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The Conversational Consent Search: How “Quick Look” And Other Similar Searches Have Eroded Our Constitutional Rights

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THE CONVERSATIONAL CONSENT SEARCH: HOW “QUICK LOOK” AND OTHER SIMILAR SEARCHES HAVE ERODED OUR CONSTITUTIONAL RIGHTS

Alexander A. Mikhalevsky*

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INTRODUCTION

Over the past decade, acts of terrorism and an increasingly unstable global economy have resulted in increased emphasis on national security.¹ In order to achieve a higher level of security, U.S. citizens have suffered the consequences of more aggressive and invasive security measures.² While most U.S. citizens would probably agree that they would sacrifice some individual liberties in the name of security, where will the line be drawn?³

As national security plays a larger role in our daily lives, U.S. law enforcement officers man the front lines in keeping our cities and communities safe.⁴ Recently, however, police across the country have

1. For example, eleven days after the terrorist attacks on September 11, 2001, the White House appointed the first Director of Homeland Security to “overs[ee] and coordinate[] a comprehensive national strategy to safeguard the country against terrorism and . . . future attacks.” *Creation of the Department of Homeland Security*, DEP’T HOMELAND SEC., <http://www.DHS.gov/Creation-Department-Homeland-Security> (last visited Mar. 3, 2014). One year later, in November 2002, Congress created the Department of Homeland Security with the passage of the Homeland Security Act of 2002, which sought to “reduce the vulnerability of . . . [and] ensure . . . the overall economic security of the United States.” Homeland Security Act of 2002, Pub. L. No. 107-296, § 101(a)(1)(B), (F), 116 Stat. 2135, 2142, (codified as amended at scattered sections of U.S.C.).

2. See Siobhan Gorman, *Spy Agency Activities Violated Fourth Amendment Rights, Letter Discloses*, WALL ST. J. (July 20, 2012), <http://online.wsj.com/article/SB10000872396390444097904577539413137490028.html> (discussing a “secret national security court[’s]” ruling that the National Security Agency has conducted “spy activities [that] on at least one occasion have violated the Fourth Amendment”). This article further discussed extensions to the Patriot Act that allow the use of “broad search warrants that permit eavesdropping [on] categories of people . . . rather [than] requiring warrants for individual people.” *Id.*

3. In a Gallup Poll conducted in August 2011, 71% of Americans believed that “the government should take steps to prevent additional acts of terrorism but not if those steps would violate [their] basic civil liberties.” *Civil Liberties*, GALLUP, <http://www.Gallup.com/Poll/5263/Civil-Liberties.aspx> (last visited Mar. 3, 2014). In comparison, 25% of Americans stated that “the government should take all steps necessary to prevent additional acts of terrorism in the U.S. even if it means [their] basic civil liberties would be violated,” while 4% had no opinion on the matter. *Id.* Despite the poll’s findings, the continuing public outrage since Edward Snowden revealed information concerning the United States’ spy operations suggests that a large number of U.S. citizens are not willing to give up their privacy in the name of national security. See *Edward Snowden: Leaks that exposed US Spy Programme*, BBC WORLD NEWS (Jan. 17, 2014, 9:56 PM), <http://www.bbc.com/news/world-us-canada-23123964>.

4. The mission statements for police departments across the country generally seek to “safeguard the lives and property of the people” they serve and to work with “communities to improve their quality of

become “increasingly militarized.”⁵ Local police forces now arm themselves with military equipment⁶ (e.g., armored personnel carriers that fire .50 caliber rounds,⁷ helicopters, and amphibious tanks)⁸ with the authorization and at the expense of the federal government.⁹

While spotting the traditional arms expansion of power amongst our law enforcement agencies is easy, the non-traditional expansion—the increasing use of covert technology and furtive tactics—is not so apparent. Police departments have begun to test the constitutional limits of their actions,¹⁰ employing techniques “once reserved for overseas intelligence . . . to domestic criminal investigations.”¹¹

life.” *The Mission Statement of the LAPD*, L.A. POLICE DEP’T, http://www.LAPDOnline.org/Inside_The_LAPD/content_basic_view/844 (last visited Mar. 2, 2014); e.g., *Mission Statement*, ATLANTA POLICE DEP’T, <http://www.Atlantapd.org/Mission.aspx> (last visited Mar. 2, 2014) (whose mission seeks to “ensur[e] the safety of our citizens and build[] trust in partnership with our community”); *Mission*, N.Y.C. POLICE DEP’T, <http://www.nyc.gov/html/nypd/html/administration/mission.shtml> (last visited Mar. 2, 2014) (whose mission seeks to “enhance the quality of life in our City” and “provide for a safe environment”); *Chicago Police Department’s Mission*, CHI. POLICE DEP’T, <https://portal.chicagopolice.org/portal/page/portal/ClearPath/About%20CPD/Our%20Mission> (last visited Mar. 2, 2014) (noting that the Chicago Police Department is “part of, and empowered by, the community . . . to protect”).

5. Erik Kain, *Police Militarization in the Decade Following 9/11*, FORBES (Sept. 12, 2011, 11:01 AM), <http://www.forbes.com/sites/erikkain/2011/09/12/police-militarization-in-the-decade-following-911/>.

6. See Benjamin F. Carlson, *Battlefield Main Street*, BENJAMIN F. CARLSON (Dec. 7, 2011), <http://benjaminfcarlson.com/?p=396> (noting that orders for surplus military equipment under the government’s 1033 program in 2012 increased “400 percent over the same period in 2011”). Under the 1033 program, the Department of Defense authorizes the transfer of excess military equipment to local law enforcement departments. *Id.*

7. Radley Balko, *Sheriff Lott’s New Toy*, HIT & RUN BLOG (Sept. 1, 2008, 1:12 PM), <http://Reason.com/blog/2008/09/01/sheriff-lotts-new-toy>.

8. Carlson, *supra* note 6.

9. The National Defense Authorization Act allows the Department of Defense to transfer excess personal property to support law enforcement activities. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 2576a, 110 Stat. 2422, 2639 (1996) (codified as amended at scattered sections of U.S.C.). Under the program, “the Secretary of Defense may transfer . . . arms and ammunition, that the Secretary determines [are] . . . suitable for use by the agencies in law enforcement activities . . . and . . . excess to the needs of the Department of Defense.” National Defense Authorization Act, 10 U.S.C. § 2576a(a)(1)(A)–(B) (2012). In addition, the program allows the law enforcement agencies to receive the property “without charge[.]” only having to reimburse the Department of Defense for charges associated with the transfer. *Id.* § 2576a(b)–(c).

10. Compare *United States v. Jones*, 132 S. Ct. 945, 949, 952–53 (2012) (finding an unreasonable search where police obtained evidence against the defendant through the use of a Global Positioning System (GPS) that they attached to the defendant’s car after their warrant had expired), with *United States v. Skinner*, 690 F.3d 772, 777–79 (6th Cir. 2012) (holding that police did not violate defendant’s Fourth Amendment protections when they tracked his location using his cell phone, reasoning that the same information could have been obtained through visual surveillance), *cert. denied*, 133 S. Ct. 2851 (2013) (mem.).

11. Benjamin Wallace-Wells, *Patriot Act: The Kitchen-Sink Approach to National Security*, N.Y.

One area in which law enforcement agencies have stretched constitutional limits concerns the scope of a suspect's consent to search his or her vehicle.¹² Police forces across the country have tested the limits of consent by asking vague, conversational questions to suspects with the goal of obtaining a suspect's consent to search, even though that individual may not want to allow the search or may not know that he or she has the right to deny consent.¹³ Conversational phrases like "Can I take a quick look?"¹⁴ or "Can I take a quick look around?"¹⁵ have "emerg[ed] as . . . a regular part of police jargon."¹⁶ When people answer these questions in the affirmative—thus consenting to a search—courts have diverged on the question of what people have actually agreed to.¹⁷ Have they given up any right at all? Or, have they just consented to a full search? Part I of this Note will describe the history of consent and its interplay with the U.S. Constitution.¹⁸ Part II will then examine and analyze how courts have interpreted the scope of consent in a variety of "conversational consent search" cases.¹⁹ Finally, Part III will analyze a variety of potential solutions to the issues conversational consent searches present and ultimately propose that courts should adopt a narrow interpretation of the search scope granted by a conversational consent.²⁰

MAG. (Aug. 27, 2011), <http://nymag.com/news/9-11/10th-anniversary/patriot-act/>.

12. See, e.g., *United States v. Wald*, 216 F.3d 1222, 1225 (10th Cir. 2000).

13. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) ("While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.").

14. See, e.g., *Wald*, 216 F.3d at 1225.

15. See, e.g., *United States v. Purcell*, 526 F.3d 953, 957 (6th Cir. 2008).

16. Dru Stevenson, *Consenting to "Quick Look" Police Searches*, CIRCUIT SPLITS (Apr. 8, 2012, 3:21 PM), <http://www.CircuitSplits.com/2012/04/Consenting-To-Quick-Look-Police-Searches.html#more>.

17. Compare *United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667–68 (5th Cir. 2003) (holding that consent to "look in" an automobile "is the equivalent of a . . . general consent to search"), with *Wald*, 216 F.3d at 1228 (holding that when defendant allowed the officer "to take a quick look inside the vehicle" the "consent did not go any further than the interior of the vehicle" (quoting the district court)).

18. See discussion *infra* Part I.

19. See discussion *infra* Part II.

20. See discussion *infra* Part III.

I. BACKGROUND

A. *The Origins of Consent Law*

In the United States criminal justice system, the idea of an individual consenting to a search by a law enforcement officer stems from the “interplay” of the Fourth and Fifth Amendments to the United States Constitution.²¹ The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and that “no Warrants shall issue, but upon probable cause.”²² Meanwhile, the pertinent portion of the Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”²³ Much debate has surrounded the definition of a “search” under the Fourth Amendment, the intricacies of which fall outside the scope of this note.²⁴ However, courts have developed a much clearer definition of a seizure under the Fourth Amendment.²⁵ In *Terry v. Ohio*, the Supreme Court stated that a seizure occurs “when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.”²⁶

On its face, the Fourth Amendment does not impose a requirement that a warrant be issued whenever a government official performs a

21. *Zap v. United States*, 328 U.S. 624, 628 (1946), *vacated*, 330 U.S. 800 (1947) (per curiam).

22. U.S. CONST. amend. IV; *see also* *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” (emphasis added) (footnote omitted)); *McDonald v. United States*, 335 U.S. 451, 455 (1948) (noting that the Constitution contains a warrant requirement “so that an objective mind might weigh the need to invade that privacy in order to enforce the law”).

23. U.S. CONST. amend. V.

24. The modern-day definition of a search under the Fourth Amendment comes from the seminal case *Katz v. United States*. 389 U.S. 347. While *Katz* did not provide a bright line rule, the majority opinion stated “the Fourth Amendment protects people, not places.” *Id.* at 351. Perhaps the more well-known and applied test came from Justice Harlan’s concurring opinion in *Katz*. *Id.* at 360 (Harlan, J., concurring) (noting that people have a “constitutionally protected *reasonable expectation of privacy*” (emphasis added)).

25. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

26. *Id.*; *see also* *Brendlin v. California*, 551 U.S. 249, 254 (2007) (“A person is seized by the police and thus entitled to challenge the government’s action under the Fourth Amendment when the officer, ‘by means of physical force or show of authority,’ terminates or restrains his freedom of movement” (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (internal quotations omitted))).

search,²⁷ and courts have long recognized situations in which police do not need a warrant to conduct a search.²⁸

One of the most widely recognized exceptions to the warrant requirement—and the one at the heart of “quick look” police searches—is the voluntary consent search.²⁹ Courts first applied the voluntary consent principle in 1946.³⁰ In early opinions on the issue, the Supreme Court validated police searches based on one’s voluntary consent, reasoning that an individual had knowingly waived a “constitutional right.”³¹ As more consent cases progressed through the courts, however, the Supreme Court shifted gears—now holding that individuals need not know that they are abandoning a legal right in order for consent to be valid.³² This premise justified a new theory—

27. The plain meaning of the text implies that warrants are not necessary in the event the police perform a reasonable search or seizure. *See* U.S. CONST. amend. IV. This seems to be the foundation for the many exceptions to the warrant rule, which include the following:

investigatory detentions, warrantless arrests, searches incident to a valid arrest, seizures of items in plain view, searches and seizures justified by exigent circumstances, consent searches, searches of vehicles, searches of containers, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable.

Warrantless Searches and Seizures, 35 GEO. L.J. ANN. REV. CRIM. PROC. 37, 37–38 (2006).

28. *See Warrantless Searches and Seizures*, *supra* note 27, at 37–38. For example, it is “well established” that courts have long accepted searches and seizures by police “without a warrant” of items in plain view. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971); *see Horton v. California*, 496 U.S. 128, 128–29 (1990) (noting that, in order for a plain view search to be valid, the officer (1) must have a legal right to “arriv[e] at the place” where (2) the item can be “plainly viewed” and (3) the “incriminating character” of the item is “immediately apparent” (quoting *Coolidge*, 403 U.S. at 466)). Among other exceptions, courts also allow searches incident to lawful arrest. *See, e.g., Chimel v. California*, 395 U.S. 752, 762–63 (1969) (“When an arrest is made, it is reasonable for the arresting officer to search the person arrested Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated.”).

29. *See Christo Lassiter, Consent to Search by Ignorant People*, 39 TEX. TECH L. REV. 1171, 1171–72 & n.2 (2007) (“State actors rely on consent to search more than any other basis to justify a governmental intrusion on Fourth Amendment protections . . .”).

30. *Zap v. United States*, 328 U.S. 624, 628 (1946) (holding that when “petitioner . . . specifically agreed to permit inspection . . . , he voluntarily waived such claim to privacy which he otherwise might have had”), *vacated*, 330 U.S. 800 (1947) (per curiam). As discussed in the remainder of the section, however, courts no longer analyze voluntary consent searches on the basis of waiver but rather the “reasonableness” portion of the Fourth Amendment. *See* discussion, *infra* notes 31–33 and accompanying text.

31. *Stoner v. California*, 376 U.S. 483, 489 (1964) (noting that petitioner could only waive a constitutional right through “word or deed” and emphasizing the fact that an individual needs to know that he is giving up a legal right in order to waive it).

32. *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996) (adding that there is no requirement that officers inform a seized person that he has the right to refuse a search); *see also Schneckloth v. Bustamonte*, 412

one other than waiver—to support consent searches. Accordingly, courts now hold that voluntary consent searches are constitutional because the consent search is a “reasonable” search.³³

B. Modern Day Consent Law

While courts first recognized voluntary consent in 1946, they did not lay out more stringent guidelines until 1973 when the U.S. Supreme Court decided a landmark consent case, *Schneckloth v. Bustamonte*.³⁴ In *Schneckloth*, the defendant was charged with possession of a check with intent to defraud.³⁵ Police found the evidence that formed the basis for the charge—three “[w]added up” checks—during a consent search of a vehicle in which the defendants were riding.³⁶ The “precise question” that the court decided was “what must the prosecution prove to demonstrate that a consent was ‘voluntarily’ given.”³⁷ As the court put it, voluntariness has “no talismanic definition[,]”³⁸ but rather in determining voluntariness one should look at “the totality of all the circumstances.”³⁹ Some of the factors that courts should weigh in determining voluntariness are:

- (1) knowledge of the constitutional right to refuse consent;
- (2) age, intelligence, education, and language ability;
- (3) the degree to which the individual cooperates with the police;
- (4) the individual’s attitude about the likelihood of the discovery of contraband; and
- (5) the length of detention and the nature of

U.S. 218, 227 (1973).

33. *E.g.*, *Illinois v. Rodriguez*, 497 U.S. 177, 183–84 (1990) (analyzing the consent issue on the ground of reasonableness under the Fourth Amendment). The idea of “reasonableness” comes from the language of the Fourth Amendment itself. U.S. CONST. amend. IV; *see also* *Lassiter*, *supra* note 29, at 1172.

34. *Schneckloth*, 412 U.S. 218.

35. *Id.* at 219.

36. *Id.* at 220. The appellate court in the case stated that whether a suspect voluntarily offers his or her consent is a “question of fact to be determined in light of all the circumstances.” *Id.* at 221 (quoting *People v. Michael*, 290 P.2d 852, 854 (Cal. 1955)).

37. *Id.* at 223.

38. *Id.* at 224 (stating that voluntariness “cannot be taken literally to mean a ‘knowing’ choice. ‘Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are “voluntary” in the sense of representing a choice of alternatives’”).

39. *Id.* at 227.

questioning, including the use of physical punishment or other coercive police behavior.⁴⁰

Since *Schneekloth*, courts have continued to tailor the requirements necessary to show that an officer obtained valid, voluntary consent from a suspect.⁴¹ In addition to the voluntariness requirement outlined above, courts have required that the consent come from a person with “actual”⁴² or “apparent”⁴³ authority to give consent. Also—and the most important requirement for the purpose of this note—to be constitutional, an officer’s search “may not legally exceed the scope of the consent supporting it.”⁴⁴ Furthermore, courts will imply consent from “the circumstances surrounding the search, by the person’s prior actions or agreements, or by the person’s failure to object to the search.”⁴⁵

40. *Warrantless Searches and Seizures*, *supra* note 27, at 81–84 (also noting that “[n]o single factor is dispositive” and that “the influence of drugs, intoxication, and mental agitation do not render consent involuntary”).

41. *See, e.g.*, *Florida v. Jimeno*, 500 U.S. 248, 250–51 (1991); *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990); *United States v. Matlock*, 415 U.S. 164, 171 (1974).

42. *Matlock*, 415 U.S. at 168–69.

43. *Rodriguez*, 497 U.S. at 194 n.1. *Rodriguez* held in part that the “determination of consent . . . must be judged against an objective standard: would the facts available to the officer at the moment . . . “warrant a man of reasonable caution in the belief” that the consenting party had authority over the premises?” *Id.* at 188 (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)) (second alteration in original).

44. *United States v. Chaidez*, 906 F.2d 377, 382 (8th Cir. 1990). The Supreme Court determined that the permissible scope of a warrantless automobile search “is defined by the object of the search and the places in which there is probable cause to believe that it may be found.” *United States v. Ross*, 456 U.S. 798, 824 (1982); *see Chaidez*, 906 F.2d at 382 (finding the officer did not exceed the scope of consent where he asked if he may look inside the trunk of the car, and after examining, he moved to the passenger area of the car without objection from defendant); *see also Jimeno*, 500 U.S. at 251; *Walter v. United States*, 447 U.S. 649, 656–57 (1980).

45. *Warrantless Searches and Seizures*, *supra* note 27, at 88. However, the “failure to object” exception only applies to general consent searches and not to limited consent searches, such as when an individual allows an officer to search one particular compartment or area. *See, e.g.*, *United States v. Gordon*, 173 F.3d 761, 766 (10th Cir. 1999) (“We consistently and repeatedly have held a defendant’s failure to limit the scope of a general authorization to search, and failure to object when the search exceeds what he later claims was a more limited consent, is an indication the search was within the scope of consent.”).

C. The Voluntary Consent Search and its Relevance to Conversational Consent Searches

Ever since courts have recognized the voluntary consent theory as an exception to the warrant requirement, law enforcement officers have made often use of it.⁴⁶ The reasons for the vast increase in voluntary consent searches have been widely addressed. In general, the popularity of these searches stems from the fact that “consent is so easily obtained,” and consent searches afford officers “the depth and breadth of the search” that they want.⁴⁷ Adding to the problem, most people do not know that they have the right to refuse consent and—unlike the attendant Fifth Amendment⁴⁸—under the Fourth Amendment, people need not know of their right to refuse consent in order for it to be voluntary.⁴⁹ As demonstrated in *Schneckloth*, a person’s knowledge of the right to refuse is just one factor used to determine voluntariness.⁵⁰

Many legal theorists present other viable reasons for the widespread use of consent searches. One such argument points out that studies have shown that people feel pressure to consent when in the face of authority.⁵¹ One study demonstrated that in certain circumstances “very little pressure is needed to induce innocent people to confess” to something that they did not do.⁵² During the study:

46. See Lassiter, *supra* note 29, at 1172 n.2 (“Empirical studies do not exist, and cannot exist, to support this proposition; rather, we must rely on common sense and informal, anecdotal reflections of individual law enforcement officers from the cop-on-the beat to Transportation Safety Administration (TSA) officers at airports to government building authorities, for example.”).

47. See *id.* at 1172.

48. In the landmark case *Miranda v. Arizona*, the Supreme Court stated that “in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Accordingly, for a confession to be deemed voluntary “the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.” *Id.* (emphasis added).

49. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (“While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.”).

50. *Id.*

51. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 172–79 (2002).

52. *Id.* at 178.

[R]esearchers brought individual subjects into the laboratory and asked them to perform a computer task. Subjects were warned not to press the “Alt” key or the computer would crash. At a preprogrammed moment, the computer did in fact crash, and the experimenter accused the subject of having hit the forbidden key. The experimenter then asked the subject to sign a written confession stating, “I hit the ‘Alt’ key and caused the program to crash. Data were lost.” . . . A total of 69% of subjects signed the confession, admitting to a transgression that they did not in fact commit.⁵³

While results like this seem wholly illogical, the same can be said of the countless number of defendants in criminal cases who voluntarily consent to searches knowing that they have illegal substances or contraband in their possession.

D. What Does This Mean for You and Me?

The idea of voluntary consent is at the heart of quick look and conversational consent searches.⁵⁴ As people consent to conversational search requests by police officers—for whatever reason—the scope of their consent is not abundantly clear. Does their conversational consent allow an officer to search for five minutes or two hours? Just in the trunk of the car or in the passenger section as well? Inside containers or just what is in plain view? The list could go on-and-on and that is precisely the problem with these conversational or quick look searches; no clear boundaries exist.

53. *Id.* While an admission in the “Alt key” scenario does not carry the same consequences of admission in a criminal context, various other studies and scenarios Nadler mentions carry equally grave consequences. *Id.* at 174. For instance, Nadler describes a phenomenon known as “captainitis”; members of the crew notice that a pilot made a mistake, yet they fail to correct or mention the mistake “because they convince themselves that if the captain has decided to do it, it must be right.” *Id.* Ultimately, plane crashes have occurred because of this phenomenon. *Id.* Crew members aboard an airplane would likely know the serious consequences of a pilot mistake exceed—or at the very least parallel—the severity of an admission in the criminal context.

54. Throughout the Note I will use the terms “quick look search” and “conversational consent search” to refer to a police officer’s conversational or misleading request for voluntary consent to search a suspect’s vehicle. The various courts that have heard these types of cases have not yet branded them with any label.

Accordingly, courts are tasked with examining the surrounding circumstances to determine the scope of consent granted. While some courts have found that consent to a conversational search request does not provide an officer with any investigative tools that he does not already have—the ability to perform a plain view search, a search incident to lawful arrest, a stop and frisk search, etc.—some courts have held that consent to a conversational request to search grants the officer a license to perform a full search.⁵⁵ As individuals’ rights are increasingly “trampled”⁵⁶ by law enforcement agencies, it is important for courts to provide a clearer standard by which officers should operate.

II. TWO VIEWS ON THE SCOPE OF CONSENT GRANTED IN QUICK LOOK POLICE SEARCHES

Courts have taken two differing views on the scope of consent granted in quick look type cases.⁵⁷ The more expansive view provides that a suspect’s voluntary consent to a conversational search request provides the officer with a general consent to search;⁵⁸ the more restrictive view limits the officer’s ability to search.⁵⁹ A vast number

55. See, e.g., *United States v. Lopez-Mendoza*, 601 F.3d 861, 869 (8th Cir. 2010); *United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667–68 (5th Cir. 2003) (holding that consent to “look in” a vehicle provides the officer with general consent to search the vehicle); *United States v. Rich*, 992 F.2d 502, 506 (5th Cir. 1993); *United States v. Harris*, 928 F.2d 1113, 1117 (11th Cir. 1991); *United States v. Espinosa*, 782 F.2d 888, 892–93 (10th Cir. 1986); *United States v. Alcaraz-Arellano*, 302 F. Supp. 2d 1217, 1225 (D. Kan. 2004) (holding that, where defendant consented to the officer’s request to “take a look” in the vehicle defendant was driving, defendant had provided the officer with a general consent to search), *aff’d*, 441 F.3d 1252 (10th Cir. 2006).

56. *Kain*, *supra* note 5.

57. Compare *United States v. Wald*, 216 F.3d 1222, 1228 (10th Cir. 2000) (holding that a “quick look” only provides a limited right to search), with *Rich*, 992 F.2d at 504, 506 (finding that consent to “have a look in” defendant’s truck authorized the officer to search luggage located behind the passenger seat).

58. E.g., *United States v. Gordon*, 173 F.3d 761, 766 (10th Cir. 1999).

59. E.g., *Rich*, 992 F.2d at 506. In the vast majority of both the expanded and restrictive view cases, courts address whether a suspect expressed any hesitation to the search because courts hold that a suspect’s “failure to object” to the officer’s search “may be considered an indication that the search was within the scope of consent.” *United States v. Pena*, 143 F.3d 1363, 1368 (10th Cir. 1998) (quoting *Espinosa*, 782 F.2d at 892 (finding in part that, after the police had searched defendant’s motel room, defendant’s subsequent failure to object to searching the room’s bathroom demonstrated that the search fell within the scope of consent granted when defendant allowed the officers to look in his room)). In *United States v. Espinosa*, the court found that a search by police at a border patrol checkpoint did not exceed the scope

of cases in which a defendant argues that an officer exceeded his scope of consent occur in the drug possession context.⁶⁰ In drug possession cases where the officer expresses that the “purpose of [his] search is to look for drugs or contraband,” a suspect’s consent to the search “‘implies that the officer’” is constitutionally permitted to “‘look wherever drugs might be hidden.’”⁶¹

A. Restricted View of Consent

A minority of quick look type cases have taken the view that consent provides a limited ability to search.⁶² Aside from *United States v. Wald*—the leading restrictive view case—the vast majority of federal cases finding that the officer exceeded the scope of consent do so based on facts rather than an interpretation of the quick look or conversational search request language.⁶³ On the other hand, state courts have been much more amenable than federal courts to narrow interpretations of consent in quick look or conversational requests to search.⁶⁴

1. United States v. Wald

The leading restrictive view case is *United States v. Wald*.⁶⁵ In *Wald*, an officer stationed alongside a highway observed a vehicle—owned

of consent granted by a defendant where “[d]efendant stood beside his car expressing no concern during [a] thorough and systematic search” which “lasted approximately fourteen minutes.” *Espinosa*, 782 F.2d at 892. And “[a]t no time did defendant attempt to retract or narrow his consent” during the search. *Id.* However, this single factor is not conclusive as determining the scope of consent “‘is a question of fact to be determined from the totality of the circumstances.’” *Wald*, 216 F.3d at 1228 (citing *Pena*, 920 F.2d at 1514).

60. See, e.g., *Mendoza-Gonzalez*, 318 F.3d at 665–66 (case involving possession of 150 kilograms of marijuana with intent to distribute); *Wald*, 216 F.3d at 1225 (case involving possession of drug paraphernalia and methamphetamine); *Pena*, 143 F.3d at 1365 (case involving possession of and intent to distribute crack cocaine).

61. *United States v. Alcaraz-Arellano*, 302 F. Supp. 2d 1217, 1224 (D. Kan. 2004) (quoting *United States v. Ramstad*, 308 F.3d 1139, 1146–47 (10th Cir. 2002)), *aff’d*, 441 F.3d 1252 (10th Cir. 2006).

62. See, e.g., *Wald*, 216 F.3d at 1228; *United States v. Elliott*, 107 F.3d 810, 815 (10th Cir. 1997); *Jacobs v. State*, 733 So. 2d 552, 555 (Fla. Dist. Ct. App. 1999); *People v. Baltazar*, 691 N.E.2d 1186, 1188 (Ill. App. Ct. 1998).

63. See discussion *infra* Parts II.A.1–2.

64. See discussion *infra* Part II.A.3.

65. *Wald*, 216 F.3d at 1222.

by defendant Wald, who was also a passenger in the vehicle—traveling down the interstate with a “badly cracked front windshield.”⁶⁶ The officer noted that the two suspects in the vehicle—the driver and defendant passenger—were “talkative[,]” “nervous[,]” and had “glassy eyes.”⁶⁷ Furthermore, the officer smelled the odor of burnt methamphetamine.⁶⁸ Based on the circumstances and his suspicion of drug trafficking, the officer addressed the driver and the defendant: ““You wouldn’t mind if I take a quick look, would you?””⁶⁹ Both responded no, and the officer proceeded to perform a “pat-down” search of the suspects, revealing two pipes in defendant’s clothes.⁷⁰ After the “pat-down” search, the officer proceeded to search the trunk of the car *without* asking for further permission from the defendant.⁷¹ In the trunk, the officer found luggage, an ice chest, and two “torches” but also noticed scratch marks on the screws that held the car’s stereo speakers in place.⁷² The scratch marks indicated to the officer that the speakers had been removed.⁷³ The officer then removed the speakers and discovered two packages containing a substance that later tested positive as methamphetamine.⁷⁴

The Government argued it had probable cause to search the trunk of the vehicle based on the presence of various drug related items in the

66. *Id.* at 1224. Importantly, the “badly cracked front windshield” constitutes a motor vehicle equipment violation under Utah law and justified the officer’s conduct in pulling over the car. *Id.*

67. *Id.* at 1224–25.

68. *Id.* at 1225. The officer also noticed a bottle of Visine and a road atlas, all of which, “in his experience,” are items associated with drug trafficking. *Id.*

69. *Id.* at 1228. Note that the officer’s question in *Wald* is basically a “command in the form of a question.” William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064 (1995) (noting that if an officer “puts his command in the form of a question, consent is deemed voluntary and the evidence comes in”). While the utterance made by the officer may not sound very harsh out of context, the fact that it comes from the officer during a traffic stop gives the question the “‘force’ of a command.” Peter Meijes Tiersma, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CALIF. L. REV. 189, 194 (1986). This has the persuasive effect of eliciting a positive response from the listener. *Id.*

70. *Wald*, 216 F.3d at 1225, 1228. Even though the officer found two pipes on Wald, Wald stated that the pipes were not used for smoking illegal drugs. *Id.* at 1225.

71. *Id.* at 1225.

72. *Id.*

73. *Id.*

74. *Id.*

car and the defendants' physical appearance.⁷⁵ Ultimately, the court found no merit in the Government's probable cause argument.⁷⁶

Because the officer did not have probable cause to search the trunk, the Government further argued that the defendant and driver consented to a full vehicle search when they stated they did not mind if the officer took a "quick look."⁷⁷ The Government bolstered its argument by pointing out that the suspects failed to object to the officer's search of the trunk, which showed that the search must have been within the scope of the defendant's consent.⁷⁸ However, the court responded that the "failure to object" rule from *Florida v. Jimeno* only applies when a suspect first gives the officer a "general authorization to search[,]” and the defendant's consent to a quick look provided a limited authorization to search; thus, the *Jimeno* rule did not apply.⁷⁹

The court also noted that, because the officer had (1) already found drug paraphernalia on the defendant, (2) told the defendant that he was

75. *Id.* at 1226.

76. *Wald*, 216 F.3d at 1228. The court found that probable cause to search the trunk of the vehicle did not exist because, under the "common-sense" holding in *United States v. Nielsen*, 9 F.3d 1487, 1491 (10th Cir. 1993), "it is unreasonable to believe people smoke [drugs] in the trunks of cars, the mere smell of burnt [drugs] does not create the fair probability that the trunk contains [those drugs]." *Wald*, 216 F.3d at 1226.

77. *Wald*, 216 F.3d at 1228–29.

78. *Id.* at 1228; *see also* *United States v. Gordon*, 173 F.3d 761, 766 (10th Cir. 1999) ("We consistently and repeatedly have held a defendant's failure to limit the scope of a general authorization to search, and failure to object when the search exceeds what he later claims was a more limited consent, is an indication the search was within the scope of consent.").

79. *Wald*, 216 F.3d at 1228 (emphasis omitted) (internal quotations omitted); *see also* *Florida v. Jimeno*, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents."); *Gordon*, 173 F.3d at 766. The rule from *Wald*—that a defendant's failure to object is only a consideration where a suspect provides a general authorization to search—is at odds with various other cases, which have interpreted the doctrine to apply to all cases, not just the general authorization cases. *See, e.g.*, *United States v. Pena*, 143 F.3d 1363, 1368 (10th Cir. 1998) (upholding an officer's search of the suspect's hotel room bathroom where the suspect replied "go ahead" to officers' request to "look in" the room, and the suspect failed to object when officer entered bathroom); *United States v. McSween*, 53 F.3d 684, 689 (5th Cir. 1995) (finding, when defendant gave general permission to search his vehicle, this was deemed to include area under hood in light of absence of objection). At best, the view regarding the failure to object rule taken by the court in *Wald* seems a bit circular. The court stated that the failure to object rule only applies when the suspect gives a general authorization to search. *Wald*, 216 F.3d at 1228. However, in determining whether a suspect provided a general or limited authorization to search, courts objectively consider the facts of the case, including whether or not the suspect objected to the search. *Jimeno*, 500 U.S. at 251. Therefore, although the failure to object to a search is a factor in determining whether a suspect provided a general or limited authorization to search, according to *Wald*, it is only to apply when a suspect gives a general authorization. *Wald*, 216 F.3d at 1228.

in a “bit of trouble,” and (3) told him and the driver that they “were not free to go[,]” the defendant likely believed that he was already under arrest and “therefore had no power to prevent the trunk search.”⁸⁰ Accordingly, the court in *Wald* held that a suspect’s consent to a conversational search request—in this case allowing the officer to take a quick look—only allows an officer to search the inside of the vehicle and does not extend to a search of the trunk of the car.⁸¹

2. *Wald Compared With Other Restrictive View Federal Cases*

Aside from *Wald*, very few federal cases have interpreted a suspect’s consent to a conversational search request as a limited authorization to search absent a suspect’s objection or other facts indicating the consent only extends to a specific area.⁸²

In *United States v. Elliott*, the court found that an officer exceeded the scope of consent after receiving permission to “look through the trunk” in order to “see what . . . [the suspect had] in there.”⁸³ The officer subsequently unzipped and looked through one of the bags in the trunk.⁸⁴ The court stated the officer’s conduct went too far in light of his statement that he “did not want to look through each item” in the trunk and “that he just wanted to see how things were packed.”⁸⁵

In applying the objective reasonableness test from *Jimeno*,⁸⁶ the court found that the conversation between the suspect and officer

80. *Wald*, 216 F.3d at 1228–29 (internal quotations omitted).

81. *Id.*

82. In a more recent case, *United States v. Purcell*, the court implied that consent to a “quick look” authorizes an officer to perform a “cursory sweep.” *United States v. Purcell*, 526 F.3d 953, 957 (6th Cir. 2008). While the court did not hold on the quick look language (because the individual, Crist, who consented to the quick look later consented to a full search), the court stated that when Crist authorized the police to “take a quick look around [defendant’s hotel] room[,]” the police did exactly what Crist had “authorized them to do: perform a cursory sweep of the room.” *Id.* at 957.

83. *United States v. Elliott*, 107 F.3d 810, 815 (10th Cir. 1997) (internal quotations omitted).

84. *Id.*

85. *Id.* (internal quotations omitted).

86. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (“The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?”); *see also Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (“[D]etermination of consent . . . must ‘be judged against an objective standard: would the facts available to the officer at the moment . . . ‘warrant a man of reasonable caution in the belief’ that the consenting party had authority over the premises?” (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968))).

“would have conveyed to a reasonable person that [the officer] was interested only in visually inspecting the trunk and its contents, and did not convey his intent to look into any containers in the trunk.”⁸⁷ Accordingly, the act of unzipping and looking through a bag in the trunk violated the suspect’s Fourth Amendment rights.⁸⁸

Similarly, in *United States v. Neely*, the Fourth Circuit Court of Appeals found the officer exceeded the scope of consent, but in this case, the suspect asked the officer if he would like to “‘check’ his trunk” for weapons.⁸⁹ Although the officer subsequently searched the passenger area of the car and found a weapon, the court found the evidence was inadmissible because the suspect never consented to a search of his entire vehicle.⁹⁰ The court reasoned that, based on the suspect’s clear statement limiting the search to the trunk of the vehicle, the officer’s subsequent search of the interior of the vehicle fell outside the scope of the suspect’s consent.⁹¹

3. *The Restrictive View in State Courts*

While *Wald* represents one of the relatively few instances in which a federal court has construed conversational consent as providing a limited authorization to search, state courts have been much more amenable to the restrictive view.⁹² In *People v. Baltazar*, an Illinois Court of Appeals case, a state patrolman pulled over defendant

87. *Elliott*, 107 F.3d at 815; see also WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.1(c) (5th ed. 2011) (“When a purpose is included in the request, then the consent should be construed as authorizing only that intensity of police activity necessary to accomplish the stated purpose.”).

88. *Elliott*, 107 F.3d at 815–16.

89. *United States v. Neely*, 564 F.3d 346, 348, 351 (4th Cir. 2009).

90. *Id.* at 351, 352–53.

91. *Id.* at 350. Notably, the court also did not find the suspect’s failure to object to the officer’s search of the interior of the vehicle sufficient to show that the suspect had expanded the scope of his original consent. *Id.* at 351 (“Because Neely’s original consent did not physically encompass the interior of his vehicle, under the specific circumstances of this case, we do not find his silence sufficiently persuasive to overcome the limitation he originally placed on the search.”).

92. *E.g.*, *Jacobs v. State*, 733 So. 2d 552, 555 (Fla. Dist. Ct. App. 1999); *Rodriguez v. State*, 539 So. 2d 513, 513–14 (Fla. Dist. Ct. App. 1989) (finding that, where the officer received permission from the suspect to “‘look’ into the car[.]” the officer exceeded the scope of consent when he subsequently opened a sealed cardboard box that he found in the back seat because the suspect gave no indication that his consent to “‘look’ into the car” included consent to break open the sealed cardboard box); *People v. Baltazar*, 691 N.E.2d 1186, 1190 (Ill. App. Ct. 1998); *State v. Jacobsen*, 922 P.2d 677, 682 (Or. Ct. App. 1996).

Baltazar for speeding in a rented U-Haul truck.⁹³ The defendant stated that he rented the truck to carry his personal belongings as he had just moved to Detroit.⁹⁴ The officer placed the defendant in his squad car while he reviewed his license and rental agreement.⁹⁵ After reviewing the documents, the officer asked the defendant if he could “take a look” inside the back of his U-Haul truck.⁹⁶ Even though the officer never gave a reason why he wanted to look in the truck, the defendant agreed and the officer’s search ensued.⁹⁷ During the officer’s search, he discovered a number of personal items (couches, dressers, mattresses, etc.)—all of which were consistent with the suspect’s story—but three sealed cardboard boxes piqued his interest.⁹⁸ The officer subsequently opened the boxes, revealing 188 pounds of cannabis.⁹⁹

The *Baltazar* court held that the officer’s act of opening the cardboard boxes exceeded the scope of consent because the defendant only agreed to let the officer “take a look” in the back of the U-Haul,¹⁰⁰ and moreover, the officer failed to provide a reason for his more in depth search.¹⁰¹ Because the defendant only agreed to allow the officer to “take a look” in the back of the U-Haul, the officer’s search was limited to looking for what the defendant expressed the truck contained—personal belongings.¹⁰² Accordingly, for the officer to legally open the cardboard boxes—which from the outside provided no indication that they contained anything other than personal

93. *Baltazar*, 691 N.E.2d at 1188.

94. *Id.*

95. *Id.*

96. *Id.* (internal quotations omitted).

97. *Id.*

98. *Id.*

99. *Baltazar*, 691 N.E.2d at 1188.

100. *Id.* at 1189 (internal quotations omitted). Note that the court decided the case both under the Fourth Amendment and the Illinois State Constitution, which has very similar language to the U.S. Constitution. Compare 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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”), with ILL. CONST. art. 1, § 6 (“The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.”).

101. *Baltazar*, 691 N.E.2d at 1190.

102. *Id.* (internal quotations omitted).

belongings—he needed to ask the defendant for his express consent to search the boxes.¹⁰³

Other state courts have taken a similar view regarding the restrictive nature of conversational consent searches.¹⁰⁴ In an Oregon case, *Jacobsen*, the state Court of Appeals found that an officer exceeded the scope of consent when a passenger said he would not mind if the officer “look[ed] inside the cab” of his pickup truck, and the officer subsequently opened a zipped duffel bag in the back seat, revealing an unlawfully possessed firearm.¹⁰⁵ The court concluded that, based on the conversation, the suspect had authorized “a more general sweep of the truck[.]” rather than the thorough search that the officer actually performed.¹⁰⁶ Importantly, and consistent with both *Baltazar* and *Jacobsen*, a Florida appeals court has stated that “a request to take ‘a quick look around’” does *not* allow “the police to go beyond a plain view search.”¹⁰⁷

B. *The Expanded View of Consent*

By and large, the primary view taken by federal courts is that a suspect’s consent to a quick look search authorizes the officer to perform a full search.¹⁰⁸ In these cases, the courts analyze the facts—

103. *Id.*

104. *E.g.*, *Jacobs v. State*, 733 So. 2d 552, 555 (Fla. Dist. Ct. App. 1999); *Rodriguez v. State*, 539 So. 2d 513, 513–14 (Fla. Dist. Ct. App. 1989); *State v. Jacobsen*, 922 P.2d 677, 682 (Or. Ct. App. 1996).

105. *Jacobsen*, 922 P.2d at 682 (noting, however, that the defendant did not have an opportunity to object to the search of the duffel bag because he was being questioned by another officer away from his truck) (internal quotations omitted). The defendant, *Jacobsen*, argued that the officer’s conduct violated both his Fourth Amendment rights under the U.S. Constitution as well as his rights under the Oregon State Constitution. *Id.* at 679. *Compare* U.S. CONST. amend. IV, with OR. CONST. art. I, § 9 (“No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”).

106. *Jacobsen*, 922 P.2d at 682.

107. *Jacobs*, 733 So. 2d at 555 (stating that “deputies may have exceeded the scope of consent by searching . . . clothing in [the suspect’s] closet or [by searching] in . . . other area[s] not in plain view” where the suspect gave officers permission to “take ‘a quick look around’”).

108. *E.g.*, *United States v. Lopez-Mendoza*, 601 F.3d 861, 864 (8th Cir. 2010); *United States v. Rich*, 992 F.2d 502, 506 (5th Cir. 1993); *United States v. Harris*, 928 F.2d 1113, 1117 (11th Cir. 1991); *United States v. Espinosa*, 782 F.2d 888, 892 (10th Cir. 1986); *United States v. Alcaraz-Arellano*, 302 F. Supp. 2d 1217, 1225 (D. Kan. 2004) (holding that, where defendant consented to the officer’s request to “take a look” in the vehicle defendant was driving, defendant had provided the officer with a general consent to search), *aff’d*, 441 F.3d 1252 (10th Cir. 2006).

which closely mirror the restricted view cases from above—based on the same rules and factors as the restricted view cases, yet come out on the other side of the issue.¹⁰⁹

1. Expanded View in the Name of Law Enforcement Efficiency

In *United States v. Rich*, a Texas district court held that the evidence an officer discovered after he received consent to “look into” defendant’s vehicle was inadmissible, but the Fifth Circuit Court of Appeals overruled their decision.¹¹⁰ In *Rich*, an officer made a routine traffic stop and proceeded to ask the suspect “if he could look into the [truck].”¹¹¹ The officer made the request three times without receiving a response from the suspect and finally demanded that the suspect answer his question, to which the suspect responded “yes.”¹¹² The officer proceeded to search the vehicle and found a suitcase, which he opened, revealing marijuana.¹¹³

The defendant argued that, by unzipping the suitcase found in his truck, the officer had exceeded his scope of consent.¹¹⁴ The district court found that, even though the officer asked the suspect if he had any weapons or narcotics in the vehicle when he first made the stop, his subsequent request to “have a look in” the truck did not grant him permission to search for drugs or other contraband because he did not “expressly or implicitly” ask to look for narcotics when he asked to “look in” the vehicle.¹¹⁵ Accordingly, an objective reasonable person

109. Compare *United States v. Wald*, 216 F.3d 1222, 1228 (10th Cir. 2000), with *Rich*, 992 F.2d at 506.

110. *United States v. Rich*, 791 F. Supp. 1162, 1165, 1170 (W.D. Tex. 1992), *rev’d*, 992 F.2d 502 (internal quotations omitted).

111. *Rich*, 992 F.2d at 504. The officer stopped the defendant because the defendant’s truck had a broken license plate light. *Id.*

112. *Id.* The district court noted that “the repeated requests to ‘look in’ the defendant’s car . . . tend[ed] to demonstrate coercion by the trooper, as well as the statement during the third request that the trooper needed a yes or no answer.” *Rich*, 791 F. Supp. at 1165.

113. *Rich*, 992 F.2d at 504.

114. *Id.* at 505.

115. *Rich*, 791 F. Supp. at 1166–67. Accordingly, since “the scope of a search is generally defined by its expressed object[,]” the officer did not receive authorization to open closed containers—like the suitcase—when he simply asked to “look into the truck.” *Florida v. Jimeno*, 500 U.S. 248, 251 (1991); *Rich*, 791 F. Supp. at 1165. The court also noted that the officer could “easily have asked [for] the defendant’s permission to search for drugs” or “to search the contents of the suitcase.” *Rich*, 791 F. Supp. at 1167.

would not have believed the suspect's scope of consent extended to the suitcase in the back seat.¹¹⁶

The Texas district court's decision and rationale parallel the interpretation of similar language in *Wald* and the other state court cases previously discussed.¹¹⁷ However, the court of appeals reversed, finding that a reasonable person would have understood defendant's consent to include the inside of the vehicle and the inside of any containers located therein.¹¹⁸

The court of appeals reversed the district court's ruling for two primary reasons.¹¹⁹ First, the court stated that the entire conversation between the officer and defendant—from stop to arrest—lasted approximately five minutes, and based on the officer's prior statements, the defendant probably knew the officer wanted to search for narcotics.¹²⁰ Secondly, the court addressed the specific meaning of the “look into” language.¹²¹ The defendant argued that the officer's request to look into the vehicle was a request to “see inside” the vehicle.¹²² In support of his argument, he pointed out that the officer had previously tried to see inside the vehicle but could not due to its tinted windows.¹²³ Importantly, the court noted that it “decline[d] the defendant's invitation to establish a list of specific terms from which an officer must select . . . for each individual situation and/or defendant” as it would “hamper” the duties of law enforcement officers and contrast with the Fourth Amendment principle of reasonableness.¹²⁴ The court noted that several other circuits had adopted a rule that conversational requests for consent provided the

116. *Rich*, 791 F. Supp. at 1166.

117. See discussion *supra* Part II.A.

118. *Rich*, 992 F.2d at 508.

119. See *id.* at 506–08.

120. *Id.* at 506–07. The defendant also argued that he did not have the opportunity to object to the search or limit his consent because things happened so quickly. *Id.* at 507. The court rejected this argument, stating that the defendant could have limited his consent when he first authorized the search to only what was in plain view. *Id.*

121. *Id.* at 506.

122. *Id.* (internal quotations omitted).

123. *Id.*

124. *Rich*, 992 F.2d at 506.

equivalent of a full request to search,¹²⁵ and the Fifth Circuit decided to follow their lead in this case.¹²⁶

2. *Expanded View Based on Failure to Object*

Many of the expanded view cases are directly at odds with *Wald*.¹²⁷ While *Wald* viewed a defendant’s failure to object as a moot point unless the defendant originally gave the officer a general authorization to search, the expanded view cases place much more emphasis on the defendant’s failure to object.¹²⁸ In *United States v. Lopez-Mendoza*, two individuals, Rene and Santiago, stopped at a gas station, and while inside, Rene “talked casually” with a police officer.¹²⁹ Upon leaving, the officer asked Rene if they had any drugs in their car, and when Rene responded “no[,]” the officer asked: “Do you care if I look and see?”¹³⁰ Santiago responded “[g]o ahead” but added that the officer “don’t got no right.”¹³¹ The officer stated that, since they agreed that he could look, he was “going to go ahead and look real quick.”¹³² The “real quick” search lasted about thirty minutes, included a drug sniffing dog, and subsequently revealed three pounds of heroin.¹³³ The court found that, even though the search lasted so long, the search still fell within the defendant’s scope of consent.¹³⁴ The court reasoned that

125. *E.g.*, *United States v. Harris*, 716 F. Supp. 1470, 1472 (M.D. Ga. 1989) (holding that a request to “look in” granted a general right to search), *aff’d*, 928 F.2d 1113 (11th Cir. 1991); *United States v. Espinosa*, 782 F.2d 888, 892–93 (10th Cir. 1986) (holding that a request to “look through” is not so vague as to provide a limited right to search).

126. *Rich*, 992 F.2d at 506 (“We take this opportunity to establish a similar rule for our own circuit: it is not necessary for an officer specifically to use the term ‘search’ when he requests consent from an individual to search a vehicle. We hold that any words, when viewed in context, that objectively communicate to a reasonable individual that the officer is requesting permission to examine the vehicle and its contents constitute a valid search request for Fourth Amendment purposes.”).

127. *E.g.*, *United States v. Montilla*, 928 F.2d 583, 587 (2d Cir. 1991) (finding officer’s search within the scope of consent where suspect allowed the officer to take a “quick look” through his bags and failed to object to the search); *Espinosa*, 782 F.2d at 892 (“Failure to object to the continuation of the search under these circumstances may be considered an indication that the search was within the scope of the consent.”).

128. *See, e.g.*, *United States v. Lopez-Mendoza*, 601 F.3d 861, 868–69 (8th Cir. 2010).

129. *Id.* at 863.

130. *Id.* at 864.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Lopez-Mendoza*, 601 F.3d at 868–69; *see also* *United States v. Alcantar*, 271 F.3d 731, 738 (8th

both individuals “express[ed] no concern” during the course of the search and at no time did they “attempt to retract or narrow” consent.¹³⁵ Thus, their failure to object to the search showed that it fell within their scope of consent.¹³⁶

Lopez-Mendoza represents just one of the many expanded view cases that hold based on the suspect’s failure to object. In *United States v. Espinosa*, the court found that an officer’s search was within the suspect’s scope of consent where—during the fourteen minute search—the defendant “stood beside his car expressing no concern during [the] thorough and systematic search” and did not “attempt to retract or narrow his consent.”¹³⁷ In *United States v. Porter*, the court found the search was “well within the scope of [defendant’s] consent” where he “could have withdrawn his consent at any time” throughout the course of the search but “failed to do so.”¹³⁸

As was the case in *Rich*, some expanded view cases rule that the conversational requests for consent grant a general authorization to search in the interest of law enforcement efficiency, while others base their decision on a view opposite from that taken in *Wald*—that a defendant’s failure to object coupled with minimal corroborating evidence are enough to show that the search fell within the defendant’s scope of consent.¹³⁹

Cir. 2001) (holding that at least the first hour of a search was within the scope of consent where neither suspects “object[ed] to the length of the search” at any point).

135. *Lopez-Mendoza*, 601 F.3d at 868.

136. *Id.* at 868–69.

137. *United States v. Espinosa*, 782 F.2d 888, 892 (10th Cir. 1986).

138. *United States v. Porter*, 49 F. App’x 438, 443 (4th Cir. 2002). These are just a couple of the many examples construing a defendant’s failure to object to a search as consent to an officer’s full-blown search.

139. *United States v. Rich*, 992 F.2d 502, 506 (5th Cir. 1993) (“We decline the defendant’s invitation to establish a list of specific terms from which an officer must select the most appropriate for each individual situation and/or defendant. To so hamper law enforcement officials in their everyday duties would be an unjustifiable extension of the Fourth Amendment’s requirement that searches be ‘reasonable.’”); *Espinosa*, 782 F.2d at 892 (“Failure to object to the continuation of the search under these circumstances may be considered an indication that the search was within the scope of the consent.”).

III. THE FUTURE OF CONSENT LAW: A NEW STANDARD FOR SHOWING VOLUNTARY CONSENT IN QUICK LOOK SEARCH CASES

As quick look and other conversational consent cases have permeated through courts since *Schneckloth*, courts have proposed a wide range of solutions to address the various issues associated with consent searches.¹⁴⁰ It is important to consider the proposed changes to the consent doctrine in general as they would have a direct impact on the law governing conversational consent searches and present viable solutions to the problems associated with conversational consent searches. The more popular propositions include the use of consent forms by police,¹⁴¹ changes initiated at a state court level,¹⁴² changes in police procedures,¹⁴³ and even abolishing the consent doctrine altogether.¹⁴⁴ In this section I will analyze the effect of some of these proposed solutions to conversational consent search issues and suggest courts adopt the restricted *Wald* view in conversational consent cases absent a suspect’s subjective knowledge of the scope of an officer’s search.¹⁴⁵

A. *Informed Consent and the Widespread Use of Consent Forms*

The fact that suspects do not exactly know what they are consenting to when they respond to a request to search is one of the many

140. *E.g.*, Lassiter, *supra* note 29, at 1192–93 (proposing that courts adopt a doctrine of informed consent, similar to the standard in the medical field, in Fourth Amendment cases); Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 80 (2008) (“[W]henever a person objects or refuses to provide consent . . . that refusal should bar further attempts by the police to seek consent. Furthermore, a refusal to sign a written consent form should also operate retroactively to invalidate an earlier oral consent.”); Arthur J. Park, *Automobile Consent Searches: The Driver’s Options in a Lose-Lose Situation*, 14 RICH. J.L. & PUB. INT. 461, 474–77 (advocating for state level changes to the consent doctrine and explaining the advantages of overruling the *Schneckloth* case); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 191–92 (1991) (arguing that courts should only find valid consent where a suspect’s consent is in “response to a specific and narrow request” to search by the officer); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 258–71 (2002) (suggesting that the consent doctrine be eliminated altogether).

141. Strauss, *supra* note 140, at 255.

142. Park, *supra* note 140, at 474–76.

143. Rotenberg, *supra* note 140, at 191–92.

144. Strauss, *supra* note 140, at 258–71.

145. *United States v. Wald*, 216 F.3d 1222, 1229 (10th Cir. 2000).

problems associated with consent searches.¹⁴⁶ This problem is compounded in conversational consent searches where the officer does not clearly indicate he is requesting a suspect's consent to search.¹⁴⁷ As a result, some have proposed that courts adopt the doctrine of informed consent from the medical context in Fourth Amendment search and seizure cases.¹⁴⁸ This suggestion seeks to safeguard the "ignorant" suspect from consenting to something that he does not fully understand.¹⁴⁹ In the medical surgery context, informed consent "consists of an absolute duty imposed by law on physicians to inform the patient of the nature of the surgery, the probable consequences, the risks and hazards of the procedure, and the anticipated benefits before obtaining the patient's consent."¹⁵⁰ In his article, Professor Lassiter suggests that the informed consent standard for physicians "makes sense" and should be "no less applicable" in the Fourth Amendment context.¹⁵¹

This approach, which would effectively overrule the holding in *Schneckloth*,¹⁵² has great merit in the conversational consent search case. By requiring individuals to know "the nature . . . the probable consequences, the risks and hazards . . . and the [] benefits" of a search prior to obtaining consent, suspects are able to make an informed decision about whether they want to provide an officer with consent to search.¹⁵³ Specifically, this solution would help address one of the

146. This proposition, while not typically stated outright, is clear from the very fact that suspects argue that the officer exceeded their scope of consent. *See, e.g.*, *United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667 (5th Cir. 2003) (addressing suspect's argument that the officer exceeded his scope of consent). The very fact that defendants argue an officer exceeded their scope of consent so often shows that defendants are not really sure what they are consenting to.

147. *Wald*, 216 F.3d at 1228. In some cases the officer makes it abundantly clear he is seeking consent to perform a full search. *See United States v. Saadeh*, 61 F.3d 510, 515, 517 (7th Cir. 1995) (noting that the officer asked the suspect "if she would consent to a search" then subsequently presented her with a consent form, which the suspect signed indicating that she "freely consent[ed]" to the search). In conversational or quick look cases sometimes the request is not so clear as to alert the suspect that the officer is seeking the consent to perform a full-blown search. *Wald*, 216 F.3d at 1228 (noting that an officer addressed the suspect by stating: "You wouldn't mind if I take a quick look, would you?").

148. Lassiter, *supra* note 29, at 1193.

149. *Id.*

150. *Id.* at 1192.

151. *Id.* at 1192-93.

152. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (holding that individuals need not know that they have a right to refuse consent for their consent to be valid).

153. Lassiter, *supra* note 29, at 1192.

primary issues in conversational consent searches—that individuals do not know they may be providing an officer with consent to perform a full search when agreeing to a conversational statement like “would you mind if I look inside the cab[?]”¹⁵⁴

Moreover, the aims of the informed consent doctrine would likely be furthered through the widespread use of consent forms by law enforcement officers. Officers would still have to inform a suspect of the consequences, risks, and benefits of consenting to a search but would additionally require suspects to sign a form confirming that the suspect had been informed of their rights. For example, the Drug Enforcement Agency has used a consent form titled “CONSENT TO SEARCH,” which provides: “1. I have been asked to permit special agents of the drug enforcement administration to search . . . 2. I have not been threatened nor forced in any way. 3. I freely consent to this search.”¹⁵⁵

Typically when these forms are used in other contexts, the officer requires the suspect to read the form and then reads the form back to the suspect, asking if the suspect has any questions periodically throughout the reading.¹⁵⁶ As with informed consent, requiring suspects to sign a consent form would ensure that they have actually been informed of their rights and options concerning consent to search, and it also confirms their knowledge in writing.¹⁵⁷ This additional writing requirement would further alleviate the confusion that goes along with a conversational consent search.

While critics of informed consent and consent forms might point out that a large number of search and seizure cases involve non-native English speakers,¹⁵⁸ at least some law enforcement agencies have

154. *State v. Jacobsen*, 922 P.2d 677, 682 (Or. Ct. App. 1996).

155. *United States v. Saadeh*, 61 F.3d 510, 517 (7th Cir. 1995) (internal quotations omitted) (alteration in original).

156. *E.g.*, *United States v. Nikzad*, 739 F.2d 1431, 1432 (9th Cir. 1984) (“Agent Marcello gave Nikzad a DEA Consent to Search form and asked him to read it. Nikzad appeared to do so. Marcello then read the form aloud to Nikzad, and asked after each line if Nikzad had any questions.”).

157. Other articles regarding consent have suggested that, in order for consent to be valid, it must be in writing. Rotenberg, *supra* note 140, at 192 (“Consent should be in writing—either a warrant or consent form would suffice.”).

158. A 2007 study by the U.S. Census Bureau indicated that almost 20% of households in the U.S. primarily spoke a language other than English in the home. U.S. CENSUS BUREAU, LANGUAGE USE IN

already addressed this problem.¹⁵⁹ For example, as of the end of 2011 the New York Police Department used consent to search forms in seven different languages and also employed a service known as “Language Line,” which enables officers to make a phone call at any time if they need a translator.¹⁶⁰ Accordingly, adopting informed consent and the use of consent forms might produce favorable results in the conversational consent search field even in light of some challenges such as a language barrier.

Logically, these solutions would have the positive effect of decreasing the number of consent searches performed by officers as individuals would realize that they have a right to refuse consent. However, in practice this might not be the case. Notably, the coercive nature of police searches would still be an issue if courts required informed consent or consent forms because the same underlying cause of coercion, the environment in which the search occurs, would still be present.¹⁶¹ Additionally, while “many [police] departments currently require or encourage their officers to tell suspects of their right not to consent before obtaining consent to search[,]” there is at least some suggestion that this does not have a significant impact on the number of consent searches suspects agree to.¹⁶²

While no one can precisely predict the outcome of implementing an informed consent policy, a suspect’s knowledge of his rights in similar contexts has proved to have an unappreciable impact on the number of suspects who forego those rights. Take for example the *Miranda*

THE UNITED STATES: 2007 1 (2010), available at <https://www.census.gov/prod/2010pubs/acs-12.pdf>. The study also noted, “the population speaking a language other than English at home has increased steadily for the last three decades.” *Id.*

159. E.g., Rocco Parascandola, ‘Consent to Search’ Forms, Now Available in Seven Languages, Allow Police to Bypass Warrant Process, N.Y. DAILY NEWS (Oct. 1, 2011, 4:00 AM), <http://www.nydailynews.com/news/crime/consent-search-forms-languages-police-bypass-warrant-process-article-1.962160>.

160. *Id.*

161. Strauss, *supra* note 140, at 254. If law required the use of consent forms or informed consent the coercion problem would still exist because “police officers [would be] providing the information in the same coercive environment that existed before.” *Id.*

162. *Id.* The Strauss article mentions that in the *Miranda* warning context 80–90% of suspects still waived their rights even when they had knowledge of the right to refuse. *Id.* at 254 n.154. While the *Miranda* and consent contexts are vastly different, this at least shows that knowledge of the right to refuse may not be as powerful as logic would suggest.

warning.¹⁶³ If you have seen an episode of *Law & Order* or *Matlock* or any one of the thousands of police and legal based television dramas, you can likely recite some form of the *Miranda* warning: “You have the right to remain silent . . . Anything you say can and will be used against you in a court of law” and so on.¹⁶⁴ While one would think that a *Miranda* warning would impact the number of people who chose to talk to police after receiving the warning, “the overwhelming majority of suspects waive their rights and agree to talk to the police without the assistance of counsel.”¹⁶⁵ In fact, studies suggest that somewhere between 78% and 96% of suspects waive their rights¹⁶⁶ and that more than ten times as many suspects waived their *Miranda* rights as invoked their rights.¹⁶⁷ No evidence suggests that the outcome would be appreciably different if courts required a similar warning in the consent context. Thus, while the doctrine of informed consent and the use of consent forms might seem like they go a long way toward improving conversational consent search issues, there is at least some suggestion that this may not provide the most effective solution to the problem.

B. Encouraging Change by State Legislature and Local Law Enforcement

As states are often better positioned to make tailored improvements for the particular needs of their citizens, some have proposed that state action¹⁶⁸ or changes to local law enforcement practices¹⁶⁹ are the solution to the problems raised by consent searches. While *Schnecko* and other federal cases dealing with consent control state courts insofar as they analyze issues under the Fourth Amendment,

163. The *Miranda* warning spawned from the Supreme Court’s decision in *Miranda v. Arizona*, 384 U.S. 436 (1966).

164. *Berghuis v. Thompkins*, 560 U.S. 370, 374–75 (2010).

165. Kit Kinports, *The Supreme Court’s Love-Hate Relationship with Miranda*, 101 J. CRIM. L. & CRIMINOLOGY 375, 379–80 (2011).

166. Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1012 (2001).

167. George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1976 (2004).

168. Park, *supra* note 140, at 474–76.

169. Rotenberg, *supra* note 140, at 191–92.

“each state has the power to impose higher standards on searches and seizures under state law than is required by the Federal Constitution.”¹⁷⁰ Accordingly, some state courts have taken up the issue and provided that a higher standard—for example, a suspect’s actual knowledge of the right to refuse consent—is required to obtain valid consent.¹⁷¹ While changes on a state level would likely be more tailored to the individual needs of their citizens, changes are unlikely to come anytime soon as evidenced by the very limited number of states that have addressed the issue over the past four decades.¹⁷²

Likewise, local law enforcement agencies could change their practices. Ideally, departments across the country would adopt “specific controls,” which aim to improve the problems associated with consent searches by changing the way officers seek consent from suspects.¹⁷³ For instance, rather than asking vague, conversational questions in an effort to obtain consent, police departments could adopt a clear phrase that officers use whenever they seek consent from a

170. *State v. Johnson*, 346 A.2d 66, 67 (N.J. 1975) (citing *Cooper v. California*, 386 U.S. 58, 62 (1967)).

171. *Id.* at 68 (“[W]here the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent.”); *see also* *Park*, *supra* note 140, at 475–76 (“In Minnesota, the prosecution’s claim of voluntary consent in the routine traffic stop context is subject to ‘careful appellate review’ due to the ability to pull over virtually anyone, the ‘enormous discretion in enforcing traffic laws,’ and the inherently coercive nature of a traffic stop. In South Dakota, the state must prove the voluntariness of consent by clear and convincing evidence.” (footnote omitted) (citing *State v. George*, 557 N.W.2d 575, 579–80 (Minn. 1997); *State v. Nemeti*, 472 N.W.2d 477, 478 (S.D. 1991))). These cases seem to be consistent with the former view taken by courts that consent to search was effectively a waiver of a constitutional right. *Stoner v. California*, 376 U.S. 483, 489 (1964) (emphasizing the fact that an individual needs to know that he is giving up a legal right in order to waive it).

172. *See, e.g., George*, 557 N.W.2d at 579–80; *Penick v. State*, 440 So. 2d. 547, 558 (Miss. 1983); *Johnson*, 346 A.2d at 68; *Nemeti*, 472 N.W.2d at 478.

173. *Rotenberg*, *supra* note 140, at 192. In his note, *Rotenberg* illustrates a few different ideas of “specific controls” that might be effective:

- 1) A minimum standard should be met, whether with or without a warrant, before consent may be sought—the standard could be a blend of need and level of belief, e.g., “reasonable need and suspicion.”
- 2) The context of consent should be limited, e.g., to residences. Automobiles are deserving of greater protection from police searches than they currently receive, and containers because of their variety in type and context should not be considered a single category.
- 3) Consent to search should not be extended to include consent to seize; probable cause should be required.
- 4) Third party consent given in response to a police officer’s request to search the privacy interests of another should not be valid.
- 5) Consent should be in writing—either a warrant or consent form would suffice.

Id.

suspect that indicates they are seeking consent to search a clearly defined and tailored area. For example, if an officer would like to search the trunk of a suspect’s vehicle during a traffic stop, the officer could pose the following question to the suspect: “Do you consent to me performing a full search of the trunk of your car, which could include examination of any open or closed container therein?” In the case that both the officer and the suspect speak English, it would be very hard for a defendant to argue that he did not understand that he was consenting to a search or that the officer exceeded his scope of consent by removing a speaker in the trunk—as was the case in *Wald*.¹⁷⁴ In addition to adopting a standard request for consent question, officers could be required to ask for a suspect’s consent in every new area in which they intend to search. This requirement would ensure that the officer never exceeds the scope of the suspect’s consent even when he moves from the trunk to the passenger area of the vehicle—as was the case in *Chaidez*.¹⁷⁵

While the examples above clearly do not exhaust the list of potential changes police departments could make, changes of this type would go a long way in improving the issues with conversational consent searches. This solution, unlike others, would not overrule the foundations of consent jurisprudence such as *Schneckloth* but would still be an admirable step towards alleviating the problems with conversational consent searches.

However, action at the local law enforcement level has its drawbacks as well. Even though the issues with conversational consent searches stem from police departments themselves—it is in fact the officers who ask to take a quick look in the first place—getting departments to change their conduct on a national basis is easier said than done. “[P]olice procedures are generally determined on the local level” and implementing an across the board change would require an enormous number of “independent decisions” by local law enforcement agencies; a feat not easily achieved.¹⁷⁶ Not to mention,

174. *United States v. Wald*, 216 F.3d 1222, 1225 (10th Cir. 2000).

175. *United States v. Chaidez*, 906 F.2d 377, 382 (8th Cir. 1990).

176. *Park*, *supra* note 140, at 474.

police departments likely would not readily adopt a policy that might “hamper” one of their most effective law enforcement tools.¹⁷⁷

C. *Abolishing Consent*

As many proposed solutions to consent law in general, such as those listed above, all have fairly substantial drawbacks; many authors have advocated for the drastic solution that courts abolish the voluntary consent doctrine altogether.¹⁷⁸ One of the foremost advocates of abolishing the consent exception, Professor Marcy Strauss, noted that courts have justified the use of consent searches on two main grounds: “First, consent searches promote the interests of law enforcement. Second, individuals may benefit from voluntary consent, and in any event should have the right to decide whether they want to allow the police to engage in a search.”¹⁷⁹

Strauss goes on to discredit these two arguments.¹⁸⁰ In response to the police efficiency argument, Strauss notes that there is a lack of empirical evidence showing that consent searches are necessary or that they vastly improve efficiency of the police.¹⁸¹ While this may be true, it is hard to argue that consent searches do not provide a benefit to our nation’s police officers. As stated previously, voluntary consent searches provide officers with “the depth and breadth of the search” that they want.¹⁸² Without the consent search, law enforcement officers would have to resort to other options such as obtaining a warrant or conducting thorough investigations that could potentially lead nowhere at the cost of precious law enforcement resources.

In response to the individual benefit and right to choose justification, Strauss states that individuals likely do not receive any

177. *United States v. Rich*, 992 F.2d 502, 506 (5th Cir. 1993).

178. *E.g.*, Rotenberg, *supra* note 140, at 192 (“If upgrading the consent search by modifying police practices or individual consent or both proves unsatisfactory, then the obvious alternative is to abolish the consent search altogether.”); Strauss, *supra* note 140, at 271 (“The power imbalance, the likelihood of coercion, and the difficulty in assessing the voluntariness of the situation all weigh in favor of a per se ban on consent.”).

179. Strauss, *supra* note 140, at 258–59.

180. *Id.* at 260, 268.

181. *Id.* at 260.

182. Lassiter, *supra* note 29, at 1172.

benefit from consenting to a search because without consent the officer will likely have to leave the individual alone and with the consent—assuming the individual does not have any illegal contraband—the police have to leave him alone anyway.¹⁸³ In this instance, Strauss has considerable merit in her argument. However, when weighed against the benefit officers likely receive from consent searches, even with the lack of empirical evidence, the scales tip in favor of the availability of a consent exception to the warrant requirement.

D. Proposed Solution to the Conversational Consent Issue

The solutions outlined above all provide at least a marginal benefit in the conversational consent search context; however, all of the solutions come with significant drawbacks. Therefore, courts should adopt the restrictive view taken in *Wald* and in a variety of state courts; consent to a conversational or quick look search provides the officer with a limited authorization to search.¹⁸⁴ As courts begin to exclude evidence found in response to a suspect’s consent to a quick look search request—evidence that typically forms the basis of the charge against the defendant—law enforcement agencies will be persuaded to change their practices, effectively eliminating the use of conversational requests to search and the unique issues they present to consent searches in general.

By adopting this rule, courts would need to clearly define what constitutes a quick look or conversational consent search. In the interest of promoting educated decisions by suspects, courts should consider any request in which an officer does not clearly indicate that he is seeking consent to search and any request that is not “specific and narrow”¹⁸⁵ as a conversational request to search. While this rule might seem unduly restrictive to officers on its face, enforcement officials still have a wide variety of tools at their disposal to get “the depth and

183. Strauss, *supra* note 140, at 266–67.

184. *E.g.*, *United States v. Wald*, 216 F.3d 1222, 1228 (10th Cir. 2000); *Jacobs v. State*, 733 So. 2d 552, 555–56 (Fla. Dist. Ct. App. 1999); *People v. Baltazar*, 691 N.E.2d 1186, 1190 (Ill. App. Ct. 1998); *State v. Jacobsen*, 922 P.2d 677, 682 (Or. Ct. App. 1996).

185. Rotenberg, *supra* note 140, at 192.

breadth of the search” that they want.¹⁸⁶ If courts adopted this rule, many of the other solutions proposed above would likely come to fruition.

By adopting this rule, courts would still advance the overall purpose of consent searches—promoting law enforcement efficiency¹⁸⁷—while not imposing a substantial burden on an individual’s constitutional rights. Additionally, this rule leaves the foundations of consent law unscathed, as it does not have any considerable impact on the decisions set forth in *Schneckloth*,¹⁸⁸ *Jimeno*,¹⁸⁹ or *Rodriguez*.¹⁹⁰ Overall, adopting a restricted view in conversational consent cases strikes the appropriate balance between police efficiency and retaining individual liberties.

CONCLUSION

In light of the vast expansion of police power over the last few decades, it has become increasingly important for courts to limit the power that the government can exert over U.S. citizens. Since courts began to recognize the voluntary consent exception to the warrant requirement in 1946,¹⁹¹ it has been used increasingly by police forces as an “eas[y]” and efficient means of obtaining “the depth and breadth of the search” they want.¹⁹² However, police have begun to disguise their requests to search in conversational questions like: “Can I take a quick look?”¹⁹³

186. Lassiter, *supra* note 29, at 1172.

187. Strauss, *supra* note 140, at 258–59.

188. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (“While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.”).

189. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (“A suspect may of course delimit as he chooses the scope of the search to which he consents.”).

190. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (holding in part that the “determination of consent . . . must ‘be judged against an objective standard: would the facts available to the officer at the moment . . . ‘warrant a man of reasonable caution in the belief’” that the consenting party had authority over the premises?” (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968))).

191. *Zap v. United States*, 328 U.S. 624, 628 (1946), *vacated*, 330 U.S. 800 (1947) (*per curiam*).

192. See Lassiter, *supra* note 29, at 1172.

193. *E.g.*, *United States v. Wald*, 216 F.3d 1222, 1225 (10th Cir. 2000).

In addition to the issues present in consent cases—such as whether consent was actually voluntarily given—conversational consent cases present the unique problem that individuals may not even know that they are consenting to a full search of their vehicle or property. In light of this, a minority of both state and federal courts have held that consent to a conversational request to search only grants the officer a limited authorization to search¹⁹⁴ while the majority of courts have held that it provides the officer with the ability to perform a full-blown search.¹⁹⁵

In considering the various solutions to the conversational or quick look search, it is important to weigh the balance between law enforcement efficiency—an important consideration in light of the serious safety concerns facing the country—and the preservation of civil liberties and individual rights. With this balance in mind, courts should adopt the restricted view of the scope of consent granted in conversational consent cases. This rule, while consistent with the historical foundations of consent law, will require officers around the country to change their practices in a manner that would be significantly more beneficial to individuals and the criminal justice system as a whole.

194. See discussion *infra* Part II.A.

195. See discussion *infra* Part II.B.

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