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## A Little White Lie: The Dangers of Allowing Police Officers to Stretch the Truth As a Means to Gain a Suspect's Consent to Search

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# A Little White Lie: The Dangers of Allowing Police Officers to Stretch the Truth As a Means to Gain a Suspect’s Consent to Search

William E. Underwood\*

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*“Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”*<sup>1</sup>

### *Introduction*

Three police officers have just pulled up to a man’s house and knocked on the front door. They tell him that they believe that he might be the victim of online identity theft; his personal information, bank accounts, social security number, and every other piece of his private life may now be in the hands of a total stranger.<sup>2</sup> If so, this stranger now has the power to assume his identity, drain his bank accounts, max out his credit cards, or do anything else he wants under an assumed alias.<sup>3</sup> The police tell the man that they can check his computer to determine whether or not he is the victim of this frightening crime, but they need his permission first. How should he respond? The last thing he wants is someone absconding with his identity, so he says, “Yes, my computer is right this way.” The prospect of all his personal information in the hands of a stranger is terrifying and he now feels that he needs all the help he can get. He also trusts the police. After all, their mission is to protect and serve and they did say that they were here to help him. But what if this is not the case? What if the police are not here to help him at all? What if there really is no solid indication that he was the victim of identity theft?

In reality, the police merely want him to give them permission to search his computer because they think it contains illegal images of child pornography.<sup>4</sup> They do not have enough evidence of this to obtain a valid warrant to search the computer, but his permission to search is just as good.<sup>5</sup> And now he has just given them permission to search his computer

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1. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

2. *See generally* Saul Hansell, *Visa Starts Password Service to Fight Online Fraud*, N.Y. TIMES, Dec. 3, 2001, at C1 (reporting that roughly 94% of Visa credit card holders are vulnerable to online credit card fraud schemes).

3. *See e.g.*, Scott J. Wilson, *THE FIVE; Preventing Identity Theft*, L.A. TIMES, Aug. 21, 2011, at B3 (reporting that identity thieves can use stolen personal information to access financial accounts, open credit cards, or even rent properties under an assumed alias).

4. *See* William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1905 (1993) (“Deception and advantage taking are . . . at the core of criminal investigation . . .”); *see also e.g.*, *Illinois v. Perkins*, 496 U.S. 292, 308 (1990) (discussing the use of deceptive tactics by police as a means to obtain confessions from suspects).

5. *See* *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“It is equally well settled that one of the specifically established exceptions to the requirements of both a

under the mistaken assumption that they are here to help him combat the potential theft of his precious identity.<sup>6</sup> The police then search the computer under his grant of permission, but they make no concerted effort to search for evidence of identity theft. Rather, they begin scanning image files, carefully looking for images of child pornography. Soon thereafter, the police have seized his computer, arrested him, and charged him with the illegal possession of child pornography. All of this resulting from his consent to search, given under the pretext that the police were looking for evidence of identity theft; that they were there to help him. But this was just a lie, a means to gain access to his computer, access that they otherwise did not have.

At its core, this Note is about the Fourth Amendment to the United States Constitution: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .”<sup>7</sup> Specifically, this Note addresses the validity of consent in several unique cases in which uniformed police officers employed the use of a ruse to gain a suspect’s consent to search. These cases, similar to the scenario discussed above, raise an extremely poignant and difficult set of questions pertaining to protections afforded by the Fourth Amendment.<sup>8</sup> There is undoubtedly a need for officers of the law to ferret out and prosecute crimes, particularly those as heinous as child pornography. But there is an equally powerful need to preserve the rights afforded to all citizens by the Constitution. It is striking a balance between these two that proves especially difficult.<sup>9</sup> As a society, we have accepted, and the courts have upheld, the necessity for police officers to sometimes lie in the pursuit of crime.<sup>10</sup> For example, undercover officers lie on an almost continual

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warrant and probable cause is a search that is conducted pursuant to consent.”); *see also infra* note 37 and accompanying text (demonstrating that the Fourth Amendment requires law enforcement to show probable cause in order to obtain a search warrant).

6. *See* discussion *infra* Part I.A (examining consent to search as one of the exceptions to the warrant requirement).

7. U.S. CONST. amend. IV.

8. *See id.* (providing protection against unreasonable searches and seizures).

9. *See* Stuntz, *supra* note 4, at 1956 (“The reason for many of [the doctrine of criminal procedure’s] complications may be that the doctrine aims simultaneously to achieve two very different goals: controlling the behavior of police and prosecutors, and facilitating the central mission of the criminal process—the separation of the innocent from the guilty.”).

10. *See, e.g.,* Grimm v. United States, 156 U.S. 604, 609–11 (1895) (acknowledging that the government is entitled to the use of undercover agents in pursuing crime); *see also* Lewis v. United States, 385 U.S. 206, 208–09 (1966) (acknowledging the necessity for undercover police activity).

basis in order to maintain their cover while building a case against the criminals with which they are in contact.<sup>11</sup> The criminals have no idea that they are being deceived by the police, but courts have held that this is not a violation of their constitutional rights.<sup>12</sup> In fact, such deceptive actions are a necessary and effective method for fighting crime. Without such latitude, citizens could be subjected to all the various ills that crime produces.<sup>13</sup> As such, all law-abiding citizens count on the government to provide some measure of protection against crime. In turn, these citizens place a great deal of trust in their law enforcement officers. But what happens when this trust is abused, even in the pursuit of legitimate criminals that pose a distinct danger to society? Where do we draw the line between the permissible use of deception by law enforcement officers to gain consent and that which goes beyond what can and should be allowed?<sup>14</sup>

Assuming that it is even possible to create such a bright line in the obscure realm of police deception, arriving at an appropriate answer is not easy. Since the inception of the Fourth Amendment, many exceptions have been drawn to its rule.<sup>15</sup> Inevitably, its waters have been muddied in an effort to strike an elusive balance between protecting citizens' rights and prosecuting crime. There does seem to be a difference between, for example, an undercover police officer lying to a potential criminal and a police officer lying to a citizen by saying that he has a warrant to search his house, when in fact he does not.<sup>16</sup> In the first instance, the suspect has no

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11. See *Lewis*, 385 U.S. at 208–09 (“Indeed, it has long been acknowledged by the decisions of this court . . . that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents.”).

12. See *id.* at 207 (1966) (concluding that the deceptions of an undercover narcotics officer were not constitutionally prohibited).

13. See, e.g., Rachel Ehrenfeld, *Perspective on the Drug War: Whither Columbia, America?; Trafficking and Money-Laundering Stretch from Streets to Banks to Government. And We're Losing*, L.A. TIMES, Dec. 6, 1992, at M5 (reporting that international drug trafficking and money-laundering has a devastating impact on American society).

14. See, e.g., Megan M. Rector, *The Maryland Survey: 2003–2004, Recent Decisions: The Court of Appeals of Maryland*, 64 MD. L. REV. 1151, 1152 (2005) (arguing that by allowing police deception in the absence of reasonable articulable suspicion, courts have left citizens vulnerable to arbitrary invasions of their privacy).

15. See THOMAS N. MCINNIS, *THE EVOLUTION OF THE FOURTH AMENDMENT* 28–32 (2009) (examining and detailing the inception and evolution of various Fourth Amendment exceptions).

16. Compare *Lewis v. United States*, 385 U.S. 206, 207 (1966) (concluding that the deceptions of an undercover narcotics officer were not constitutionally prohibited), with *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (stating that a blatant misrepresentation made by uniformed officers is essentially a form of coercion).

idea that the undercover officer is actually a police officer.<sup>17</sup> Typically, the suspect intends to engage in some sort of criminal activity with the undercover officer.<sup>18</sup> The suspect does not know that the undercover agent is an officer, and therefore he does not expect the certain level of trust that often accompanies police officers.<sup>19</sup> However, this is not the case in the latter instance when the officer clearly identifies himself to the suspect as an officer of the law. This person now has a certain level of trust towards the officer, whose primary duty is to protect and serve the citizens in his jurisdiction.<sup>20</sup> Thus, within the scope of these two different scenarios, one form of lie is accepted, while the other is not.<sup>21</sup> Courts and society both seem to generally accept this, providing two concrete guidelines for permissible police deception.<sup>22</sup> But this still leaves an immense grey area in between which includes the hypothetical scenario discussed above.

This Note explores a portion of that grey area through the lens of several similar cases that fall squarely within its bounds.<sup>23</sup> Each case involves police officers telling suspected possessors of child pornography

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17. *See, e.g.*, Lewis, 385 U.S. at 207 (noting that the undercover officer identified himself to the defendant by an alias, and not as an officer of the law).

18. *See id.* (noting that an undercover officer went to the defendant's house with the express purpose of purchasing marijuana, an illegal act).

19. *See* David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 472 (1999) (stating, as an example, that judges operate under a principle that police officers are presumptively trustworthy).

20. *See id.* at 462 (stating that the foundation of public trust in the government rests on the responsibility of public officials to make fair representations); *see also* White v. Beasley, 453 Mich. 308, 331, 552 N.W.2d 1, 9 (1996) ("The public-duty doctrine begins with the premise that police officers owe a duty to the public to investigate crime and to protect the citizenry *because* they are police officers.").

21. *Compare* Bumper, 391 U.S. at 550 (stating that a blatant misrepresentation is essentially a form of coercion), *with* Grimm v. United States, 156 U.S. 604, 609–11 (1895) (acknowledging that the government is entitled to the use of deceit by undercover agents in pursuing crime).

22. *See* Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 28 (2010) (noting that the Supreme Court allows police to use deception to gather evidence and urge confessions).

23. *See* United States v. Richardson, 583 F.Supp. 2d 694, 724–25 (W.D. Pa. 2008) (granting defendant's motion to suppress evidence seized during a consensual search of the defendant's computer because the search exceeded the scope of defendant's consent); *see also* United States v. Parson, 599 F.Supp. 2d 592, 612 (W.D. Pa. 2009) (granting defendant's motion to suppress evidence seized during a search of the defendant's computer because defendant's consent to search was invalid); *People v. Prinzing*, 907 N.E.2d 87, 100 (Ill. App. Ct. 2009) (concluding that suppression of evidence seized during a consensual search was warranted because the search exceeded the scope of defendant's consent).

that they believed that they were victims of online identity theft.<sup>24</sup> However, the officers never mentioned that they in fact wanted access to the suspects' computers in order to search them for images of child pornography.<sup>25</sup> Thus, the police used the specter of identity theft to gain consent to search these computers.<sup>26</sup> In all three cases, the police found illegal images of child pornography on the suspects' computers and they were subsequently arrested.<sup>27</sup> Were these suspects' Fourth Amendment rights violated? It is a straightforward question, but there is no immediately clear answer.<sup>28</sup> Each of these suspects was in possession of illegal material,<sup>29</sup> but each of these suspects was also told a lie in order to obtain consent to search.<sup>30</sup> The lie was not a complete fallacy, such as claiming to have a search warrant when in reality one does not exist,<sup>31</sup> but the statements were not strictly truthful either.<sup>32</sup> Thus, they fall squarely between truth and fiction, placing two directly competing issues at odds here. We can allow "little white lies" like these under the justification that they are a necessary means to discover and prosecute criminals, but we would do so at the expense of fostering trust between law enforcement officers and citizens. On the other hand, we can prevent the use of such deceptions in order to stop the development of such a void of trust.

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24. See generally *United States v. Richardson*, 583 F.Supp. 2d 694 (W.D. Pa. 2008); see also *United States v. Parson*, 599 F.Supp. 2d 592, 594 (W.D. Pa. 2009) (explaining misrepresentations made to defendant regarding identity theft); *People v. Prinzing*, 907 N.E.2d 87, 106 (Ill. App. Ct. 2009) (discussing use of identity theft as a ruse to gain access to defendant's computer).

25. See *Prinzing*, 907 N.E. 2d at 108 (explaining police's use of a ruse to gain access to child pornography files).

26. See *id.* (explaining the deception used to gain defendant's consent).

27. See *id.* (outlining events leading to Prinzing's arrest); see also *Richardson*, 583 F.Supp. 2d at 707 (detailing Richardson's eventual arrest); *Parson*, 599 F.Supp. 2d at 601 (explaining circumstances surrounding Parson's arrest).

28. See generally *Parson*, 599 F.Supp. 2d 592 (detailing the Fourth Amendment analysis); *Prinzing*, 907 N.E. 2d 87 (detailing the Fourth Amendment analysis); *Richardson*, 583 F.Supp. 2d 694 (detailing the Fourth Amendment analysis).

29. See *supra* note 28 and accompanying text (describing challenges of Fourth Amendment analysis).

30. See *id.*

31. See, e.g., *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (holding that a patent misrepresentation made by law enforcement officers in an effort to obtain the suspect's consent to search rendered the following search unconstitutional).

32. See generally *United States v. Richardson*, 583 F.Supp. 2d 694 (W.D. Pa. 2008); see also *United States v. Parson*, 599 F.Supp. 2d 592 (W.D. Pa. 2009); *People v. Prinzing*, 907 N.E.2d 87 (Ill. App. Ct. 2009).

However, the downside is obvious: police officers would be restricted in their ability to pursue legitimate criminals.

Part I of this Note briefly examines and outlines the relevancy of the Fourth Amendment to consent searches, since this document provides the ultimate backdrop for searches and seizures of citizens' property. Part I.A examines consent to search as one of the exceptions to the warrant requirement. This Part outlines the necessary requirements for consent to be valid and the standards that courts use as a tool to analyze the validity of a suspect's consent. Part I.A.1 examines the scope of consent and the new guidelines that come into play in order to determine the constitutional parameters of a consented search. Part I.B briefly outlines the concept and requirements of the plain view doctrine, another exception to the warrant requirement. Thus, the entirety of Part I provides the background law necessary for analyzing the validity of a suspect's consensual search. Part II contains the three main cases that this Note focuses on. This Part provides the necessary facts and the analytical processes each court used to ultimately arrive at a conclusion that police illegally obtained evidence of child pornography. This Part also provides some personal analysis of each court's approach to the issue at hand. Part III examines the potential applicability of the plain view exception to each case, ultimately concluding that the facts of each case are such that the exception does not apply. Part IV of the Note offers the suggested rule that when police officers are operating as fully disclosed officers of the law, they must state the main purpose of their visit to a suspect's home in order to validly obtain any consent to search without a warrant. This Part discusses and analyzes this proposed rule, ultimately concluding that it is necessary not only to maintain a semblance of trust between citizens and police officers, but also to provide firm guidance to police in the efforts to investigate potential crimes. Finally, Part V concludes the Note.

The issue discussed in this Note is so immensely complex because it is nearly impossible to draw a bright line between police deceptions that violate the Fourth Amendment and those that do not.<sup>33</sup> The various Fourth Amendment exceptions that have been drawn by courts have served to carve away at the protections offered by the Fourth Amendment, but they have not done away with it altogether.<sup>34</sup> The Fourth Amendment still

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33. See *e.g.*, *Lewis v. United States*, 385 U.S. 206, 210 (1966) (refusing to hold that the use of deception by law enforcement agents is per se unconstitutional).

34. See *Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984) ("Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated' . . . ." (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 318



provides citizens with substantial protections from invasive searches and seizures.

*I. The Fourth Amendment as It Relates to Consent to Search Absent a Warrant*

“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.”<sup>35</sup> The Fourth Amendment protects one of the most fundamental rights in American history—the right to be free from unreasonable searches and seizures.<sup>36</sup> It requires all officers of the law to obtain a search warrant, issued only upon a showing of probable cause, before searching a citizen’s home.<sup>37</sup> Note, however, that certain exceptions to this rule do exist.<sup>38</sup> Throughout American history, courts have vigorously upheld this right in an attempt to protect all citizens from police abuse during searches.<sup>39</sup> Such judicial protections are essential to maintaining the validity and reverence of the Fourth Amendment in American society.<sup>40</sup> These protections encompass a variety of settings, including a citizen’s body, movable property, and home.<sup>41</sup> Of particular relevance to this Note are searches conducted within a citizen’s home, a

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(1972))).

35. U.S. CONST. amend. IV.

36. *See id.* (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .”).

37. *See* U.S. CONST. amend IV. (“No warrants shall issue but upon probable cause.”).

38. *See infra* Part I.A (discussing consent to search); *see also infra* Part I.B (discussing the plain view doctrine).

39. *See* *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the use of Thermovision imaging to explore areas of the home normally unreachable without physical intrusion is a violation of the Fourth Amendment); *see also* *Steagald v. United States*, 451 U.S. 204, 222–23 (1981) (concluding that the warrantless search of the defendant’s home was a violation of his Fourth Amendment protections).

40. *See e.g.*, *California v. Ciraolo*, 476 U.S. 207, 218 (1986) (“Since the landmark decision in *Katz v. United States*, the Court has fulfilled its duty to protect Fourth Amendment rights . . .”).

41. *See* *Payton v. New York*, 445 U.S. 573, 589 (1980) (noting that the Fourth Amendment provides personal protections from unreasonable searches in a number of different settings).

place that has commanded great reverence in American judicial history.<sup>42</sup> “‘At the very core ‘of the Fourth Amendment’ stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”<sup>43</sup> With only a limited number of exceptions, a warrantless search of a citizen’s home is unreasonable, and therefore unconstitutional.<sup>44</sup> Absent this handful of special circumstances, the Supreme Court of the United States has consistently upheld this principle, essentially requiring all searches to be conducted pursuant to a validly obtained warrant.<sup>45</sup> Thus, it is firmly established that the Supreme Court considers a search conducted pursuant to a validly obtained warrant as reasonable under the Fourth Amendment. However, once one departs from this principle, the judicially established boundaries of reasonableness rapidly deteriorate.

Several exceptions exist that allow law enforcement officers to conduct a search absent a warrant.<sup>46</sup> However, the Supreme Court has noted that these exceptions are relatively few in number and carefully delineated.<sup>47</sup> Furthermore, the Court has been relatively hesitant in finding the existence of such exceptions that allow for a circumvention of the Fourth Amendment.<sup>48</sup> These warrantless searches are presumptively unreasonable unless the government can show the existence of one of these exceptions.<sup>49</sup> Based on the importance of the Fourth Amendment, it is no

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42. *See id.* (“In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home—a zone that finds its roots in clear and specific constitutional terms . . .”); *see also* Christine Hurt, *Regulation Through Criminalization: Of Breaches of the Peace, Home Invasions, and Securities Fraud*, 44 AM. CRIM. L. REV. 1365, 1375 (2007) (“The cultural importance of home and hearth is well-established and embodied in the oft-repeated phrase ‘a man’s home is his castle.’”).

43. *Kyllo*, 533 U.S. at 31 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

44. *See id.* (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”).

45. *See Steagald v. United States*, 451 U.S. 204, 211 (“Except in such special situations, we have consistently held that the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant.”).

46. *See* MCINNIS, *supra* note 15, at 28–32 (outlining several exceptions to the Fourth Amendment warrant requirement).

47. *See Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984) (“Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are ‘few in number and carefully delineated’ . . .” (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972))).

48. *See id.* at 749–50 (noting the Supreme Court’s hesitation to find the existence of exigent circumstances that would allow for a warrantless search of a citizen’s home).

49. *See id.* at 750 (“Before agents of the government may invade the sanctity of the

surprise that the Supreme Court has been wary of creating judicial exceptions to the warrant requirement.<sup>50</sup> It is also not surprising that there is a relatively high burden on the government to prove the existence of an exception to the rule.<sup>51</sup> For purposes of this Note, two exceptions are particularly relevant: consent and the plain view doctrine.

#### A. Consent to Search in the Absence of a Warrant

*“A search prosecuted in violation of the Constitution is not made lawful by what it brings to light. . . .”*<sup>52</sup>

The Supreme Court has firmly established that one of the specific exceptions to the requirement of a warrant is a search conducted pursuant to a citizen’s consent.<sup>53</sup> Validly obtained consent renders a warrantless search reasonable.<sup>54</sup> But this exception is not taken lightly, as the Supreme Court stated that valid consent is a “jealously and carefully drawn” exception to the rule prohibiting warrantless searches.<sup>55</sup> As a result, several pivotal Supreme Court cases have carefully established what constitutes valid consent to a warrantless search.<sup>56</sup> Perhaps most important, a citizen’s consent to

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home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.”)

50. *See id.* at 749 (“Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are ‘few in number and carefully delineated’ . . .” (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972))).

51. *See Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) (stating that the burden of proof rests on the government to prove that law enforcement officers validly obtained a suspect’s consent to search).

52. *Byars v. United States*, 273 U.S. 28, 29 (1927).

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

54. *See Katz v. United States*, 389 U.S. 347, 358 n.22 (1967) (citing *Zap v. United States*, 328 U.S. 624 (1946)) (“A search to which an individual consents meets Fourth Amendment requirements . . .”).

55. *See Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (noting the care and diligence that the Court has used in carving out this exception (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958))).

56. *See, e.g., Schneckloth*, 412 U.S. at 223 (stating that the voluntariness of consent is to be determined from a totality of the circumstances); *see also United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (noting relevant factors in determining whether a suspect voluntarily gave consent to search).

search must be voluntarily given.<sup>57</sup> Voluntariness of consent is a factor that should be examined under a totality of all the circumstances.<sup>58</sup> Such circumstances can include the suspect's age, gender, race, and level of education.<sup>59</sup> Additionally, great weight should be placed on the widely shared societal expectations in assessing the voluntary nature of a suspect's consent.<sup>60</sup> Many lower courts have acknowledged this by placing a high importance on society's values and expectations, concluding that voluntariness of consent is examined under these societal notions of fairness.<sup>61</sup> In analyzing these issues of valid consent, two competing concerns come into play: the legitimate need for police searches and the need to ensure the absence of police coercion in obtaining consent.<sup>62</sup> In balancing these concerns, the Court established a test in *Schneckloth v. Bustamonte*, stating that consent is invalid if it is coerced, by explicit or implicit means, by implied threat or covert force and is not a product of free and unconstrained choice.<sup>63</sup> Thus, any amount of coercion used in obtaining consent will render the following search unconstitutional.<sup>64</sup> As the Supreme Court bluntly stated in *Bumper v. North Carolina*, "[w]here there is coercion there cannot be consent."<sup>65</sup> But this raises another issue: what actions constitute coercion?

Determining what constitutes coercive action is sometimes very easy. The application of force, an overwhelming show of force, the

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57. See *McINNIS*, *supra* note 15, at 99 (stating that consent to a search must be voluntary).

58. See *Schneckloth*, 412 U.S. at 248–49 (“[V]oluntariness is a question of fact to be determined from all the circumstances . . .”).

59. See *Mendenhall*, 446 U.S. at 558 (noting that these factors are relevant, but not decisive, in evaluating the voluntariness of a suspect's consent).

60. See *Randolph*, 547 U.S. at 111 (“The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations . . .”).

61. See *People v. Daugherty*, 514 N.E.2d 228, 232 (Ill. App. Ct. 1987) (noting that voluntariness of consent is viewed in light of society's notions of fairness).

62. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (“[T]wo competing concerns must be accommodated in determining the meaning of a ‘voluntary’ consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.”).

63. See *id.* at 228 (“But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force.”).

64. See *id.* (noting that even subtle coercion renders the resulting consent void).

65. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

brandishing of weapons, intimidating movements, and other such threats are all clear examples of easily identifiable acts of coercion.<sup>66</sup> Furthermore, certain misrepresentations used by police officers to obtain consent can constitute coercion.<sup>67</sup> For example, in *Bumper v. North Carolina*, the Supreme Court stated that material misrepresentations made by police rendered consent invalid.<sup>68</sup> In *Bumper*, police falsely stated that they had a warrant to search the suspect's house.<sup>69</sup> As a result, the suspect's grandmother consented to the search under the assumption that she had no choice.<sup>70</sup> Thus, the Court has established that such blatantly false statements are akin to coercion.<sup>71</sup> Professor LaFave, a renowned criminal procedure scholar, echoed this notion by stating that when a misrepresentation is so extreme that it deprives an individual of his ability to accurately assess the situation in order to determine the potential need to surrender, then consent is not valid.<sup>72</sup> Thus, it is firmly established that consent predicated upon blatantly false statements is not valid. But, the picture is not so clear when it comes to lesser deceptions made by the police.

In *Lewis v. United States*,<sup>73</sup> the Supreme Court refused to craft a per se rule about the use of deception by law enforcement officers.<sup>74</sup> The Court stated that such a rule would severely hamper the

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66. See *United States v. Drayton*, 536 U.S. 194, 204 (2002) (listing a variety of behaviors that constitute easily identifiable acts of coercion).

67. See *Bumper*, 391 U.S. at 550 (holding that a patent misrepresentation made by law enforcement officers in an effort to obtain the suspect's consent to search rendered the following search unconstitutional).

68. See *id.* (noting that the officers' false claim of having a search warrant is tinged with coercion).

69. See *id.* at 546 (noting that the prosecution did not try to justify the validity of the search by arguing the validity of the warrant since none existed).

70. See *id.* at 547 (describing the grandmother's belief that the officers had lawful authority to search the house since they claimed to have a search warrant).

71. See *id.* at 550 (noting that when a law enforcement officer claims he has the authority of a warrant to search a home, he is essentially stating that the suspect has no right to resist).

72. See WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* § 3.10(c) (3d ed. 2000) [hereinafter *CRIMINAL PROCEDURE*] (stating that consent is not valid if it is given in response to an extreme misrepresentation made by law enforcement officers).

73. See *Lewis v. United States*, 385 U.S. 206, 207 (1966) (holding defendant's consent to search valid, thus validating the use of deception by undercover police officers).

74. See *id.* at 210 (refusing to hold that the use of deception by law enforcement agents is per se unconstitutional).

government's efforts to pursue organized criminal activity.<sup>75</sup> Instead, the Court stated that in this particular area, courts must examine each case based on its own particular facts and circumstances.<sup>76</sup> However, the Court was careful to note that "[w]ithout question, the home is accorded the full range of Fourth Amendment protections."<sup>77</sup> Thus, a distinct grey area of the law exists when a police officer's misrepresentations fall short of the blatantly misleading category.<sup>78</sup> Lower courts are left simply with an analysis framework based within the vagaries of societal notions of fairness and good faith.<sup>79</sup> In turn, this presents a tough balancing act that courts must follow between weighing the Fourth Amendment rights of citizens against the need for law enforcement to zealously ferret out criminal activity.<sup>80</sup> It is undisputed that valid consent must be freely and voluntarily given,<sup>81</sup> but it is decidedly unclear what degree of falsehood is necessary to constitute outright coercion. However, the Court has established that the government must prove that consent was freely and voluntarily given in order to uphold the constitutionality of a warrantless search.<sup>82</sup> But, if a citizen does consent to a search, additional limitations exist that serve to narrow the permissible parameters of the search.

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75. *See id.* ("Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest.")

76. *See id.* at 212 ("[I]n this area, each case must be judged on its own particular facts.")

77. *Id.* at 211.

78. *See* Rebecca Strauss, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868, 882 (2002) (arguing that police deception should negate any resulting consent to search).

79. *See e.g.*, *Georgia v. Randolph*, 547 U.S. 103, 111 (2006) (noting that great significance should be placed on widely shared societal expectations of fairness in assessing a suspect's consent).

80. *See* *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973) ("[T]wo competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.")

81. *See* PHILLIP A. HUBBART, *MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK* 269–70 (2005) (noting that an individual whose property is to be searched must give consent freely and voluntarily).

82. *See* *Bumper v. North Carolina*, 391 U.S. 543, 548 (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.")

### 1. *Scope of the Search Once Consent Is Granted*

Once a citizen does consent to a search, an entirely new set of guidelines comes into play to determine the scope of the search.<sup>83</sup> Courts apply these guidelines in order to determine the exact nature and extent of the search to which the citizen consented.<sup>84</sup> As a result, anything found outside the scope of the search is inadmissible as evidence.<sup>85</sup> In *United States v. Ross*, the Supreme Court stated that the scope of a warrantless search is defined by the object of the search and the places in which the object might reasonably be found.<sup>86</sup> As an example, the Court notes that probable cause to believe that undocumented aliens are being transported in a van does not justify a search of a suitcase inside the van.<sup>87</sup> Additionally, the Supreme Court stated in *Maryland v. Garrison* that limiting searches to specific areas in which it would be reasonable to find certain objects prevents the type of wide-ranging, exploratory searches that the Fourth Amendment seeks to prohibit.<sup>88</sup> However, determining the scope of a warrantless consent search can become problematic because there is no warrant listing the specific areas that the officers have probable cause to search.

In an effort to provide some guidance, the Supreme Court stated in *Florida v. Jimeno* that “[t]he 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

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83. See HUBBART, *supra* note 81, at 274 (explaining how to determine the scope of a suspect’s consent).

84. See *id.* (explaining how to apply judicial guidelines in determining the scope of a search).

85. See *Horton v. California*, 496 U.S. 128, 140 (1990) (stating that seizure of evidence discovered as a result of a search that exceeds its permissible scope is unconstitutional, and therefore the seized evidence will be excluded).

86. See *United States v. Ross*, 456 U.S. 798, 824 (1982) (“The scope of a warrantless 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.”).

87. See *id.* (listing several examples of reasonable places in which police officers might find specific types of objects).

88. See *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (describing the limitations and tailoring of searches to their legitimate justifications). The Court continued:

By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

*Id.*

by the exchange “between the officer and the suspect?”<sup>89</sup> Accordingly courts should not apply a subjective test analyzed in respect to a suspect’s unique, individual characteristics. Rather, courts should administer a test under an objective standard based upon what a typical, reasonable person would have understood the consent to entail.<sup>90</sup> Lower courts have applied the objective standard outlined in *Jimeno* in a variety of cases, focusing primarily on the exchange between the police officer and the suspect.<sup>91</sup> Thus, an examination of the exchange between the suspect and the police officer is essential to determining the scope of the consented search and any limitations that might be placed thereon. As Professor LaFave notes, a search conducted pursuant to consent cannot be more intensive than what the suspect contemplated in giving his consent.<sup>92</sup> As a result, the test for the scope of consent is an objective, factually intensive analysis that focuses largely on the exchange between the suspect and officer. However, there is an exception to the scope requirements.

#### *B. Plain View Doctrine as an Exception to the Warrant Requirement*

The Supreme Court has established that police officers may seize evidence found in plain view without a warrant.<sup>93</sup> Over time, the Court has honed and developed a fairly specific test to offer firm guidance in analyzing plain view issues.<sup>94</sup> This test is specifically laid out in *Horton v. California*.<sup>95</sup> In *Horton*, the Court stated three prerequisites that a police

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89. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 183–89 (1990); *Florida v. Royer*, 460 U.S. 491, 501–02 (1983)).

90. *See id.* (stating that courts should use an objective standard for measuring the scope of a suspect’s consent).

91. *See, e.g., United States v. Carey*, 172 F.3d 1268, 1277 (10th Cir. 1999) (Baldock, J., concurring) (focusing on what a reasonable person would have understood the search scope to entail based on his exchange with the police officer); *see also United States v. Turner*, 169 F.3d 84, 87 (1st Cir. 1999) (noting that the standard for measuring scope is that of objective reasonableness).

92. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2 (4th ed. 2008) [hereinafter TREATISE ON FOURTH AMENDMENT] (“[T]he fundamental point here is that a search pursuant to consent may not be more intensive than was contemplated by the giving of the consent . . .”).

93. *See Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (“It is well established that under certain circumstances the police may seize evidence in plain view without a warrant.”).

94. *See Horton v. California*, 496 U.S. 128, 136 (1990) (outlining and developing this test).

95. *See id.* at 136 (concluding that officers constitutionally seized evidence under the



officer must satisfy before a seizure will be deemed constitutional under the plain view doctrine.<sup>96</sup> First, the officer must be lawfully present at the place where the evidence can be plainly viewed.<sup>97</sup> This simply means that the search or seizure that put the officer in a position to observe the object is reasonable under the Fourth Amendment.<sup>98</sup> However, if the initial intrusion is unreasonable, then the officer is not in a valid position to make the observation and the evidence will be suppressed.<sup>99</sup> To meet the second requirement, the officer must have a lawful right of access to the evidence.<sup>100</sup> As a result, the officer must be able to seize the evidence without an additional intrusion.<sup>101</sup> Finally, the third element requires that the incriminating character of the evidence must be immediately apparent.<sup>102</sup> The Supreme Court stated that the proper standard to determine this is the probable cause standard.<sup>103</sup> Thus, if these three above mentioned requirements are satisfied, then any evidence that an officer discovers outside the initial scope of the search may still be admissible under the doctrine. This doctrine establishes that the mere observation of an object in plain view is not a search and its main function is to permit the warrantless seizure of an object under the above criteria.<sup>104</sup> The basic rationale for the doctrine is that if an officer lawfully observes an object left in plain view, then there has been no invasion of a legitimate expectation of

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plain view doctrine).

96. *See id.* at 136–37 (outlining a three-part test for the plain view doctrine).

97. *See id.* at 136 (“It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.”).

98. *See* THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 7.4.4.4.1 (2008) (describing the nature of the “prior valid intrusion” requirement).

99. *See id.* (“If the initial intrusion is unreasonable, then the police are not validly in a position to make the observations and the evidence will be suppressed.”).

100. *See Horton v. California*, 496 U.S. 128, 137 (1990) (“Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.”).

101. *See* CLANCY, *supra* note 98, at § 7.4.4.4.2 (“The plain view doctrine differs from mere visual inspection from a lawful vantage point in that the officer is also in a lawful position to *seize* the object without an additional intrusion.” (emphasis in original)).

102. *See Horton*, 496 U.S. at 136 (“First, not only must the item be in plain view; its incriminating character must also be ‘immediately apparent.’”).

103. *See* CLANCY, *supra* note 98, at § 7.4.4.4.3 (noting the probable cause standard for determining the incriminating character of an object as embraced by the Supreme Court in *Arizona v. Hicks*, 480 U.S. 321 (1987)).

104. *See id.* § 7.4.4.4 (noting that observation of an object in plain view is not a search and that the doctrine permits the seizure of such an object).

privacy in violation of the Fourth Amendment.<sup>105</sup> Thus, the plain view doctrine serves as a legitimate exception to warrant requirement under the Fourth Amendment.<sup>106</sup>

## II. *The Cases—Grappling With the Problem of Police Deception and Consent to Search*

The previously mentioned framework for analyzing warrantless consent searches seems straightforward enough, but this is hardly the case when one must attempt to apply these doctrines to real cases. The seemingly bright line rules soon become blurred as courts are forced to sort out the constitutional issues that inevitably arise in the pursuit of crime.<sup>107</sup> The following three cases are prime examples of this, and a brief examination of each will illustrate just how difficult these constitutional issues are.

### A. *United States v. Richardson*

In *United States v. Richardson*,<sup>108</sup> the United States District Court for the Western District of Pennsylvania squarely addressed the issue of whether the defendant's consent to search was involuntary due to law enforcement officers' misrepresentations to the defendant that he was a victim of identity theft.<sup>109</sup> Ultimately, the court granted Richardson's motion to suppress evidence found during the search of his computer,

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105. *See id.* (outlining the rationale of the plain view doctrine according to modern jurisprudence (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993))).

106. *See* WILLIAM W. GREENHALGH, *THE FOURTH AMENDMENT HANDBOOK* 20 (3d ed. 2010) (stating that the plain view doctrine is "a legitimate exception to the warrant requirement for the reason that the Fourth Amendment proscribes unreasonable seizures as surely as it proscribes unreasonable searches").

107. *See* *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) ("There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.").

108. *See* *United States v. Richardson*, 583 F.Supp. 2d 694, 724–25 (W.D. Pa. 2008) (granting defendant's motion to suppress evidence seized during a consensual search of the defendant's computer because the search exceeded the scope of defendant's consent).

109. *See id.* at 707 (stating the main issues presented by *Richardson* were the voluntariness and scope of his consent to a search of his computer); *see also* *United States v. Montoya*, 760 F.Supp. 37, 39 (E.D.N.Y. 1991) ("It seems clear that when the officers do not have at least reasonable suspicion that the occupants are engaged in crime, there can be no justification for resorting to false statements to get into a dwelling.").

stating that while Richardson's consent was voluntary, the search exceeded the scope of that consent.<sup>110</sup> The facts of this case are relatively similar to the other cases that follow, but there are some subtle differences that undoubtedly affect the analysis of the defendants' consent under the aforementioned framework.<sup>111</sup> In *Richardson*, local police received a tip from federal Immigration and Customs Enforcement (ICE) agents that Richardson had unsuccessfully attempted to access an illegal child pornography website on several occasions.<sup>112</sup> Several local police officers then proceeded to Richardson's residence, where they told Richardson that they wished to speak to him regarding some illegal credit card activity over the Internet.<sup>113</sup> It is important to note that none of the officers believed that there was enough probable cause to obtain a search warrant.<sup>114</sup> Based on this, the court commented that, "[t]he only purpose of the agents referring to the fact that someone had improperly used Defendant's credit card was to secure his cooperation. . . ."<sup>115</sup> Thus, the court determined that the officers inferred that Richardson might have been the victim of some sort of identity theft.<sup>116</sup> None of the officers indicated that they were investigating the possibility that Richardson was in possession of child pornography, although this was clearly their main intent.<sup>117</sup> After this initial discussion about possible illegal online credit card activity, the officers asked Richardson if they could search his computers and he consented.<sup>118</sup> A

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110. *See Richardson*, 583 F.Supp. 2d at 723–25 (granting Richardson's motion to suppress because the police search exceeded the scope of Richardson's voluntary consent).

111. *See supra* Parts I.A, I.B (outlining the requirements necessary for valid consent and the plain view doctrine)

112. *See Richardson*, 583 F.Supp. 2d at 696–97 (stating that Immigration and Customs Enforcement agents discovered that someone matching Richardson's name, physical address, email address, and credit card number had tried to access an illegal website on several occasions).

113. *See id.* at 698 (quoting the officer's testimony stating that he told Richardson that they were there regarding some illegal credit card activity over the Internet).

114. *See id.* (stating that the officer did not apply for a search warrant prior to visiting Richardson's house because he did not believe enough probable cause existed); *see also Investigations and Police Practices*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 3, 89 (2009) (stating that police officers can conduct a constitutional search absent a warrant or probable cause based upon an individual's consent).

115. *United States v. Richardson*, 583 F.Supp. 2d 694, 699 (W.D. Pa. 2008).

116. *See id.* at 700 (noting the repeated inferences made by officers throughout their visit to Richardson that he may be the victim of identity theft).

117. *See id.* (noting that although it was the officers' intent to investigate the potential possession of child pornography, they did not indicate that this was their purpose for the visit).

118. *See id.* (noting that the officers asked Richardson for consent to search his

subsequent search of the computer's hard drive revealed numerous images of child pornography.<sup>119</sup> Richardson subsequently made a motion to suppress this evidence.<sup>120</sup>

The court began its analysis by initially addressing the issue of the voluntariness of Richardson's consent.<sup>121</sup> The court relied on its earlier conclusion of law in *United States v. Richardson* ("*Richardson I*"),<sup>122</sup> stating that Richardson's consent was voluntarily given.<sup>123</sup> The court subsequently concluded that the voluntariness of Richardson's consent was the law of the case.<sup>124</sup> The court determined that the officers' initial statements to Richardson that they were investigating potential illegal credit card activity were not lies or misrepresentations.<sup>125</sup> Instead, these statements were a possible explanation for the attempted access to the illegal child pornography Internet sites.<sup>126</sup> Thus, due to the absence of any misrepresentation, the

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computers and that he consented both orally and in writing); *see also* *United States v. Stringer*, 535 F.3d 929, 939 (9th Cir. 2008) (citing *United States v. Robson*, 477 F.2d 13, 18 (9th Cir. 1973)) (stating that a consensual search is unreasonable if obtained by trickery or deceit).

119. *See Richardson*, 583 F.Supp. 2d at 703–04 (noting that the officers found numerous images of suspected child pornography after searching the computer's hard drive).

120. *See id.* at 696 (stating that the court will address Richardson's motion to suppress evidence obtained as the result of an unlawful search and seizure).

121. *See id.* at 707 (addressing the issue of the voluntariness of Richardson's consent as addressed in previous rulings of law); *see also* *Katz v. United States*, 389 U.S. 347, 358 n.22 (1967) (citing *Zap v. United States*, 328 U.S. 624 (1946)) (noting that validly obtained consent to a search renders a search reasonable).

122. *See Richardson*, 583 F.Supp. 2d at 726 (conditionally granting part of Defendant's motion to suppress).

123. *See id.* at 710 (stating that the earlier conclusions of law discuss the manner in which Richardson voluntarily gave officers consent to search his computers).

124. *See id.* ("The voluntariness of Defendant's consent for the agents to enter his home and search his computers is thus the law of the case."); *see also* *United States v. Tibbs*, 49 F.Supp. 2d 47, 51 (D. Mass. 1999) (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)) (noting that consent must be "freely and voluntarily given").

125. *See Richardson*, 583 F.Supp. 2d at 710 (stating that the officers' vague explanations to Richardson for the purpose of their visit was not a lie or other type of misrepresentation). *But see* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 807 (1997) (noting that when undercover officers assume an active role in pursuing criminals, their actions can constitute a significant invasion of privacy).

126. *See Richardson*, 583 F.Supp. 2d at 710 (stating that credit fraud was a potential explanation for how someone else may have attempted to access the child pornography websites).

court determined that Richardson voluntarily gave the officers consent to search his computers for signs of credit fraud.<sup>127</sup>

This is arguably the correct conclusion, but it is far from definitive. Technically, the officers did not lie to Richardson since they were actually investigating potential illegal online credit card activity,<sup>128</sup> but they clearly led Richardson to believe that they were investigating one matter—credit card fraud—when they were truly investigating another—possession of child pornography.<sup>129</sup> Other than the mere possibility that someone else used Richardson’s information to attempt to access illegal websites, there really was no legitimate indication that Richardson was the subject of credit card fraud.<sup>130</sup> Yet, the officers focused their conversation with Richardson solely on this remotely plausible theory.<sup>131</sup> However, the officers never actually lied to Richardson by keeping the subject of their conversation with him intentionally vague.<sup>132</sup> As a result, no concrete and obvious misrepresentation coerced Richardson to consent to a search.<sup>133</sup> However, the nature of the exchange between Richardson and the police did affect the court’s analysis of the scope of the search.<sup>134</sup>

In analyzing the scope of Richardson’s consent, the court properly relied upon the objective reasonableness standard outlined in *Florida v. Jimeno*.<sup>135</sup> Thus, the court focused heavily on the verbal exchange

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127. *See id.* (“In the absence of any misrepresentation, the consent obtained by [the officers] was voluntary.”).

128. *See* United States v. Bosse, 898 F.2d 113, 115 (9th Cir. 1990) (citing United States v. Phillips, 497 F.2d 1131, 1135 n.4 (9th Cir. 1974)) (stating that an entry premised upon a complete lie is not justified by consent).

129. *See Richardson*, 583 F.Supp. 2d at 719 (noting that the agent’s vague statements about credit card fraud led Richardson to believe that he was not suspected of possessing child pornography).

130. *See id.* at 697 (noting the lower court’s finding of fact that there was not much information indicating an attempt by someone other than the Defendant to access the illegal websites).

131. *See id.* at 719 (stating that the officers “presented the Defendant with a concern of the presence of a crime concerning his credit card being used on the Internet”).

132. *See id.* at 710 (stating that the officers’ vague explanations to Richardson regarding the purpose of their visit was not a lie or other type of misrepresentation).

133. *Cf.* Bumper v. North Carolina, 391 U.S. 543, 550 (noting that the officers’ false claim of having a search warrant is tinged with coercion).

134. *See Richardson*, 583 F.Supp. 2d at 712–13 (using the framework outlined in *Jimeno* to examine the nature of the exchange between Richardson and the officers).

135. *See id.* at 711 (quoting the language of *Jimeno* outlining the reasonableness standard).

that took place between Richardson and the officers, particularly noting the absence of any discussion related to child pornography.<sup>136</sup> The main subject matter of the discussion revolved around illegal credit card usage and the inferred possibility of identity theft, thus leading Richardson to believe that he was a possible victim, not a suspect.<sup>137</sup> As such, any voluntary consent given by Richardson applies only to the subject matter of his exchange with the officers as it was reasonably understood by all parties.<sup>138</sup> The key here is that although “illegal credit card activity” is a broad category, the officers led Richardson to believe that he was the victim of some sort of credit card fraud.<sup>139</sup> Thus, a search for image files on the computer was outside the areas of the computer that would be useful in identifying possible identity theft.<sup>140</sup> As the court aptly notes, “[i]f there is no meeting of the minds on the subject matter of the search [between the officer and the suspect], the consent to search cannot be found to authorize a search for any subject matter because the Defendant objectively lacks understanding of what the Government is seeking.”<sup>141</sup> Thus, the officers’ vague description of “illegal credit card activity” coupled with the inferences of identity theft provided a restriction on the scope of Richardson’s consent.<sup>142</sup>

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136. *See id.* at 710–11 (noting that there was no initial discussion of child pornography between Richardson and the officers).

137. *See id.* at 712 (noting that the context of the exchange between Richardson and the officers led Richardson to believe that he might be a victim of identity theft, not a possible suspect in a child pornography investigation); *see also* Jeffrey Haningan Kuras et al., *Warrantless Searches and Seizures*, 90 GEO. L.J. 1130, 1176 (2002) (“The scope of consent is determined by asking how a reasonable person would have understood the conversation between the officer and the suspect or third party when consent was given.”).

138. *See Richardson*, 583 F.Supp. 2d at 711 (noting that the absence of any mention of child pornography limited a reasonable understanding of the search limits to only that of material related to potential identity theft).

139. *See, e.g.*, Wayne R. LaFave, *Panel Discussion: The Present and Future Fourth Amendment*, 1995 U. ILL. L. REV. 111, 119 (1995) [hereinafter *Present and Future Fourth Amendment*] (examining the legal morass surrounding pretextual stops in which an officer claims to detain a citizen for some innocuous reason when in reality the officer is searching for evidence of illegal activity).

140. *See Richardson*, 583 F.Supp. 2d at 712 (“With the subject matter of the conversation revolving around illegal credit card usage and Internet activity, a search for images was far afield from the subject matter of what Web sites the computers were used to access.”).

141. *Id.* at 714; *see also* *United States v. Tibbs*, 49 F.Supp. 2d 47, 51 (D. Mass. 1999) (noting that a court’s examination of a consent to search requires careful scrutiny).

142. *See Richardson*, 583 F.Supp. 2d at 713 (noting that the vague description the

This is clearly the proper conclusion. The court was correct in finding that the officers led Richardson to reasonably believe that evidence of credit card fraud was the object of their search.<sup>143</sup> Perhaps if the officers had not led Richardson to believe that he was a victim of some sort of online scheme, then their search might not have been so narrowly limited. “Illegal credit card activity” is a broad and vague category with many possible understandings. The officers did not tell Richardson a blatant lie, since accessing and making credit charges to child pornography sites is illegal.<sup>144</sup> The officers were truly investigating illegal credit card activity on the Internet,<sup>145</sup> but they subtly led Richardson to believe that child pornography was not the focus of their investigation.<sup>146</sup> As one officer testified, “[i]n some definitions for a ruse—I may have used a ruse in the initiation of the interview.”<sup>147</sup> Thus, the officers relied upon an incomplete truth to gain Richardson’s consent to search. Such incomplete truths can be just as misleading as a blatant lie, and, if the officers had employed the use of a blatant lie, the evidence would have been suppressed without a second thought.<sup>148</sup> Here the court properly rejected the use of such a ruse as a means to gain sweeping consent to search the entirety of Richardson’s computer, ultimately limiting the search’s scope to that which directly relates to online credit card fraud.<sup>149</sup>

### B. *United States v. Parson*

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officers gave for their visit resulted in an unintended restriction of what the objectively reasonable scope of the search could be).

143. *See id.* at 719 (stating that the officers presented Richardson with the possibility that his credit card was used illegally on the Internet, thus leading him to believe that this was the object of the search to which he consented).

144. *See* 18 U.S.C.A. § 2252A (2009) (outlawing the possession or distribution of child pornography).

145. *See Richardson*, 583 F.Supp. 2d at 719 (stating that the officers presented Richardson with the possibility that his credit card was used illegally on the Internet).

146. *See id.* at 712 (noting that the subject of the conversation revolved around illegal credit card use on the Internet, and not images of child pornography).

147. *See id.* at 701 (quoting Special Agent Lieb who testified that the officers did not clearly describe to Richardson the type of illegal activity for which they were searching).

148. *See Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (stating that a blatant misrepresentation is essentially a form of coercion).

149. *See Richardson*, 583 F.Supp. 2d at 713 (noting that the vague description the officers gave for their visit resulted in an unintended restriction of what the objectively reasonable scope of the search could be).

In *United States v. Parson*,<sup>150</sup> the United States District Court for the Western District of Pennsylvania again addressed the issue of whether the defendant's consent to search was involuntary due to law enforcement officers' misrepresentations to the defendant that he was a victim of identity theft.<sup>151</sup> In answering this question, the court properly examined the totality of the circumstances involved, including the defendant's characteristics and the exchange that took place between him and police officers.<sup>152</sup> The court noted that the defendant, Parson, was sixty-five years old, living in a trailer, supporting himself on Social Security benefits totaling less than \$1,000 per month, hard of hearing, afflicted by cataracts, and taking medication for depression.<sup>153</sup> The court noted that these characteristics are particularly pertinent towards analyzing the voluntariness of Parson's consent.<sup>154</sup> As a result, the court was decidedly subjective; they took into account all of Parson's unique personal aspects in an attempt to analyze his current state at the time of the police search.<sup>155</sup> This appears to be perfectly within the parameters for determining voluntariness as outlined by previous case law.<sup>156</sup> The presence of these various characteristics undoubtedly placed Parsons in a vulnerable position and the court specifically noted this.<sup>157</sup> The court also stated that the presence of three agents, all inside Parson's small trailer, served

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150. See *United States v. Parson*, 599 F.Supp. 2d 592, 612 (W.D. Pa. 2009) (granting the defendant's motion to suppress evidence seized during a search of the defendant's computer because the defendant's consent to the search was invalid).

151. See *id.* at 594 ("The foremost issue is whether Parson's consent to search was involuntary due to law enforcement's misrepresentations to Parson that he was a victim of identity theft.").

152. See *id.* at 602 (stating that assessment of the circumstances surrounding Parson's consent includes analyzing "the characteristics of the accused" and the details of his exchange with the police); see also *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973) (noting that voluntariness of consent should be determined from a totality of the circumstances).

153. See *Parson*, 599 F.Supp. 2d at 597 (explaining Parson's personal characteristics and current living situation).

154. See *id.* at 602 (noting that Parson's physical condition is relevant in analyzing the voluntariness of his consent).

155. See, e.g., George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1280-84 (1985) ("The criteria of voluntariness affect the legal significance of acts in every branch of the legal system").

156. See *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (noting that factors such as age, gender, race, etc. are relevant to an analysis of the voluntariness of a suspect's consent).

157. See *Parson*, 599 F.Supp. 2d at 607 (noting that Parson's advanced age, poor physical and mental condition, and current living situation left him in a particularly vulnerable state).



as an intimidating force; a force that was further amplified by Parson's vulnerable position.<sup>158</sup> Parson even testified: "I was afraid to refuse doing anything they asked because [sic] there's three men there."<sup>159</sup>

Thus, it is clear that before even addressing the use of police misrepresentations, the court envisioned a scenario in which a partially disabled old man was intimidated by three officers in his tiny trailer. From the findings of fact stated by the court, this does not seem to be an absurd or illogical conclusion.<sup>160</sup> Undoubtedly, Parson's vulnerable nature had a distinct impact on the nature of his interaction with the officers.<sup>161</sup> In turn, this presumably had some influence on the court, perhaps to the point where it may have found that Parson's consent was involuntary based solely on the intimidating environment present at the time.<sup>162</sup> Nevertheless, the court rightly included an analysis of the effect that the officer's misrepresentations may have had in influencing Parson's consent to search.<sup>163</sup>

The police officers initiated the conversation with Parson by stating that they were investigating potential identity theft involving Parson's credit card.<sup>164</sup> However, the lead investigating officer testified that although there was always the chance that Parson was actually the victim of identity theft, the reality of this was remote.<sup>165</sup> This testimony, coupled with the lack of any evidence suggesting that Parson was an identity theft victim, strongly influenced the court to conclude that the officers did not

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158. *See id.* (explaining the intimidating effect of the agents on the Defendant). The court continued:

In this matter, three agents entered the small trailer of a sixty-five-year-old man. Speaking from the likely perspective of a public citizen, two agents seem to constitute a necessary and proper investigative team; however, three agents seem an intimidating force.

*Id.* *See also* Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 785 (2005) ("[C]onsent to search is 'voluntary' if the police have not used 'coercive' tactics in obtaining the consent.").

159. *Parson*, 599 F.Supp. 2d at 607.

160. *See id.* (noting the overall vulnerability of Parson's condition).

161. *See id.* (quoting Parson's testimony in which he states that he felt intimidated by the officers).

162. *See id.*

163. *See id.* at 602 (beginning the court's analysis of the officers' misrepresentations).

164. *See id.* at 597 (noting that one of the officers present during the search of Parson's home testified that one of the other officers told Parson that they were there investigate the possible identity theft involving Parson's credit card).

165. *See id.* at 596 (noting that the lead investigator did not believe there was a high probability that Parson was the victim of identity theft).

truly believe that Parson was actually a victim of identity theft.<sup>166</sup> Additionally, the court heard testimony that the lead investigator told other agents that he was looking at Parson in connection to a child pornography case.<sup>167</sup> This evidence, taken in whole, led the court to the conclusion that the officer's investigation of Parson had nothing to do with identity theft.<sup>168</sup>

Thus, the court classified the agent's statements about investigating identity theft as material misrepresentations, analogous to those presented in *Bumper*.<sup>169</sup> The agents presented themselves as focused solely on identity theft, inducing Parson to place his trust in them under the impression that they were there to help him.<sup>170</sup> Parson's age and physical condition made him a particularly vulnerable target for identity theft, presenting an even greater incentive for Parson to trust the officers to help him.<sup>171</sup> Furthermore, the officers never mentioned that they were there to investigate Parson for possession of child pornography.<sup>172</sup> In fact, after the officers found several illegal images on Parson's computer, they stated that they were not looking for images of child pornography and that someone else was responsible for the legality of those images.<sup>173</sup> Based on these comments, the court surmised that after being told that the officers were not looking for child pornography,

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166. *See id.* (concluding that the officers did not believe Parson was the victim of identity theft, nor did any evidence exist that he was); *cf. Present and Future Fourth Amendment, supra* note 139, at 119–20 (examining pre-textual criminal stops made by police officers).

167. *See Parson*, 599 F.Supp. 2d at 596 (noting that the investigator told Pennsylvania state troopers that he was investigating a child pornography case while making no mention of credit card fraud).

168. *See id.* at 603 (“The evidence conclusively shows that the agents did not suspect any identity theft in Parson’s situation.”).

169. *See id.* (noting that material misrepresentations, such as those made in the case *sub judice* and in *Bumper*, are equivalent to physical coercion); *see also* CRIMINAL PROCEDURE, *supra* note 72 at § 3.10(c) (noting that when an extreme misrepresentation limits a suspect’s ability to fairly assess the situation, consent is not valid).

170. *See Parson*, 599 F.Supp. 2d at 603 (noting that the statements about identity theft served to facilitate Parson’s trust in the officers).

171. *See id.* at 607–08 (noting that Parson’s heightened susceptibility to identity theft left him in greater fear for the safety of his limited financial assets); *see also* Ralph V. Seep, Annotation, *What Constitutes Unusually “Vulnerable” Victim Under Sentencing Guideline § 3A1.1 Permitting Increase in Offense Level*, 114 A.L.R. FED. 355, § 2 (1993) (outlining enhanced sentencing guidelines as a means to provide greater protection to those particularly vulnerable to crimes like identity theft).

172. *See Parson*, 599 F.Supp. 2d at 603–04 (“Additionally, Agent Stitzel did not warn Parson that he was a target, or that the agents were investigating the illegal possession of child pornography.”).

173. *See id.* at 605 (noting that after officers found illegal images on Parson’s computer, they still told Parson that they were not there to look for child pornography).

“Parson could only assume that the men meant to aid him with his newly realized identity theft problem.”<sup>174</sup> Clearly, the statements made by the officers were “deceptive and deliberately misleading.”<sup>175</sup> As a result, the court found that the “agents’ lies and trickery in this matter violated widely shared social expectations.”<sup>176</sup>

Such lies serve to obliterate citizens’ widely shared social expectations that they can trust government officials.<sup>177</sup> If the court were to tolerate such lies, it does not take much thought to envision the dire consequences this would have on society.<sup>178</sup> To avoid such consequences, the court properly concluded that Parson’s consent to the search was invalid.<sup>179</sup> The agents greeted Parson with a lie.<sup>180</sup> The record shows that the agents had no indication that Parson was actually the victim of identity theft, nor was it their primary purpose to search for evidence of identity theft.<sup>181</sup> It is clear that the agents only employed this ruse to gain Parson’s trust and consequent consent to search. Parson’s current physical and mental state made him particularly susceptible to this lie.<sup>182</sup> The fact that Parson later rushed to his bank to change his account numbers and safeguard other personal information is a good indication that he truly believed what the agents had told him.<sup>183</sup> The agents never mentioned that they were looking for child pornography until

174. *Id.*

175. *Id.* at 604; *see also* United States v. Hardin, 539 F.3d 404, 425 (6th Cir. 2008) (noting that when “the effect of the ruse is to convince the resident that he or she has no choice but to invite the undercover officer in, the ruse may not pass constitutional muster”).

176. *Parson*, 599 F.Supp. 2d at 605.

177. *See id.* at 606 (“Lies such as this, if condoned, would obliterate citizens’ widely shared social expectations that they may place some modicum of trust in the words of government officials acting as such.”); *see also* Stuntz, *supra* note 4, at 1913 n.24 (arguing that lying is necessarily wrong because it promotes distrust).

178. *See Parson*, 599 F.Supp. 2d at 606 (noting that the consequences of allowing law enforcement officers to make material misrepresentations to citizens would be catastrophic).

179. *See id.* at 608 (concluding that the government had not met its burden of showing that Parson’s consent was voluntary); *cf.* Bumper v. North Carolina, 391 U.S. 543, 548 (1968) (stating that the burden of proof rests on the government to prove that law enforcement officers validly obtained a suspect’s consent to search).

180. *See Parson*, 599 F.Supp. 2d at 603 (“The evidence conclusively shows that the agents did not suspect any identity theft in Parson’s situation.”). “Additionally, no objective evidence suggests any possibility of identity theft.” *Id.*

181. *Id.*

182. *See id.* (“[T]he facts of the encounter show that the agents’ statements about identity theft were constantly on the mind of Parson . . .”).

183. *See Parson*, 599 F.Supp. 2d at 605 (noting that immediately after the agents left, Parson went to his bank to change his account numbers and social security direct deposit information).

they actually found some on his computer.<sup>184</sup> Even then the agents stated that they were not there to look for pornographic images.<sup>185</sup> It is the totality of these factors that indicates that the agents' statements were a material misrepresentation. Although Parson thought he was consenting to a search for evidence of identity theft, he was unknowingly giving the agents permission to search for child pornography. Such consent clearly is not valid. The agents never gave Parson any indication of what they were searching for and, as a result, Parson never had the opportunity to weigh possible outcomes of his consent.<sup>186</sup> The court is absolutely correct in stating that if such police tactics are allowed then society's shared social expectations will be obliterated.<sup>187</sup> Citizens must be able to trust their government, but this becomes impossible if courts permit government agents to materially lie with impunity. As the court states, the "absence of direct physical torture is not strong evidence supporting voluntariness of consent."<sup>188</sup> Indeed, there are other equally as coercive, yet far subtler, methods to gain consent.<sup>189</sup> When faced with that dilemma here, the court properly concluded that Parson's consent to search was invalid.<sup>190</sup> However, the court also turned to an analysis of the scope of Parson's consent, assuming, *arguendo*, that the consent was not invalid.<sup>191</sup>

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184. *See id.* (noting that the agents stated that they were not there to look for pornographic images).

185. *See id.* (noting that the agents stated that they were not there to look for pornographic images). The court continued:

He asked the agents if he could get in trouble for having this type of picture. The agents responded that they were not the ones who decided that, and that was not what they were there to look for.

*Id.*

186. *See id.* (noting that the agents stated that they were not there to look for pornographic images).

187. *See id.* ("The agents' lies and trickery in this matter violated widely shared social expectations.").

188. *Id.*

189. *See id.* (stating that "the specter of identity theft added additional coercion and intimidation to the situation").

190. *See id.* at 607 (discussing Parson's age, health issues, and financial stature). The court continued:

Parson was sixty-five years old. His medical history includes frequent bouts with depressive mood disorders, for which he has been medicated. He lived alone, subsiding primarily on a low fixed income provided by the Social Security Administration. His cataracts interfered greatly with his ability to see. In short, Parson was a particularly vulnerable target for a ploy regarding identity theft.

*Id.*

191. *See id.* at 609–10 (analyzing the scope of Parson's consent to search).

Alternatively, the court found that if Parson had validly consented to the search, the agents subsequently exceeded the scope of that consent.<sup>192</sup> This analysis was undoubtedly a means for the court to cover all angles of the problem, while simultaneously publishing the messages that such police tactics cannot be tolerated. The court properly looked to *Jimeno* for guidance, stating that it must determine what an objective, reasonable person would have understood the scope of the search to include.<sup>193</sup> The agents initially told Parson that they suspected that he was the victim of identity theft.<sup>194</sup> There was no initial talk of child pornography, and when the subject came up later during the investigation, the agents explicitly denied that they were there to investigate that issue.<sup>195</sup> Thus the issue is what a reasonable person would have ascertained the scope of his consent to entail based on his exchange with the law enforcement officers.<sup>196</sup> Here Parson could only have consented to a search involving evidence of identity theft. The officers explicitly stated that they were there to search for identity theft; therefore there was no reasonable basis for Parson to think that he was consenting to anything other than a search for evidence of possible identity theft. When the officers searched Parson's computer for images of child pornography, a subject wholly unrelated to identity theft, they clearly exceeded the scope of Parson's consent.

Yet again, society's expectations would be obliterated if officers gained consent to search for one thing and then extended the scope of that consent to all things. Citizens must be able to weigh their options when

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192. *See id.* at 610 (concluding that officers exceeded the scope of Parson's hypothetical consent when they seized images of child pornography from his computer because such images had no connection to credit card fraud); *see also* Donald L. Doernberg, "Can You Hear Me Now?": *Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court's Fourth Amendment Jurisprudence*, 39 *IND. L. REV.* 253, 298–99 (2006) (noting that a search by consent cannot exceed the limits imposed by the consenting party).

193. *See Parson*, 599 F.Supp. 2d at 609 (citing the objective reasonableness test outlined in *Jimeno* as the proper mode of analysis for determining the scope of Parson's consent).

194. *See id.* (noting that the agents gained admission to Parson's by telling him that they suspected that he was a victim of identity theft).

195. *See id.* (noting that the agents clearly told Parson that they were not there to search for child pornography).

196. *See 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?" (citing *Illinois v. Rodriguez*, 497 U.S. 177, 183–89 (1990); *Florida v. Royer*, 460 U.S. 491, 501–02 (1983))).

granting consent, but this becomes impossible if officers can freely exceed the scope of granted consent. The court recognized that problem here and sought to address it through several modes of analysis.<sup>197</sup> In cases with facts similar to those in *Parson*, other courts must follow this analysis and rule that the scope of consent has been exceeded in order to preserve the sanctity of the Fourth Amendment. In the case at hand, weighing all the evidence appropriately, the court correctly arrived at this conclusion.<sup>198</sup>

### C. *People v. Prinzing*

In *People v. Prinzing*,<sup>199</sup> the Illinois Appellate Court also faced the issue of law enforcement trickery used to obtain a suspect's consent to search.<sup>200</sup> Although the facts are similar to those of *Parson*, several important differences are present in *Prinzing* that serve to distinguish its slightly different holding. Like in *Parson*, local law enforcement officers received information that led them to believe that Prinzing had purchased child pornography on the Internet.<sup>201</sup> One of the officers then called Prinzing's credit card company, which informed him that there had been a disputed charge on an old credit card of Prinzing's that he had since canceled.<sup>202</sup> The company told the officer that the fraudulent charge had been reported around the time that the card was first used to purchase child pornography.<sup>203</sup> Officers then proceeded to go to Prinzing's house, where they told Prinzing that they were there to discuss "possible fraudulent

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197. See generally, *Parson*, 599 F.Supp. 2d at 602–12.

198. See *id.* at 610 ("When officers examined the seized computer for illegal child pornography images, they violated the scope of any such consent, and thereby violated Parson's Fourth Amendment rights.").

199. See *People v. Prinzing*, 907 N.E.2d 87, 100 (Ill. App. Ct. 2009) (concluding that suppression of evidence seized during a consensual search was warranted because the search exceeded the scope of defendant's consent).

200. See *id.* at 89 (stating that the defendant argued that his consent was illegally obtained by deception and even if his consent was valid, the subsequent search exceeded the scope of his consent).

201. See *id.* (noting that local law enforcement received information from a federal agent that Prinzing may have purchased child pornography over the Internet).

202. See *id.* (noting that law enforcement officers contacted Prinzing's credit card company and obtained information about possible fraudulent charges on his credit card); see also Bob Tedeschi, *Retail Executives Are Uniting to Fight Credit-card Fraud in the Online Bazaar*, N.Y. TIMES, Oct. 21, 2002, at C6 (reporting that credit card fraud costs online companies over \$1 billion annually).

203. See *Prinzing*, 907 N.E.2d at 90 (noting that the reported fraudulent charge occurred around the same time the credit card was used to purchase child pornography).

charges made on his credit card.”<sup>204</sup> Prinzing agreed to discuss the matter and he provided the officers with his credit card information.<sup>205</sup> One of the officers then realized that the credit card number matched a card reported to have been used to subscribe to “a particular Web site.”<sup>206</sup> The officer asked Prinzing for permission to search his computer in regard to the fraudulent credit card charges, stating that if there was any evidence that his computer had been compromised by unsafe Internet websites or viruses, it would likely be on the computer used to make online purchases.<sup>207</sup> Although Prinzing denied having any suspicions that his computer had been compromised, he nonetheless consented to its search by the officers.<sup>208</sup> The officer proceeded to search for pornographic images, not fraudulent credit card charges.<sup>209</sup> After about ten to fifteen minutes of searching, the officer found several images of child pornography.<sup>210</sup> This led to a more in depth investigation, culminating in the confiscation of Prinzing’s home computers and a taped statement by Prinzing.<sup>211</sup> Prinzing ultimately moved to suppress evidence found on his computer, but the trial court denied this motion.<sup>212</sup>

Upon review, the Illinois Appellate Court properly began its analysis with an examination of the voluntariness of Prinzing’s consent to search.<sup>213</sup> The court began its discussion by considering the totality of the

204. *See id.* (noting that officers went to Prinzing’s house “under the guise of interviewing him about ‘possible fraudulent charges made on his credit card’”).

205. *See id.* (noting that Prinzing agreed to discuss the possibility of fraudulent charges on his credit card, and that he provided his credit card information to the officers); *see also* *United States v. Garcia*, 997 F.2d 1273, 1280 (9th Cir. 1993) (quoting *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990)) (noting that government agents cannot gain entry into a suspect’s home by completely misrepresenting the scope of their search).

206. *Prinzing*, 907 N.E.2d at 90.

207. *See id.* at 91 (noting that the officer told Prinzing that if there was evidence of an unsafe virus, it might still be on the computer used to make online purchases).

208. *See id.* (noting that Prinzing consented to a search of his computer in regard to fraudulent credit card activity).

209. *See id.* (noting that the officer only searched for pornographic images, not evidence of credit card fraud); *see also Present and Future Fourth Amendment*, *supra* note 139, at 119 (examining the complexities of pretextual searches).

210. *See Prinzing*, 907 N.E.2d at 91 (noting that the officer found what he believed were images of child pornography).

211. *See id.* at 94 (noting that an in-depth search led to the confiscation of Prinzing’s computers and his subsequent agreement to provide a taped statement).

212. *See id.* (noting that the trial court denied Prinzing’s motion to suppress, concluding that officers truly were searching for evidence of fraud first and foremost).

213. *See id.* at 96 (beginning with an examination of the voluntariness of Prinzing’s consent).

circumstances involved in Prinzing's ultimate consent to search.<sup>214</sup> The analysis does not mention Prinzing's age, race, educational background, or other such determinative factors.<sup>215</sup> However, in analyzing the voluntariness of Prinzing's consent, one can probably assume that Prinzing was a man of average age and intelligence because the court does not note otherwise.<sup>216</sup> In the analysis of Prinzing's consent, the main issue was whether or not the officers engaged in deceit or trickery that manifestly affected Prinzing's ability to voluntarily consent to a search of his computer.<sup>217</sup> Here it is important to note that the officers admitted that they had no actual information that Prinzing's credit card had been used fraudulently nor did they ever mention the words "child pornography" in their discussions with Prinzing.<sup>218</sup> Additionally, the officers never informed Prinzing that his credit card might have been used to purchase child pornography.<sup>219</sup> However, the appellate court determined that it was undisputed that the officers had legitimate information regarding disputed credit card charges that took place around the same time that child pornography website charges were incurred.<sup>220</sup> Thus the court concluded that the police officers had not fully resolved whether or not the disputed

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214. *See id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)) (noting that an examination of the totality of the circumstances is the best place to begin).

215. *See United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (noting that these factors are relevant, but not decisive, in evaluating the voluntariness of a suspect's consent).

216. The failure to mention any unique or differentiating characteristics of Prinzing supports an inference that he was of average age, intelligence, etc. *Cf. United States v. Parson*, 599 F.Supp. 2d 592, 607 (W.D. Pa. 2009) (detailing Parson's unique personal characteristics, leading to the conclusion that he was more susceptible to outside influence than the average person).

217. *See Prinzing*, 907 N.E.2d at 96 ("This leaves us to first determine whether the trial court's factual determination that Detective Smith did not engage in trickery, deceit, or subterfuge when he asked to search defendant's computer . . . is against the manifest weight of the evidence.").

218. *See id.* at 93 (noting that officers had no information that Prinzing's card had actually been used fraudulently and that they never mentioned that they were also investigating child pornography).

219. *See id.* (noting that the officers did not tell Prinzing that his credit card may have been used to purchase child pornography); *see also* Jason E. Zakai, *You Say Yes, But Can I Say No?: The Future of Third-Party Consent Searches After Georgia v. Randolph*, 73 BROOK. L. REV. 421, 425–26 (2007) ("[T]he Supreme Court's paradigm for the consent search doctrine has become less focused on the subjective test of the defendant's voluntariness and more concerned with the objective test of whether the officer compelled the defendant's consent.").

220. *See Prinzing*, 907 N.E.2d at 97 (noting that the child pornography charges were incurred around the same time that disputed charges took place on Prinzing's credit card).



charges were related to the child pornography website charges.<sup>221</sup> As a result, the police officers did not make any manifest misrepresentations when they told Prinzing that they were investigating fraudulent credit card charges.<sup>222</sup> Therefore, the court concluded that Prinzing's consent to search was voluntary.<sup>223</sup>

Several distinct problems arise with this conclusion, particularly surrounding the fairness of its application.<sup>224</sup> The court stated that the officers were "not required to provide [the] defendant with every piece of information that [they] possessed while investigating the matter."<sup>225</sup> Although this may be true, credit card fraud was clearly not the main reason for the officers' visit to Prinzing's house—it was the information they had received from federal agents about possible child pornography charges on Prinzing's credit card.<sup>226</sup> Furthermore, the officers that investigated Prinzing were specifically assigned to review cases that involve Internet child pornography, not credit card fraud.<sup>227</sup> Additionally, the federal agent never mentioned credit card fraud to the investigating officers nor was there any information that suggested that someone other than Prinzing had used the credit card to visit the child pornography sites.<sup>228</sup> Finally, the officer

221. *See id.* at 97–98 (“[T]he police had not resolved whether the disputed credit card charge was related to the child pornography Web site charges.”).

222. *See id.* at 98 (noting that the police did not make any blatant misrepresentations since the credit card fraud issue was not fully resolved); *cf.* *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (holding that a patent misrepresentation made by law enforcement officers in an effort to obtain the suspect's consent to search rendered the following search unconstitutional).

223. *See Prinzing*, 907 N.E.2d at 98 (concluding that Prinzing voluntarily consented to the search of his computer).

224. *See Georgia v. Randolph*, 547 U.S. 103, 111 (2006) (noting that great significance should be placed on widely shared societal expectations of fairness in assessing a suspect's consent).

225. *Prinzing*, 907 N.E.2d at 97.

226. *See id.* at 89–90 (noting that the officers' investigation of Prinzing only began after they received information from federal agents that Prinzing may have purchased child pornography on the Internet); *cf.* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1461 (1996) (noting the idea that the guilty seem perhaps less deserving of a right to privacy which they have abused).

227. *See Prinzing*, 907 N.E.2d at 92 (noting that the officers involved in the investigation were assigned to handle Internet child pornography cases, indicating that they really were not concerned about potential credit card fraud).

228. *See id.* (noting that there was no legitimate indication that anyone other than Prinzing had used the credit card to purchase child pornography on the Internet, thus virtually eliminating the potential for credit card fraud); *see also* Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 27 (2008) (“[W]hether a person's consent is voluntary simply depends on *all* of the facts of the

who conducted the search of Prinzing's computer began with a scan to search for images associated with previously visited websites.<sup>229</sup> The officer insisted that he was only looking for images of the Visa logo, not child pornography.<sup>230</sup> Clearly this is tenuous at best. Here the evidence clearly tends to show that the officers had no intention of actually investigating Prinzing's computer for signs of credit card fraud. Instead their real purpose was to search Prinzing's computer for images of child pornography based on a tip they had received from federal agents.<sup>231</sup>

Yet the court ultimately concluded that the officers had a "twofold purpose" for their visit to Prinzing's house.<sup>232</sup> However, this notion of a "twofold purpose" is extremely problematic. Under this conclusion, officers can use even the most tenuous hypothetical scenarios to mask their true intentions for wanting to search a suspect's property. Such a conclusion opens the door to massive police abuse, in turn creating an environment that inherently undermines the trust that citizens place in law enforcement officers.<sup>233</sup> It suddenly becomes impossible for a citizen to determine the reason officers wish to search his property. How can someone grant voluntary consent in a scenario in which he does not truly know what he is consenting to? Here, Prinzing consented to a search of his computer under the belief that officers were searching for evidence of credit card fraud, not child pornography.<sup>234</sup> Yet this was not the case, as the officers took advantage of the situation to gain access to Prinzing's computer.<sup>235</sup> Thus, the court's conclusion that Prinzing voluntarily gave consent is highly questionable.

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case.").

229. *See Prinzing*, 907 N.E.2d at 91 (noting that officer began the computer search with an image scan for Internet images).

230. *See id.* (noting that the officer was looking for images of the Visa logo, not child pornography).

231. *See id.* at 90 (stating that one of the investigating officers received a tip from an ICE agent that the Defendant's credit card had been used to purchase child pornography and that this tip prompted the officer to begin investigating the Defendant).

232. *See Prinzing*, 907 N.E.2d at 98 (noting that the officers had "the twofold purpose" of looking for both credit card fraud and child pornography).

233. *See Stuntz*, *supra* note 4, at 1913 n.24 (stating that lying promotes distrust).

234. *See Prinzing*, 907 N.E.2d at 91 (noting that the officers told Prinzing that they were investigating potential credit card fraud).

235. *See id.* at 91 (noting that the officers asked to search the defendant's computer with the stated intent to determine how credit card information may have been stolen).

The court does ultimately arrive at the overall proper conclusion after an examination of the scope of Prinzing's consent.<sup>236</sup> After an examination of the facts, the court determined that the officers' search exceeded the scope of Prinzing's consent.<sup>237</sup> As a result, the court concluded that a suppression of the evidence was warranted.<sup>238</sup> The court stated that the officer, "by his own words, limited the scope of the intended computer search."<sup>239</sup> The officer specifically requested to search Prinzing's computer for viruses or other such programs to determine whether or not Prinzing's credit card information had been stolen.<sup>240</sup> During their interactions with Prinzing, the officers made no mention of child pornography or the fact that his credit card may have been used to purchase child pornography.<sup>241</sup> Thus, based on the exchange between the officers and Prinzing, the court determined that the officers limited the scope of their search to evidence pertaining to credit card fraud.<sup>242</sup> As a result, any image search conducted on the computer exceeded the scope of Prinzing's consent because no image could lead the officers to discover evidence of a virus or other programs that could steal Prinzing's credit card information as such programs would not be embedded in an image file.<sup>243</sup> Because Prinzing consented to a search for evidence of credit card fraud, the scope was limited only to file areas in which such evidence might exist.<sup>244</sup> The only

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236. *See id.* at 99–100 (finding that the officer's search of the defendant's computer exceeded the scope of the defendant's consent).

237. *See id.* (determining that the officers exceeded the scope of the defendant's consent).

238. *See id.* ("We accordingly conclude that suppression was warranted.")

239. *Id.*; *see also* United States v. Benezario, 339 F.Supp. 2d 361, 367 (D.P.R. 2004) ("A search conducted pursuant to consent may not exceed the scope of the consent sought and given." (citing Florida v. Jimeno, 500 U.S. 248 (1991))).

240. *See Prinzing*, 907 N.E.2d at 100 (noting that the officer only stated that he wished to search Prinzing's computer for evidence of credit card fraud).

241. *See id.* at 93 (noting that the officers did not tell Prinzing that his credit card may have been used to purchase child pornography). *But see* Arnold H. Loewy, *The Fourth Amendment as a Device For Protecting the Innocent*, 81 MICH. L. REV. 1229, 1229 (1983) (noting that there is no implicit Fourth Amendment right to be secure from the government finding evidence of a crime).

242. *See Prinzing*, 907 N.E.2d at 100 ("Detective Smith's search exceeded the scope of defendant's consent.")

243. *See id.* (noting that programs which could steal credit card information would not exist in image files, thus making a search of such images beyond the scope of Prinzing's consent).

244. *See id.* at 99 ("Defendant consented to a search only for viruses, not images."); *see also* Benezario, 339 F.Supp. 2d at 367 ("A search conducted pursuant to consent may not exceed the scope of the consent sought and given." (citing Florida v. Jimeno, 500 U.S. 248

way for the officers to obtain evidence of child pornography on Prinzing's computer was to search image files, thus exceeding the scope of Prinzing's consent.<sup>245</sup> Ultimately, the court did arrive at the proper conclusion by determining that the images obtained from the search conducted of Prinzing's computer were beyond the scope of his consent, therefore making the search illegal.<sup>246</sup>

Hence, the court upheld the officers' clear use of subterfuge to gain Prinzing's consent to search his computer, but they drastically limited the scope of the search based on the exchange between Prinzing and the officers.<sup>247</sup> Ultimately, the court arrived at the correct conclusion, but not before opening the door for massive police abuses. It is fairly clear that the police had no real intention to search for credit card fraud.<sup>248</sup> They were simply using this as a ruse to gain access to image files on Prinzing's computer.<sup>249</sup> Yet, the court upheld the validity of this ruse.<sup>250</sup> They allowed the officers to gain access to Prinzing's computer via a lie, but then they severely restricted the scope of the search to the areas of the computer related to that initial lie. Why not just conclude that the consent was invalid because it was not voluntarily given?

Although non-material misrepresentation is not always a deciding factor by itself in determining the validity of consent, it still plays a critical role.<sup>251</sup> The court in *Parson* recognized this and correctly ruled that Parson's consent was involuntary because the officers lied to him.<sup>252</sup> Although here, in *Prinzing*, there was actually a contested credit card

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(1991))).

245. *See Prinzing*, 907 N.E.2d at 100 (noting that programs which could steal credit card information would not exist in image files, thus making a search of such images beyond the scope of Prinzing's consent).

246. *See id.* (concluding that suppression was warranted because the search exceeded the scope of Prinzing's consent since evidence of credit card fraud would not exist in image files).

247. *See id.* at 99 (examining the verbal exchange between Prinzing and the officers).

248. *See id.* at 90 (noting that the investigation of Prinzing began with the tip from the ICE agent about child pornography).

249. *See id.* at 97 (noting that the officers did not mention child pornography to the defendant).

250. *See id.* (noting that the officers did not necessarily lie because they had yet not fully resolved what the disputed credit card charge was).

251. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973) (noting that voluntariness of consent should be determined from a totality of the circumstances, not simply one factor).

252. *See United States v. Parson*, 599 F.Supp. 2d 592, 605 (W.D. Pa. 2009) (noting that the officers explicitly told Parson that they were not there to investigate child pornography).

charge involved.<sup>253</sup> Nevertheless, the overall relation of this to the police officers' investigation was clearly erroneous. In fact, its only relation was that it occurred at roughly the same time that charges were made on a child pornography website.<sup>254</sup> This relation is far too tenuous to justify the court's determination. In essence, Prinzing consented to a lie and a court should not hold that such consent is valid. In doing so, the court gave government agents far too much latitude to use deception in obtaining consents to search. This is exactly what prior courts sought to stop in an effort to preserve citizens' Fourth Amendment protections.<sup>255</sup> The court in *Prinzing* is correct in determining that police officers do not have to give a suspect every piece of information they have while investigating a matter.<sup>256</sup> However, courts should not extend this concept to the extent that the court did in *Prinzing*.<sup>257</sup> The police withheld not only the main reason for their investigation of Prinzing, but essentially the only reason.<sup>258</sup> Where do we draw the line?

### III. Potential Application of the Plain View Doctrine

The *Richardson* court was the only one to directly address the potential application of the plain view doctrine to the present facts, but each of the previous three cases merit a brief discussion of the possible application of the plain view doctrine.<sup>259</sup> In *Richardson*, the court specifically stated that a plain view argument for the discovery of the pornographic images fails because such images fell outside the scope of the

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253. See *Prinzing*, 907 N.E.2d at 97 (noting that there was a disputed credit card charge).

254. See *Prinzing*, 907 N.E.2d at 98 (noting that the disputed credit card charge occurred around the same time that the charge was made to a child pornography website, providing a loose basis for a credit card fraud theory).

255. See *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (holding that a patent misrepresentation made by law enforcement officers in an effort to obtain the suspect's consent to search rendered the following search unconstitutional).

256. See *Prinzing*, 907 N.E.2d at 97 (stating that the investigating officer "was not required to provide defendant with every piece of information that he possessed by investigating the matter").

257. See *id.*

258. See *id.* at 99 (noting that the subject of the exchange between the defendant and the officer was limited only to potential credit card fraud).

259. See *Richardson*, 583 F.Supp. 2d at 716 (beginning an analysis of the facts under the plain view doctrine).

search for illegal credit card activity.<sup>260</sup> The image files were not in any of the officers' plain view, as shown by the fact that the officers had to open the files to view the images contained therein.<sup>261</sup> The opening of these files took the officers beyond the scope of the consented search to areas of the computer in which they did not have lawful access.<sup>262</sup> As discussed previously, the scope of Richardson's consent limited the officers to investigate only the areas of the computer where evidence could be found of some sort of credit card fraud.<sup>263</sup> Without getting too far into the subject regarding the complicated technical nature of computers and all the privacy issues that accompany it, it is sufficient to say that evidence of online credit card fraud would not exist in image files.<sup>264</sup> The contents of such image files were not in plain view on the computer; the officers should have been looking in other file areas of the computer for evidence of Internet fraud.<sup>265</sup> The analysis might be very different if Richardson had open images of child pornography on his computer when the officers began their search. Such images would then appear in plain view to anyone who had access to the computer, regardless of how limited that access might have been. In that case, such images might fall under the plain view exception; however, that was not the case.

Nor was this the case in *Parson* and *Prinzing*.<sup>266</sup> Although the courts in neither of these cases engaged in a discussion of the applicability of the plain view doctrine to the facts of the cases, it is fairly clear that such an application would be unwarranted.<sup>267</sup> In both cases, the images were

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260. *See id.* ("A 'plain view' argument for discovery of the child pornography also fails because the consented search was limited to a concern for the '[illegal] credit card activity over the Internet,' not images.").

261. *See id.* (noting that the closed image files were outside of the plain view of the officers).

262. *See id.* (stating that the officers proceeded to open image files that they were not permitted by the scope of Richardson's consent to be viewing); *see also* *United States v. Maldonado Garcia*, 655 F.Supp. 1363, 1366 (D.P.R. 1987) (noting that the scope of a consent search must conform to precise limits).

263. *See supra* Part II.A (examining the *Richardson* case).

264. *See Richardson*, 583 F.Supp. 2d at 715 (quoting EOGHAN CASEY, *DIGITAL EVIDENCE AND COMPUTER CRIME* 279 (2d ed. 2004)) (describing the manner in which a computer stores and logs Internet activity).

265. *See id.* at 716 (noting that the images were beyond the plain view of the officers).

266. *See generally* *United States v. Parson*, 599 F.Supp. 2d 592 (W.D. Pa. 2009); *People v. Prinzing*, 907 N.E.2d 87 (Ill. App. Ct. 2009).

267. *See e.g., Richardson*, 583 F.Supp. 2d at 716 ("A 'plain view' argument for discovery of the child pornography also fails because the consented search was limited to a concern for the '[illegal] credit card activity over the Internet,' not images.").

contained in image files that fell beyond the scope of the consented search and it does not appear from the facts that any of these images were open in plain view.<sup>268</sup> The opening of these image files took the officers beyond the scope of their permissible search into areas of the computer in which they did not have consent to enter. As such, a plain view argument also fails in *Prinzing* and *Parson* for essentially the same reasons that it failed in *Richardson*; none of the pornographic images seized in these three cases successfully falls under the plain view doctrine.

#### IV. Suggested Rule to Provide Clearer Guidance

When law enforcement officers, acting as fully disclosed officers of the law, request consent to search from a suspect, they must fully disclose the main purpose of their visit in order for any subsequently rendered consent to be valid.

These cases offer three different fact scenarios that are similar in some respects, yet decidedly different in others.<sup>269</sup> In each case, the police gained access to the suspects' personal property through the use of subterfuge.<sup>270</sup> Each ruse was slightly different from the others, but the overall impact was roughly the same.<sup>271</sup> In each instance, the police gained access to the suspects' property under the guise of providing aid rather than investigating a potential crime.<sup>272</sup> It proved to be highly successful from a crime-fighting standpoint; in each instance the officers found numerous images of illegal child pornography.<sup>273</sup> It was a failure in other respects as each of the defendants' suppression motions were granted, thus leaving the law enforcement officers back where they started—with nothing.<sup>274</sup> In each of the cases, it was the officers' own words that ultimately provided an unintended limitation on the scope of their searches,

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268. See generally *United States v. Parson*, 599 F.Supp. 2d 592 (W.D. Pa. 2009); *People v. Prinzing*, 907 N.E.2d 87 (Ill. App. Ct. 2009).

269. See generally *United States v. Richardson*, 583 F.Supp. 2d 694 (W.D. Pa. 2008); *United States v. Parson*, 599 F.Supp. 2d 592 (W.D. Pa. 2009); *People v. Prinzing*, 907 N.E.2d 87 (Ill. App. Ct. 2009).

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. See *Richardson*, 583 F.Supp. 2d 694; *Parson*, 599 F.Supp. 2d 592; *Prinzing*, 907 N.E. 2d 87.

because the courts used the scope of the defendants' consent to limit the searches.<sup>275</sup> In only one case did a court actually determine that the consent itself was invalid.<sup>276</sup> Although Parson's personal characteristics seemed to be a controlling factor in the district court's decision, the other factors present in *Parson* were very similar to those of *Prinzing* and *Richardson*.<sup>277</sup> In each case, the courts ultimately arrived at the constitutionally correct decision.<sup>278</sup> It is clear, both from the facts and holdings of each case, that a unified, guiding standard is necessary. Such a standard would not only serve as a protective device for citizens' constitutional rights, but it would also provide clearer guidance for law enforcement officers so that they can be more effective in their pursuit of crime.

Finding such a standard is no easy task. As the Court in *Lewis* noted, a per se rule banning the use of deception by undercover police officers would unduly hamper law enforcement officers in their pursuit of crime.<sup>279</sup> However, the Court's decision in that case was focused on the specific area of undercover officers, not police officers in general.<sup>280</sup> Furthermore, the Court was reluctant to establish an outright prohibition on the use of deception, but they did not address the possibility of creating a rule outlining the permissible use of deception without completely prohibiting such deception.<sup>281</sup> The three cases discussed in this paper differ from *Lewis* in that none of the officers involved were working undercover.<sup>282</sup> They all arrived at the suspects' homes dressed in some sort of police garb and they all immediately identified themselves as officers of the law.<sup>283</sup> In fact,

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275. *Id.*

276. *See* *United States v. Parson*, 599 F.Supp. 2d 592, 608–09 (W.D. Pa. 2009) (concluding that Parson's consent to the search was invalid).

277. *See generally* *United States v. Richardson*, 583 F.Supp. 2d 694 (W.D. Pa. 2008); *United States v. Parson*, 599 F.Supp. 2d 592 (W.D. Pa. 2009); *People v. Prinzing*, 907 N.E.2d 87 (Ill. App. Ct. 2009).

278. *Id.*

279. *See* *Lewis v. United States*, 385 U.S. 206, 210 (1966) (stating that a per se rule about the use of deception by undercover agents would unduly hamper law enforcement officers in the pursuit of crime).

280. *Id.*

281. *Id.*

282. *See generally* *United States v. Richardson*, 583 F.Supp. 2d 694 (W.D. Pa. 2008); *United States v. Parson*, 599 F.Supp. 2d 592 (W.D. Pa. 2009); *People v. Prinzing*, 907 N.E.2d 87 (Ill. App. Ct. 2009).

283. *Id.*



this was essential to their ruse, since they wanted the suspects to believe that they were there to investigate legitimate identity threats to the suspects.<sup>284</sup> Their position as police officers added credibility to their story and allowed them to convince the suspects that they were there to help.<sup>285</sup> This is a decidedly different scenario from that of undercover police work, which could be the subject for an entirely different legal discussion.

Although difficult, it is not impossible to formulate a workable rule to address police conduct in scenarios similar to that of three cases discussed above. However, such a rule cannot, and should not, be applied broadly across the entire spectrum of police work. As mentioned above, undercover police work is very different from the type of work the police officers were conducting in the above cases. This rule is therefore only applicable to scenarios in which police officers are operating as fully disclosed officers of the law while requesting access to a suspect's personal property. When operating as such, police officers must fully inform the suspect of the *main* purpose of their visit in order to validly obtain any consent to search.<sup>286</sup> This proposed rule is simple in theory, but it requires a fact intensive analysis. The main purpose of the officers' visit to a citizen's home should be determined from a wide variety of objectively reviewed factors, including: the nature of the officer's primary assignments and the nature of the evidence previously collected by the officer in connection to the suspect.<sup>287</sup> Such a rule would prevent officers who were assigned primarily to child pornography cases from using the remote and unsubstantiated possibility that a suspect has been the victim of identity theft as a means to gain that suspect's consent to a search. At its core, the use of such tactics essentially induces the suspect to consent to a lie under the reasonable, yet incorrect, assumption that the officers are there to help. This rule eliminates that possibility, requiring the police to state the real purpose of their visit

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284. *Id.*

285. *Id.*

286. See Michael J. Friedman, *Another Stab at Schneckloth: The Problem of Limited Consent Searches and Plain View Seizures*, 89 J. CRIM. L. & CRIMINOLOGY 313, 344 (1998) (noting that any rule which focuses on the subjective intent of police officers is easy to manipulate and difficult to enforce).

287. See David John Housholder, Note, *Reconciling Consent Searches and Fourth Amendment Jurisprudence: Incorporating Privacy into the Test for Valid Consent Searches*, 58 VAND. L. REV. 1279, 1294 (2005) (noting that many court decisions show a tendency to favor objective standards).

or actually produce legitimate evidence of an alternate reason for their visit.

The rule provides a clearly delineated guideline that can serve as a protective device to ensure that the Fourth Amendment rights of citizens are not violated by the police. Without such a rule, these rights could easily erode in the face of illegitimate police tactics. A clear guideline, such as this rule, would solidify and preserve the Fourth Amendment rights that our forefathers valued so dearly.<sup>288</sup> The construction of this rule serves to deter uniformed officers from abusing their position of trust by advancing a lie in order to gain a suspect's consent to search. The requirement that officers disclose the *main* purpose of their visit is the key element that creates the restriction necessary to protect citizens from unlawful and unconstitutional searches and seizures in the specific scenario described above. With this rule in place, suspects will actually know what they are consenting to, thus preserving their Fourth Amendment rights as citizens. But this rule only applies when government agents are acting as fully disclosed officers of the law. In this way, the rule will not hamper police officers engaged in legitimate undercover work. Therefore the rule does not infringe upon this important, legally sanctioned area of police work.

Furthermore, this rule can have an overall beneficial effect for law enforcement officers as well. If officers adhere to the rule, any evidence they collect will be admissible, in turn allowing prosecutors to move forward with their case.<sup>289</sup> As a result, there can be more successful prosecutions of legitimate criminals. In the cases described above, each of the suspects clearly violated the law,<sup>290</sup> but each suspect ultimately escaped punishment because the police violated their constitutional rights.<sup>291</sup> This rule has the potential to stop scenarios like this by providing police officers with a guideline that allows them

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288. See William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013, 1036–37 (1994) (chronicling the rise of Fourth Amendment principles in colonial America beginning in 1776).

289. See e.g., *Creekmore v. State*, 800 N.E.2d 230, 233 (Ind. Ct. App. 2003) (stating that the state bears the burden of proving that evidence was properly gathered, and therefore admissible at trial).

290. See generally *United States v. Richardson*, 583 F.Supp. 2d 694 (W.D. Pa. 2008); *United States v. Parson*, 599 F.Supp. 2d 592 (W.D. Pa. 2009); *People v. Prinzing*, 907 N.E.2d 87 (Ill. App. Ct. 2009).

291. *Id.*

to pursue criminals in a manner that is consistent with the U.S. Constitution. Police officers undoubtedly have a difficult and frustrating job, but this rule could ease some of these frustrations by providing officers with a guideline for gathering evidence in a manner that will not later render such evidence inadmissible. Admittedly, officers might initially feel frustrated that they must adhere to a strict guideline while gathering evidence. But, in the end, it will be far less frustrating than watching legitimate criminals go unpunished. Ultimately, this rule could allow government officers to have greater success in identifying and prosecuting the crimes that undermine the safety of an ordered society.

Consequently, this rule has potential benefits for both citizens and police officers. Citizens can place their trust in police officers, knowing that their constitutionally guaranteed protections are still valid, while the officers have greater guidance in successfully obtaining evidence. By obtaining success in both of these areas, harmony can be reached between the rights of citizens and the duty of police officers to pursue and extinguish criminal activity.

The three cases discussed above<sup>292</sup> undoubtedly present a difficult scenario for courts to analyze. On the one hand, courts must balance the Fourth Amendment rights afforded to all citizens. On the other, courts must balance the ever-pressing need to successfully pursue and eliminate crime. Both factors are essential to modern society. The courts in the above cases wrestled with these competing interests, ultimately arriving at proper conclusions.<sup>293</sup> But the analysis was not perfect, nor was it clearly guided by a useful rule.<sup>294</sup> *When law enforcement officers, acting as fully disclosed officers of the law, request consent to search from a suspect, they must fully disclose the main purpose of their visit in order for any subsequently rendered consent to be valid.* A rule, such as this one, could provide greater guidance for both courts and law enforcement officers, while

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292. See *Richardson*, 583 F.Supp. 2d at 724–25 (granting defendant’s motion to suppress evidence seized during a consensual search of the defendant’s computer because the search exceeded the scope of defendant’s consent); *Parson*, 599 F.Supp. 2d at 612 (granting defendant’s motion to suppress evidence seized during search of the defendant’s computer because defendant’s consent to search was invalid); *Prinzing*, 907 N.E.2d at 100 (concluding that suppression of evidence seized during a consensual search was warranted because the search exceeded the scope of defendant’s consent).

293. *Id.*

294. *Id.*

simultaneously protecting the rights of citizens, no matter what their accused crime. It is a difficult subject area, but answers must be found. Such answers could serve to benefit both citizens and police officers alike, fostering an environment that is beneficial to all.

### V. Conclusion

Justice Cardozo once lamented the idea that a “criminal is to go free because the constable has blundered.”<sup>295</sup> Such is the scenario in the three cases discussed above.<sup>296</sup> It is certainly lamentable that suspects in possession of child pornography are able to suppress its evidence due to the over-extension of the police search.<sup>297</sup> There is, at some point, a basic notion that justice is not served by allowing such criminals to escape punishment for these crimes, but there is the equally compelling need for citizens to safely place their trust in the officers of the law. In the cases at hand, police officers used surreptitious methods to identify and apprehend criminals.<sup>298</sup> Although they made no attempt to hide who they were, they still made an effort to shield their true intentions in an attempt to deceive the citizens to whom they were speaking.<sup>299</sup> The officers used their position of trust as a means to implement deceptive action. By allowing such action to go unchecked, courts serve to undermine the fundamental protections of the Fourth Amendment.<sup>300</sup> Citizens must be able to trust their government

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295. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

296. *See Richardson*, 583 F.Supp. 2d at 724–25 (granting defendant’s motion to suppress evidence seized during a consensual search of the defendant’s computer because the search exceeded the scope of defendant’s consent); *Parson*, 599 F.Supp. 2d at 612 (granting defendant’s motion to suppress evidence seized during search of the defendant’s computer because defendant’s consent to search was invalid); *Prinzing*, 907 N.E.2d at 100 (concluding that suppression of evidence seized during a consensual search was warranted because the search exceeded the scope of defendant’s consent).

297. *See* Derrick Augustus Carter, *To Catch the Lion, Tether the Goat: Entrapment, Conspiracy, and Sentencing Manipulation*, 42 AKRON L. REV. 135, 138 (2009) (noting that there is little common sympathy for a criminal suspect who is willing to commit a crime).

298. *See generally* *United States v. Richardson*, 583 F.Supp. 2d 694 (W.D. Pa. 2008); *United States v. Parson*, 599 F.Supp. 2d 592 (W.D. Pa. 2009); *People v. Prinzing*, 907 N.E.2d 87 (Ill. App. Ct. 2009).

299. *Id.*

300. *See* Mary Helen Wimberly, *Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment*, 60 VAND. L. REV. 283, 312 (2007) (“[W]hen it comes to protecting rights guaranteed by the Constitution, courts have traditionally taken on the role as protector. Therefore, a court, in recognizing a Fourth Amendment right to privacy, would be fulfilling its traditional role.”).

and its officials. The absence of such trust has the potential to cause more damage than affording the full array of Fourth Amendment rights to suspected criminals. The courts in the three cases above struggled to address this issue and ultimately reached the correct conclusion, preserving what is left of the Fourth Amendment.<sup>301</sup> However, clearer guidance is undoubtedly needed in order to guarantee correct results in the future. Continuing forward without such guidance is not only ill-advised, but also invidious to the fundamental principles upon which our government is founded.<sup>302</sup> “Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”<sup>303</sup>

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301. See *Richardson*, 583 F.Supp. 2d at 724–25 (granting defendant’s motion to suppress evidence seized during a consensual search of the defendant’s computer because the search exceeded the scope of defendant’s consent); *Parson*, 599 F.Supp. 2d at 612 (granting defendant’s motion to suppress evidence seized during search of the defendant’s computer because defendant’s consent to search was invalid); *Prinzing*, 907 N.E.2d at 100 (concluding that suppression of evidence seized during a consensual search was warranted because the search exceeded the scope of defendant’s consent).

302. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

303. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).