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Introduction

One of the most pernicious legal fictions in criminal law is that people stopped by the police chose to be stopped and searched. As a result of this legal fiction, most people stopped and searched by the police are denied their Fourth Amendment protections on the theory that they opted to abandon these rights. Here is one example of how this fiction played out in an actual case.

Mr. Thompson and Mr. Carter,[1] poor black men who were walking in a poor neighborhood in Washington D.C. in 2011, were stopped by police. I use the term "stopped" advisedly, for police officers abruptly pulled their cruiser to the curb, got out, walked up to the two men and began to question

* Associate Professor of Law, Howard University School of Law. To Andrew Taslitz who inspires me in many ways, including thinking about the connection between social science and the law, with thanks to Dean Kurt Schmoke of the Howard University School of Law for continued support of my scholarship. A special thank you to Catherine Grosso and Dean Joan Howarth of the Michigan State University College of Law for inviting me to speak on this topic at their symposium and to those who attended for their interest and encouragement. Kudos to Anitha Vemury for her fine research support.

1. Individual names are altered to ensure client privacy.

them. The men stopped walking and answered the police. The questions the police asked are routinely posed to pedestrians in inner-city neighborhoods throughout this country. Here's the trilogy:

1. Where are you going?
2. Do you have any drugs on you?
3. You don't mind if I search you just to be sure?

People who comply with the officer's request to search are asked to put their hands behind their head, fingers interlaced, legs three feet apart, while the officer methodically checks for drugs. There is a divergence of opinion on what would happen to inner-city residents who refuse to comply with an officer's request to search, but few actually take that risk.[2] Neither Mr. Thompson nor Mr. Carter wanted to anger the officers.

Under the Fourth Amendment of the United States Constitution, police need a valid reason to stop and question someone in a car. That is because the Court has declared that a stop is a type of a seizure. In order for police to pull over a car, they must have, at minimum, a reasonable basis for suspecting that the driver or a passenger has committed a crime or is about to commit a crime. However, the rules change dramatically when the person targeted is standing or walking.

What happened to Mr. Thompson and his friend is not even called a stop. D.C. police call it a "contact," as in: "I went up and made contact with the individual." Contacts are consensual. That means an individual chooses to have a conversation with the police officers, instead of walking away. The usual Fourth Amendment constraints on police intrusions simply do not apply when courts determine that the stop was really a consensual encounter. Under current Supreme Court case law, police may stop people standing or walking based on a hunch or without any reason whatsoever, as long as a trial court categorizes that stop as a consensual encounter. The people most likely to walk—children leaving inner-city schools, people without cars, those who live in poor neighborhoods—are the people most likely to be targeted for "consent" searches.[3] In the cases

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2. One study found that over ninety-five percent of people asked to consent to a search did so. *See* Janice Nadler & J.D. Trout, *The Language of Consent in Police Encounters* 5, *forthcoming in* OXFORD HANDBOOK ON LINGUISTICS AND LAW, [Hereinafter *The Language of Consent*] (Peter Tiersma & Lawrence Solan eds., 2012) (forthcoming July 2012), *available at* http://ssrn.com/abstract=1485008 ("One study found that over 95% of people asked to consent to a search did so." (citing to State v. Carty, 170 N.J. 632; 790 A.2d 903 632)) (on file with the Washington and Lee University Journal of Civil Rights and Social Justice).

3. *See, e.g.*, Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103,

we see in the Howard University School of Law Criminal Justice Clinic, police often target individuals in poor neighborhoods based on their professional mission to make drug arrests and the indisputable logic that to find drugs each day, officers need to search many people.[4] The consent doctrine serves the drug war by allowing police to stop, question, and search without any particularized suspicion that this person has contraband on them. It also leaves a segment of our society without legal protections, encourages an ever-growing distrust of police, and sends a message that certain populations fall outside of the social fabric.

Paradoxically, the test articulated by the Supreme Court to determine whether police have stopped—as opposed to contacted—an individual would seem to favor Mr. Thompson. The Supreme Court test is whether a reasonable person in the defendant's position would have felt free to leave or to terminate the conversation, and individuals who are reasonable in feeling constrained from leaving have thus been "detained" under the Fourth Amendment.[5] Acquiescence to authority is not consent.[6] Logic

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139 (2011) (noting that minorities are disproportionately singled out for "consensual" encounters, and that minorities are least likely to "feel free" to leave such encounters). For a discussion of how the war on drugs has targeted the poor and black men and women of every class, *see* Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual but Continual Erosion of* Terry v. Ohio, 34 HOW. L.J. 567, 586 (1991) ("The broad powers given to the police in that decision will be exercised in minority and low-income communities, and many of our citizens will be subjected to unscrupulous police conduct."). *See also* David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241, 241–42 (2001) ("Even though illegal drug use appears to be an equal opportunity offense, blacks and the poor are disproportionately arrested, convicted, and incarcerated for drug offenses.").

4. David Rudovsky, *Toward a Rational Drug Policy: The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL. F. 237, 241 (1994) (describing the reasoning for large numbers of stops by police on streets and sidewalks). The article notes:

> Increasingly, enforcement on the street depends upon making large numbers of stops and searches without the kind of individualized justification normally required by the Fourth Amendment, on the theory that the abundance of drugs in our society will result in positive finds in a certain percentage of the stops. This net ensnares the innocent and guilty alike. While we only represent indigent clients, almost all persons charged with misdemeanors in the District of Columbia are assigned free attorneys because they are poor.

Id.

5. *See* Lindsey v. United States, 911 A.2d 824, 833 (D.C. 2006) ("Thus, there is no reason to conclude that he perceived that he was in custody or that he was not free to leave if he wished, nor that any reasonable person in his position would have perceived that he was not free to leave."); *see also* I.N.S. v. Delgado, 466 U.S. 210, 221 (1984) (holding that interviewing a suspect in a custodial setting for an unrelated reason is not a seizure within

suggests that Mr. Thompson would have wanted to keep walking and only stopped because he was acquiescing to the officers' authority. Unfortunately, the Supreme Court has fleshed out the test with factual rulings that assume that people can always walk away from police officers who approach them, as long as the officers do not use words like "halt" or brandish a weapon or grab the person stopped.[7] Police may target, stop, and question a pedestrian for any reason and not violate the Fourth Amendment if a court decides that a reasonable person in the pedestrian's shoes would have felt free to leave.[8] The Supreme Court has found no stop and therefore no type of detention or seizure in situations every bit as coercive as the one facing Mr. Thompson and his friend.

When I told a class of students at Howard University School of Law that they can walk away when police officers approach to ask them questions, they rebelled. "Not in my neighborhood," said one student. "You can get yourself arrested," another law student said. "Or shot," added another. The law students were preparing to teach high school students their rights. One student in my class who was a former police officer declared that it would be irresponsible for us to tell young people that they can walk away from police. As the students recognized, the free-to-leave test, as applied by the Court, is unmoored from reality. In reality, Mr. Thompson and his friend believed, with justification, that they could not walk away from the police without risking repercussions including an arrest for failing to obey a police officer.[9]

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the meaning of the Fourth Amendment).

6. *See* Bumper v. North Carolina, 391 U.S. 543, 548–49 (1968) ("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."); *see also* Florida v. Bostick, 501 U.S. 429, 435 (1991) (holding that if police convey the impression that the request is a command, then consent is not voluntary).

7. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980) (holding that "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained" (citing United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976))).

8. *See id.* ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

9. *See* Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483, 1504 (2007) (stating that failure to cooperate with a police officer's directives can have many serious repercussions, including arrest and charges).

This area of law parallels judicial attitudes towards domestic violence victims. Judges sometimes blame battered women for failing to leave abusive partners.[10] Research shows, however, that women are in the best position to know whether they are in greater danger by leaving or staying.[11] Just as courts sometimes tell battered women to leave their abusers without really knowing how that might affect their safety, courts essentially tell Mr. Thompson that it is his own fault for failing to leave the encounter with the police, without really knowing how that might have affected his welfare. Whatever actual dangers lurked for Mr. Thompson at the time, the Court will later re-imagine the confrontation as a consensual encounter where Mr. Thompson implicitly expressed his wish to stop walking and engage the police.

I teach a criminal justice clinic at Howard University School of Law where we represent poor clients charged with misdemeanors including drug possession. Mr. Thompson was our client. The police found illegal narcotics when they searched Mr. Thompson, which is why the case went to court.

Mr. Thompson's friend was searched, but he was allowed to leave when no controlled substances were recovered. Mr. Carter's stop and search is one of the thousands of searches where nothing is found and for which there is no record.[12] This illustrates one reason why unlawful police intrusions are rarely rectified, even when there is case law on the side of the

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10. Jane K. Stoever, *Freedom From Violence: Using The Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 Ohio St. L. J. 303, 336 (2011) ("Judges are preoccupied with this question and persist in asking it and variations, such as, "Why don't they just get up and leave?"); Heather Lauren Hughes, *Contradictions, Open Secrets and Feminist Faith in Enlightenment*, 13 Hastings Women's L.J. (2002); Naomi R. Cahn, *Inconsistent Stories*, 81 Geo. L.J. 2475, 2488 (1993). Moreover, there has been more scientific inquiry into the nature of coercion for domestic violence victims than for subjects of police stops. See, e.g., Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 Berkeley J. Gender L. & Just. 2, 22 n.73, (2007) citing to Alan Wetheimer, Coercion 206 (1987) ("coercion is contextually dependent, and has a significant subjective component, making the application of a universal standard of measurement difficult.").

11. *See* Margaret E. Johnson, *Balancing Liberty, Dignity, And Safety: The Impact of Domestic Violence Lethality Screening*, 32 Cardozo L. Rev. 519, 526 & n. 21 (2010); Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. Davis L. Rev. 1107, 1127, n.93 & 94 (2009) ("research shows women are best able to determine the safest course of action" including research on separation assault) citing to Lenore E. A. Walker, ABUSED WOMEN AND SURVIVOR THERAPY: A PRACTICAL GUIDE FOR THE PSYCHOTHERAPIST 55 (1994).

12. *See, e.g.*, Nadler & Trout, THE LANGUAGE OF CONSENT, *supra* note 2, at 3 ("[T]he vast majority of people subjected to consent searches are innocent.").

pedestrian. As David Rudovsky wrote, "[T]hose who are stopped and searched but found without drugs generally do not complain, and those who are found with drugs have little or no credibility in court to challenge the legality of the seizure and arrest."[13]

Scholars who have addressed the disconnect between the existing empirical evidence and the Supreme Court's constitutional jurisprudence have focused on changing the nine justices' minds.[14] This Article focuses on influencing the trial court judge who decides the motion to suppress. A novel way for defense lawyers to challenge the case law on consensual stops and searches is to present trial courts with social science data that proves that someone in Mr. Thompson's situation would not feel free to leave. While trial court judges must follow United States Supreme Court precedent, the Supreme Court has created a test that demands that judges consider the totality of the circumstances in determining whether a reasonable person would feel free to walk away in the face of police interrogation.

Trial lawyers need not ask judges to jettison precedent when they cite social science that contradicts the Court's prior analysis of cases before them. Rather, social science data provides judges with important tools to apply the totality-of-the-circumstances test properly to the facts before them. Consider how the law students in the Howard University clinic reacted to the notion that they are free to walk away from police officers who question them without inviting retaliation. If citizens who are versed in the law are constrained by the officers' power and authority, then it is unlikely that those without legal training could withstand the pressure of the badge. A trial judge who knows that young people, or at least young people of color, would not feel free to leave should rule differently than a judge who is unaware of this reality.

Social science research could be helpful here by outlining under what circumstances a citizen might feel free to refuse the request of a police officer. One problem is that there is not a lot of social science data available. As Janice Nadler writes, "[T]he extent to which citizens feel

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13. Rudovsky, *supra* note 4, at 241.

14. *See, e.g.*, Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 156 (2002) (suggesting that the Supreme Court should engage in an evaluation of the suspicionless search of civilians by law enforcement officials); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2040 (2011) (suggesting that the Court approach Fourth Amendment search and seizure with a "behavioral realist" approach).

compelled to accede to a police request is an empirical question," although "[n]ot much empirical evidence is available to help answer that question."[15]

There is another problem to consider, namely that the free-to-leave doctrine is essentially a legal fiction. The Supreme Court never really thought that someone stopped by police would feel free to leave. This creates a particular challenge to lawyers because it raises the question of whether empirical data will sway a trial judge deciding a motion to suppress.

In Part I, the facts in Mr. Thompson's case are set forth to demonstrate why social science helps judges to properly adjudicate motions involving the "free-to-leave" test. Part II examines how case law serves to block rational decision-making by trial judges when they determine the totality-of-the-circumstances. Part III explores the existing social science data relating to consensual stops. Part IV investigates other scholarship, aimed at the Supreme Court justices, that addresses empirical data as a means to challenge Fourth Amendment jurisprudence. This section also discusses a recent case where the Court jettisoned an entrenched legal fiction. And Part V will demonstrate that social science might make a difference at the trial level.

Can social science challenge a legal fiction or are legal fictions immune from reality-based decision-making? This article explores new territory in seeking to use empirical data to unmask the Supreme Court's harmful decisions and to encourage trial judges to make independent assessments of whether the individual was detained or choosing to stop. This article will show that these assessments can be made even while scrupulously following the test set forth by the Supreme Court.

I. Testimony at the Motion to Suppress

The Motion to Suppress in the case of Mr. Thompson was based on two distinct arguments. First, we argued that the encounter was not consensual from the start since the police lacked even reasonable suspicion to believe Mr. Thompson had committed a crime. Second, the search was impermissible because police lacked probable cause or consent.

There were some "bad facts" to contend with when sculpting our search and seizure argument. During the encounter with police, Mr. Thompson allegedly told the officer that he was just shooting up in an alley.

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15. Nadler & Trout, *supra* note 2, at 19.

When asked, "Do you have any drugs on you?" he helpfully responded, "Yes, in my top pocket." If the judge credited the officer's testimony, this would provide probable cause for the search. Thus, although we made two distinct arguments, we emphasized that the encounter violated Fourth Amendment rules the moment that Mr. Thompson was stopped by police. As soon as the police came up to our client and he stopped walking, he was seized, we argued.[16] A person in this defendant's shoes would not have felt free to walk away.

During the motion to suppress hearing, the officer testified that he suspected the two men of holding heroin because he had found many middle-aged men with heroin in that neighborhood in recent weeks. In addition, Mr. Thompson avoided eye contact with police as they drove up, which made the police want to investigate.

The government wanted it both ways. The prosecutor argued that Mr. Thompson did not want to interact with the police, giving rise to a reason for the police to investigate him. Yet, at the same time, the prosecutor argued that Mr. Thompson freely chose to stop and answer questions, so apparently he did want to interact with police. This incongruity epitomizes the fictional nature of the free-to-leave test.

Although the police offered a reason for stopping our client to question him, these suspicions did not rise to the level of articulable reasonable suspicion, let alone probable cause.[17] Therefore, the judge would have to suppress the evidence seized if she determined that the police stopped Mr. Thompson when they came up to him and started asking questions.

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16. *See* California v. Hodari D., 499 U.S. 621, 621 (1991) (holding that seizure of a person requires physical restraint of the suspect or submission to that officer's authority). The majority stated:

> To constitute a seizure of the person, just as to constitute an arrest—the quintessential 'seizure of the person' under Fourth Amendment jurisprudence — there must be *either* the application of physical force, however slight, *or*, where that is absent, submission to an officer's 'show of authority' to restrain the subject's liberty.

Id.

17. *See, e.g.*, Cauthen v. United States, 592 A.2d 1021, 1025 (D.C. 1991) (holding that police did not have reasonable, particularized, and objective basis when they seized and searched the appellant and his bag). The court stated:

> For flight to suggest consciousness of guilt—a mentality other than a legitimate desire to avoid the police—that flight not only must be very clearly in response to a show of authority *but also* must be carried out at such a rate of speed, or in such an erratic or evasive manner that a guilty conscience is the most reasonable explanation.

Id.

The hearing included an interchange that has become a stock phrase in motions to suppress. On direct examination, the prosecutor asked the officer to describe the tone of voice he had used when the officer asked Mr. Thompson if he had drugs. "Real conversational, just like I am talking to you today," answered the witness. Litanies of this sort have become a standard part of motions to suppress when the prosecution seeks to demonstrate a consent to stop or consent to search. It bows to the case law's reliance on what Edwin Butterfoss calls "'minute factual differences' that courts have determined to be crucial, but which bear little relationship to the individual's actual freedom to walk away."[18] This attention to mostly irrelevant detail that is, from the point of view of the person obeying the officer's instructions and most likely long forgotten by the officers themselves, gives these hearings "an air of unreality," and reminds the trial judge that the case law is almost uniformly against any defendant who argues that he was only acquiescing to authority, not voluntarily consenting.[19]

"Do you have any drugs or weapons on you?" "There's a dime bag in my right front pocket," Mr. Thompson allegedly responded. Later in his testimony, the officer added that he asked Mr. Thompson if he could search him and Mr. Thompson said, "Yes."

During cross-examination, the officer agreed that before the police searched Mr. Thompson, he told him to interlock his fingers behind his head and stand with his feet a couple of feet apart. This position hardly conforms to the notion of a consensual search and probably influenced the judge's perception of the encounter. Fortunately for Mr. Thompson, the officer remembered very little about the encounter other than the four lines written in the police report. He did not even recognize the Google map of the location where the men were stopped. The other officer added little to the scenario. Our client did not testify, a common occurrence in criminal cases.

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18. Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 439–40 (1998). This litany over the officer's tone of voice began after the case of *United States v. Drayton* where Justice Kennedy declared that passengers were not seized when police boarded their bus and requested cooperation with drug interdiction, in part because the officers "did not brandish their badges in an authoritative manner, did not make a general announcement to the entire bus, and did not address anyone in a menacing tone of voice." United States v. Drayton, 536 U.S. 194, 200 (2002). But, Justice Souter took a different tack in his dissent, noting that a "police officer who is certain to get his way has no need to shout." *Id.* at 208 (Souter, J., dissenting).

19. *Drayton*, 536 U.S. at 208 (Souter, J., dissenting).

While it may seem obvious that Mr. Thompson and Mr. Carter did not want the police to stop them or question them, case law has a way of interfering with common sense interpretation of the facts.

II. How Case Law Blames the Victims of Unwanted Police Interactions

The idea that some police interactions fall outside of the ambit of Fourth Amendment protection originated in *Terry v. Ohio*.[20] In dicta, Justice Warren announced that "not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[21] While agreeing with the dissent's assertion that police interactions were sometimes used to harass individuals based on race, the majority carved out a category of police activity that would fall outside of judicial review, explaining that the Court was powerless to prevent harassment.[22]

More than a decade later, *United States v. Mendenhall* articulated the free-to-leave test to separate out stops from consensual encounters, namely that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[23] As one critic of the test observed, "literal application of the *Mendenhall* . . . 'free-to-leave' test would result in virtually all police-citizen encounters being characterized as seizures."[24] The test "is ironic because it is generally accepted that, in fact, citizens almost never feel free to end an encounter initiated by a police officer and walk away."[25] From its inception in *Mendenhall*, the free-to-leave test was a legal fiction crafted in

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20. Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring) ("There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets."); *see also* Sibron v. New York, 392 U.S. 40, 62 (1968).

21. *Id.* at 19 n.16.

22. *See id.* at 13 ("It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections.").

23. United States v. Mendenhall, 446 U.S. 544, 554 (1980) (holding that search and seizure is acceptable when the appellant has voluntarily consented to the search of her person).

24. Butterfoss, *supra* note 18, at 439.

25. *Id*.

order to permit some police seizures to fall outside the Fourth Amendment, and therefore to allow police some latitude to stop and detain without cause.[26]

In *Mendenhall*, Justice Stewart wrote for the majority, although only one other justice joined him when he announced the free-to-leave test and concluded that Ms. Mendenhall had not been seized when she was accosted by Drug Enforcement Administration agents in an airport.[27] In *Mendenhall*, DEA agents approached a 22-year-old black woman at an airport, asked for her ticket and driver's license and then asked her to accompany them to an office where she eventually was strip-searched.[28] The majority concluded that the search was constitutional since she had consented to a body search carried out by a female police officer who informed her that this would require Ms. Mendenhall to undress.[29] Although most of the justices determined that Ms. Mendenhall had been seized or assumed this to be true, Justice Stewart and the Chief Justice found no seizure and concluded that the DEA agents did not even need reasonable suspicion to approach Ms. Mendenhall, examine her ticket, and ask her to accompany them to an office since she was allegedly free-to-leave at any time.[30] As Tracey Maclin observed:

> In the unrealistic world of Mendenhall, the average citizen feels free to ignore a police officer who has approached her. In this abstract world, it is irrelevant whether the citizen is aware of her right to ignore the officer. In the real world, however, few people are aware of their fourth amendment rights, many individuals are fearful of the police, and police officers know how to exploit this fear.[31]

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26. *See id.* at 554 ("Moreover, characterizing every street encounter between a citizen and the police as a seizure . . . would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices . . . the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. 'Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished.'").

27. *Mendenhall*, 446 U.S. at 554–55 (Section IIA of Justice Stewart's opinion, joined only by Justice Rehnquist).

28. *Mendenhall*, 446 U.S. at 547–49.

29. *Mendenhall*, 446 U.S. at 558–59. This is section IIC of Justice Stewart's opinion, with which the concurring justices agree.

30. *Id*. at 551–57. This is section IIA of Justice Stewart's opinion, which was joined by Chief Justice Rehnquist. The concurrence did not join this section but concluded, instead, that Ms. Mendenhall was seized but that the agents had the requisite reasonable suspicion. *Id*. at 560.

31. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment*

Or, as another scholar bluntly put it: "How much of an idiot—how stupid, moronic, imbecilic—would a person carrying a gram of crack cocaine stashed in her underwear, for example, have to be to really consent—'freely and voluntarily'—to being searched by a police officer . . . ?"[32]

Another sign of the fictional nature of Justice Stewart's decision was that at the time that a reasonable person in Mendenhall's position would have felt herself free to leave, in fact, Ms. Mendenhall was not actually free to do so. In his dissent, Justice White pointed out that the DEA agent testified he would have detained her if she had attempted to leave.[33] Thus, in the "unrealistic world of *Mendenhall*," people think they can walk away from police questions, even when, in reality they are not at liberty to do so.

Mendenhall created a legal fiction by ignoring the officer's subjective intentions, "constructing a highly artificial 'reasonable person,'"[34] and basing the determination on irrelevant details such as the number of police officers, "the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[35] The legacy of Justice Stewart's opinion in *Mendenhall* is that lower court judges "minimize important contextual features, like the fact that the speaker is armed,"[36] while ascribing too much weight to the form of the question, and basing decision "on 'minute factual differences' that courts have determined to be crucial, but which bear little relationship to the individual's actual freedom to walk away."[37]

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on the Streets, 75 CORNELL L. REV. 1258, at 1300 (1990).

32. John M. Burkhoff, *Search Me? Citizen Ignorance, Police Deception, and the Constitution: A Symposium, Consent Searches by Ignorant Citizens*, 39 TEX. TECH L. REV. 1109, 1114 (2007). *See, e.g.*, Maclin, *supra* note 31, at 1300 ("How can the Court say that a reasonable person would feel free to leave an armed police officer in these circumstances?"); Alexandra Coulter, *Drug Couriers and the Fourth Amendment: Vanishing Privacy Rights for Commercial Passengers*, 43 VAND. L. REV. 1311, 1331 (1990) ("The assertion that most persons in Mendenhall's situation should feel free to leave absent a display of force rings hollow."); Butterfoss, *supra* note 18, at 450 n.83 ("Most commentators believe citizens never feel free to leave when approached and questioned by a police officer.").

33. United States v. Mendenhall, 446 U.S. 544, 575 n.12 (1980) (White, J., dissenting).

34. Butterfoss, *supra* note 18, at 439–40.

35. *Mendenhall*, 446 U.S. 544, 554 (1980).

36. Nadler & Trout, *supra* note 2, at 13.

37. Butterfoss, *supra* note 18, at 439–40.

Again, in *INS v. Delgado*,[38] the Court applied the free-to-leave test in a way that exposed the fictional nature of the Court's reasonable person.[39] DEA agents blocked the exits of a factory and questioned employees, including Mr. Delgado, about their citizenship.[40] Concluding there was no seizure, the Court explained that "police questioning, by itself, is unlikely to result in a Fourth Amendment violation."[41] Writing for himself and Justice Marshall, Justice Brennan complained about the "studied air of unreality" in the Court's "proposition that the interrogations of respondents by the INS were merely brief, 'consensual encounters.'"[42] "Indeed, it is only through a considerable feat of legerdemain that the Court is able to arrive at the conclusion that the respondents were not seized."[43] After *Delgado*, it appeared that outside of a car or house, nothing short of physical touching or egregious police behavior would constitute a seizure.

Florida v. Bostick[44] changed the language of the Mendenhall test slightly, expanding it to fit drug interdictions that occur on buses and other cramped spaces where a person may not be able to physically leave.[45] The defendant in *Bostick* was a bus passenger.[46] During a brief stopover, police boarded the bus, approached Mr. Bostick, and stood over him, asking for his ticket and identification.[47] After providing his documents to police, Mr. Bostick then assented to a search of his bag, but the lower court held that his consent was invalid because the initial stop was unsupported by reasonable suspicion.[48] Reversing the lower courts, the Court found there

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38. I.N.S. v. Delgado, 466 U.S. 210, 220–21 (1984) (finding that INS agents' inquiry into factory workers' citizenship while other agents are stationed at exits is not a seizure under the Fourth Amendment).

39. *See id.* at 218 ("Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers."). The opinion goes further to state that "[t]he obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned." *Id.*

40. *Id.* at 212–13.

41. *Id*. at 216.

42. *Id.* at 226 (Brennan, J., dissenting).

43. *Id*.

44. *See* Florida v. Bostick, 501 U.S. 429, 439–40 (1991) (ruling that random bus searches that are conducted pursuant to the passenger's consent are not per se unconstitutional).

45. *See id*. at 435–37 (explaining why the *Mendenhall* test needed to be changed).

46. *See id*. at 431 (describing the defendant in *Bostick*).

47. *See id*. (outlining the initial interaction between the police and the suspect).

48. *See id*. at 432 (noting that the suspect did consent to the search).

was no need for reasonable suspicion if there was no seizure.[49] Justice O'Connor wrote that the proper test was "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[50] The Court encouraged the lower court to find that the whole encounter was consensual unless the police behaved in an unusually coercive manner.[51] "As we have explained, no seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search his or her luggage—so long as the officers do not convey a message that compliance with their requests is required."[52] Thus, even if a reasonable person in Bostick's position would not feel free to exit the bus, the judge could still deem it a voluntary contact.[53]

In addition, *Bostick* changed the reasonable person test to the reasonable "innocent" person test.[54] One of Bostick's arguments was that since there were illegal narcotics in his bag, he obviously would not have consented to a seizure of his person or a search of his bag if he had a choice.[55] Therefore, police must have "convey[ed] a message that compliance with their requests [was] required," which would make this encounter a seizure and make the search involuntary.[56] Justice O'Connor dismissed that argument, explaining that "the 'reasonable person' test presupposes an *innocent* person."[57] Although the reasonable person test was always an objective test, Justice O'Connor took the fictional nature of this construct one step further away from reality. The test now intentionally excludes the viewpoint of the person bringing the motion to suppress as police and prosecutors assert that they are not innocent people.

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49. *See id.* at 434 (stating the ruling of the case—since there was no seizure, the police did not need reasonable suspicion to perform the search).

50. *Id*. at 430.

51. *See id*. at 438 (explaining the high threshold the Supreme Court has used when reviewing a search and seizure case).

52. *Id*. at 435. On the other hand, later case law allows police to charge individuals for refusing to hand over identification when asked. *See* Hiibel v. Sixth Judicial District Court, 542 U.S. 177 (2004). *Contra* Hiibel v. Humboldt Cnty., 542 U.S. 177, 177 (2004) (holding that police may charge an individual if the individual refuses to present identification when asked).

53. *See* Florida v. Bostick, 501 U.S. 429, 430 (1991).

54. *See* Florida v. Bostick, 501 U.S. 429 (1991).

55. *See id.* at 437–38 (arguing that a guilty suspect would not willingly consent to a police search).

56. *Id*. at 435.

57. *Id*. at 438.

Finally, in *United States v. Drayton*,[58] the Supreme Court applied the facts to a situation quite similar to the one in *Bostick*. Police boarded a bus and told passengers that they were conducting a drug interdiction and asked if they had bags on the bus.[59] In determining that Mr. Drayton would feel free to terminate the encounter with police at any time, the Court brushed aside the fact that Drayton's traveling companion, Brown, was arrested after submitting to a search that turned up drugs before Drayton also submitted to a search of his person.[60] "If anything," the Court opined, "Brown's arrest should have put Drayton on notice of the consequences of continuing the encounter by answering the officers' questions. Even after arresting Brown, Lang [the police officer] addressed Drayton in a polite manner."[61]

In *Blaming the Victim: Consent within the Fourth Amendment and Rape Law*, I suggested that the *Drayton* Court essentially blamed the victim of unwanted searches similarly to how society blamed rape victims for not fighting off aggressive men.[62] "Just as rape victims were told they asked for it by wearing short dresses and not screaming for help, individuals are told they asked for it by extending their arms to be searched."[63] Justice Alito recently made explicit what had been implicit, blaming individuals who fail to exercise their rights properly.[64] In *Kentucky v. King*,[65] the Court held that police acted properly when they chose to try to gain entry into a dwelling through consent rather than applying for a warrant, and then used the sounds emanating from the apartment as a justification for breaking down the door. "Occupants who choose not to stand on their constitutional rights" stated Justice Alito, writing for the majority, "have only themselves

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58. *See* United States v. Drayton, 536 U.S. 194 (2002) (finding that a police officer's act of boarding a bus and questioning passengers did not constitute a seizure of passengers by police).

59. *See id.* at 197–98 (stating the initial interaction between the police and the suspect).

60. *Id*. at 199.

61. *Id.* at 206.

62. Josephine Ross, *Blaming the Victim: Consent Within the Fourth Amendment and Rape Law*, 26 HARV. J. RACIAL & ETHNIC JUST. 1, 1 (explaining how the history of rape law can illuminate the Fourth Amendment's doctrine of consent).

63. *Id.* at 2.

64. *See* Kentucky v. King, 131 S. Ct. 1849, 1849 (2011).

65. *Id.* at 1863 (holding that police can create their own exigency by knocking on a door without a warrant and then forcing entrance when they fear illegal drugs are being destroyed in response to the police knock). *See also id*. at 1857–58 (stating that noise from within an apartment justified a warrantless search based on exigency when police reasonably concluded that drug-related evidence was being destroyed).

to *blame* for the warrantless . . . search that may ensue."[66] Thus, under Supreme Court precedent, it was Mr. Thompson's fault for stopping when the police cruiser abruptly stopped a few feet from him and police came up to talk to him. It was Mr. Thompson's fault for not telling the police officer he wanted to be left alone. In Justice Alito's words, he had no one to blame but himself for not fighting back against the unwanted intrusion.[67]

These cases make it difficult for a judge to truly evaluate whether the person before them was in a position to ignore the police officer or to tell the officer to leave him alone. In order to apply the Supreme Court's test accurately, judges would have to jettison the factual determinations made by the Court in *Mendenhall* and other consent cases where the Court went on to apply the facts to the articulated legal test.[68] As critics of the Supreme Court consent doctrine have noted, "'[T]he Court has never struck down a consent as involuntary.' Never!"[69] A trial judge is likely to compare the facts to one of these other cases, such as *Mendenhall*, and determine that the stop was consensual because the police were no more coercive in their behavior in the current case than in *Mendenhall* or *Drayton*. This would turn the free-to-leave test into an "approved level of coercion without any indicia of suspicion needed" test. Under an "approved level of coercion" test, police are allowed to detain people without cause as long as the coercion is subtle.

The motion to suppress appeared bleak for Mr. Thompson. Since the police testified that they behaved politely, the "approved level of coercion" approach would permit the police to stop and detain Mr. Thompson without needing a legitimate cause to do so. Social science presented the opportunity for the judge to avoid the contradiction created by case law between the test as articulated and the test as applied.

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66. Kentucky v. King, 131 S. Ct. 1849 (2011) (emphasis added) (describing that when police knocked on dwelling house seeking consensual entry, the occupants refused to open up the door, so the police broke down the door). This activity was legal because police had probable cause to believe that the occupants were destroying marijuana and the police were permitted to create their own exigency thereby avoiding the need for a warrant. The Court implied that the occupants could have won their motion if they stayed still after advising the police they were not welcome.

67. *See id*. at 1862 (stating that a citizen has the duty to refuse to give his or her consent to a police search).

68. *See* United States v. Mendenhall, 446 U.S. 544, 558 (1980) (noting that a defendant's level of education and race were relevant but not decisive factors in determining whether the defendant voluntarily accompanied officers from airport concourse to Drug Enforcement Administration office).

69. Burkoff, *supra* note 32, at 1129 (quoting Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L. J. 339, 340 (2006)).

III. Social Science Regarding Police Encounters

Recently, I suggested to students that they include social science references in their motions to suppress. I suggested this because this research would provide judges a basis and a background to persuade them to truly apply the free-to-leave test based on the circumstances in the current case, rather than relying on the Supreme Court's previous factual determinations. Social science might convince a judge to take into account what case law has obfuscated, namely, that these investigatory stops in the inner-city streets are coercive. Also, the social science references might focus a judge's attention on the particular individual stopped, or at least make the judge focus on how someone in the defendant's position would experience the encounter.

Although the free-to-leave test is supposed to be objective and from the point of view of someone in the defendant's position, Supreme Court cases focus instead on police behavior. Consent cases require case-by-case factual inquiries based on the totality of the circumstances, although trial judges tend to employ a legalistic approach comparing police actions in the case in front of them to prior case law. Trial judges frequently reason that "the coercion by the police here was no greater than in *Mendenhall*, hence this was consensual." Since the consent in both *Mendenhall* and *Delgado* were legal fictions, it makes it difficult for judges to apply the purported Supreme Court test, and truly inquire into whether Mr. Thompson and individuals in his position would have felt free to ignore the police officer and "keep going about their business." Social science might encourage judges to apply the test honestly, thereby reaching a different conclusion than the Supreme Court did when it created a fictional "innocent reasonable person."

There is surprisingly little social science that investigates consensual stops and consensual searches and few law review articles that discuss the existing work. The leading law review article is by Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*.[70] Nadler uses social science to critique the Supreme Court's holding in *United States v. Drayton,* arguing that the Supreme Court ignores the social psychology of compliance, conformity, social influence, and politeness in reaching its conclusions.[71]

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70. *See* Nadler, *supra* note 14, at 155 (critiquing the standard applied by many courts to determine whether a reasonable person would feel free to refuse a police officer's request to be searched).

71. *See id*. (arguing that the question of whether a citizen feels free to terminate a

Studies show that people tend to underestimate the strength of situational constraints and overestimate the voluntariness of others actions.[72] While people recognize how situational forces apply to their own past behavior, people are poor predictors of how they will act in a new situation.[73] For example, one study asked participants to predict what they would do in a job interview when asked certain inappropriate questions and compared this data to job candidates who were asked the same questions.[74] Participants stated they would decline to answer the questions and confront the interviewer.[75] In contrast most of the job candidates, faced with this choice in a simulated situation, in fact, capitulated.[76] This literature might convince trial judges to recognize their own tendency to overestimate the voluntariness of defendants' conduct in remaining at the scene to respond to police questions.

Social science also serves to debunk the linguistic criteria fashioned by the Court to justify its conclusion that a suspect would have felt free to leave, so the police need not have a reasonable suspicion for the stop. Similarly, studies can refute the criteria fashioned to justify searches. For example, the Court determined that the question "do you mind if I check [your bag]" if uttered in a quiet tone of voice would be understood as a request that could be refused without negative consequences.[77]

In reality, listeners interpret questions or suggestions as orders when they come from a person of authority. Employees do not distinguish

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police encounter depends on certain empirical claims).

72. *See id*. at 168–69 (stating that people tend to grossly overestimate when the actions of others are voluntary).

73. *See id*. at 170–72 (stating that the general finding that observers do not appreciate the strength of situational constraints on one's behavior has been demonstrated in many different settings, including encounters between police and citizens).

74. *See id*. at 171 (comparing answers in a survey focused on inappropriate answers in job interviews with actual answers in job interviews).

75. *See id*. at 172 (describing how participants in the survey answered that they would confront the interviewer directly).

76. *See id*. at 183 (describing an experiment by Solomon Asch where seventy-five percent of the participants gave a wrong answer in response to peer pressure, while most other study participants predicted they would not change their answer); *see also* John A. Bargh, *Automaticity in Social Psychology*, *reprinted in* SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 69, 179 (1996) (explaining the history, basics, and anticipated direction of automaticity research in the field of social psychology).

77. *See* United States v. Drayton, 536 U.S. 194, 199 (2002) (holding that plainclothes police officers did not seize bus passengers when they boarded a bus at a rest stop and began asking passengers questions, and also ruling that Mr. Drayton's consent to the search of his person was voluntary).

between a boss informing them "don't be late again" or using the softer approach: "try not to be late again."[78] The soft request will be interpreted as an order because the authority-subordinate roles create the context for interpretation.[79] There is little doubt that police are in a position of authority vis-à-vis someone they approach on the street. Thus, the indirect request "would you mind if I searched your bag" coming from a police officer will therefore be interpreted by the suspect as "I am an officer; please do what you are asked and everything will go smoothly." Similarly, when police ask a driver, "Can I please see your license and registration," the driver will interpret this as a command.[80] In fact, this question is recognized by the Court as a command; drivers must give police their license and registration when pulled over.[81]

Police may use the polite form when asking to see a driver's documents because it constitutes face-saving language while communicating the same message as if the officer used a declarative sentence structure.[82] "When discourse is framed as a suggestion (rather than imperative), and when the listener believes that he or she must comply anyway (due to the authority of the speaker), the suggestion is taken as a sign that the authority is being sensitive to face."[83] Thus, the line between requests and orders is essentially non-existent when it comes to a police officer requesting something from a suspect. As Dorothy Kagehiro has pointed out, "'I wouldn't do that if I were you' could be a warning or a threat," depending upon the context in which it was uttered.[84] Thus, judges should recognize that Mr. Thompson would have heard a command, even if police phrased the order as a request.

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78. Nadler, *supra* note 14, at 189.

79. *See id*. (discussing how tone can be irrelevant when an employer speaks to a subordinate employee).

80. Nadler, *supra* note 14, at 188.

81. *See, e.g.*, Gustafson v. Florida, 414 U.S. 260, 261–63 (1973) (driver arrested when he could not produce his license after he was pulled over for crossing the center lane of a highway); *see also* David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 568 (1998) (stating that either a driver or a passenger of a stopped motor vehicle who ignores a police request to exit the car may face the penalty of arrest for disobeying an officer).

82. *See* Nadler, *supra* note 14, at 189 (noting that a police officer's polite tone does not necessarily change how a citizen interprets the statement).

83. *Id.* ("Because a police officer is perceived as an authority, he need not rely on coercive statements to achieve a goal—his role is adequate, and a polite request can increase face-sensitivity without reducing coercive power.").

84. Dorothy K. Kagehiro, *Perceived Voluntariness of Consent to Warrantless Police Searches*, 18 J. APPLIED SOC. PSYCHOL. 38, 41 (2006).

As my students and I prepared for the motion to suppress, I decided to demonstrate what they were about to argue to the court. I asked one student if he would like to redo the cross-examination of the officer and give it to me later that day. His face fell; he looked devastated. "Did you interpret my request as an order?" I asked in a surprised voice, explaining that I was just demonstrating Nadler's point. "Now that my heart stopped pounding," the student replied, "I would have to agree that your experiment worked."

Nadler also cites literature to support the claim that allowing police to search might be based upon "over-learned patterns of responses" where individuals comply because the authority-subordinate roles dictate that response.[85] It is often difficult to separate out role-oriented acquiescence to authority from acquiescence based on fear of disobeying police. Legally, the Supreme Court is unlikely to view role response as creating a coercive situation because the police did not create this pressure. Similarly, the Supreme Court criticized the state court in *Drayton* for finding that when in "cramped confines onboard a bus the act of questioning would deprive a person of his or her freedom of movement" because "this is the natural result of choosing to take the bus; it says nothing about whether the police conduct is coercive."[86] Physical proximity between officer and subject may also affect the voluntariness of the subject's consent to a search or seizure. Nadler found research about personal space, noting that people begin to report discomfort when someone who approaches them stands about twenty-seven inches away, although the test was done with people posing as researchers.[87] No research has been done regarding the proximity of police-to-person contacted. In our case, the first officer testified he was arm's distance from Mr. Thompson, arguably placing himself within the discomfort zone.

In Illya Lichtenberg's well-regarded study, the researcher interviewed drivers who were stopped by police for traffic violations and asked to consent to a search of their car.[88] The data was stark. Forty-eight out of the

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85. Nadler, *supra* note 14, at 175.

86. United States v. Drayton, 536 U.S. 194, 201–02 (2002) (finding that a police officer's actions of boarding a bus and questioning passengers did not constitute a seizure of passengers by police).

87. *See* Nadler, *supra* note 14, at 191 (stating that studies of interpersonal distance have demonstrated that people feel increased pressure to comply with a request when the requester speaks to them from a close physical distance).

88. *See* Illya D. Lichtenberg, Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police-Citizen Encounter 240 (1999) (unpublished doctoral dissertation, Rutgers University) (on file with Washington and Lee Journal of Civil Rights and Social Justice); *see generally* Illya D. Lichtenberg, *Miranda in Ohio: The Effects of*

forty-nine consenting drivers thought that the police would have searched them anyway.[89] All but two drivers stated they were afraid of what would happen if they did not consent.[90] This proves that the searches were involuntary under the Supreme Court test, because reasonable people felt compelled to submit to the request. Only five people out of fifty-four people in the vehicles refused to consent to a search.[91] Of these, two were in fact searched anyway and one was threatened with future retaliation.[92] Nadler argues that this study proves a difference of perspective between officer and motorist.[93] Although the officers were not interviewed in the study, there was nothing to suggest that the police officers were unusually abusive, nor that they brandished their pistols or phrased their requests as orders. All the Supreme Court indicators of a consensual search were present, and yet we know from the perspective of the motorists, they were "coerced to comply with a request that they would prefer to refuse,"[94] making it a nonconsensual search.

Within the memorandum in support of Mr. Thompson's motion to suppress, students also included David Kessler's survey in which he polled pedestrians in Boston about their perception of police stops.[95] This research was explicitly on point. Harvard law students asked participants to take part in a survey where they answered six questions.[96] The first question was:

> 1. You are walking on the sidewalk. A police officer comes up to you and says, "I have a few questions to ask you." Assume you do not want to talk to the officer.

Robinette *on the "Voluntary" Waiver of Fourth Amendment Rights*, 44 HOWARD L. J. 349, 365 (2001) (arguing that the fear that mandatory use of warnings by police would undermine the use of consent searches is unfounded).

89. *See* Lichtenberg, *supra* note 88, at 267–75.

90. *Id*.

91. *Id*.

92. *Id*.

93. *See* Nadler, *supra* note 14, at 169 (finding that a person's perspective can make behavior appear voluntary to an outsider, when in actuality, the actor feels constrained by the situation).

94. *Id*. at 193.

95. *See* David K. Kessler, *Free To Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 52 (2009) (discussing whether people feel free to terminate simple encounters with law enforcement officers).

96. *See id*. at 68 (explaining the questionnaires that were administered to several students at Harvard Law School).

> On a scale of 1 to 5, please indicate how free you would feel to walk away without answering or to decline to talk with the police officer.[97]

The other questions also involved individuals projecting how they would feel in situations with police.[98] Kessler reports that the majority of respondents would not feel free to leave a police officer who questioned them on a sidewalk or on a bus, nor would they feel "somewhat free to leave."[99] Only twenty percent reported they felt free to leave.[100] However, although Kessler's research is useful, it relies on people's suppositions about how police might talk to them and does not capture the essence of most street interactions. As Nadler recognized, people tend to underestimate the extent to which situational pressures will affect their behavior.[101] Kessler agrees that "[t]he coercive pressures experienced when actually dealing with a police officer are likely to make one feel less free than when one is standing in a train station" conversing with a student researcher.[102] Even so, Kessler's study shows that the majority of people recognize that they will not feel free to walk away if police approach them.

While there are some other social science studies that relate to the consent doctrine, none are exactly on point. Slobogin and Schumacher created a study where volunteers rated the intrusiveness of various police behaviors.[103] The results indicated a disconnect between society's actual expectations of privacy and the Court's assumptions about how police activities affect expectations of privacy. While most of the study had little to do with consent or the free-to-leave doctrine, people rated the intrusiveness of police boarding a bus and asking to search luggage. Contradicting the Court's assumptions in *Bostick* and *Drayton*, responders rated this as much more intrusive than the specter of police rummaging through drawers at an office, although the bus interrogations are not

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97. *Id*. at 88.

98. *See id.* (noting the thoroughness of the test).

99. *Id.* at 75.

100. *See id*. (suggesting that the average respondent did not feel somewhat free to leave).

101. *See* Nadler, *supra* note 14, at 155, 168-72 (detailing how people tend to discount the amount of coercion created by situations, a form of observer bias).

102. Kessler, *supra* note 95, at 80.

103. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society*," 42 DUKE L. J. 727, 733–42 (1993); Christopher Slobogin & Joseph E. Schumacher, *Rating the Intrusiveness of Law Enforcement Searches and Seizures*, 17 LAW & HUM. BEHAV. 183, 198–99 (1993).

covered by the Fourth Amendment while the latter is.[104] The study is an example of the increasing use of social science as a means of critiquing the Court's Fourth Amendment rulings. Like other social science critiques of the Fourth Amendment, Slobogin and Schumacher sought change at the Supreme Court level, although they recognized the Court is likely to simply ignore the data.[105]

One researcher who focused on Fourth Amendment consent was Dorothy Kagehiro, but she focused on third party consent situations.[106] One hypothesis that was borne out in the data was that the person consenting had a different understanding of her own ability to choose or control the situation than did an observer to the situation. Judges, as observers, are more likely to "overestimate consenters perceived choice in permitting police entry," Kagehiro cautioned.[107] In addition, Kagehiro proved that the manner in which questions were asked altered whether volunteers felt they had a choice in refusing consent.[108] However, the nuances used in the study are beyond the capacity of a court to use in ruling on a motion to suppress evidence. For example, Kagehiro tests different responses to a police officer saying "Would you mind if I came in to look around," to one saying "I would appreciate it if I could come in and look around."[109] While this information would be useful for training police officers in techniques that maximize cooperation, courts cannot be expected to make distinctions such as this.[110] At hearings, judges must generally rely on police self-serving

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104. Slobogin & Schumacher, *Rating the Intrusiveness*, *supra* note 103, at 189 (presenting respondents' results to inquiries about intrusiveness of searches); s*ee also* Slobogin & Schumacher, *Reasonable Expectations of Privacy and Autonomy, supra* note 103, at 774 (1993) (noting "The results of this research should also remind judges that because of their distance from the world of police investigation and the effect of hindsight bias, they may tend to underestimate the intrusiveness of police actions.").

105. *See id.* at 198–99 (concluding that most of the Supreme Court's rulings on search and seizure are based on flawed assumptions about society's perspective on privacy and autonomy).

106. *See* Kagehiro, *supra* note 84, at 41 (applying psychological theory and research on attributions, interpersonal relationships, and human territorial functioning to issues and assumptions in the law of warrantless searches and seizures).

107. *See* Slobogin, *Reasonable Expectations*, *supra* note 103, at 188–92 (hypothesizing that consent influenced by coercion could be mistakenly perceived as voluntary willingness); *see also* Kagehiro, *supra* note 84, at 39 ("The perspective of a court during a suppression hearing . . . is that of an observer.").

108. *See* Slobogin, *supra* note 103, at 189 (discussing how police can use coercive phrasing to obtain perceived consent).

109. Kagehiro, *supra* note 84, at 41 (describing vignettes used to demonstrate how different phrasing would influence consent).

110. *See id.* at 46 (suggesting that the courts may inaccurately interpret the defendant's

recitations of events that occurred months ago.[111] Street interactions are never recorded, and as there are generally no unbiased witnesses, there is no method to confirm the accuracy of police memory other than the testimony of the defendants themselves. Moreover, drawing such fine linguistic distinctions in laboratory experiments invites the Court to continue to make fine distinctions in the case law, such as determining that people are free to leave if the officer is polite or uses a conversational tone of voice—distinctions that have been extensively critiqued by Nadler and other commentators.[112] Criticizing the Supreme Court's blind adherence to the structure of police language seeking permission to search, Nadler notes that context is more important than phrasing, "because contextual factors can affect meaning in limitless, even if systematic, ways, there is no sense to be made—either scientific or folk—of claims about the 'literal meaning' of some linguistic sequence. Its meaning can change with identity of speaker, tone and accent, location of the utterance (church, courthouse), and a host of other indexes."[113]

Studies of attitudes towards the police may also be relevant to determining what a reasonable person's response would be to police conduct. In an important study in Chicago, researchers found that "observing others being treated with disrespect was the strongest predictor of trust in the police."[114] "In general, the public experiences police-initiated contacts as negative experiences (e.g., arrests, vehicular stops, field interrogations) that lead to dissatisfaction with law enforcement and other unfavorable opinions of police officers."[115] In interviews with a large

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consent as voluntary without considering the full psychological context).

111. *See, e.g.*, Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L 259, 272 (2010) (citing Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI L. REV 1016, 1024–25 (1987) ("According to Orfield, virtually all of the officers admit that the police commit perjury, if infrequently, at suppression hearings.") (emphasis added).

112. Nadler, *supra* note 14, at 155 (discussing how politeness could create socially-induced pressure); *see also* Raymond, *supra* note 9, at 1492 (stating that courts assume that people have the confidence to easily decline consent to searches).

113. Nadler & Trout, *supra* note 2, at 11.

114. Jamie L. Flexon, et al., *Exploring the Dimensions of Trust in the Police Among Chicago Juveniles*, 37 J. CRIM. JUST. 180, 186 (2009) (explaining that observing police mistreatment of others strongly predicts level of trust in police (citing D. D. Jones-Brown, *The Myth of Officer Friendly: How African American Males Experience Community Policing*, 16 J. CONTEMP. CRIM. JUST. 209−29 (2000)).

115. *Id.* at 182 (citing M. Sced, PUBLIC SATISFACTION WITH POLICE CONTACT - PART 1: POLICE INITIATED CONTACTS, ADEL.: AUSTRALASIAN CTR. FOR POLICING RES. (2004)).

sample of high school students, researchers found that nearly sixty percent of students interviewed "reported having been stopped by the police in the last year, and forty percent reported that they observed others stopped and treated with disrespect by the police. Only eleven percent reported that they witnessed others stopped and treated with respect by the police."[116] This data undermines the Court's hypothetical reasonable person test because the precedent assumes a certain level of trust. Not only does the Court assume that the police will not punish those who try to leave in determining whether there has been a consensual encounter, but the Court also assumes that individuals trust the police will not punish them for asserting this right. The data proves the assumption of trust is unfounded.

In sum, there is a scarcity of social science research on what a "reasonable person" would do in situations such as these. While Kessler's study regarding people's perceptions of their freedom to terminate interactions with police is the most on point, it suffers from the very problem that affects judges' decision-making, namely, a tendency for observers to overestimate choice. Ideally, further studies should be undertaken that simulate the situation actually faced on the street.

IV. Can Social Science Change A Legal Fiction?

Advocates for the use of social science in Fourth Amendment decision-making have focused almost exclusively on the Supreme Court.[117] Tracey Meares and Bernard Harcourt argue that empirical evidence is particularly useful when the Supreme Court justices engage in a balancing test that weighs liberty interests against society's interest in law enforcement.[118] Meares and Harcourt ask: "Do we really believe that the unadorned commonsense judgments of the justices of the Supreme Court are adequate to determine the scope of individual rights . . . if there is social science research available to inform the Court's commonsense

116. *Id.* at 185 (discussing statistics of those stopped by police in a Chicago study); *see also* Wesley G. Skogan, *Asymmetry in the Impact of Encounters with Police*, 16 POLICING & SOC'Y 99, 99–126 (2006) (introducing the background of the Chicago study).

117. *See* Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 742–43 (2002) (including various academic discussions on why the Supreme Court should apply social science research); *see also* Slobogin & Schumacher, *Reasonable Expectations of Privacy*, *supra* note 103 at 774–75.

118. *See id*. at 742 (suggesting that it would be a good idea for the Supreme Court to use social scientific studies to gauge the social consequences of its decisions).

judgments?"[119] In the Fourth Amendment context, they criticized the Court for deciding that "headlong flight" from police officers constitutes proof of criminal wrong-doing without reference to empirical evidence, such as available data gathered during stops in New York City.[120] Their criticism could be equally aimed at the *Mendenhall, Delgado,* and *Drayton* decisions, for the three majority opinions contain no empirical evidence to support the Justices' conclusions that reasonable people in the same situation as those individuals would have felt free to leave or to tell the police to leave them alone.

I imagine that certain critiques will be leveled against the call for empirical evidence at the trial court level. First, skeptics might argue that this really is a matter of Supreme Court decision-making. According to this view, lower courts are bound to apply the legal fiction regardless of the persuasiveness of empirical evidence contradicting the Supreme Court's conclusions. Since misdemeanor cases will never make it to the Supreme Court, efforts should be redirected away from trial memoranda towards amicus briefs. Second, others might argue that the Supreme Court will not be persuaded by social science since the free-to-leave doctrine as applied by the Court is a legal fiction designed to empower the police and dilute the Fourth Amendment. Both of these critiques will be addressed below. Other criticisms that relate to social science generally are beyond the scope of this article. However critiques about the paucity of studies are welcome, especially if accompanied by an interest in creating new data.

Turning to the first potential criticism, that the free-to-leave test is a matter of Supreme Court decision-making and not a lower court matter, it is indeed improbable that a misdemeanor trial will be appealed all the way to the Supreme Court. Nevertheless, these trial court briefs have merit. There is increasing criticism directed at the Court's failure to use social science when defining the contours of Fourth Amendment protection, despite fatalism that the current Supreme Court will disregard social science data in favor of its own commonsense judgments when balancing the privacy and dignity rights of individuals against society's interest in fighting crime.[121]

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119. *See id.* at 784 (questioning whether common sense judgments alone are sufficient, or whether there needs to be more social science research to supplement them).

120. *See id.* at 750 (discussing the Court's conclusion in Illinois v. Wardlow, 528 U.S. 119 (2000), that flight from police meant evasion).

121. *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation,* 139 U. PA. L. REV. 541, 612 (1991) (describing Justice Brennan's opinion that social science research does not coincide with the Court's normative philosophy); *see also* Slobogin & Schumacher, *Reasonable Expectations of Privacy*, *supra* note 103 ("The alternative most likely to be adopted, given the Court's

Trial lawyers' efforts to include social science in their memoranda should be understood as part of the growing condemnation of "the Court's empirical myopia."[122] Moreover, although the Brandeis brief has become the preferred method of introducing social science into appellate decision-making, the most celebrated opinion based on social science was the school desegregation case of *Brown v. Board of Education*,[123] where studies on children's attitudes towards black dolls were initially introduced at the trial level. Nevertheless, critics would be correct that the primary purpose in including the social science in the Memorandum Supporting Mr. Thompson's Motion to Suppress was to convince the trial judge to grant the motion, not to change the law or to convince an appellate court.

While proponents of social science data as a method for resolving constitutional law questions generally seek to influence the nine Supreme Court justices, there is no scholarship on the use of social science in motions to suppress to influence the trial judge. Although primarily concerned with the ability of appellate justices to consider empirical studies in creating rules of law, Monahan and Walker wrote an article that envisioned a role for lower courts in shaping law, rather than ceding this work to the Supreme Court or judges on the highest state courts.[124] A "lower court should be able to reach empirical conclusions that differ from those of an appellate court when it has obtained new research not previously before the reviewing court," they argue.[125] Monahan and Walker distinguish between social science research used to create the rule of law, and research used "to adjudicate an issue within a settled legal context."[126] The data we used in Mr. Thompson's case to challenge the free-to-leave doctrine should be classified as research used to change or shape the rule of law. Thus, in Mr. Thompson's case, Monahan and Walker would recognize the trial court's ability to consider these studies in deciding that the precedent was wrong, envisioning the judge's role as a step in a gradual process of changing the rule of law.

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past reaction to empirical research, is to reject or ignore the data.").

122. *See id.* (explaining that the Supreme Court's projected view of the Constitution limits its application of other views).

123. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 n.11 (1954) (noting Clark's study).

124. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science*, 134 U. PA. L. REV. 477, 499–500 (1986) (discussing the importance of appellate review).

125. *See id.* at 516 (discussing how higher court opinions may deviate from the lower courts opinions on the basis of newfound research).

126. *Id.* at 491 (contrasting the different applications of social science research).

In fact, the distinction between rule of law and question of fact is not so clear. After all, Supreme Court precedent does not declare that people approached on the street by police are never seized. Rather the settled doctrine is that judges must look at all the circumstances to determine what a reasonable person in the defendant's position would think. In Mr. Thompson's case, arguably, it is a question of applying this law to the particular facts adduced during the motion hearing. The loose nature of the test vests great discretion with the trial judge who is in the best position to recognize subtleties that might change the dynamic between officer and citizen. Understanding human nature can help a court apply the facts. Knowing how most people behave and think in similar situations can help a judge determine what is reasonable. Thus, social science may be useful in an individual application of the reasonable person test as well as the creation of the rule of law.

Turning next to the criticism that social science cannot defeat a legal fiction, this poses a novel question regardless of whether the decision-maker is the trial judge or the Supreme Court. At the trial court level, since judges probably view the free-to-leave test as a fiction, how people actually behave might be beside the point. It may seem obvious that Ms. Mendenhall would never voluntarily consent to a strip search,[127] that Mr. Drayton would have terminated the encounter with police if he could, and that Mr. Delgado would never stay to answer questions about his immigration status had they not each felt compelled to do so. On the other hand, judges might truly seek to apply the free-to-leave test. Judges might agree with Erik Luna that the alternative to incorporating societal standards is relying on each judge's "own naked preferences."[128]

Similarly, if the Supreme Court created the legal fiction in order to empower the police and dilute the Fourth Amendment, then social science data that proves the obvious would be unlikely to sway the Court. The Supreme Court has a complicated relationship with social science, as David Faigman documented.[129] Often the Court decides facts without any

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127. *Mendenhall*, 446 U.S. at 549.

128. *See* Erik Luna, *Privacy, Policing Homosexuality, and Enforcing Social Norms*, 41 U.C. DAVIS L. REV. 839, 846–47 (2008) (discussing the preferences of the Supreme Court justices); *see also* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) ("Legitimat[e] expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.").

129. *See* Faigman, *supra* note 121, at 566–600 (discussing several Supreme Court cases in which social science played a role).

research or data.[130] When data contradict the Court's factual assumptions, the Court "might simply sweep the research aside as invalid or shift to an alternative basis for its holding, thereby rendering the research irrelevant."[131] Yet, while it may seem unlikely for the Supreme Court to throw out the current free-to-leave doctrine based on proof of how people actually behave, such a switch is not unprecedented.[132] The "separate but equal" doctrine was also a legal fiction, undone by psychological studies, or at least the Court attributed the changed rule in part to the empirical evidence presented.[133]

Consider another Fourth Amendment doctrine that was recently transformed. In 2009, the Court radically altered the "search incident to arrest" doctrine when the majority refused to continue to perpetuate a fiction. *Arizona v Gant*[134] overturned *New York v. Belton*,[135] jettisoning an oft-used exception to the Fourth Amendment. *Belton* had allowed police to search a car without probable cause or a warrant whenever the police arrested the driver.[136] The stated justification for *Belton*'s bright line rule allowing searches of vehicles following an arrest was that police needed protection from arrestees who could reach in and arm themselves or destroy evidence.[137] It was clear immediately that this bright line rule would include men and women who had no actual ability to retrieve items from the car.[138]

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130. *See id.* at 581 (noting that the Court rules on the basis of its own bias when no data is available).

131. *Id.* at 589 (discussing how the Court can choose to ignore contradicting research); *see* Brief of Respondents at 36–43, United States v. Drayton, 536 U.S. 194 (2002) (referencing empirical research in support of arguments made in the brief).

132. *See id.* at 565–66 (referencing *Brown v. Board of Education* and *Roe v. Wade*).

133. *See id.* at 566 (noting "[i]n retrospect, it seems clear that the studies were not necessary to the holding" in Brown v. Bd. of Educ., 374 U.S. 483 (1955)).

134. *See* Arizona v. Gant, 556 U.S. 332, 335 (2009) (holding that police may search a vehicle incident to a recent arrest if that "arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or there is reasonable belief that there is evidence relating to the arrest in the vehicle").

135. *See* New York v. Belton, 453 U.S. 454, 460–62 (1981) (concluding that police may search a vehicle without probable cause if the occupant is arrested).

136. *See id.* (same).

137. *See id.* at 461 (noting that contents in compartments that are within the reach of the occupant may pose a danger to the arresting officer).

138. *Id.* at 468 (Brennan, J., dissenting) ("Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest."); *see also* Thornton v. United States, 541 U.S. 615, 624–25 (2004) (holding that a police officer may search a vehicle incident to an arrest even if the arrestee is handcuffed and in the back of a police

For over two decades men and women were handcuffed before police searched the cars they had been driving.[139] The Court even explicitly applied the exception to handcuffed suspects.[140] Finally, in *Gant*, the Court refused to continue the fiction, valuing logic over precedent.[141] Justice Stevens explained that the reason for the switch was that the stated justification did not comport with reality:

> The experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely 'within the area into which an arrestee might reach,' . . . and blind adherence to *Belton*'s faulty assumption would authorize myriad unconstitutional searches. The doctrine of *stare decisis* does not require us to approve routine constitutional violations.[142]

As the dissent pointed out, reality had not changed; this was a legal fiction from the start:

> Abandonment of the *Belton* rule cannot be justified on the ground that the dangers surrounding the arrest of a vehicle occupant are different today than they were 28 years ago . . . surely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence.[143]

Even though the lack of reality was obvious at once, ultimately it was attention to this reality that undermined the doctrine. As Colin Miller wrote, "*Gant*'s deconstruction of the *Belton* fiction was based upon Justice Scalia's *Thornton* concurrence, which found that the problem with the *Belton* fiction was that the government could cite no examples in which an arrestee had escaped and retrieved a weapon or evidence from his vehicle 'despite being handcuffed and secured in the back of a squad car.'"[144]

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cruiser).

139. *See Thornton*, 541 U.S. at 628 ("Reported cases involving this precise factual scenario—a motorist handcuffed and secured in the back of a squad car when the search takes place—are legion.").

140. *Id*. at 625 (affirming the conviction while admitting that the possibility of a handcuffed arrestee getting hold of a weapon, or something that would put the officer in danger, is remote).

141. *See* Arizona v. Gant, 556 U.S. 332, 359–60 (2009) (Alito, J., dissenting) (observing that a defendant who is handcuffed cannot reach the contents of his vehicle).

142. *Id.* at 351 (majority opinion) (emphasis added).

143. *Id.* at 360 (Alito, J., dissenting).

144. Colin Miller, *Stranger Than Dictum: Why* Arizona v. Gant *Compels the Conclusion that Suspicionless Buie Searches Incident to Lawful Arrests are*

If a standard as firmly entrenched as search incident to arrest can be "interred" based on reality, then *Mendenhall* and *Drayton* can also be interred by social science.[145] Social science might lead the Court to reason that "we now know that" people on inner city streets who are stopped and questioned are not free to leave and would not feel free to leave; and, "blind adherence to [*Mendenhall*'s] faulty assumption would authorize myriad unconstitutional searches. The doctrine of *stare decisis* does not require us to approve routine constitutional violations."

V. The Outcome in Mr. Thompson's Motion to Suppress

The students representing Mr. Thompson cited social science studies in their motion to suppress to support the argument that a reasonable person in his position would not feel free to leave when police quickly stopped their cruiser, exited, and came to stand directly in front of him and his friend. Therefore, Mr. Thompson was seized as soon as police came up to talk to him. The government did not respond at all to these social science studies.

Did the social science help get around the case law in this case? The answer is ambiguous, because the judge granted the motion to suppress based on other grounds. While the social science supported the first argument, that Mr. Thompson was seized, the judge ruled against us on that issue. Mr. Thompson fell victim to the legal fiction that he was free to walk away when the police stopped and questioned him. Thus, even though the police stated that Mr. Thompson looked away from police, trying to avoid contact with them, the judge endorsed the fiction that he voluntarily relinquished his right to be left alone.

On the other hand, the judge ruled that while the stop was consensual, the search itself violated the Fourth Amendment. The judge simply did not credit the officer's testimony that our client told him he had drugs in his pocket. Hence, there was no probable cause to search. While the officer had testified that he asked for consent to search, the judge did not credit the officer's memory on that score either.

In sum, the social science did not convince the judge to evaluate the free-to-leave test from Mr. Thompson's perspective. Still, it is unusual to win a motion to suppress. In addition, I feel certain that the judge read our

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Unconstitutional, 62 BAYLOR L. REV. 1, 65 (2010).

145. *See Gant*, 556 U.S. at 358 ("This 'bright-line' rule has now been interred.") (Alito, J., dissenting).

motion. Quite possibly, the social science data shifted the way the judge viewed the testimony presented at the hearing on the motion to suppress.

VI. Conclusion

> "When a citizen summons the police, police presence is a welcome relief. But when officers approach uninvited, it is seldom a happy event for the citizen."[146]

Stops for "walking while black or brown" are as intrusive and intimidating as the better-known "driving while black" policing. Each week, thousands of people are stopped and questioned as they walk on city streets. They did not seek out the police any more than drivers stopped for traffic offenses voluntary consent to pull over. This repeated invasion into privacy and dignity translates into a distrust of the police and a sense of not belonging to American society.[147] Unlike drivers stopped for traffic offenses, police are free to target individuals for any reason whatsoever because the Fourth Amendment only governs stops, not consensual encounters. When individuals stop and respond to the police, as Justice Alito declared in a 2011 case, they "have only themselves to blame" for choosing "not to stand on their constitutional rights."[148] The Court underestimates the intrusive and coercive nature of police investigations on targeted pedestrians, blaming the victim for acquiescing to police pressure.

Although the government has the burden of proof during motions to suppress, the deck is stacked against pedestrians who acquiesce to police authority. Social science might make a difference. Although there is not necessarily a correlation between a court's definition of the reasonable person and how most people actually behave or think, the courts at least provide lip service to this connection. How most people feel when confronted by police is something that can be measured. Defense attorneys should include social science as a way of convincing the trial court and if that fails, convincing an appellate court.

This Article has shown that social science can defeat a legal fiction such as the consensual nature of street encounters. There is precedent for the U.S. Supreme Court reversing legal fictions when reality proves the

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146. Nadler & Trout, *supra* note 2, at 13.

147. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 335–36 (2009) (discussing the theory that decreasing privacy rights could cause fear of government and law enforcement).

148. Kentucky v. King, 131 S.Ct. 1849, 1862 (2011).

precedent wrong. Moreover, where the Supreme Court has created a reasonable person test based on totality of the circumstances, it is legitimate to ask a trial judge to take that test at face value and use statistics, psychology and sociology to demonstrate what reasonable people actually think when confronted by police officers and thereby defeat the government's claim that the stop was not a stop, but merely a consensual encounter.