT, SECURITY, AND DIGNITY

The extent to which lower courts will sanction these stop and frisk practices is not yet known. In light of the values that the U.S. Supreme Court has expressed in the context of its consent jurisprudence, it is perhaps not surprising that police departments have taken the scattershot approach to consent searches one step further and simply dispensed with the fiction of asking for consent to search. Law enforcement agencies are no longer hampered by the U.S. Supreme Court's former concern that citizens be treated with dignity and respect by government agents. More than four decades ago in Terry v. Ohio, the case that initially authorized the brief detention and frisking of citizens upon a showing of reasonable suspicion of criminal activity, the Court sent a clear message to law enforcement:

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

A lot has happened since Terry, and the current Court does not seem to embrace these concerns about dignity. Even more fundamentally, the Court is not focused on protecting the security of the people against the government. The text of the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." The scattershot approach to policing poses serious costs on the ability of the people to feel secure from arbitrary intrusions by the state. When people who are not engaging in criminal activity have reason to worry that a walk down the street or a drive to the grocery store will end with being stopped, searched, and perhaps even arrested and strip searched, then "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" has been eroded to
the point of being unrecognizable. The volume and frequency of scattershot stops and searches create a profound harm to the security of the people as a whole. As Jed Rubenfeld has argued, "Freedom requires that people be able to live their personal lives without a pervasive, cringing fear of the state ... produced by the justified apprehension that their personal lives are subject at any moment to be violated and indeed taken from them if they become suspicious in the eyes of governmental authorities."

10. FROM FEAR TO COOPERATION

The practice of widespread, scattershot stops and searches derives from an assumption that effective policing is based on using the most intrusive tools available within the boundaries of the law. Adopting the perspective of law enforcement, the U.S. Supreme Court has expressed approval for intrusive tactics, by employing assumptions about human behavior that conflict with both common sense and empirical research. There is reason to think, however, that intrusive, scattershot policing does not serve well the government's interests in the long run. In order to deter crime, the police need the cooperation of the community members it polices. People obey the law to the extent that they view legal actors and institutions as legitimate, and they care a great deal about the extent to which law enforcement officers exercise their authority fairly and respectfully. If community members perceive their police as treating people unfairly and disrespectfully, they will not be motivated to go forward to report crime, they will be more likely to believe that the police are engaging in illegitimate tactics like racial profiling, and they may even be more likely to engage in criminal activity themselves.

Instead of looking to formal law to define the boundaries of everyday police practices, law enforcement agencies would do well to take the perspective of the citizens whom they police, just as the supreme courts of New Jersey and Hawaii and a handful of other state supreme courts have in interpreting their state constitutions. Instead of simply examining the officers' actions and words from the officers' perspective, these courts have taken seriously the idea that it is a mistake to treat all citizens like criminals in the hope of getting "lucky" and finding some evidence of criminal wrongdoing. The scattershot approach to law enforcement turns citizens against the police, because stops and searches are in fact serious governmental intrusions that often leave the individual feeling violated, degraded, and resentful. Ultimately, scattershot policing is counterproductive: it yields little evidence of criminal activity, and its costs to legitimacy and compliance are potentially devastating.
Notes

2 Id.
3 The subjective experience of compulsion to comply with law enforcement holds even for those who are aware of their legal right to refuse, Id. at 78, and for people from relatively privileged socio-economic backgrounds, Id. at 80 n.159.
5 Illya Lichtenberg, Miranda in Ohio: The Effects of Robinette on the Voluntary Waiver of Fourth Amendment Rights, 44 How. L.J. 349 (2000). In this study for part of the period in question, police were not required to advise motorists of their right to refuse consent, and for part of the period, police were required to so advise. The rate of consent during both periods was about 90%.
6 Stephen J. Schulhofer, Reconsidering Miranda, 54 U. Chi. L. Rev. 435, 436 (1987) ("[T ]he view that Miranda posed no barrier to effective law enforcement [has] become widely accepted, not only by academics but also by such prominent law enforcement officials as Los Angeles District Attorney Evelle Younger and Kansas City police chief [later FBI director] Clarence Kelly.").
7 536 U.S. 194 (2002).
9 Id.
10 DRAYTON, 536 U.S. at 204.
11 Id. at 207.
13 These states include Alaska, Hawaii, Minnesota, New Jersey, and possibly Wyoming. See BROWN v. STATE, 182 P.3d 624 (Alaska Ct. App. 2ooS); STATE v. QUINo, 74 Haw. 161 (1992); STATE v. FORT, 66o N.W.2d 415,416 (Minn.2oo3); STATE v. CARTY, 170 N.J. 632 (2oo2); O'BOYLE v. STATE, 117 P.3d 401, 411 (Wyo.2oo5).
14 See CARTY, 170 N.J. at 639.
15 See, e.g., Id. at 632.
16 Quino, 74 Haw. 161.
17 CARTY, 170 N.J. at 641.
18 Id. (quoting TERRY v. OHIO, 392 U.S. 1 (196S)).
19 Id. at 644.
21 Howes v. FIELDS, 132 S. Ct. 11S1 (2o02).
26 Statistics are difficult to come by and are quite scattered. The Sheriff in one Florida county arrested 55 of the 507 motorists subjected to consent searches over a
three year period. Jeff Brazil & Steve Berry, Color of Driver Is Key to Stops in I-95 Video, *Orlando Sentinel Trib.*, Aug. 23, 1992, at A1. Relatedly, New York City police arrest about 5% of pedestrians of recorded stops and frisks. If they stop individuals without filling out a report, then the 5% figure is an underestimate.


30 See Id. at 283, 285, 288 (subject numbers 11091, 12731, 4735, and 15494).


33 *FLORIDA v. RODRIGUEZ*, 469 U.S. 1, 5-6 (1984).

34 Id.

35 Lichtenberg, supra note 29.


37 Id.


39 Id.

40 TERRY v. OHIO, 392 U.S. 1 (1968).

41 Michael Powell, Former Skeptic Now Embraces Divisive Tactic, *N.Y. Times*, Apr. 9, 2012. The actual number is likely to be higher, assuming that police make additional stops and frisks that they fail to document.


44 TERRY, 392 U.S. at 16-17.


