

ABOLISHING POLICE CONSENT SEARCHES THROUGH LEGISLATION: LESSONS FROM SCOTLAND

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Why have U.S. civil rights organizations omitted the abolition of consent searches from the panoply of recommended police reforms? As over 90% of all searches of cars and pedestrians in the United States are based on consent, this begs the question. The Supreme Court created the consent loophole so that police who lacked probable cause could nevertheless search pockets and cars. In the American context, consent searches bolster racial profiling and enable police harassment.

Americans do not have to wait for the Court to change the law. States and cities have the power to close off this loophole through legislative action. In this regard, the Scottish Parliament provides an illuminating example. Scotland faced a problem with excessive stop-and-search, a practice resembling stop-and-frisk in the United States. Responding to the abusive over-policing, Scotland applied a legislative fix in 2016 that eliminated police consent searches. Harassment immediately decreased, with stops and searches falling from 600,000 stops per year to 40,000 in the first year after the law was enacted. Voluntary consent is an oxymoron in the United States, as it was in Scotland.

This Article looks at the current law reform efforts on consent searches in the United States, argues that state legislatures should follow Scotland's example, and offers model legislation. Except where legal counsel provides advice on the

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waiver of rights, legislation should prevent the searches of bodies, cars, and homes based merely on a subject's cooperation with the police.

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INTRODUCTION: THE NEED TO ELIMINATE “CONSENT” SEARCHES

The “consent search” captured on the officer’s body camera in October 2021 is both typical and immoral. Beverly Hills police stopped a thirty-five-year-old Black man named Salehe Bembury on Rodeo Drive for the ubiquitous crime of jaywalking.¹ The Versace shoe

1. Sarah Moon, *Versace Executive Accuses Beverly Hills Police of Racial Profiling After Jaywalking Stop*, CNN (Oct. 7, 2020, 8:03 PM), <https://www.cnn.com/2020/10/07/us/versace-exec-accuses-beverly-hills-police-racial-profiling/index.html> [https://perma.cc/6QKB-KFSX] (the stop of Salehe Bembury occurred on October 1, 2020); *see also* Priya Elan, *Versace Executive Accuses Los Angeles Police of Racial Profiling*, GUARDIAN (Oct. 10, 2020), <https://www.theguardian.com/fashion/2020/oct/10/versace-executive-salehe-bembury-accuses-los-angeles-police-of-racial-profiling> [https://perma.cc/92F3-YKHW]; *Versace VP Gets Stopped, Pat Down Asked About Weapons for Jaywalking Beverly Hills*

designer was carrying a shopping bag with the label Versace on it.² Police lacked any justification to search Mr. Bembury or run his identification, that is, unless they could convince him to waive his rights.

One officer asked, “*Do you mind if I just check to make sure?*”³ This is the approved method to frisk for weapons when American police lack reasonable suspicion.⁴ Mr. Bembury immediately responds: “[y]ou can do whatever you need to do man, I’m just nervous.”⁵ Once he receives this so-called “consent,” the police officer unleashes a spew of commands: “*Face that way real quick; put your hands behind your back, palms together like you are praying; awesome, thank you—all the way like you are praying, like you are praying; interlace them, interlace them. Spread your feet.*”⁶ Once the officer is satisfied with Mr. Bembury’s helpless position, he pauses long enough to ask, “*You said I can search you, right?*”⁷ With that renewed “consent,” the officer then feels the front and back of the executive’s body over the clothing, including his groin area.⁸ The video shows the officer go into at least one of Mr. Bembury’s front pockets, rendering this a full-blown search.⁹ Following this “consent” search of the designer’s body, the officer easily procured permission to search the executive’s wallet, and he thumbed through it, pulling out his identification so police could look for warrants.¹⁰

This was a classic “walking while Black” encounter. When police saw a Black man carrying a Versace shopping bag, either the officers’

Police, YOUTUBE (Oct. 3, 2020), <https://www.youtube.com/watch?v=SyFU5ne7LYo> [<https://perma.cc/655A-X8WR>] [hereinafter *Body-Worn Camera*]. For more about the designer, see Sandra E. Garcia, *A Day in the Studio with Salehe Bembury*, N.Y. TIMES (updated Oct. 12, 2021), <https://www.nytimes.com/2021/10/08/style/salehe-bembury-crocs.html> [<https://perma.cc/YZJ4-TPS3>].

2. Moon, *supra* note 1.

3. *Body-Worn Camera*, *supra* note 1.

4. *See id.*, *supra* note 1; *Stop-And-Frisk*, ACLU D.C. (2023), <https://www.acludc.org/en/know-your-rights/stop-and-frisk> [<https://perma.cc/456X-Y232>] (“Police can lawfully ‘frisk’ you if you consent, or even without your consent if they have ‘reasonable suspicion’ . . . that you have a weapon.”).

5. *Body-Worn Camera*, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *See id.*; *see also* *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) (holding that a pat-down search for weapons exceeded the “strictly circumscribed” scope allowable under *Terry* when the officer reached into the detainee’s pocket “after having concluded that it contained no weapon” (citing *Terry v. Ohio*, 392 U.S. 1, 26 (1968))).

10. *Body-Worn Camera*, *supra* note 1.

unconscious bias triggered an irrational suspicion that the executive had stolen merchandise, or, more likely, the officers wanted to send a message that Rodeo Drive is a space reserved for rich White people.¹¹ Officers must have quickly realized that Mr. Bembury was no shoplifter, but they nevertheless proceeded through the humiliating rituals of frisking him, searching his wallet, and running his license without any justification. Whatever their exact motivations, officers engaged in racial profiling when they selected him for excessive surveillance. It is difficult to imagine police in that tony shopping district singling out well-dressed White men for such humiliation when they cross a street outside of a designated crosswalk.¹² In fact, the Rodeo Drive Task Force that searched Mr. Bembury only arrested Black Americans, except for one Latinx civilian, according to a class-action lawsuit.¹³ While it is not known how many Task Force searches were characterized by police as consensual, the video suggests that this is the Task Force's *modus operandi*.

"Consent" is a Supreme Court contrivance that allows police to stop, search, and question people without any basis to believe that a person has engaged in criminal activity.¹⁴ To obtain the Versace executive's

11. See Eric J. Miller, *Knowing Your Place: The Police Role in the Reproduction of Racial Hierarchy*, 89 GEO. WASH. L. REV. 1607, 1609 (2021) ("[T]he problem is not that White-dominated communities or the police misperceive where Black people belong, but that they seek to enforce racialized norms of civil order by dictating who belongs where."); Hailey Branson-Potts, *'Beverly Hills While Black': Race, Wealth, Policing Collide on Rodeo Drive*, L.A. TIMES (Nov. 5, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-11-05/la-me-beverly-hills-rodeo-drive-racial-profiling-wealth> [<https://perma.cc/R3WR-YXRZ>] (discussing how the police follow Black individuals in Beverly Hills and expect Black individuals on Rodeo Drive not to have money). For implicit bias, see L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1147 (2012) (explaining that social cognition research demonstrates that a person's subconscious categorization of others can trigger implicit stereotypes and attitudes that lead to negative behaviors).

12. Cf. Michael Lewyn, *The Criminalization of Walking*, 2017 U. ILL. L. REV. 1167, 1173 n.5 (2017) (discussing the selective enforcement of jaywalking against marginalized groups, which, according to a report from 2015, was prominent in Ferguson, Missouri, where ninety-five percent of arrestees for jaywalking were Black).

13. *Lawsuit Claims Beverly Hills Police Officers Racially Profiling Minorities*, CBS NEWS (Sept. 1, 2021, 12:35 PM), <https://www.cbsnews.com/losangeles/news/lawsuit-claims-beverly-hills-police-officers-racially-profiling-minorities> [<https://perma.cc/8PZ6-M7XK>] (stating the group of officers' targeting people of color in Beverly Hills is known as the "Operation Safe Street and Rodeo Drive Task Force").

14. For background on the consent exception to the Fourth Amendment, see generally *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

legal “consent,” officers followed the script set out by the Supreme Court.¹⁵ The Beverly Hills officers did not raise their voices nor brandish their guns, and they used practiced phrases like:

- “You are not in handcuffs or anything. I’m just talking to you right now, okay.”
- “Do you mind if I just pull [your ID] up,” (referring to Mr. Bembury’s wallet).
- You may turn around and pick up your phone “*if that makes you feel more comfortable.*”¹⁶

Cooperation often passes for Fourth Amendment “voluntary consent” in a courtroom, but viewers can observe the injustice.¹⁷ Nothing here was truly consensual. “*I’m like super nervous,*” Mr. Bembury explained.¹⁸ Like all situations where police elicit consent from people they want to search, the gentleman’s cooperation was merely self-preservation.¹⁹

15. See *Ohio v. Robinette*, 519 U.S. 33, 35, 39–40 (1996) (holding that officers are not constitutionally obligated to advise a detainee that they are “free to go” to obtain voluntary consent (citing *Schneekloth*, 412 U.S. at 227)); *Florida v. Bostock*, 501 U.S. 429, 436–37 (1991) (finding voluntary consent where “officers walked up to Bostock on the bus, asked him a few questions, and asked if they could search his bags,” notwithstanding that he “did not feel free to leave” because the officers did not “convey a message that compliance with their requests [was] required”).

16. *Body-Worn Camera*, *supra* note 1.

17. See, e.g., *id.* (showing an officer asking, “you said I could search you, right?” while halfway through a pat-down); see *United States v. Drayton*, 536 U.S. 194, 210 (2002) (6-3 decision) (Souter, J., dissenting) (“The police not only carry legitimate authority but also exercise power free from immediate check, and when the attention of several officers is brought to bear on one civilian the imbalance of immediate power is unmistakable.”); see also Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 177 (discussing the blurred distinction between cooperation and consent).

18. *Body-Worn Camera*, *supra* note 1.

19. See Josephine Ross, *Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment*, 18 WASH. & LEE J. CIV. RTS. & SOC. JUST. 315, 318, 332–33 (2012) (dismantling the legal fiction that “people can always walk away from police officers who approach them” through social science research showing that “the line between requests and orders is essentially non-existent when it comes to a police officer requesting something from a suspect”).

Among its many evils, “consent” buttresses racial profiling,²⁰ with the Beverly Hills video illustrating this perfectly. Suspicion rooted in racial stereotypes falls short of the reasonable suspicion or probable cause required for frisks and full-blown searches.²¹ Absent the consent exception, any court would conclude that the police violated both Mr. Bembury’s Fourth Amendment guarantee against unreasonable searches and the Equal Protection clause.²² Here is where the consent doctrine kicks in: If the officer convinces a court or reviewing body that Mr. Bembury voluntarily consented to a search, then the officer needs no other justification.²³ With consent, police do not need probable cause to search.²⁴ Officers need only show they were not unusually coercive in obtaining a “yes” or “okay.”²⁵ Consent is a loophole that excuses otherwise unconstitutional behavior.

Even if a court finds that a civilian’s “okay” does not amount to legal “voluntary” consent, this court-created doctrine helps shield officers who conduct harassing searches like the one on Rodeo Drive. When a court analyzes whether a reasonable officer would understand Mr.

20. JOSEPHINE ROSS, *A FEMINIST CRITIQUE OF POLICE STOPS 17*, 156–58 (2021) (“[B]y constructing an alternative reality where police behave like the proverbial ‘Officer Friendly,’ . . . [courts] camouflage police aggression and racial profiling and allow it to thrive.”). In the Rodeo Drive video, race and racial profiling are on full display: from the officer’s selection of the executive for investigation and search and the particular stigma implied to the way Salehe Bembury responds.

21. *Enoch v. Hogan*, 728 F. App’x 448, 455 (6th Cir. 2018) (explaining well-established precedent that race cannot be the sole determinant of reasonable suspicion or probable cause (citing *United States v. Avery*, 137 F.3d 343, 354 (6th Cir. 1997))).

22. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”); *id.* amend. XIV (“No State shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the laws.”); *see* CONG. RSCH. SERV., *RACIAL PROFILING: CONSTITUTIONAL AND STATUTORY CONSIDERATIONS FOR CONGRESS 1–2* (2020), <https://sgp.fas.org/crs/misc/LSB10524.pdf> [<https://perma.cc/3XQ4-UAYJ>] (explaining that Fourteenth Amendment Equal Protection Clause prohibits police officers from intentionally discriminating based on race, and the Fourth Amendment further prohibits police officers from relying on a person’s racial appearance alone as grounds for reasonable suspicion).

23. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“It is . . . 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.”).

24. *Id.*

25. *See Florida v. Bostock*, 501 U.S. 429, 437 (1991) (noting that consent only becomes involuntary once officers indicate that “compliance with their requests is required”).

Bembury's capitulation as "voluntary consent," this takes the spotlight off the officer's illegal and unethical actions.²⁶ Instead of looking at whether the officer lacked reasonable suspicion to frisk, courts and reviewing agencies will ask whether the officer obtained valid consent. Imagine a court determining that Mr. Bembury's statement "do whatever you need to do" was coerced rather than voluntary. Even then, if the officer made a reasonable mistake in thinking the consent was voluntary, this shields the officer from accountability for his unconstitutional search via qualified immunity.²⁷ In contrast, the race-based searches here lacking probable cause would be patently unconstitutional without the consent exception.²⁸ In this way, the consent loophole allows racial profiling to flourish and encourages unnecessary and demeaning police encounters on the sidewalks and during traffic stops.

Although the police allowed Mr. Bembury to leave after only three and a half minutes,²⁹ this non-violent ending should not disguise the harm of this so-called "consensual" encounter. There is the stigma of being selected as a potential criminal, the sense of powerlessness as a stranger puts his hands over one's body, and for many people, the fear

26. See *United States v. Kelley*, 981 F.2d 1464, 1470 (5th Cir. 1993) (holding that the detainee's consent remediated any potential Fourth Amendment violation that occurred).

27. "The Supreme Court has made clear that '[t]he protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' However, qualified immunity only protects 'reasonable mistakes.'" *Jones v. Treubig*, 963 F.3d 214, 230–31 (2d Cir. 2020) (citation omitted) (first quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); and then quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

28. "Racial profiling" can be "defined as actions by police officers or other government officials in enforcing laws based on racial stereotyping, rather than the 'reasonable suspicion' or 'probable cause' standard." L. Darnell Weeden, *Criminal Procedure and the Racial Profiling Issue for Professor Gates and Sergeant Crowley*, 17 WASH. & LEE J. CIV. RTS. & SOC. JUST. 305, 312 (2011). While jaywalking allowed the officer to stop Salehe Bembury, the frisk must be based on reasonable suspicion that he was armed and dangerous, and the search of his wallet must be based on probable cause to believe the officer would find evidence of wrongdoing. See *Terry v. Ohio*, 392 U.S. 1, 10–11, 30–31 (1968) (holding that officers who properly stop an individual may frisk for weapons if the officer has a reasonable belief that the individual is armed and dangerous). The crime of jaywalking does not support reasonable suspicion for a frisk. See *State v. Ewing*, 95 N.E.3d 1112, 1122 (Ohio Ct. App. 2017) (holding that although police properly stopped the defendant for jaywalking, they lacked reasonable suspicion to pat him down for weapons).

29. *Body-Worn Camera*, *supra* note 1.

that arises from knowing that American police kill one thousand people each year, sometimes starting with an investigative stop like this one.³⁰

The Supreme Court's consent doctrine is premised on the lie that people accosted or detained by one or more officers maintain actual agency and choice.³¹ Feminists have long pointed out (in the context of sexual harassment and rape) that true consent is impossible when there is a significant power imbalance between the parties.³² This Article builds on the Author's previous works that analyze policing practices and regulations through a feminist lens. Notably, *A Feminist Critique of Police Stops* applied a feminist perspective to the Fourth Amendment, revealing how "consent" excuses the otherwise unconstitutional invasion of people's bodies, interrupts their sense of safety, and blames the people searched for waiving their rights.³³

30. *National Police Shootings*, WASH. POST (updated July 9, 2023), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database> [<https://perma.cc/MNS8-ZQYM>]; Curtis Bunn, *Report: Black People Are Still Killed by Police at a Higher Rate than Other Groups*, NBC NEWS (Mar. 3, 2022, 12:08 PM), <https://www.nbcnews.com/news/nbcblk/report-black-people-are-still-killed-police-higher-rate-groups-rcna17169> [<https://perma.cc/TE8B-YC38>] (pointing out that Black people make up only thirteen percent of the U.S. population but account for twenty-seven percent of those fatally shot and killed by police in 2021). We can look to the recent examples of Rayshard Brooks, who was fatally shot by Atlanta police after falling asleep in his car in a Wendy's parking lot. Aimee Ortiz, *What to Know About the Death of Rayshard Brooks*, N.Y. TIMES (Nov. 21, 2022), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html> [<https://perma.cc/X94N-X4VC>]. Also, Patrick Lyoya was shot in the back of the head by Michigan police after a routine traffic stop. Mike Householder & Ed White, *Expert: Cop Pressed Gun to Patrick Lyoya's Head Then Fired*, AP NEWS (Apr. 19, 2022, 5:22 PM), <https://apnews.com/article/patrick-lyoya-shootings-michigan-detroit-police-6684358f9218b32a94a59e9490ba484b> [<https://perma.cc/Z6WL-QBLC>].

31. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 244 (2001) ("Given the reality faced by the African-American community, a court's nimble assertion that a person can 'just say no' to a police request to search is a sorry, empty slogan . . . [B]ecause of the experiences in their community, they will frequently—if not usually—feel coerced to forego their constitutional right to privacy.")

32. See Luis E. Chiesa, *Solving the Riddle of Rape-by-Deception*, 35 YALE L. & POL'Y REV. 407, 437–38 (discussing the "inherently coercive" nature of asymmetrical relationships).

33. ROSS, A FEMINIST CRITIQUE OF POLICE STOPS, *supra* note 20, at 10–12; see also Josephine Ross, *Blaming the Victim: 'Consent' Within the Fourth Amendment and Rape Law*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 1, 44 (2010) [hereinafter *Blaming the Victim*] ("Just as consent is supposed to define the line between rape and consensual sex, so consent

Bringing a feminist understanding of consent to the Fourth Amendment, we can see that what courts call “consent,” feminists would call submission.³⁴

Mr. Bembury did not truly wish to have his body touched nor his wallet inspected. The viewer knows there is no actual choice here, given everything we know about how police punish people who do not fully cooperate.³⁵ These punishments can take various forms, including applying gratuitous physical force or “contempt of cop” arrests.³⁶ Sexual harassment law recognizes the workplace power dynamics, yet police possess more power over civilians than a boss in one’s workplace.³⁷ There is too great a power differential between officers and civilians for consent ever to be truly voluntary.³⁸ As Mr. Bembury’s ordeal illustrates, consent is a fiction that the Supreme Court designed to give the police easy, gratuitous access to bodies and property.

is supposed to define which searches are consensual or nonconsensual within the Fourth Amendment Consent for searches should be a question of what the individual wanted, since, were it not for this individual’s autonomous decision to forgo his Fourth Amendment rights to privacy, the police would violate the Constitution were they to intrude upon his privacy.”).

34. See *Blaming the Victim*, *supra* note 33, at 11 (discussing the overlap between Fourth Amendment consent jurisprudence and rape law discourse).

35. See *Utah v. Strieff*, 579 U.S. 232, 253 (2016) (Sotomayor, J., dissenting) (discussing how, during a stop-and-frisk, if a suspect does not comply with an officer’s requests, “the officer . . . may handcuff you and take you to jail for doing nothing more than speeding [or] jaywalking,” leading to a chain of indignities ranging from indecent physical examination to endless “discrimination by employers, landlords, and whoever else conducts a background check,” amounting to “civil death” by conviction).

36. See, e.g., *id.*

37. See Chiesa, *supra* note 32, at 437–38 (analyzing the inherently coercive nature of certain societal relationships); see also Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 162 (2017) (explaining the legalistic asymmetry in which “[a]n officer may be granted a qualitative excuse—a particularistic shield—once he has failed to follow Fourth Amendment conduct rules. But the layperson has no particularistic sword with which to challenge the legally authorized, yet morally problematic, intrusion”).

38. See *Blaming the Victim*, *supra* note 33, at 37 (“All a waiver [of rights] would do where the person truly feels coerced is mask the coercion. The lack of knowledge requirement should be understood as part of a general disregard for the power differential between police and suspect and part of search law’s project to dislocate the legal concept of coercion from the experience of the person facing police pressure.”).

The Supreme Court created the current consent doctrine fifty years ago.³⁹ It is time to abolish the consent loophole that sanctions otherwise blatantly unconstitutional searches, which legal scholars remain virtually unanimous in condemning.⁴⁰ Moreover, the consent loophole is not a minor issue, given that throughout the United States, consent is the primary justification for all warrantless police searches.⁴¹ Building on the critique, this Article zeros in on the question of remedy. The question is: what can civil rights advocates do right now, given that the Supreme Court no longer serves as a trusted venue for curtailing police violence, racial profiling, or their authority to target the powerless?

Part I of the Article canvasses recent efforts to reign in police harassment premised on consent. To date, no jurisdiction within the United States has fully eliminated consent searches. That includes individual states and cities.

Then, Part II argues that American civil rights advocates should look to Scotland for inspiration as their parliament eliminated consent

39. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226–27 (1973) (applying a totality of the circumstances approach, as opposed to bright line rules, when evaluating the voluntariness of a person’s consent to an officer’s request to search).

40. See Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 515 nn.9–11 (2015) (“The doctrine of Fourth Amendment consent is so schizophrenic that scholars can hardly use the term ‘voluntary consent’ without qualifying it. They refer to the ‘fictions’ of consent and voluntariness, dub consent searches ‘consent(less)’, and insist on placing the words *voluntary* and *consent* in quotation marks.”); see also DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 20, 31 (1999) (criticizing consent search cases); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 970–71 (2002) (advocating for an intersectional and individualistic assessment of consent); George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 541 (2003) (“Consent is an acid that has eaten away the Fourth Amendment.”); Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483, 1484 (2007) (arguing that Supreme Court’s consent jurisprudence requires a suspect to “demonstrate an extraordinary and unlikely degree of assertiveness, autonomy, and empowerment”); Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 28 (2008) (pointing out that most people understand requests to search as de facto commands); Timothy P. O’Neill, *Vagrants in Volvos: Ending Pretextual Traffic Stops and Consent Searches of Vehicles in Illinois*, 40 LOY. U. CHI. L.J. 745, 777 (2009) (“The ‘voluntary’ quality of the consent is chimerical.”).

41. See Susan A. Bandes, *Police Accountability and the Problem of Regulating Consent Searches*, 2018 U. ILL. L. REV. 1759, 1760 (2018) (finding that nationally, over ninety percent of police searches are accomplished through the consent exception to the Fourth Amendment).

searches for pedestrian stops with striking results.⁴² Before Scotland eliminated consent searches, Scottish police used stop-and-search methods four times as often as English police when adjusted for population; however, the two countries shared a similar crime index.⁴³ In 2016, after social scientists revealed this data, Scottish Parliament passed a law banning consent searches.⁴⁴ Harassment immediately decreased, with stop-and-search falling from 600,000 stops per year to 40,000 in the first year after the law went into effect.⁴⁵ There are strong parallels between Scottish law on stop-and-search compared to American stop-and-frisk. In addition, consent plays an outsized role in both countries in encouraging suspicionless stops. This Article argues

42. The Scottish Parliament passed the Criminal Justice (Scotland) Act in December 2015. POLICE SCOT., STOP AND SEARCH IMPROVEMENT PLAN 2016/17 – CODE PHASE III 7 (2016), <https://www.scotland.police.uk/spa-media/bwkduz2j/stop-and-search-improvement-plan-201617-code-phase-iii.pdf> [<https://perma.cc/2ZTF-TW2Z>]. The Act included a provision for a Code of Practice for Stop and Search in Scotland and came into force on May 11, 2017. *Id.*; POLICE SCOT., MANAGEMENT INFORMATION: NATIONAL STOP AND SEARCH DATABASE: QUARTERLY REPORT 2 (2021), <https://www.scotland.police.uk/spa-media/klbhokf4/stop-and-search-data-01-april-30-september-pdf-file.pdf> [<https://perma.cc/7MEQ-6YHD>].

43. Severin Carrell, *Police Stop and Search Rates in Scotland Four Times Higher than in England*, GUARDIAN (Jan. 16, 2014, 7:05 PM), <https://www.theguardian.com/uk-news/2014/jan/17/police-stop-and-search-scotland> [<https://perma.cc/G48N-2TMC>].

44. *Police Powers to Stop and Search, Enter Private Property and Seize Goods*, CITIZENS ADVICE SCOT., <https://www.citizensadvice.org.uk/scotland/law-and-courts/legal-system-s/police-s/police-powers-to-stop-and-search-enter-private-property-and-seize-goods-s> [<https://perma.cc/S6NS-RGDU>] (discussing Scotland's 2016 Criminal Justice Act, which prohibits a police officer from asking a person to consent to a search without a warrant or reasonable grounds).

45. *See Stop and Search in Europe*, POLSTOPS (June 11, 2020), <https://polstops.eu/events/workshop-governance-practice-police-stops> [<https://perma.cc/6CL2-2R93>].

This document presents the timeline of events from 2013 to 2017 which led to a comprehensive reform of the practice and governance of police stops in Scotland. Prior to reform, police officers in Scotland were recording about 600,000 stop searches per year, most of which were not based on statutory grounds and with very little oversight. Since the reform process, the internal and external oversight has been enhanced, the data based is more robust and detailed, and a Code of Practice is now in place. All stops in Scotland are now based on statutory grounds and have dropped to about 40,000 per year.

Id.; *see also Stop and Search Timeline of Events*, POLSTOPS, <https://polstops.eu/wp-content/uploads/2020/11/Stop-and-Search-timeline-of-events-for-COST.pdf> [<https://perma.cc/H8ER-H8Z4>] (detailing the review of the stop-and-search policy from 2013 to 2019).

that abolishing consent searches in the United States would similarly lead to a dramatic decrease in harassing police stops.

Lastly, Part III offers model legislation for the United States— included in the appendix—that can be adapted and adopted in every State to abolish consent as an excuse for otherwise unconstitutional searches.⁴⁶ Eliminating the consent doctrine is a straightforward endeavor that will go a long way toward eradicating suspicionless searches and racial profiling. Currently, the law puts the onus on people like Salehe Bembury to demonstrate that officers were unusually coercive in obtaining their assent to a search. Adding a paragraph or two to a state’s statutory code will remove that burden while simultaneously removing officers’ incentives to conduct unnecessary searches of individuals’ possessions and bodies.

Jurisdictions in the United States must follow Scotland’s example and eliminate consent searches through legislation.

I. U.S. REFORM EFFORTS ON CONSENT

A. *Legislating Change: Abolition, Warnings, or Written Consent*

In 2012, the City Council of Fayetteville, North Carolina, imposed a four-month moratorium on police consent searches as part of an effort to address racial profiling.⁴⁷ This moratorium is the closest any city has come to abolishing consent searches.⁴⁸ The police union sued to block the measure, and the state court judge granted a preliminary

46. There is tension between the movement to abolish the carceral state and the need to make incremental changes that are possible to alleviate suffering. Professor Amna Akbar lays out a method to distinguish useful reforms from those that simply reinforce the status quo. See generally Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020) (arguing that abolition requires first an understanding of the history of race and policing and the political economy of the carceral state and then a fundamental transformation of reform demands). Abolishing uncounseled consent searches fits within this framework. The incremental change must be part of the panoply of new laws that include changing the use of force codes and rewarding police officers who de-escalate encounters while ensuring consequences for officers who violate people’s rights and dignity.

47. *PBA Sues Fayetteville over Ban of Police Consent Searches*, LRIS (Feb. 23, 2012), <https://lris.com/2012/02/23/pba-sues-fayetteville-over-ban-of-police-consent-searches> [<https://perma.cc/LMT7-VNRL>].

48. The Rhode Island Legislature prohibits officers from asking for consent to search without reasonable suspicion or probable cause of criminal activity in traffic stops, pedestrian stops, and interactions with juveniles, which carries the additional procedural requirement of informing the juvenile of their right to refuse to consent. Cf. tit. 31 R.I. GEN. LAWS § 31-21.2-5(b) (2023).

injunction.⁴⁹ A decade later, no state or municipality within the United States has ended the consent excuse, the loophole that allows police to lawfully search without an iota of proof that the individual was engaged in wrongdoing.⁵⁰

At the end of the moratorium period, Fayetteville, North Carolina, imposed a reform to the consent doctrine requiring police to obtain written consent from the civilian.⁵¹ Similarly, the police chief in Dallas, Texas, directed his officers to capture the consent on audio and video from their squad cars or to obtain consent in writing.⁵²

Readers may be tempted to solve the consent problem as Fayetteville did by requiring police to warn people of their right to refuse. Certainly, it is troubling that people can waive their rights by consenting to searches without realizing they may decline. Nevertheless, warnings are not a solution. Take Salehe Bembury, who explained to officers that he was “super nervous.”⁵³ Why would someone in Salehe Bembury’s position trust an officer who reels off a script such as “you may say no, but I am asking to search you for weapons. Do you have any knives or weapons on you? Do you mind if I search?” This is an example of a *Miranda*-style warning that neither changes the power imbalance nor assures the civilian that a refusal will

49. *Rauhoff v. City of Fayetteville*, No. 12 CVS 1690, 2012 WL 12536472, at *1 (N.C. Super. Mar. 1, 2012).

50. Most recently, California attempted to ban consent searches during traffic stops lacking a warrant or any legal justification, but as many as two dozen democrats voted against the measure on final passage. See Hannah Wiley, *Police Flex Political Power at the California Capitol*, L.A. TIMES (June 8, 2023, 5:00 AM), <https://www.latimes.com/california/story/2023-06-08/police-unions-power-california-capitol-consent-searches-pretext-stops-canines-reform> [https://perma.cc/S53CJE86].

51. Frank R. Baumgartner, Derek Epp & Kelsey Shoub, *Summary of Fayetteville Stops and Searches Before and After Written Consent Ruling Effective 2 March 2012*, U.N.C. DEP’T POL. SCI. (June 16, 2015), <http://fbaum.unc.edu/TrafficStops/Reports2014/Baumgartner-Fayetteville-WrittenConsentAnalysis.pdf> [https://perma.cc/W5NJ-4NAK]. In October of 2010, there were allegations made that the Fayetteville Police Department had engaged in biased policing with regards to consent searches. POLICE EXEC. RSCH. F., CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 22 (2013), https://www.policeforum.org/assets/docs/Critical_Issues_Series/civil [https://perma.cc/33J5-72K4].

52. In Dallas, Texas, the police chief imposed written or recorded consent requirements on his own initiative without legislative or DOJ involvement. *Dallas Police to Get Written or Recorded Consent Before Searches*, DALL. NEWS (Feb. 11, 2013, 10:44 PM), <https://www.dallasnews.com/news/crime/2013/02/12/dallas-police-to-get-written-or-recorded-consent-before-searches> [https://perma.cc/X23A-LDF8].

53. See Moon, *supra* note 1.

not provoke negative repercussions.⁵⁴ Police kill over one thousand people annually, and Black people can view a steady diet of videos documenting the killing of unarmed Black civilians.⁵⁵ Perhaps Mr. Bembury saw the footage of the beating that Sacramento police gave to a jaywalker named Nandi Cain in 2017.⁵⁶

In 2002, long before the videos proved him right, Devon Carbado explained how Black people fear police officers too much to refuse police demands, no matter how nicely phrased.⁵⁷ Class and level of education may alter the dynamic between officer and civilian, but even an affluent Black executive felt compelled to cooperate with whatever the police asked.⁵⁸ Resisting police requests can appear futile if not suicidal, making verbal warnings irrelevant.

Written consent requirements are better than verbal warnings because they create paperwork. The additional burden of filling out forms may discourage officers from seeking consent to search.⁵⁹ On

54. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (requiring officers to prophylactically advise a person of their constitutional rights to silence and counsel prior to custodial interrogation); *supra* notes 31, 35 (discussing the enormous weight of authority, both legal and social, that officers wield over detainees).

55. See Bunn, *supra* note 30 (“According to data collected by The Washington Post, police shot and killed at least 1,055 people nationwide last year, the most since the newspaper began tracking fatal shootings by officers in 2015. That is more than the 1,021 shootings in 2020 and the 999 in 2019.”).

56. See *Sacramento Settles Lawsuit over Police Beating of Alleged Jaywalker*, L.A. TIMES (Apr. 6, 2018, 5:55 PM), <https://www.latimes.com/local/lanow/la-me-sacramento-police-jaywalker-20180406-story.html> [<https://perma.cc/6AH3-MW39>] (alleging an officer threw Nandi Cain to the ground over a jaywalking infraction and repeatedly punched him in the face); *Sacramento Police Dashcam Video of Violent Jaywalking Arrest*, YOUTUBE (Apr. 11, 2017), <https://www.youtube.com/watch?app=desktop&v=yOgx6I14sRI> [<https://perma.cc/84R6-LDE8>] (video of incident). A better-known California incident occurred in 2020 when a homeless man, Kurt Reinhold, was killed “in the midst of a mental health crisis when he was stopped for jaywalking.” Kim Bellware, *A Deputy Fatally Shot a Black Homeless Man During a Jaywalking Stop. He Won't Face Charges*, WASH. POST (Feb 12, 2022, 4:46 PM), <https://www.washingtonpost.com/nation/2022/02/12/kurt-reinhold-orange-county-homeless> [<https://perma.cc/3W4E-XMHW>].

57. See Carbado, *supra* note 40, at 1013–14 (explaining that Black people are often socialized to believe they should comply with police demands and make police officers racially comfortable, which results in higher rates of consent to intrusive searches).

58. See Moon, *supra* note 1 (describing how Los Angeles police stopped and searched a Black fashion executive and designer for jaywalking in a luxury shopping district).

59. Cf. Nancy Leong & Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS. L. REV. 751, 775 (2013) (noting that various states grant the police broad

the other hand, it does not change the power imbalance between officers and civilians. Civilians who fear police will sign a piece of paper waiving their rights as readily as they will verbally agree to a search.⁶⁰

In the 50 years since the Court decided that suspects in custody must be given *Miranda* warnings,⁶¹ there is a growing consensus among scholars and social scientists that *Miranda* warnings do not deliver on their promise.⁶² Despite the ubiquitous presence of *Miranda* warnings on television, four out of five people waive their rights after hearing them.⁶³ The most vulnerable individuals—those most in need of protection from police overreach—are the most likely to waive their rights.⁶⁴ Hence, other jurisdictions seeking to close the consent loophole should not look to warnings or written consent as the best model for change.

discretion in deciding whether to use consent forms, and officers often ask for verbal rather than written consent if using a form would be impractical or deter the suspect from consenting).

60. See *id.* at 752 (“[C]onsent forms do not prevent coercion. If an officer can use coercion or other psychological tactics to obtain verbal consent, surely, she can also do so to obtain a signature on a consent form.”).

61. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing that suspects in custodial interrogation must be informed of: their right to remain silent; the fact that their statements may be used against them; their right to consult with counsel and have counsel present during the interrogation; and their right to have counsel appointed if they are indigent).

62. See, e.g., Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 481 (1998) (noting that “police continue to elicit false confessions in the post-*Miranda* era”).

63. Kiera Janzen, *Coerced Fate: How Negotiation Models Lead to False Confessions*, 109 J. CRIM. L. & CRIMINOLOGY 71, 82–83 (2019).

64. See Emily Haney-Caron & Erika Fountain, *Young, Black, and Wrongfully Charged: A Cumulative Disadvantage Framework*, 125 DICK. L. REV. 653, 683 (2021) (“[D]uring a police interview, Black interviewees may be aware of stereotypes related to Black criminality and dishonesty and may experience pressure to appear both innocent and credible.”); Andrew Guthrie Ferguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 AM. CRIM. L. REV. 1437, 1454 (2012) (There is “a growing scientific understanding of brain science and forensic science about problems with *Miranda* waivers, especially involving vulnerable suspects such as people with intellectual disabilities, mental illness, and juveniles”); see also Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of Miranda Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157, 1176 (2017) (finding that very young children and individuals with intellectual disabilities often feel compelled to talk to police regardless of whether and how they received *Miranda* warnings).

B. *Changing Consent Through DOJ Settlements*

Some cities reformed police consent searches through settlements with the Department of Justice (DOJ).⁶⁵ These settlements were reached after the DOJ initiated a pattern of practice investigation based on allegations of widespread violation of constitutional rights.⁶⁶

New Orleans is the most recent example of how DOJ settlements can change the status quo on consent searches. The DOJ began investigating the New Orleans Police Department (NOPD) in 2010 for an alleged pattern of civil rights violations.⁶⁷ Although the initial consent decree of 2013 did not address consent searches, the settlement authorized the monitor to add new provisions as needed.⁶⁸ In 2020, the monitor found that New Orleans' police department had made progress in many areas but had not fully met the consent decree

65. *With No Police Shootings in 2020, Newark Makes Case for Consent Decrees*, KSBYNEWS (May 6, 2021, 1:45 PM), <https://www.ksby.com/national/newsy/with-no-police-shootings-in-2020-newark-makes-case-for-consent-decrees> [<https://perma.cc/BY5M-GGSU>].

66. *Id.*

67. *See* United States v. City of New Orleans, No. 12-1924, 2012 WL 12990388, at *1 (E.D. La. Aug. 31, 2012) (“The Complaint . . . was brought . . . to remedy an alleged pattern or practice of conduct by the New Orleans Police Department (the “NOPD”) that subjects individuals to excessive force in violation of the Fourth Amendment, unlawful searches and seizures . . . and discriminatory policing practices”); *see also* Campbell Robertson, *Justice Department to Review New Orleans’ Troubled Police Force*, N.Y. TIMES (May 17, 2010), <https://www.nytimes.com/2010/05/18/us/18orleans.html> [<https://perma.cc/DYE7-C38A>] (describing the reform process beginning in New Orleans after the mayor publicly asked for federal intervention to address reducing crime, restoring public trust in law enforcement, and protecting the rule of law); *NOPD Consent Decree*, NOLA.GOV (last updated June 29, 2023), <https://www.nola.gov/nopd/nopd-consent-decree> [<https://perma.cc/R878-SWH8>] (“In May 2010, at the invitation of Mayor Mitchell J. Landrieu, the United States Department of Justice (DOJ) began investigating an alleged pattern of civil rights violations and other misconduct by the New Orleans Police Department (NOPD).”).

68. Amended & Restated Consent Decree Regarding the New Orleans Police Department ¶ 116, *City of New Orleans*, No. 12-CV-01924, at *1. *See generally* U.S. DEP’T JUST., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [<https://perma.cc/WD5Q-7XV9>] (detailing DOJ findings of civil rights violations and unconstitutional practices within NOPD); NEW ORLEANS POLICE DEP’T, OPERATIONS MANUAL, CHAPTER: 1.2.4, TITLE: SEARCH AND SEIZURE (2016), <https://nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-1-2-4-Search-and-Seizure.pdf> [<https://perma.cc/NM6N-2SC6>] (establishing standards for searches and seizures, including searches of persons in custody, that New Orleans police are required to follow in their operations).

targets for reforming stops, searches, and arrests.⁶⁹ Even under federal oversight, the racial disparity between the police department's stops of Black subjects and other races had grown.⁷⁰ To remedy this, several terms were added to the NOPD Manual, including new rules on consent searches.⁷¹ These changes went into effect on May 12, 2021.⁷²

The settlement update to the police department manual essentially adds three provisions that limit consent searches: (1) police now must administer a *Miranda*-type warning for consent searches; (2) officers must seek pre-approval from a supervisor; and (3) a third provision requires an attorney or guardian, but this only applies to juveniles.⁷³

FIRST, THE WARNING. "When an officer seeks consent for a search, the officer shall affirmatively inform the subject of his or her right to refuse and to revoke consent at any time."⁷⁴ In addition to the oral warning, the search subject must sign their initials to show they have been warned.⁷⁵ As described earlier in this Article, warnings do not protect the most vulnerable, although the burden of filing extra

69. See generally *2018 Stop and Search Annual Report*, NOLA.GOV (2018), <https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/2018-Stop-and-Search-Annual-Report.pdf> [<https://perma.cc/V6GY-B7BT>].

70. See *id.* (explaining that the consent decree requires NOPD to publish a report on its stop, search, and arrest data each year, and for 2018, about three of every four people NOPD stopped – 74% were Black; U.S. Census Bureau statistics show Black people make up about 60% of New Orleans' population); see also Emily Lane, *WDSU Investigates: 3 out of 4 People NOPD Stops Are Black, Racial Disparity Has Grown*, WDSU NEWS (last updated Nov. 18, 2020, 9:41 AM), <https://www.wdsu.com/article/wdsu-investigates-3-out-of-4-people-nopd-stops-are-black-data-show/34705104> [<https://perma.cc/NW7T-MNJ5>].

71. NEW ORLEANS POLICE DEP'T, OPERATIONS MANUAL, CHAPTER: 1.2.4, TITLE: SEARCH AND SEIZURE, *supra* note 68, at ch. 1.2.4. §§ 21, 23, 24 (revised May 12, 2021), in NOPD CONSENT DECREE MONITOR NEW ORLEANS, LOUISIANA 5 [hereinafter NOPD CONSENT DECREE MONITOR 2021] <http://nopdconsent.azurewebsites.net/Media/Default/Documents/Policies/Chapter> [<https://perma.cc/6K8B-Z39T>].

72. NOPD CONSENT DECREE MONITOR 2021, *supra* note 71, at 1.

73. *Id.* §§ 21–24.

74. *Id.* § 24 (incorporating the requirements of amended Consent Decree and approved by the Monitor); see also Amended & Restated Consent Decree Regarding the New Orleans Police Department ¶ 129, *United States v. New Orleans*, No. 12-CV-01924 (E.D. La. Oct. 2, 2018) ("Where an officer seeks consent for a search, the officer shall affirmatively inform the subject of his or her right to refuse and to revoke consent at any time, and document the subject's consent on a written form that explains these rights.").

75. See NOPD CONSENT DECREE MONITOR 2021, *supra* note 71, § 24(f)–(g).

reports may reduce consent searches.⁷⁶ Ironically, police must also ask the subject for their initials, “indicating the officer(s) did not make any promises in return for cooperation to the person to obtain consent” and sign again in another place, “indicating the officer(s) did not threaten or coerce the person to obtain consent.”⁷⁷ The irony is that when civilians feel threatened or coerced, they are more likely to sign their initials, attesting to no threats or coercion.

SECOND, THE PRE-APPROVAL REQUIREMENT. New Orleans will now require supervisors to approve consent searches beforehand and sign the paperwork attesting to this at the end.⁷⁸ The paperwork and pre-approval requirements apply to motor vehicle searches and street stops.⁷⁹ Given the courts’ general acceptance of consent searches, one would predict that police supervisors will grant these requests. Nevertheless, requiring supervisory approval will discourage some consent searches simply by virtue of police aversion to these cumbersome steps, especially on top of new paperwork required to demonstrate that the officer warned the civilian. It is too early to know whether officers will still execute consent searches while skipping the

76. See *supra* notes 59–64 and accompanying text (discussing the advantages of consent forms while noting that vulnerable individuals frequently waive their *Miranda* rights).

77. NOPD CONSENT DECREE MONITOR 2021, *supra* note 71, § 21(f)–(g). The NOLA consent decree builds upon the Newark consent decree. See *Justice Department Reaches Agreement with City of Newark, New Jersey to Reform Police Department’s Unconstitutional Practices*, U.S. DEP’T JUST. (Mar. 30, 2016), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-newark-new-jersey-reform-police-department-s> [<https://perma.cc/Z9D9-6WFD>]; NEWARK POLICE DIVISION, NEWARK POLICE DIVISION GENERAL ORDER: SEARCHES WITHOUT A SEARCH WARRANT 18–15 (2018) [hereinafter NEWARK CONSENT DECREE], <https://www.newarkpdmonitor.com/wp-content/uploads/2019/04/Searches-Policy.pdf> [<https://perma.cc/LTD6-ZKG2>]. Newark also required a warning and supervisors to approve consent searches beforehand but did not require subjects to sign. *Id.* (“The Newark Police Division requires that an officer seeking consent for a search affirmatively inform the consenting party of the right to refuse and to revoke consent at any time The Officer will have the consenting party . . . sign the Consent to Search form only if the party understands the waiver of their rights.”).

78. See Amended & Restated Consent Decree Regarding the New Orleans Police Department ¶ 128, *United States v. New Orleans*, No. 12-CV-01924 (E.D. La. Oct. 2, 2018) (“An officer shall immediately notify a supervisor when considering a search based on consent, and the supervisor shall approve the search before it is conducted.”).

79. See NOPD CONSENT DECREE MONITOR 2021, *supra* note 71, § 24(e) (requiring an officer to indicate on a form “if the consent relates to the search of the person, his/her vehicle, or residence (it can be more than one)”).

paperwork, except when police find contraband and initiate an arrest. Such conduct would violate the new rules in substance and spirit but would allow police to maintain current levels of consent searches. Only an outright ban on the consent excuse would close off this shortcut.

Like warnings, pre-approval requirements add roadblocks for police, but neither addresses the central problems inherent in consent searches. The very existence of the consent exception encourages police to engage in meritless race-based searches. After all, police do not need consent if they have a reasonable, evidence-based belief that the person stopped possesses contraband.⁸⁰ Another central problem is the power imbalance; people waive their rights because they know that officers might retaliate against those they perceive as uncooperative.⁸¹ Race, age, gender, and LGBTQ status can impact civilians' power differential and vulnerability.⁸² Victim blaming compounds these harms, an inescapable offshoot of the consent doctrine. For example, if the police found contraband on Salehe Bembury during the search, a judge would allow the evidence to be submitted against him at trial based on the consent loophole. In essence, the law would instruct Mr. Bembury that the arrest and conviction were his fault due to his own fateful decision to waive his constitutional rights during the encounter.⁸³

80. *Terry v. Ohio*, 392 U.S. 1, 10–11 (1968).

81. Newark's 2016 consent decree requires an officer seeking consent to search to affirmatively inform the consenting party of the right to refuse and revoke consent at any time as well as use the Consent to Search form (DPI:1493-10M). *See* NEWARK CONSENT DECREE, *supra* note 77, at 7. The officer must explain the terms of the form and have the consenting party sign the Consent to Search form only if the party understands the waiver of their rights. *Id.*; *cf., e.g.*, George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: "Embedded" in our National Culture?*, 29 CRIME & JUST. 203, 247 (2002) (citing research finding that some suspects in custodial interrogation comply with police demands because they "fear that by failing to cooperate they will anger their interrogators, who may thereby retaliate against them").

82. *See, e.g.*, Ferguson, *supra* note 64, at 1454, 1456 (identifying juveniles, and those under sixteen years old especially, as a particularly vulnerable group to *Miranda* waivers); *see also* Ashley N. Jackson, Lisa Fedina, Jordan DeVlyder & Richard P. Barth, *Police Violence and Associations With Public Perceptions of the Police*, 12 J. SOC'Y FOR SOC. WORK & RSCH. 303, 304 (explaining that police more frequently commit violence, harassment, and discrimination against racial minorities, members of the LGBT community, and those with lower income and education).

83. For more on how the consent loophole constitutes victim-blaming, see generally ROSS, A FEMINIST CRITIQUE OF POLICE STOPS, *supra* note 20, at 72 ("Just as rape

THIRD, SEARCHES OF JUVENILES. When it comes to juveniles, the recent New Orleans settlement creates a simple, far-reaching change for consent searches: “A juvenile cannot waive his/her rights and consent to a search without first being allowed to engage in a meaningful consultation with an attorney or an informed parent, guardian, or other adult interested in his or her welfare.”⁸⁴ With these thirty-eight words, the police department manual radically changed youth policing in New Orleans. This change connects to the power imbalance between officers and civilians. As the parties understood, knowledge alone is not enough to ensure that consent is voluntary for juveniles.⁸⁵ Juvenile suspects need help navigating the situation. The change recognizes that juveniles are likely to see police as the authority figures they are.⁸⁶ Moreover, juvenile suspects may also fear the police.⁸⁷ Here, the added section to the Police Manual addresses and rectifies the issue at its core.

victims have been told they ‘asked for it’ by not running or fighting back, stop-and-frisk victims are often told they asked for it by submissively extending their arms to be searched. They are told it is their fault that the police touched their thighs or looked in their pockets. They are told that they should have resisted the police incursion, even if resistance risked triggering further charges or unpleasant responses from the police.”).

84. NOPD CONSENT DECREE MONITOR 2021, *supra* note 71, § 21.

85. *See, e.g.*, Ferguson, *supra* note 64, at 1454–57 (finding that a factual understanding of *Miranda* rights among juveniles does not amount to a full appreciation of those rights).

86. *Id.* at 1466 (noting that “juveniles tend to be more deferential to authority figures such as interrogating police officers”).

87. *See* METROPOLITAN POLICE DEPARTMENT PERFORMANCE OVERSIGHT HEARING: TESTIMONY OF EDUARDO R. FERRER (2021), <https://www.law.georgetown.edu/wp-content/uploads/2021/03/MPD-Performance-Oversight-Testimony-FY20-Ferrer.pdf> [<https://perma.cc/TX7Y-J9PV>] (“Black youth . . . living in over-policed areas often feel compelled to consent to searches based on their own personal, often traumatic, experiences with law enforcement and the historical experiences of police violence against Black people in DC.”). Professor Ferrer is a strong proponent of D.C. Council Bill 24-306, the Youth Rights Amendment Act of 2021, that would ban consent searches for people under eighteen years of age. *See* Donovan J. Thomas, *Juvenile Justice Advocates and Police at Odds over Reform Bill*, WASH. POST (Dec. 11, 2021, 3:27 PM), <https://www.washingtonpost.com/dc-md-va/2021/12/11/dc-juvenile-justice-reform> [<https://perma.cc/KU7J-U8X8>] (explaining that Professor Ferrer and other juvenile justice advocates support consent search reform because young people are more easily susceptible to consenting to police, which in turn gives police officers permission to “search their bags, get them to waive their rights and talk in situations where an adult would not”).

The right to consult provision in the New Orleans consent decree represents the most progressive change to date on consent searches in the United States. Nevertheless, this provision is imperfect. For example, many parents and guardians cannot protect juveniles. Consider the example of the exonerated Central Park Five, where only one of the five parents or guardians was able to resist the police pressure and prevent their child from waiving his *Miranda* rights.⁸⁸ Instead, the provision should require “a meaningful consultation with an attorney,” full stop.

Ideally, the attorney provision would encompass adults as well as juveniles. Adults should also waive their rights to refuse a search only after “first being allowed to engage in a meaningful consultation with an attorney.” Research establishes that while adults are less vulnerable than children when interacting with police, they are still vulnerable.⁸⁹ The Central Park Five guardians failed to protect their children due to their own lack of status vis-à-vis the police.⁹⁰ Like juveniles, adults view police as authority figures and may fear that police will retaliate by arresting them or using physical force or restraint.⁹¹ Nor are these fears unwarranted. We endow police with the authority to arrest and a

88. See *WHEN THEY SEE US* (Netflix 2019) (Dramatization of Central Park Five) (depicting Yusef Salaam, who does not give a confession because his mother takes him away); see also M. Dyan McGuire, *Miranda is Not Enough: What Every Parent in the United States Should Know About Protecting Their Child*, 2 J.L. & CRIM. JUST. 299, 305 (2014) (noting that 80% of adult suspects waive their rights, and over 90% of children waive their rights).

89. See, e.g., Slobogin, *supra* note 64, at 1176–77 (noting that adults with disabilities often feel compelled to talk to police despite receiving *Miranda* warnings); Ferguson, *supra* note 64, at 1455–56 (reporting that 21% of adult offenders “do not understand the right to silence in an interrogation”); cf. William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 994 (2001) (stating that *Miranda* warnings fail to offer sufficient protection to vulnerable individuals).

90. See Kate Storey, *‘When They See Us’ Shows the Disturbing Truth About How False Confessions Happen*, ESQUIRE (June 1, 2019), <https://www.esquire.com/entertainment/a27574472/when-they-see-us-central-park-5-false-confessions> [<https://perma.cc/TY6Z-JDN6>] (“There’s a lack of understanding about the relationship between people of color and the police . . . [i]t’s scary to be [B]lack and [B]rown and face a police officer, let alone you’re a minor who doesn’t know your rights [and] your parents are not educated on their rights.”).

91. Cf., e.g., Patia Braithwaite & Tiffanie Graham, *The Toll of Police Violence on Black People’s Mental Health*, N.Y. TIMES (May 25, 2023), <https://www.nytimes.com/interactive/2023/05/25/well/mind/black-mental-health-police-violence.html> [<https://perma.cc/HT69-9XMG>] (highlighting widespread fear of police brutality among Black adults “across generations and socioeconomic groups”).

monopoly on state-sanctioned violence.⁹² Except in highly unusual situations, such as the January 6, 2021 uprising at the U.S. Capitol, police hold all the cards during encounters between police and civilians.⁹³

Of all the well-meaning provisions discussed above, the most far-reaching is New Orleans' ban on all consent searches unless the juvenile speaks to a lawyer or declines to talk to a lawyer when presented with a meaningful opportunity to do so.⁹⁴ This directive goes further than any jurisdiction yet and addresses the root of what is wrong with consent: what passes for consent is never consensual.⁹⁵ Almost everyone would prefer not to be searched if this were truly a choice. Civil rights proponents should build upon the New Orleans provision and abolish consent searches except when a person is given a meaningful opportunity to consult a lawyer.

Because there are no United States precedents for abolishing consent searches for adults and juveniles, one must look outside our borders for analogs.

II. SCOTLAND

What happened in Scotland seems remarkable to an American eye, both for the speed of the policing reform and how the country resolved the problem of consent searches. In 2016, unlike any U.S. city or state, Scotland fully abolished consent searches for pedestrian stops.⁹⁶ Stop-and-search in Scotland is similar to stop-and-frisk in the United States, although some legal distinctions will be articulated below. A doctoral student at the University of Edinburgh, Kath Murray, ignited the change in 2014 when she published data from 2005 to 2010 that

92. See generally UNIV. CHI. L. SCH. GLOB. HUM. RTS. CLINIC, DEADLY DISCRETION: THE FAILURE OF POLICE USE OF FORCE POLICIES TO MEET FUNDAMENTAL INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS (2020), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1014&context=ihrc> [<https://perma.cc/JY4R-CPXN>] (designating police abuses in the United States as forms of state-sanctioned violence).

93. See Susan Dominus & Luke Broadwater, *The Capitol Police and the Scars of Jan. 6*, N.Y. TIMES (updated Jan. 7, 2022), <https://www.nytimes.com/2022/01/04/magazine/jan-6-capitol-police-officers.html> [<https://perma.cc/7JBT-MYM4>] (recalling “[t]he police were clearly outnumbered”).

94. NOPD CONSENT DECREE MONITOR 2021, *supra* note 71, § 21.

95. See *Blaming the Victim*, *supra* note 33, at 2 (arguing that the Fourth Amendment consent doctrine focuses on police use of force and coercion rather than on true consent).

96. Criminal Justice Act 2016, c. 1, §§ 1, 3 (Scot.), <https://www.legislation.gov.uk/asp/2016/1/part/1> [<https://perma.cc/X74N-2N8J>].

revealed excessive police searches in some regions of Scotland, with most of these searches based on the voluntary consent of the person searched.⁹⁷

Further research by Dr. Murray revealed that police searches grew 550 percent in Scotland between 2005 and 2013.⁹⁸ By 2013, search rates in Scotland were seven times higher per capita than in England, although crime rates were no worse in Scotland.⁹⁹ In one police district in Scotland, the rate of searches exceeded the New York City per capita frisk rate in 2012, when the New York Police Department (NYPD) engaged in programmatic stop-and-frisk that a federal judge found unconstitutional.¹⁰⁰

Once the national press reported the researcher's findings, the Scottish government appointed an independent Advisory Group to study the stop-and-search power.¹⁰¹ The Advisory Group was charged with determining whether the police should reduce the use of consensual stops or whether "there should be an absolute cessation of the practice."¹⁰² The Advisory Group selected the more radical route.

97. KATH MURRAY, STOP AND SEARCH IN SCOTLAND: AN EVALUATION OF POLICE PRACTICE 4, 19–23 (2014) [hereinafter STOP AND SEARCH IN SCOTLAND], http://www.sccjr.ac.uk/wpcontent/uploads/2014/01/Stop_and_Search_in_Scotland1.pdf [<https://perma.cc/KJ6D-GZ9Y>]; see also Megan O'Neill & Liz Aston, *Fighting Knife Crime: If Police Worked Closely with Academic Experts, They'd Be Less Gung-Ho About Stop and Search*, CONVERSATION (May 7, 2019, 11:48 AM), <https://theconversation.com/fighting-knife-crime-if-police-worked-closely-with-academic-experts-theyd-be-less-gung-ho-about-stop-and-search-114837> [<https://perma.cc/8CDK-DZ7U>] (explaining how the Scottish police reform process sought to tackle excessive consent searches).

98. Kath Murray & Diarmaid Harkin, *Policing in Cool and Hot Climates: Legitimacy, Power and the Rise and Fall of Mass Stop and Search in Scotland*, 57 BRIT. J. CRIMINOLOGY 885, 894 (2017).

99. *Id.*; see also *Recorded Crime in Scotland, 2013–14*, SCOT. GOV'T (Nov. 25, 2014), <https://www.gov.scot/publications/recorded-crime-scotland-2013-14> [<https://perma.cc/ZA99-STJT>] (explaining that crime rates in 2013–14 were the lowest level since 1974, with only 270,397 total crimes recorded by the police).

100. STOP AND SEARCH IN SCOTLAND, *supra* note 97, at pt. 2.5 ("By way of insightful comparison, the rate of stop-and-search in legacy Strathclyde in 2012/13, was over four times higher than the rate of stop-and-frisk in New York City in 2012."); *Floyd v. City of New York*, 283 F.R.D. 153, 162, 178 (S.D.N.Y. 2012) (finding that NYPD's stop-and-frisk program reflects a troubling apathy toward fundamental constitutional rights).

101. *John Scott QC to Chair New Stop and Search Advisory Group*, LAW SOC'Y OF SCOT. (Mar. 31, 2015), <https://www.lawscot.org.uk/news-and-events/legal-news/john-scott-qc-to-chair-new-stop-and-search-advisory-group> [<https://perma.cc/7SLC-6CZ4>].

102. *Id.* The group was asked to make recommendations to Scottish ministers on questions concerning the presumption against consensual stop-and-search and any additional measures that should be taken. *Id.*

Rather than merely shrinking the number of situations the police could rely on consent or recommending minor reforms such as written warnings, the Advisory Group recognized that consent searches are not truly consensual and proposed abolition.¹⁰³

With the stroke of a pen in 2015, the Scottish Parliament abolished consent searches and codified many of the Advisory Group's recommendations.¹⁰⁴ Scotland divided police searching power into two distinct categories: "statutory searches," which describe searches based on reasonable suspicion, and consent searches, for which constables only needed the voluntary agreement of the person searched.¹⁰⁵ The *Code of Practice for Police Constables Exercising the Power of Stop and Search* now reads: "Constables must not search a person, even if they are prepared to submit to a search voluntarily, where no statutory power to search is applicable, and they have no warrant to do so."¹⁰⁶ The

103. THE REPORT OF THE ADVISORY GROUP ON STOP AND SEARCH 15–16 (2015), <https://webarchive.nrscotland.gov.uk/3000/https://www.gov.scot/Resource/0048/00484527.pdf> [<https://perma.cc/25VG-4EEE>]. The Advisory Group reported their recommendations to the Cabinet Secretary for Justice. *Id.* at 1; *see also* SCOT. GOV'T, SUPPLEMENTARY REPORT BY THE ADVISORY GROUP ON STOP AND SEARCH, 2–3 (2017), https://archive2021.parliament.scot/S5_JusticeSubCommitteeOnPolicing/Inquiries/John_Scott_QC.pdf [<https://perma.cc/8EKA-6Z5M>] (presenting the outcome of the consultation process on two recommendations of the Advisory Group Report and recommending that no new power to stop-and-search children for alcohol be introduced).

104. The Scottish Parliament passed the law that ended consent searches in December 2015, approximately two years after Kath Murray published her findings in January 2014. *See Changing Stop and Search Legislation in Scotland*, ECON. & SOC. RSCH. COUNCIL (June 2016), <https://webarchive.nationalarchives.gov.uk/ukgwa/20170110121223/http://www.esrc.ac.uk/news-events-and-publications/impact-case-studies/changing-stop-and-search-legislation-in-scotland/div.autocomplete-suggestion> [<https://perma.cc/F2KA-HQQ5>].

105. *Id.*

106. SCOT. GOV'T, CODE OF PRACTICE ON THE EXERCISE BY CONSTABLES OF POWERS OF STOP AND SEARCH OF THE PERSON IN SCOTLAND, pt. 2 § 3.3 (Jan. 11, 2017) [hereinafter SCOTTISH CONSTABLES' PRACTICE], <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2017/01/code-practice-exercise-constables-power-stop-search-person-scotland/documents/00512924-pdf/00512924-pdf/govscot%3Adocument/00512924.pdf> [<https://perma.cc/LKH7-QN6R>]; *see also Police Powers to Stop and Search, Enter Private Property and Seize Goods*, ADVICE FOR SCOT., <https://www.citizensadvice.org.uk/scotland/law-and-courts/legal-system-s/police-s/police-powers-to-stop-and-search-enter-private-property-and-seize-goods-s> [<https://perma.cc/2N59-KMVK>] ("Under s65 of the Criminal Justice (Scotland) Act of 2016 you can't be asked to volunteer or consent to be searched.").

Scottish police could no longer justify a search of someone's bag or pockets based on voluntary agreement.

A. *Stop-and-Search Compared to Stop-and-Frisk*

Context is required to understand the consent searches in Scotland. This Section examines the similarities and differences between stop-and-search in Scotland versus stop-and-frisk in the United States. It also details the similarities between Scottish and American concepts of consent.

The law on consent searches during pedestrian stops was strikingly similar in the United States and Scotland before it was abolished. First, in both countries, consent must be “voluntary” to serve as a waiver of rights.¹⁰⁷ Second, officers in both countries need not explain to pedestrians that they have a right to refuse.¹⁰⁸ Third, to target someone for a consent search, police do not require proof of criminal behavior nor valid reasons for their suspicions.¹⁰⁹ For Scotland and the United States, consent circumvented the usual law requiring police to suspect wrongdoing before turning out pockets.¹¹⁰ Fourth, the police-civilian power imbalance discussed in the Salehe Bembury example also exists in Scotland. When a Scottish police agency later reviewed the police generated data, they “could find no evidence of recording of instances where individuals had declined to consent” when asked.¹¹¹

107. See STOP AND SEARCH IN SCOTLAND, *supra* note 97, at pt. 1.3 (“Officers in Scotland can stop-and-search people on a non-statutory basis, more commonly known as a ‘voluntary’ or ‘consensual’ search. Non-statutory stop-and-search is based on verbal consent”); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (holding that when the State is justifying a search based on consent, consent has to be voluntarily given, consent cannot be a result of duress or coercion, and voluntariness is a question of fact to be determined based on all the circumstances).

108. STOP AND SEARCH IN SCOTLAND, *supra* note 97, at pt. 4.3 (“[T]here is *no duty on officers to inform* a person of their right to refuse a non-statutory search.”).

109. See *Fourth Amendment*, CORNELL L. SCH.: LEGAL INFO. INST. (updated May 2023), https://www.law.cornell.edu/wex/fourth_amendment [<https://perma.cc/RM6D-VH8D>] (expounding how various exceptions to the Fourth Amendment warrant requirement allow police to conduct warrantless, suspicion-based searches).

110. See *id.* (explaining that warrantless searches may be lawful under the Fourth Amendment if the suspect consents to the search); STOP AND SEARCH IN SCOTLAND, *supra* note 97, at pt. 1.3 (“Non-statutory stop and search is based on verbal consent and does *not* require reasonable suspicion.”).

111. SCOT. POLICE AUTH., SCRUTINY REVIEW – POLICE SCOTLAND’S STOP AND SEARCH POLICY AND PRACTICE: FINAL REPORT AND RECOMMENDATIONS 20 (2014) [hereinafter SCOTLAND POLICE’S SCRUTINY REVIEW], <https://polstops.eu/wp-content/uploads/2020>

Scottish stop-and-search and American stop-and-frisk serve the same goals. Scottish law allows police to use stop-and-search as “an investigative tool to allay or confirm an officer’s suspicions.”¹¹² The U.S. Supreme Court set forth this same policy justification for stop-and-frisk.¹¹³ In parts of Scotland, police policy directed officers to aggressively use stop-and-search as a preventative measure to discourage segments of the population from carrying weapons.¹¹⁴ The same justification was given for New York City’s programmatic stop-and-frisk policy.¹¹⁵

However, there are differences between Scottish and American searches accomplished without consent. Consent searches aside, the Scottish police power derives from statutes, which allow Scottish police to search without a warrant when they have a reasonable suspicion that a person carries an illegal knife, a gun, illicit drugs, or stolen property, or any of a few other enumerated items.¹¹⁶ That is why most Scottish police searches are referred to as “statutory stop-and-search,” while searches based on consent are called “non-statutory” searches.¹¹⁷ In contrast, American police do not need statutory approval to conduct searches.¹¹⁸ American police may exercise any power not otherwise prohibited by the federal or state constitutions or other duly enacted

/11/1-SPA-Stop-and-Search-Report-published-30-May-2014.pdf [https://perma.cc/PW6M-LWCE].

112. STOP AND SEARCH IN SCOTLAND, *supra* note 97, at pt. 1.1.

113. *Terry v. Ohio*, 392 U.S. 1, 10 (1968).

114. See STOP AND SEARCH IN SCOTLAND, *supra* note 97, at pt. 6.1 (discussing the aims of the “stop-and-search” policy as a deterrence measure); see also SCOTLAND POLICE’S SCRUTINY REVIEW, *supra* note 111, at 17 (noting the stop-and-search tactic has been effective in detecting weapons).

115. See Kate Taylor, *Stop-and-Frisk Policy ‘Saves Lives,’ Mayor Tells Black Congregation*, N.Y. TIMES (June 10, 2012), <https://www.nytimes.com/2012/06/11/nyregion/at-black-church-in-brooklyn-bloomberg-defends-stop-and-frisk-policy.html> [https://perma.cc/GPT9-VL8Z] (“By making it ‘too hot to carry,’ the N.Y.P.D. is preventing guns from being carried on our streets That is our real goal—preventing violence before it occurs, not responding to the victims after the fact.”).

116. For a list of the search items and the corresponding statutes, see SCOTLAND POLICE’S SCRUTINY REVIEW, *supra* note 111, at 7. Note that special search powers are provided for sporting events. *Id.*

117. See STOP AND SEARCH IN SCOTLAND, *supra* note 97, at 1 (“‘Stop-and-search’ refers to a range of police powers, both statutory (underpinned by legislation), and non-statutory (based on verbal consent).”).

118. Instead, the U.S. Supreme Court has ruled that the Fourth Amendment defines the parameters of constitutional searches and seizures. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 223 (1973).

laws.¹¹⁹ Officers in the United States operate under guidelines created by police departments, which can be changed anytime.

This distinction on where police derive their searching authority may help explain Scotland's successful elimination of consent searches ahead of the United States. The U.S. Supreme Court created the consent search doctrine, just as a Scottish Court did, but for Americans, that judicial creation hardly presents an anomaly.¹²⁰ Accustomed to nine justices on the Supreme Court establishing what police can and cannot do, Americans tend to view consent searches as immutable, woven into the Fourth Amendment exceptions created and shaped by the Court.¹²¹

When police rely on something other than consent, the law diverges regarding the quantity of suspicion the two countries require. Scottish police need "reasonable suspicion" that a person carries an illegal knife, gun, drugs, or stolen property before they may look through someone's pockets or bag.¹²² A Scottish officer with reasonable suspicion that the person carries an illegal weapon may conduct a full search of that person, not just a pat-down.¹²³ In contrast, for full searches, American officers need "probable cause" to believe they will find evidence of a crime, a higher standard than reasonable suspicion.¹²⁴ Although Supreme Court case law allows American police to frisk for weapons based on reasonable suspicion, this frisking authority is limited to patting the outside of the civilian's clothing.¹²⁵

These legal distinctions may not matter much in practice. First, even though American police are not authorized to check pockets based on reasonable suspicion, the American frisk (based on reasonable

119. *Police Powers*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/police_powers [<https://perma.cc/K6FD-HVEF>] (last updated Dec. 2020).

120. *Schneckloth*, 412 U.S. at 223.

121. *See, e.g., id.*, at 248 (holding that the Fourth Amendment requires consent to be given voluntarily to justify an unwarranted police search).

122. STOP AND SEARCH IN SCOTLAND, *supra* note 97, at pt. 1.1 (adding that special search powers are provided for sporting events).

123. *Id.* (explaining that 29% of statutory searches in 2010 were because of reasonable suspicion of offensive weapons).

124. Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 UCLAL. REV. 1508, 1520 (2017) [hereinafter *Stop and Frisk to Shoot and Kill*] (analyzing the Supreme Court's decision in *Terry* as splitting the search and seizure requirement of "probable cause" from the stop-and-frisk requirement of "reasonable suspicion").

125. *Terry v. Ohio*, 392 U.S. 1, 10 (1968) (explaining that frisks must be based on reasonable suspicion that a suspect carries a weapon and presents a threat).

suspicion) is immensely intrusive, as police departments train police to rub the breast and groin areas of a person's body.¹²⁶ Second, frisks American officers perform based on reasonable suspicion may lead to full-blown searches. Even though the frisk is supposed to be a limited search for weapons, it is not a secret that American police employ the tactic to ferret out drugs. During pat-downs in the United States, if when feeling the outside of a person's clothing it becomes "immediately apparent" that the officer feels what he knows to be illegal contraband or evidence of a crime, the officer may search the person's pockets and any other property that person is carrying.¹²⁷

Third, Scotland offers procedural protection to those stopped and searched. Before a Scottish officer conducts a statutory stop-and-search based on reasonable suspicion, they must announce their purpose, and that purpose must link to one of the enumerated reasons passed by Parliament.¹²⁸ For example, before the search begins, the officer announces that he has reasonable suspicion to believe that the civilian possesses an illegal knife. This makes it more challenging to predicate the justification on what the officer finds after the fact.

Consider how these legal differences might play out in the context of drug investigations. Scottish police will announce they are searching for drugs if they have reasonable suspicion to believe an individual carries them.¹²⁹ Meanwhile, when American police search for drugs,

126. See generally Josephine Ross, *What the #MeToo Campaign Teaches About Stop and Frisk*, 54 IDAHO L. REV. 543 (2018) (comparing sexual harassment in the #MeToo movement to police sexual misconduct during Terry stops); Seth W. Stoughton, *Terry v. Ohio and the (Un)Forgettable Frisk*, 15 OHIO ST. J. CRIM. L. 19 (2017) (criticizing the physicality and intrusive nature of frisk procedures by recounting his training and personal experiences as a police officer); ROSS, A FEMINIST CRITIQUE OF POLICE STOPS, *supra* note 20, at 125 ("[F]risks can be demeaning, even when they are done by the book. What the teenager at Youth Court experienced as 'like a rape' might have been an intentional humiliation, a standard by-the-book frisk, or a combination of the two."). In Scotland, police guidance for stop-and-search includes feeling inside pockets but does not include groins. *Stop and Search: Guidance*, SCOT. GOV'T (May 11, 2017), <https://www.gov.scot/publications/guide-stop-search-scotland> [<https://perma.cc/D3GM-DMHH>] ("The officer can do a light search on the outside of the clothes that you are still wearing. This can include the officer putting his hands inside pockets of outer clothes or feeling round the inside of a collar, socks and shoes if this is reasonable to find the item that the officer is looking for.").

127. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

128. *Stop and Search: Guidance*, *supra* note 126, at pt. 2 (explaining that an officer must tell a person "the specific law which gives them the power to search you").

129. *Id.* (noting police officers should tell a person what they expect to find, such as illegal drugs, prior to the search).

they need not explain what they are looking for to the civilian.¹³⁰ After the fact, assuming the American police find drug evidence during the search, they might claim they had reasonable suspicion to believe the person was armed and, during the pat-down for weapons, felt something that they believed to be drugs. Thus, the primary difference between drug searches in Scotland and the United States arguably is linguistics.

“Reasonable suspicion,” the standard that controls American frisks and Scottish searches, is inherently flexible. Its application can vary from department to department, even within the United States.¹³¹ Scottish police make arrests and searches based on reasonable suspicion that a person committed a crime, whereas U.S. officers require probable cause to arrest or search.¹³² Scholars in both countries express concerns that “reasonable suspicion” is a malleable concept that may provide insufficient protection, especially given that police generally make these decisions independently, with little to no oversight.¹³³ Moreover, there is a danger in placing too much weight

130. See *Terry*, 392 U.S. at 27 (permitting an officer to frisk upon reasonable suspicion and search further if probable cause arises, but not requiring an officer to communicate reasons during search).

131. See Fred O. Smith, Jr., *Policing Mass Incarceration*, 135 HARV. L. REV. 1853, 1866 (2022). In *Presumed Guilty*, Erwin Chemerinsky “argues that, in the absence of ‘a neat set of legal rules,’ police officers have wide discretion to ‘easily stop almost anyone at any time as long as they can articulate some basis for suspicion, even if they make it up after the fact to justify the admissibility of the evidence against the criminal defendant.’” *Id.* (quoting ERWIN CHEMERINSKY, *PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS* 113 (2021)). Professor Smith writes that in his experience, some state and local courts do not function “in ways that furnish fair procedures.” *Id.* at 1874; see also Brian McNeil, *Stop-and-Frisk in New York, Philadelphia, and Chicago: Slowly Approaching an Uneasy Synthesis or Running out of Time to Justify Its Freight?*, 29 WIDENER COMMONWEALTH L. REV. 69, 101–02 (2020). Deviating from federal law, the Massachusetts Supreme Judicial Court concluded that a suspect’s unprovoked flight was insufficient as reasonable suspicion for an investigatory stop. *Commonwealth v. Warren*, 58 N.E.3d 333, 341 (Mass. 2016).

132. SCOTTISH CONSTABLES’ PRACTICE, *supra* note 106, at 7; *Probable Cause*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/probable_cause [<https://perma.cc/X5XN-VEML>].

133. Reasonable suspicion is “suspicion that is backed by a reason capable of articulation and is something more than a hunch or a whim The officer has to have intelligence or information supporting the reason for the search.” Genevieve Lennon, *Searching for Change: Scottish Stop and Search Powers*, 20 EDINBURGH L. REV. 178, 193 (2016) (citing *Police Scotland, Stop and Search Operational Toolkit* (2013)); see Ross Deuchar, Johanne Miller & James Densley, *The Lived Experience of Stop and Search in*

on legal phrasing when there is insufficient evidence to know the extent to which legal constraints actually constrain police conduct.¹³⁴ As the number of frisks recorded in Baltimore and New York suggests, many police departments do not adhere to legal requirements.¹³⁵

Scottish officers even admitted to researchers that when people refused a search, they counted the refusal as evidence that the person was hiding something and would proceed to conduct a search based on reasonable suspicion.¹³⁶ Legally, refusing consent did not qualify as evidence of guilt, but stopping the train once it leaves the station is

Scotland: There Are Two Sides to Every Story, 22 POLICE Q. 416, 417–19 (2019); Ben Bowling & Coretta Phillips, *Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search*, 70 MODERN L. REV. 936, 938–39 (2007) (criticizing the reasonable suspicion standard in England and Wales). For an example of criticism of “reasonable suspicion” in the United States, see Jennifer Laurin, Terry, *Timeless and Time-Bound*, 15 OHIO STATE J. CRIM. L. 1, 6 (2017) (describing the “prescient warning from the NAACP . . . that the reasonable suspicion standard . . . ‘is a delusive and unworkable proposition on the streets of our cities’ [that will become] a . . . ‘pretext[] for oppression’” (quoting Brief for the NAACP Legal Defense and Education Fund, Inc., as Amicus Curiae Supporting Petitioner at 23, *Sibron v. New York*, 392 U.S. 40 (1968))).

134. See Laurin, *supra* note 133, at 17 (referencing Professor Alexandra Natapoff’s critique of courts’ reliance on the formalistic distinctions between “stops” and “arrests” or “reasonable suspicion” and “probable cause”).

135. See *Justice Department Announces Findings of Investigation into Baltimore Police Department*, U.S. DEP’T JUST. (Aug 10, 2016), <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department> [<https://perma.cc/2YLC-VYPS>] (“The department found reasonable cause to believe that BPD engages in a pattern or practice of: Conducting stops, searches and arrests without meeting the requirements of the Fourth Amendment . . . [u]sing unreasonable force in violation of the Fourth Amendment”); see also *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556, 558 (S.D.N.Y. 2013) (highlighting that the NYPD made 4.4 million stops between January 2004 and June 2012, with over 80% of these 4.4 million stops being stops of Black or Hispanic individuals, and in 98.5% of the 2.3 million frisks conducted, no weapon was found). Explaining “reasonable suspicion,” the Court in *Floyd* stated:

Courts reviewing stops for reasonable suspicion “must look at “the totality of the circumstances” of each case to see whether the detaining officer has a “particularized and objective basis” for suspecting legal wrongdoing While “reasonable suspicion” is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop.

Id. at 568.

136. STOP AND SEARCH IN SCOTLAND, *supra* note 97, at 21; see also Deuchar, Miller & Densley, *supra* note 133, at 432 (recounting stories of people saying “no” to a police stop-and-search, but the police continued with the search nonetheless).

difficult. Once police are accustomed to legally searching anyone by merely stating their request, running into that rare person who is bold enough to refuse must seem suspicious and aggravating. Police in both countries share this inclination to penalize people who fail to cooperate with their requests.¹³⁷

The bottom line: both probable cause and reasonable suspicion are vastly superior to the searches based on consent. On both continents, consent searches are a device that give police almost unlimited search powers because of the power imbalance between officers and civilians.¹³⁸ Instead of requiring officers to observe evidence of likely wrongdoing, jurisdictions that allow for consent searches effectively grant officers the authority to search anyone without evidence to suspect wrongdoing.

What about stops that do not lead to searches? If Scottish police do not engage in a search but simply talk to community members, no level of suspicion is needed for this engagement.¹³⁹ The presumption is that “the person is free to leave at will.”¹⁴⁰ It is the search that triggers the need for reasonable suspicion in Scotland.¹⁴¹ This is akin to the “free to leave” doctrine created by the U.S. Supreme Court in *Terry v. Ohio*¹⁴²

137. See STOP AND SEARCH SCOTLAND, *supra* note 97, at 21 (noting that refusing to consent to a search may be seen as “suspicious” and grounds for a statutory search); see also U.S. DEP’T JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 25 (2015) (“[Officers] are quick to overreact to challenges and verbal slights. These incidents—sometimes called ‘contempt of cop’ cases—are propelled by officers’ belief that arrest is an appropriate response to disrespect.”).

138. Deuchar, Miller & Densley, *supra* note 133, at 433 (discussing how Scottish police officers used coercive tactics to force a submission to their authority).

139. See REPORT OF THE ADVISORY GROUP ON STOP AND SEARCH, *supra* note 103, at 20 (“Not every encounter between a police officer and the public involves a ‘stop.’ In Scotland we expect our police officers to engage with the public in as friendly and approachable a manner as is consistent with the circumstances. Such engagement may involve the member of the public stopping but, for present purposes, our only concern is where this is not truly voluntary or where stopping is a matter [outside] their control.”); see also Bowling & Phillips, *supra* note 133, at 939 (highlighting that the Police and Criminal Evidence (PACE) Codes of Practice for the exercise of statutory powers of stop/search notes that officers may converse with members of the public without detaining them).

140. SCOTTISH CONSTABLES’ PRACTICE, *supra* note 106, at 9.

141. SCOT. GOV’T, A GUIDE TO STOP AND SEARCH IN SCOTLAND 2 (2017) [hereinafter STOP AND SEARCH GUIDE], <https://www.gov.scot/publications/guide-stop-search-scotland/pages/1> [<https://perma.cc/7EJ5-FBNZ>] (stating an officer has the power to search if they have reasonable grounds).

142. 392 U.S. 1 (1968).

and *United States v. Mendenhall*.¹⁴³ Under American law, police may approach a person and ask them questions without any level of suspicion.¹⁴⁴ United States courts interpret most verbal interactions between the police and the public as consensual encounters.¹⁴⁵ As in Scotland, it is often the frisk or search that legally turns an American “consensual” encounter into a Fourth Amendment event, also known as the “*Terry* stop,” for which American police need reasonable suspicion.¹⁴⁶

For changes to the law on consent stops, rather than consent searches, we should look to the United States and England, not Scotland. Scottish researchers have yet to address the issue of consent stops, although the identical English law has been scrutinized.¹⁴⁷ U.S. scholars have roundly criticized the consent stop for many of the same reasons they criticize the consent search: people often cooperate because of the power differential rather than a wish to stop and talk with the police.¹⁴⁸ Once the consent search is eliminated, legislatures

143. 446 U.S. 544 (1980); *see id.* at 554 (“[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not *free to leave*.” (emphasis added)); *see also Terry*, 392 U.S. at 16 (“It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

144. *Terry*, 392 U.S. at 10, 24 (requiring only suspicion of criminal activity for officer to initiate a stop).

145. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973) (explaining that it would be impractical for officers to give a warning about granting consent before a consent search); *United States v. Drayton*, 536 U.S. 194, 203 (2002) (highlighting that officers gave passengers on a bus “no reason to believe that they were required to answer the officers’ questions”); *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (holding it is unrealistic to require officers to tell people they have stopped that they are free to go before a search).

146. *See Terry*, 392 U.S. at 10, 24, 27 (“[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual.”).

147. Bowling & Phillips, *supra* note 133, at 940. Consent stops have continued in Scotland after the 2016 reform. *See SCOTTISH CONSTABLES’ PRACTICE*, *supra* note 106, at pt. 4.8 (“Constables have many encounters with members of the public which do not involve detaining people against their will. Constables do not require any statutory power to speak to a member of the public.”).

148. *See, e.g., ROSS, A FEMINIST CRITIQUE OF POLICE STOPS*, *supra* note 18, at 50 (suggesting parties fear refusing consent during a stop); Tracey Maclin, “*Black and Blue Encounters*” – *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race*

in the United States should turn their attention to the problem of harassing stops that lack reasonable suspicion and are justified as consensual encounters.

In Scotland, class rather than race controls officers' selection of targeted populations, corroborated by research demonstrating the ongoing conflict between Scottish police and working-class communities.¹⁴⁹ Scottish police are told they may not use race, gender, age, or stereotyping to support reasonable suspicion.¹⁵⁰ However, when seeking consent, Scottish police did not need to demonstrate that improper considerations were absent from their choice of whom to target.¹⁵¹ With consent searches, police were authorized to target these over-policed communities and conduct stop-and-search almost exclusively on working-class youth.¹⁵² In contrast, race generally trumps class in American policing, as the search of Salehe Bembury, the well-dressed Black executive on Rodeo Drive illustrates. Throughout the United States, police employ stop-and-frisks and consent searches to apply extra surveillance to Black people and other outside groups.¹⁵³ Therefore, abolishing consent searches is inexorably linked to anti-racism platforms which have aroused fierce political opposition in

Matter?, 26 VAL. U. L. REV. 243, 255–58 (1991) (discussing how the power imbalance between Black men and police creates an intimidating atmosphere during a stop).

149. See Murray & Harkin, *supra* note 96, at 889 (noting “evidence of conflict between the police and working class communities and excessive contact, in particular with young people”). See generally Robert Duncan & Arthur McIvor, *Militant Workers: Labour and Class Conflict on the Clyde 1900–1950: Essays in Honour of Harry McShane 1891–1988*, 13 J. SCOT. HIST. STUD. 110 (1993) (analyzing the development of left-wing politics in Scotland, which arose in response to power differentials between socioeconomic classes); SCOT. POLICE AUTHORITY, A QUALITATIVE STUDY OF THE IMPACT OF STOP AND SEARCH ON INDIVIDUALS AND COMMUNITIES IN SCOTLAND (Apr. 2016), <https://www.scotland.police.uk/spa-media/yovd2scn/stop-search-qualitative-survey.pdf> [<https://perma.cc/APC7-9D8H>] (chronicling Scottish citizens' experiences with police stops).

150. See STOP AND SEARCH IN SCOTLAND, *supra* note 141, at 3 (“An officer cannot stop-and-search you just because of how you look based on your age, disability, sex, sexual orientation, gender re-assignment, pregnancy, race, religion or beliefs, or your general appearance or how you are dressed.”).

151. See SCOT. POLICE AUTHORITY, *supra* note 149, at 19 (finding in a survey of seventy-five self-reporting participants that 21% of participants were given “no clear reason” for being stopped and searched).

152. *Id.* at 22.

153. See Laurin, *supra* note 130, at 10 (referencing a DOJ investigation in Baltimore finding that Black residents were disproportionately subject to stop-and-frisks).

many jurisdictions. However, it would be a mistake to discount the Scottish opposition to the all-out ban on the consent excuse.

B. Resistance in Scotland to Eliminating Consent

In the face of criticism, the Strathclyde police department stood behind its programmatic use of stop-and-search, including its reliance on consent searches. As with the New York City Police Department's defense of excessive stops and frisks, Strathclyde claimed success based on the low recovery rate.¹⁵⁴ When police failed to find knives, they assumed their searches caused people to leave their weapons at home.¹⁵⁵ An organization representing rank-and-file police officers, The Scottish Police Federation, "attacked" politicians and police leaders over plans to ban or limit consent searches.¹⁵⁶ "Are we really suggesting citizens should no longer be able to co-operate with police officers on a voluntary basis?"¹⁵⁷ They argued that police need this tool "to combat crime and to keep the public safe."¹⁵⁸

154. Murray & Harkin, *supra* note 96, at 893; Taylor, *supra* note 115.

155. Murray & Harkin, *supra* note 96, at 893 ("In a remarkable discursive victory, the force established that stop-and-search was successful when weapons were discovered *and* when searches turned up empty," referring to the Strathclyde police force); *see also* REPORT OF THE ADVISORY GROUP ON STOP AND SEARCH, *supra* note 103, at 23 (concluding "there is an absence of evidence to support" the view that stop-and-search acts as a deterrent).

156. David Leask, *Police Rank-and-File Body Warns of "Frightening Political Ignorance" over Stop-and-Search Powers*, HERALD (Feb. 9, 2015), <https://www.heraldscotland.com/news/13200936.police-rank-and-file-body-warns-frightening-political-ignorance-stop-and-search-powers> [<https://perma.cc/GH2E-U3VL>].

157. *Id.*

158. *Scottish Police Federation Attacks Politicians over 'Ignorance' of Non-Statutory Stop and Searches*, SCOT. LEGAL NEWS (Feb. 10, 2015), <https://www.scottishlegal.com/article/scottish-police-federation-attacks-politicians-ignorance-non-statutory-stop-searches> [<https://perma.cc/3WBX-WAXB>] (arguing that "what the public require to know is that police officers are only engaging in this activity in the public interest in an effort to combat crime and to keep the public safe" and "it's up to the individual whether they consent or not"); *see also* Paul Hutcheon, *Scotland's Human Rights Tsar Demands: Scrap Stop and Search Without Suspicion*, HERALD (Jan. 31, 2015), <https://www.heraldscotland.com/news/13199684.scotlands-human-rights-tsar-demands-scrap-stop-search-without-suspicion> [<https://perma.cc/P9TR-9BTJ>] (discussing how the report's findings led to extensive media and political attention and prompted criticism from the Scottish Human Rights Commission).

The Scottish Police Authority (SPA) undertook its own review after Kath Murray reported her findings.¹⁵⁹ The SPA's findings demonstrated concern over the excessive and unsuccessful deployment of stop-and-search but suggested moderate changes.¹⁶⁰ Notably, the SPA did not recommend eliminating consent searches. While the investigation acknowledged a problem with the overuse of consent, their recommendation for improving consent searches reads: "Police Scotland should ensure that those to be searched on a non-statutory basis [meaning based on consent] are aware of their right to decline."¹⁶¹ This is similar to proposals in the U.S. that would require police to warn civilians of their right to say no.¹⁶²

Another police oversight body, Her Majesty's Inspectorate of Constabulary in Scotland (HMICS), also reviewed stop-and-search. Again, while critical of consensual stops, HMICS offered a mild correction. Police Scotland, it wrote, "should encourage a position where officers only revert to consensual searches, supported by informed consent, where no legislative power exists."¹⁶³ This idea is similar to the United States Supreme Court's reason for allowing consent searches in the first place: there may be no other way for police to lawfully find out whether a person is carrying contraband in their pocket or has placed evidence of a crime inside an automobile.¹⁶⁴

159. For a timeline of the response to Kath Murray's 2014 publication, see SCOT. POLICE AUTHORITY, *supra* note 149, at 1–3 (explaining that SPA "research took place during a time of considerable media and public interest in stop-and-search policy and practice. Questions were being asked by leading authorities and organisations about whether and when stop-and-search was justified, and the appropriateness of consensual stop-and-search").

160. SCOTLAND POLICE'S SCRUTINY REVIEW, *supra* note 111, at 25–26.

161. *Id.* at 26.

162. See, e.g., D.C. Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, Act 23-336, § 23-526(a) (2020) (instructing law enforcement to advise subjects that a search will not be done if the subject refuses to consent); NEWARK CONSENT DECREE (2016), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-city-newark-new-jersey-reform-police-department-s> [<https://perma.cc/2ZVZ-8YQJ>]; see also *supra* Section I.B. (mandating NOPD to revise search and seizure policies and training).

163. AUDIT AND ASSURANCE REVIEW OF STOP AND SEARCH: PHASE 1, 10 (Mar. 30, 2015), <https://www.hmics.scot/publications/audit-and-assurance-review-stop-and-search-phase-1> ("Police Scotland should consider a policy which raises a general presumption amongst officers that stop-and-search encounters should be legislative.").

164. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) ("In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search,

Next, the Scottish government appointed an Advisory Group to conduct their independent review.¹⁶⁵ One might have expected the Advisory Group to follow suit and recommend some written or oral warning while keeping consent intact. Alternatively, one might have expected the Advisory Group to recommend ending consent searches for only the most vulnerable segment of the population, namely children. Some reformers in the United States have employed this tactic, advocating for the prohibition of consent searches for persons under 18 years old.¹⁶⁶ Many of the targets of police searches in Scotland were young.¹⁶⁷ Police targeted teenagers to counteract what some saw as a “new wave of Glasgow hooliganism.”¹⁶⁸ One chart indicated that over 26,000 of those who consented in 2010 were fourteen or younger.¹⁶⁹ The press expressed concern that children would not be able to refuse consent.¹⁷⁰

Nevertheless, instead of merely limiting the problematic practice for youth, Parliament ended consent searches for all. The legislation, which passed, stated that officers may only search a person not in custody “in accordance with a power of search conferred in express terms by an enactment, or under the authority of a warrant expressly conferring a power of search.”¹⁷¹ In other words, searches in Scotland must be justified by a suspicion that the person carries evidence of criminality, not by consent. The fifty states in the United States should pass similar legislation to close the consent loophole. Scottish

a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.”).

165. See *Changing Stop and Search Legislation in Scotland*, *supra* note 104.

166. See, e.g., DC B24-0306 - Youth Rights Amendment Act of 2021, COUNCIL OF D.C., <https://lims.dccouncil.gov/Legislation/B24-0306> [<https://perma.cc/EBL3-H8GS>] (explaining this bill would prohibit consent searches if the subject of the search is under 18 years of age). The Bill was first introduced by Councilmembers R. White, Nadeau, Pinto, Cheh, Bonds, Allen, Henderson, and Lewis George, on June 14, 2021, and is still currently under Council Review. *Id.*

167. Murray & Harkin, *supra* note 98, at 892, 895.

168. *Id.* at 889.

169. STOP AND SEARCH IN SCOTLAND, *supra* note 97, at 21.

170. See Severin Carrell, *Police Stop and Search Rates in Scotland Four Times Higher than in England*, GUARDIAN (Jan. 16, 2014), <https://www.theguardian.com/uk-news/2014/jan/17/police-stop-and-search-scotland> [<https://perma.cc/2VTR-MRRH>].

171. See Criminal Justice Act 2016, c. 1, § 65(2) (Scot.), <https://www.legislation.gov.uk> [<https://perma.cc/G5AM-6ES2>]. The Act included provision for a Code of Practice for Stop-and-Search in Scotland, which came into force on May 11th, 2017. *Id.* § 73. For an official guide on the current law on stop-and-search in Scotland, see generally STOP AND SEARCH GUIDE, *supra* note 141.

Lawmakers recognized that it is difficult to say no to police no matter your age. If this applies to Scotland's police force, with its reputation for progressive and open-minded policing, it applies *a fortiori* to the United States.¹⁷²

C. *The Aftermath*

There was some apprehension from Scottish scholars that police would respond to eliminating consent searches by increasing the number of statutory searches.¹⁷³ The fear was that police would falsely claim to have reasonable suspicion in situations where they would have previously relied on consent.¹⁷⁴ That has yet to materialize in the findings. In fact, police also reduced the quantity of statutory searches. During the first twelve-month period following the abolition of consent searches, stop-and-search dropped by 27%, with consent searches dropping to zero.¹⁷⁵ As expected, eliminating consent searches increased the positive detection rate. Officers recovered drugs in 38% of searches and found stolen property in 44% of their stop-and-searches, with positive outcomes increasing 7% overall in the first twelve months after the new rules went into effect.¹⁷⁶ As for the relationship between crime rates and the elimination of consent, the numbers trend in the right direction. "Over the past ten years crime has been on a downward trend in Scotland, having decreased by 24% since 2010–11," according to a government report on crime levels from

172. See Murray & Harkin, *supra* note 96, at 888 (discussing how police in Scotland have a specific set of "traditions and characteristics" that make them progressive, open-minded, more community-involved, civic-minded, and sensitive to diversity).

173. SUSAN McVIE, TWELVE MONTH REVIEW OF THE CODE OF PRACTICE FOR STOP AND SEARCH IN SCOTLAND 80 (June 2019), <https://www.gov.scot/publications/twelve-month-review-code-practice-stop-search-scotland-quantitative-report/documents> [<https://perma.cc/BL85-KRNN>].

174. *Id.* at 80 (comparing the elimination of consent searches in Scotland to criticism of English and Welsh officers using statutory stops as a means of "widening the scope for searching while reducing the need for reasonable suspicion").

175. *Id.* at 15–16; see also James Wyllie, *Praise for Police as One-Third of Lockdown Stop-and-Searches Find Illegal Items*, PRESS & J. (May 27, 2020), <https://www.pressandjournal.co.uk/fp/news/scotland/2216489/praise-for-police-as-one-third-of-lockdown-stop-and-searches-find-illegal-items> [<https://perma.cc/GS73-Z3Y5>] (reporting that for an eight-day window in March 2020, one-third of searches yielded "positive results"). Note that from June to November of 2016, there were 24,210 encounters involving a search or seizure in Scotland. From June to November of 2017, this number was down to 17,446, representing a 28% reduction in the use of stop-and-search as a police tactic. *Id.*

176. McVIE, *supra* note 173, at 18.

2019 to 2020.¹⁷⁷ Scotland's "crime remains at one of the lowest levels seen since 1974."¹⁷⁸ Eliminating consent searches did not create more crimes.

In both countries, it will take time to heal the damage caused by the consent searches on the populations targeted.¹⁷⁹ Still, across Scotland, public attitudes towards the police remain high. For example, a 2021 survey found that 73% of respondents felt "officers were friendly and approachable," and 86% of respondents felt "safe in their neighbourhood."¹⁸⁰ Police in American cities can only dream of such positive responses.¹⁸¹

D. *What the United States Can Learn from Scotland's Success*

In 2013, Scotland merged its autonomous police departments into one nation-wide police force.¹⁸² The consolidation likely helped garner

177. *Recorded Crime in Scotland, 2019–2020*, SCOT. GOV'T (Sept. 29, 2020), <https://www.gov.scot/publications/recorded-crime-scotland-2019-2020/pages/3> [<https://perma.cc/3UWV-B7F7>].

178. *Id.*

179. See Gordon Blackstock, *Experts Say Stop and Search is Damaging Scottish Teens' Trust in Police as Concerns Raised over Force Targeting Children as Young as Seven*, SUNDAY POST (Jan. 19, 2020), <https://www.sundaypost.com/fp/experts-stop-and-search-is-damaging-scottish-teens-trust-in-policeconcerns-raised-as-force-targets-children-as-young-as-seven> [<https://perma.cc/865P-AN2U>] (reporting the stop-and-search policy harmed the relationship between police and young people regularly stopped without justification).

180. Mike Merritt, *Poll: Most Scots Happy with Policing of the Pandemic*, SUNDAY POST (Apr. 4, 2021), <https://www.sundaypost.com/fp/n040421-covid-cops-survey> [<https://perma.cc/M88V-6MZ4>]. Note that people responding to the poll were not uniformly happy with the COVID response by police. *Id.*

181. Gallup polled communities with concentrated poverty, and 43% of White residents say they personally know "some" (31%) or "a lot" of people (12%) who were mistreated by the police. Camille Lloyd & Dalia Naguib, *Implications of Inequitable Policing in Fragile Communities*, GALLOP (June 16, 2020), <https://news.gallup.com/opinion/gallup/312707/implications-inequitable-policing-fragile-communities.aspx> [<https://perma.cc/CVH9-ZSNZ>]. By contrast, 60% of Black residents answered that they know some or many people who were mistreated by the police. *Id.*; see also FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 13 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [<https://perma.cc/7DNU-EQLA>] (urging police to build trust with their respective communities by treating people with dignity and showing that they are honest and unbiased).

182. Police and Fire Reform Act 2012, c. 1, § 1 (Scot.), <https://www.legislation.gov.uk/asp/2012/8/section/1> [<https://perma.cc/W9FX-QS8X>]. Before that, there were eight independent police departments in Scotland. Severin Carrell, *Scotland's New*

media and political interest for researcher Kath Murray's findings about stop-and-search the following year. The consolidation allowed Parliament to change police procedures nationwide by enacting a single statute.¹⁸³ A similar approach is not possible in the United States because federal law does not govern policing; however, there are a few federal statutes governing policing, such as 42 U.S.C. § 1983, which provided Salehe Bembury the right to sue Beverly Hills for violating his Equal Protection and Fourth Amendment rights.¹⁸⁴ On the other hand, the Scottish success suggests that state legislation addressing multiple police departments at once could be impactful.

Murray's research sparked a movement for change because her data alerted people for the first time to the sheer number of searches, especially by officers in Strathclyde, a jurisdiction that includes the city of Glasgow.¹⁸⁵ There were more searches of sixteen-year-olds in Strathclyde in one year than there were sixteen-year-olds living there.¹⁸⁶ Strathclyde police conducted 123 stop-and-searches per 1,000 people in one year compared to another Scottish jurisdiction that logged only four searches for every 1,000 persons.¹⁸⁷ The data showed a direct connection between consent and Strathclyde's massive deployment of the stop-and-search tactic.¹⁸⁸ Over three-quarters of Strathclyde's searches were based on verbal consent.¹⁸⁹ That department alone accounted for 84% of all recorded searches in Scotland.¹⁹⁰

Academics studied the Scottish data and "found no evidence to support a correlation between the volume of stop-and-search and

Unified Police Force Replaces Eight Regional Constabularies, GUARDIAN (Apr. 1, 2013, 5:00 AM), <https://www.theguardian.com/uk/2013/apr/01/police-scotland-stephen-house-chief-constable> [<https://perma.cc/73DA-6V3T>].

183. Severin Carrell, *supra* note 182 (explaining that police procedures will change from being controlled at the local level to the national level).

184. *See* 42 U.S.C. § 1983 (providing a cause of action for deprivation of rights by a government official).

185. *See generally* STOP AND SEARCH IN SCOTLAND, *supra* note 97.

186. Severin Carrell, *UN Human Rights Body Criticises Police Stop-and-Search Powers in Scotland*, GUARDIAN (July 24, 2015), <https://www.theguardian.com/uk-news/2015/jul/24/un-human-rights-body-criticises-police-stop-search-powers-scotland> [<https://perma.cc/8QG4-Z9U8>].

187. STOP AND SEARCH IN SCOTLAND, *supra* note 97, at 12.

188. Severin Carrell, *supra* note 43.

189. STOP AND SEARCH IN SCOTLAND, *supra* note 97, at 10, 19 (finding that in 2010, 76% of stop-and-searches were non-statutory). In Scotland, non-statutory stop-and-search is premised on verbal consent. *Id.* at 19.

190. *Id.* at 3.

reduction in crime.”¹⁹¹ For Scottish police searches based on reasonable suspicion, in 1% of the searches, police were looking for firearms, in 4%, police suspected stolen property, 25% of searches were concerning alcohol, while the majority of searches involved police looking for knives (29%) or drugs (42%).¹⁹² Detection rates varied, with police finding evidence in 18% of searches based on reasonable suspicion but only 7% of consent searches.¹⁹³ Thus, when the advisory committee recommended reigning in excessive police searches, it made sense that they would focus on so-called voluntary consent.

By comparison, consent searches are not substantively tracked by United States police departments.¹⁹⁴ This makes it difficult for the American public to register the magnitude of the harms that flow from the consent doctrine. Advocates must continue to push for data collection and include consent search demographics in these demands, as data often serves as a prerequisite for evidence-based change.

Another explanation for Scotland’s successful elimination of consent searches ahead of the United States relates to where police

191. Kenny Ramsay, *Reforming Stop and Search in Scotland*, POLSTOPS NETWORK (Feb. 3, 2021), <https://polstops.eu/blogs/understanding-the-practice-of-police-stops-in-europe/reforming-stop-and-search-in-scotland> [<https://perma.cc/2SPS-5QN2>]; see Paul Quinton, Matteo Tiratelli & Ben Bradford, *Does More Stop and Search Mean Less Crime? Analysis of Metropolitan Police Service Panel Data, 2004–14*, COLL. OF POLICING 3–4 (2017), <https://library.college.police.uk/docs/college-of-policing/College-of-Policing-does-more-stop-and-search-2017.pdf> [<https://perma.cc/UF7Q-Q9JF>] (discussing how the effectiveness of stop-and-search remains unclear; particularly, the relationship between search levels and crime reduction appears weak).

192. STOP AND SEARCH IN SCOTLAND, *supra* note 97, at 9.

193. *Id.* at 20 (analyzing results of consent searches in 2010, not including alcohol searches); see also *id.* at 18 (comparing statistics for proactive and reactive Scottish police forces prior to the nation-wide police force merger).

194. See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 S. CT. REV. 153, 209 (2002) (“There is no single reliable estimate for the number of consent searches conducted in any given year nationwide (or even statewide).”). Recent procedural changes may provide opportunities for tracking consent searches in discreet jurisdictions, such as Los Angeles. See, e.g., Kevin Rector, *Police Commission Approves Stricter Rules for Some LAPD Searches*, L.A. TIMES (Nov. 17, 2020, 3:04 PM), <https://www.latimes.com/california/story/2020-11-17/police-commission-approves-stricter-rules-for-some-lapd-searches> [<https://perma.cc/8PHH-6VP2>] (reporting on a new police policy that requires officers to document proof of consent, and which encourages but does not require officers to state and document the reason for the search clearly).

derive their searching authority. Courts, not legislators, created the consent exception in both the United States and Scotland.¹⁹⁵ Courts in the United States often define the scope of police authority, especially the Supreme Court. However, for Scotland, this was an exception to the usual legislative process that defined the scope of police power. In fact, some Scottish officers remained unconvinced about the legality of the consent searches, worrying that judges would view consent searches as mere “fishing expeditions.”¹⁹⁶ For Scotland, consent searches represented an anomaly, a police power never properly bestowed.

It is not too late for the United States to learn from Scotland about the value of legislation over courts to define the scope of police powers. This issue resonates beyond the consent doctrine. Whether the reliance on court rulings arose from the subject matter of law school courses or optimism about a future bench that might resemble the Warren Court, many civil rights organizations have emphasized constitutional law advocacy over legislative drafting.¹⁹⁷ Given the current make-up of the Supreme Court following what some describe as a Court-packing scheme by Senate Republicans, state legislators

195. See *Zap v. United States*, 328 U.S. 624, 628 (1946) (“[T]he law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived.”), *vacated*, *Zap v. United States*, 330 U.S. 800 (1947) (per curiam). Murray writes, “This precedent is set in case law which states that when a person is asked to consent to a search and is not suspected of a specific crime, it is permissible to request consent without highlighting the option to refuse (*Brown v. Glen*, 1997 SCCR 636).” STOP AND SEARCH IN SCOTLAND, *supra* note 97, at 21. Regarding a home search, one Scottish court wrote: “There is no legal requirement on the police to advise someone specifically of his ability to refuse a police request to enter a private property, at least in normal circumstances. Indeed, seeking consent in the first place carries with it the idea that the person requested is entitled to refuse permission.” *Freeburn v. HM Advocate*, [2012] HCJAC 135 [15], 2012 SCCR 809, 809–10.

196. STOP AND SEARCH IN SCOTLAND, *supra* note 97, at 20 (“Officers were aware that if they found contraband in the course of a non-statutory encounter, they could be accused of fishing for evidence in a court situation.”). Scottish judges have the authority to exclude ill-gotten evidence from trials. See Peter Duff, *Irregularly Obtained Real Evidence: The Scottish Solution?*, 8 INT’L. J. EVIDENCE & PROOF 77, 77 (2004) (explaining how Scottish authority balances the public interest of convicting guilty persons against individual rights and civil liberties).

197. See, e.g., Edwin Rios, *For Civil Rights Groups, Roe v. Wade is Reminder of Supreme Court’s Limits*, GUARDIAN (July 4, 2022, 8:05 AM), <https://www.theguardian.com/us-news/2022/jul/04/abortion-roe-v-wade-civil-rights-groups> [<https://perma.cc/DBB4-PLGG>] (arguing a need for coalition building and lobbying rather than relying solely on litigation).

must meet the moment and protect civil rights against government overreach.¹⁹⁸ Whether through state, federal, or city codes, American activists are now using these instruments to curtail police violence and overreach.

In sum, there is a distinction between the statutory powers given to Scottish police versus the default power of American police, where all police conduct is allowed except for what the Constitution prohibits. This distinction helps to explain why the Scottish policing reform movement succeeded in prohibiting consent searches. U.S. legislators interested in curtailing police overreach should look to the Scottish model and recognize the advantage of the public deciding affirmatively what powers police should possess.

Any discussion of policing reforms must reckon with the entrenched racialized nature of policing within the United States. The United States and Scotland are different in their history of policing and current-day practices. From disparate stop rates for White Americans compared to Black Americans¹⁹⁹ to excessive use of force rates between each group²⁰⁰ and the rates at which police kill unarmed Black men,²⁰¹ any discussion of policing practices must acknowledge this reality.²⁰²

198. See Jackie Calmes, *How Republicans Have Packed the Courts for Years*, TIME (June 22, 2021, 10:40 AM), <https://time.com/6074707/republicans-courts-congress-mcconnell> [<https://perma.cc/LKY4-LLRY>] (asserting that Republicans' focus on confirming conservative judges has amounted to court-packing).

199. Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 736 (July 2020) (“[P]olice stops and search decisions suffer from persistent racial bias . . .”).

200. Phillip Atiba Goff, Tracey Lloyd, Amanda Geller, Steven Raphael & Jack Glaser, *The Science of Justice: Race, Arrests, and Police Use of Force*, CENTER FOR POLICING EQUITY (July 2016), https://policingequity.org/images/pdfs-doc/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf [<https://perma.cc/BDH3-VEP3>] (showing that use of force rates per 1,000 arrests are 1.3 times higher for Black Americans than White Americans; 46 for Black Americans, and 36 for White Americans).

201. Justin Nix, Bradley A. Campbell, Edward H. Byers & Geoffrey P. Alpert, *A Bird's Eye View of Civilians Killed by Police in 2015: Further Evidence of Implicit Bias*, 16 CRIMINOLOGY & PUB. POL'Y 309, 309 (2017) (“Black civilians [fatally shot by police] were more than twice as likely as White civilians to have been unarmed.”).

202. See Rachel Eisenberg, Brandon Tucker & Hadi Sedigh, *The Killing of Tyre Nichols Must Serve as a Catalyst to Root out Racial Injustice in Policing*, CTR. FOR AM. PROGRESS (Feb. 10, 2023), <https://www.americanprogress.org/article/the-killing-of-tyre-nichols-must-serve-as-a-catalyst-to-root-out-racial-injustice-in-policing> [<https://perma.cc/>]

Some may argue that Scotland's profound legislative change would not happen in the United States, where the change would primarily benefit—and be seen to benefit—Black and Brown bodies. Several scholars argue that the role of the police is to perpetuate the social and economic advantages enjoyed by European Americans over non-Whites, making it almost impossible to create significant change.²⁰³ True, Scotland's example appears elusive given the American Senate's refusal to pass the George Floyd Policing Act or any policing reform in the two years since the country was transfixed by the video of his asphyxiation at the hands of the police.²⁰⁴

Nevertheless, American racism cuts both ways when it comes to eliminating consent. While the challenge is more significant in the United States, the benefits of such legislation are also greater. Searches without probable cause are a form of harassment, and in the United States, most are a form of racial harassment.²⁰⁵ Amna Akbar explains how transformational justice can be achieved incrementally, but each reform must move towards a world where the goal is eliminating prisons and the police as central instruments of oppressing Black and

2T2Q-SEHK] (“After almost three years of public outcry following the murder of George Floyd, far too little action has been taken to right the fundamental wrong of police policies and practices . . . Without meaningful structural and cultural changes in policing, these atrocities will continue.”).

203. See, e.g., Paul Butler, *The System is Working the Way it is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425–26, 1443 (2016) (arguing that the Court's grant of broad police power has sanctioned and legalized unjust police conduct that bolsters a White anticompetitive monopoly on societal resources); Paul Butler, *Equal Protection and White Supremacy*, 112 NW. U. L. REV. 1457, 1458 (2018) (“When we complain about the police killing and beating up [B]lack people, and don't understand why those cops aren't disciplined, we don't get the problem. The problem is not bad-apple cops. The problem is that the system is working the way it is supposed to.”); Carbado, *Stop and Frisk to Shoot and Kill*, *supra* note 124, at 1551 (concluding that the stop-and-frisk doctrine is part and parcel of systematic police violence, enabling broad over-policing rather than sporadic police misconduct).

204. The George Floyd Justice in Policing Act of 2020 (H.R. 7120) passed the House of Representatives on June 25, 2020, but its Senate counterpart never made it out of committee. Daniel Rafferty, Comment, *Qualified Immunity: Sculpting a Statute-esque Solution to a Judicially Created Policy*, 47 U. DAYTON L. REV. 105, 127–28 (2022); see also Justice in Policing Act of 2020, S. 3912, 116th Cong. (2020); George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).

205. See Carbado, *supra* note 124, at 1533 (arguing that *Terry* searches provided the police with a constitutional mechanism for racial harassment); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1419–21 (1993) (explaining that a more demanding test “would help eliminate the pervasive element of racial harassment that seems to accompany most profile searches”).

Brown communities.²⁰⁶ To move towards true transformational change, Dorothy Roberts explains, any proposed “reforms must shrink rather than strengthen ‘the state’s capacity for violence’ and facilitate the goal of building a society without prisons.”²⁰⁷ Abolishing consent fits this definition, for it does not expand the police arsenal but removes a particular strain of abusive police practices linked to violence and humiliation. In that way, it fits the agenda of those activists who resist reforms that simply build up the budget of police departments. Abolishing consent is an incremental change, but it moves in the direction set by current anti-racist activists. Unlike many proposed reforms, this one is singularly straightforward. It closes one loophole that the police have used to dominate individuals who live in certain neighborhoods or fit a particular demographic.²⁰⁸ Moreover, its simplicity might make it attractive to politicians and voters who have hesitated to pass more multi-faceted legislation.²⁰⁹

206. See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1787, 1789–91 (2020) (stating, “[r]ather than aiming to improve police through better regulation and more resources, reform rooted in an abolitionist horizon aims to contest and then to shrink the role of police, ultimately seeking to transform our political, economic, and social order to achieve broader social provision for human needs”).

207. DOROTHY E. ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 296 (2022).

208. In the District of Columbia, 92% of the Metropolitan Police Department’s consent searches were of Black people, causing concern that “the practice is undermining community trust in the police, especially in areas with substantial minority populations.” *Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission*, D.C. POLICE REFORM COMM’N 105 (Apr. 1, 2021) [hereinafter *Decentering Police*], <https://dccouncil.gov/wp-content/uploads/2021/04/Police-Reform-Commission-Full-Report.pdf> [<https://perma.cc/NG9Q-WBLC>]; see also David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 571–72 (1997) (explaining that in the view of some, the “police target [B]lack and Hispanics [through consent searches] because . . . this technique gets results,” yet, “police are targeting all African-Americans because some are criminals”).

209. See Christopher Rhodes, *Why Police Reform Stalled After George Floyd’s Murder and What Can Be Done About It*, YAHOO (May 25, 2023), <https://www.yahoo.com/entertainment/why-police-reform-stalled-george-213132514.html> [<https://perma.cc/Z7SU-A7NB>] (discussing the “uphill battle” associated with attempted police reforms due to political pushback from the Republican party); see also Allison Pecorin, *Why Congress Has Failed to Pass Policing Reform in Recent Years*, ABC NEWS (Jan. 27, 2023, 5:06 PM), <https://abcnews.go.com/Politics/congress-failed-pass-policing-reform-recent-years/story?id=96723272> [<https://perma.cc/6NU8-3DNQ>] (explaining that recent legislation towards police reforms has stalled due to disagreements concerning qualified immunity and police unions between both major political parties).

III. CRAFTING MODEL LEGISLATION

Unlike Scotland, where the problem of consent arose during pedestrian stops only, American police also seek consent to search cars and even homes. Scholars have noted a direct connection on U.S. roads between pretext stops—“driving while Black”—and automobile searches based on consent.²¹⁰ Similarly, in some areas of the country, the police use the “knock and talk” strategy to search homes.²¹¹ People open the door to the police and then feel pressured to let them into their homes without a warrant.²¹² Moreover, when people refuse to allow the police to search, the police may retaliate by arresting the person who refuses consent.²¹³

Fortunately, “searches based on consent” refers to all three situations. The model legislation, produced in the appendix, does not distinguish consent searches of cars from consent searches of bodies or houses.²¹⁴ Eliminate consent searches, and the jurisdiction ameliorates three problems at once.

210. See Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1475, 1484 (2021) (citing studies highlighting the disproportionate stops for Black and Latinx motorists for, often pretextual, traffic violations which can lead to consent searches). See generally Harris, *supra* note 208 (discussing the intersection of consent searches and racial profiling).

211. Craig M. Bradley, “*Knock and Talk*” and the Fourth Amendment, 84 IND. L.J. 1099, 1099, 1116–17 (2009) (explaining that some jurisdictions hold that, where the police have reasonable suspicion, they are permitted to “seize” the suspect before consent to search the home is obtained, seriously undermining its voluntariness).

212. Bradley, *supra* note 211, at 1099 (“[T]here is a large swath of police activity that intrudes into dwellings that has been widely allowed by the courts and that often renders the search and arrest warrant requirements nugatory. This . . . ‘knock and talk’ technique . . . has severely limited the Fourth Amendment protection afforded to homes.”); see, e.g., *United States v. Spence*, 397 F.3d 1280, 1282 (10th Cir. 2005) (no warrant was needed for a “knock and talk” where the trial judge found the defendant gave federal agents consent to enter and search his computer). The Supreme Court approved knock and talks in *Kentucky v. King*, 563 U.S. 452, 467 (2011), where Justice Samuel Alito explained in dicta that “the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant.” *Id.* at 466–67. See generally Jamesa J. Drake, *Knock and Talk No More*, 67 ME. L. REV. 25, 26–27 (2014) (arguing that using a strategy intended to circumvent the warrant requirement by inducing consent is a Fourth Amendment violation, undermining the validity of any subsequent consent).

213. See, e.g., *Koch v. City of Del City*, 660 F.3d 1228, 1238 (10th Cir. 2011) (finding no right to sue when an officer arrested the petitioner for failing to answer his questions and not allowing him to enter her home without a warrant).

214. *Infra* Appendix: Limitations on Consent Searches § (a).

A. “*You Have a Right to a Lawyer*” Versus *Actual Consultation*

Scotland’s ban on consent searches did not include an exception for people who receive advice from an attorney.²¹⁵ In contrast, the model legislation set forth below would allow adults and juveniles to waive their rights after they consult with a lawyer.²¹⁶

While lawyers are impractical in stop-and-frisk encounters and during traffic stops, they may be useful for home searches. Take the example of someone who wants to prove their innocence. A lawyer who understands the ongoing investigation against their client may work out an agreement whereby the police may search their client’s home based on consent, and in return, assuming the police find nothing, the police will quit pursuing their client. Alternatively, imagine a situation where someone wants police to search a shared domicile, hoping to implicate their co-tenant in criminal behavior. Here, again, an attorney may provide important advice. A lawyer would advise such a client about the exposure they face for allowing another person to store contraband in their home. Although the client ultimately decides whether to consent, good legal advice will prevent some domestic violence victims from calling the police on abusers only to face incarceration themselves. Alternatively, the lawyer may enter an agreement that prevents the government from charging their client in exchange for consent to search. No client or guardian could accomplish this. That is why consent should only be permitted when civilians consult with lawyers.

Under the model legislation, the police need not supply people with lawyers, which would bring up budgetary concerns and may hamper the bill’s passage. Instead, under this model, a person may not waive Fourth Amendment rights by consenting to a search when lawyers are unavailable.²¹⁷ The model legislation is similar to a New Orleans law where juveniles must be able to meet with an attorney before waiving their rights and consenting to a search.²¹⁸ However, unlike New

215. See generally Criminal Justice (Scotland) Act 2016 § 65, 2016 asp. 1 (limiting power to search only where conferred by express terms of an enactment or where the search is pursuant to a warrant).

216. *Infra* Appendix: Limitations on Consent Searches § (a).

217. See *infra* Appendix: Limitations on Consent Searches § (a) (outlining that for non-statutory searches, the legislation does not provide an alternative to an express, voluntary waiver through an attorney).

218. NOPD CONSENT DECREE MONITOR 2021, *supra* note 71, § 21.

Orleans, the model legislation also applies to adults and does not provide any alternative to an attorney.²¹⁹

A critical choice in crafting legislative language is whether the police must provide “an opportunity to confer” with an attorney or require actual consultation as a prerequisite to waiving rights. The model legislation presented here selects the actual consultation approach. After consultation, the attorney must communicate to the police the civilian’s decision to consent.²²⁰ This wording avoids ambiguity, for some courts will interpret the language “opportunity to confer” as allowing people to waive their right to consult a lawyer as soon as the police advise them of this right. In this reading, the right to consult with a lawyer turns into the right to receive a verbal caution, much like the *Miranda* warnings.²²¹

Consider what we have learned in the fifty years since the Court decided that suspects in custody must be given *Miranda* warnings.²²² There is a growing consensus among scholars and social scientists that *Miranda* warnings do not deliver on their promise.²²³ Despite the ubiquitous presence of *Miranda* warnings on television, four out of five people waive their rights after hearing them.²²⁴ The most vulnerable individuals—those most in need of protection from police overreach—are the most likely to waive their rights.²²⁵ In the context of consent

219. *Id.*

220. *Infra* Appendix: Limitations on Consent Searches § (a) (2).

221. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) (requiring verbal warnings that may be subsequently waived).

222. *Id.* at 492, 498–99.

223. See Susan R. Klein, *Transparency and Truth During Custodial Interrogations and Beyond*, 97 B.U. L. REV. 993, 994–96 (2017) (arguing that protections such as *Miranda* have been chipped away to the point of actively contributing to the adversarial and deceptive elements of police encounters); Tonja Jacobi, *Miranda 2.0*, 50 U.C. DAVIS L. REV. 1, 3–4, 10 (2016) (expressing the need to rework *Miranda* with a focus on preventing false confessions).

224. Kiera Janzen, Comment, *Coerced Fate: How Negotiation Models Lead to False Confessions*, 109 J. CRIM. L. & CRIMINOLOGY 71, 82–83 (2019).

225. See also Slobogin, *supra* note 64, at 1176–77, 1182 (discussing how the use of manipulative interrogation techniques compounds risk factors such as mental illness, intellectual disability, immaturity, and a “belief that the criminal justice system is fair and thus exoneration is forthcoming”); Ferguson, *supra* note 64, at 1454 (explaining that there is “a growing scientific understanding of brain science and forensic science about problems with *Miranda* waivers, especially involving vulnerable suspects such as people with intellectual disabilities, mental illness, and juveniles”). See generally Stuntz, *Miranda’s Mistake*, *supra* note 89 (arguing that the system created by *Miranda* benefits

searches, a *Miranda*-style fix might benefit the few who keep a lawyer on retainer and speed-dial. Vulnerable people who are most likely to consent out of fear or ignorance are equally likely to waive their right to a lawyer in these encounters, especially where no lawyer is present and available for consultation. The wording of the statute is essential to guarantee consultation.

B. Objections to Eliminating Consent in the United States

When the D.C. Council entertained a proposal to eliminate consent searches, Council members asked about common fears.²²⁶ Those common fears are set forth here.

One objection to legislation eliminating consent pertains to domestic violence victims who seek police protection.²²⁷ This is a bit of a red herring. The police enter homes under the exigency rationale in domestic violence situations: “No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence,” the Supreme Court explained, “so long as they have good reason to believe such a threat exists.”²²⁸

Moreover, the police do not need consent when a domestic partner gives the police trustworthy information about their partner.²²⁹ Even without a lawyer, a spouse, partner, or co-inhabitant may provide enough information about illicit drugs or weapons to allow the police to obtain a warrant to search the joint home. In addition, officers can prevent the domestic partner (an alleged abuser) from reentering their home to guard against the destruction of evidence while the

“savvy suspects” with financial means or experience with the regulatory game; the most vulnerable are those new to the system).

226. *Committee on the Judiciary & Public Safety, Public Hearing on B24-0306*, COUNCIL OF D.C. (Oct. 21, 2021), https://dc.granicus.com/MediaPlayer.php?view_id=2&clip_id=6775 [<https://perma.cc/6FR8-4GLU>].

227. *Georgia v. Randolph*, 547 U.S. 103, 138–39 (2006) (Roberts, C.J., dissenting).

228. *Id.* at 118 (majority opinion) (quoting 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 8.3(d), at 161 (6th ed. 2022)) (“[W]here ‘the defendant has victimized the third-party . . . the emergency nature of the situation is such that the third-party consent should validate a warrantless search despite defendant’s objections.’”).

229. “The reliance on a co-tenant’s information instead of disputed consent accords with the law’s general partiality toward ‘police action taken under a warrant [as against] searches and seizures without one’” *Randolph*, 547 U.S. at 116–17 (citing *United States v. Ventresca*, 380 U.S. 102, 107 (1965)).

police prepare the paperwork and assemble a team for the search.²³⁰ In actuality, the warrant provides more protection to the government than consent since a co-tenant may successfully object to a consent search if they are present or if the search goes into areas controlled solely by the objecting party.²³¹

The second fear often raised against eliminating consent searches is centered on autonomy, which, ironically, is also one of this Article's primary arguments in favor of eliminating sham consent.²³² If people want the officer to search their homes or bodies, the argument goes, they should be allowed to choose. This viewpoint envisions consent as an actual choice. Justice Kennedy imagined that everyone on an interstate bus cooperated with drug enforcement officers "not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them."²³³ As Justice Souter pointed out in his dissent in that case, "[t]here is therefore an air of unreality about the Court's explanation that bus passengers consent to searches of their luggage 'to enhance their own safety . . .'"²³⁴ People who carry drugs or other contraband would not willingly acquiesce if they believed that police would otherwise leave them alone. As for the innocent, imagine choosing between two lines at customs on reentering the United States, where one line requires a pat-down of your body and a full search of your bag, while the other line allows you to walk through without being touched. While you

230. See *Illinois v. McArthur*, 531 U.S. 326, 337 (2001) (upholding "limited and tailored" restraints to avoid the destruction of evidence).

231. *Randolph*, 547 U.S. at 114 (holding that consent to a search is not valid if a present co-tenant objects); cf. *Fernandez v. California*, 571 U.S. 292, 299–300 (2014) (where the defendant was not physically present to refuse a search, the consent of one occupant was valid, even though the defendant was not present due to an arrest and had previously objected). Similarly, courts will refuse to find implied consent for searches of spaces that belong to the non-consenting party, such as a son's bedroom. See, e.g., *United States v. Robinson*, 999 F. Supp. 155, 162 (D. Mass. 1998) (finding that the mother's consent did not extend to a closed vinyl bag within her son's bedroom).

232. Compare *Fernandez*, 571 U.S. at 307 (denying a domestic abuse victim "the right to allow the police to enter her home" over the co-tenant's objections "would also show disrespect for her independence") with Alan C. Michaels, *Rights Knowledge: Values and Tradeoffs*, 39 TEX. TECH. L. REV. 1355, 1366 (2007) ("If an individual is ignorant of her right to remain silent, then she may lack the capacity to exercise either choice or autonomy with regard to speaking. Autonomous action presupposes choice, and choice presupposes knowledge of multiple options.").

233. *United States v. Drayton*, 536 U.S. 194, 205 (2002).

234. *Id.* at 208 (Souter, J., dissenting).

might want others to be frisked, common sense dictates that people will choose the no-frisk line for themselves.

Finally, there may be concerns that the police will arrest more people to search them incident to arrest.²³⁵ For example, the Beverly Hills police might start by arresting Salehe Bembury for jaywalking so they can legally search his person and property.²³⁶ This outcome did not occur in Scotland—and likely would not occur in the United States because arrests involve significantly more paperwork and justification than consensual stops-and-frisks. On the other hand, this issue points to a separate piece of legislation that would work well as a companion bill. As part of a general decriminalization effort, states should require the police to issue summonses instead of arrests for most misdemeanors and decriminalize minor misdemeanors, including jaywalking.²³⁷ This would eliminate some unintended consequences of eliminating consent.

C. Remedies for Violating the Ban

Although banning consent searches takes simple, straightforward language, drafters must also consider the remedies. Decrees without remedies are toothless and essentially useless.

Imagine that the police found a counterfeit bill in Salehe Bembury's wallet during the consent search, and prosecutors charged Mr. Bembury with possession of counterfeit money. Mr. Bembury's defense

235. See, e.g., 3 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 5.2(b) (6th ed. 2022) (“While the myth persists that warrantless searches are the exception, the fact is that searches incident to arrest occur with the greatest frequency.”); *id.* § 5.2(e) (expressing the risk that officers will use an arrest as a pretext for a search where other grounds are absent).

236. See *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (explaining that during an arrest, an officer may search the arrestee, as well as the area in the arrestee's immediate control, for weapons and evidence).

237. See, e.g., Allison Sherry, *Drunk Paddleboarding and Prostitution Are Among 1,100 Crimes in Colorado's Misdemeanor Reform*, CPR NEWS (May 14, 2021, 4:00 AM), <https://www.cpr.org/2021/05/14/colorado-misdemeanor-criminal-justice-reform> [<https://perma.cc/942U-B4LS>] (highlighting a bipartisan effort in Colorado to streamline misdemeanors by combining, downgrading, and eliminating various crimes); see S.B. 1449, 2021–22 Leg., Reg. Sess. (Cal. 2022) (demonstrating that Senate Bill 1449 reduced the charges for possessing less than an ounce of marijuana from a misdemeanor to an infraction); Caro Jauregui and Mike McGinn, *It's Time for California to Decriminalize Jaywalking*, BLOOMBERG (Sept. 22, 2022, 12:00 PM), <https://www.bloomberg.com/news/articles/2021-09-22/why-california-needs-to-decriminalize-jaywalking> [<https://perma.cc/6X3M-KMTW>] (discussing how California Assemblymember Ting introduced a bill to decriminalize jaywalking).

attorney would file a motion to suppress evidence, seeking to keep the counterfeit bill out of the trial. If California had abolished consent searches, the officer's search of Mr. Bembury's wallet would violate state law. Does this mean that a court would suppress the evidence found during the search as a fruit of an unlawful search? The Supreme Court addressed this situation in *Virginia v. Moore*,²³⁸ where Virginia state law required police to issue a summons rather than conduct arrests for certain driving offenses.²³⁹ Even though the police violated state law by arresting the driver, he lost before the Supreme Court.²⁴⁰ The Court explained that the Fourth Amendment does not turn on state law.²⁴¹ In line with this reasoning, under the Fourth Amendment, it is reasonable for police to violate state laws. After *Virginia v. Moore*, state legislatures are on notice that they must link a state exclusionary rule for bills that limit police discretion. If an exclusionary rule is not part of a state's criminal code, it can easily be included in a consent bill. The model legislation provided in the appendix does this.

Drafters of a consent ban must also consider creating a remedy for all the innocent people wrongly searched by the police. Remedies may take the form of equitable relief or financial compensation for victims.²⁴² Researchers have discovered many types of harm that flow from unnecessary pat-downs, many of which would be labeled as a form of sexual assault if perpetrated by a stranger rather than a police officer.²⁴³ Apart from invasive frisks, property searches can also humiliate people. Consider the subjugation perpetrated on Mr. Bembury as he publicly admitted that he was scared and as he stood there in the role of a criminal suspect while officers detained him based on his consent to search his wallet and implied consent for them to take his ID card and run a warrant check.

238. 553 U.S. 164 (2008).

239. *Id.* at 167 (addressing whether evidence seized during a custodial arrest of a driver should be suppressed when “[u]nder state law, the officers should have issued [the defendant] a summons instead of arresting him”).

240. *Id.* at 178.

241. *See id.* at 167–68, 178 (denying the defendant's motion to suppress evidence found as a result of an improper arrest under state law).

242. *See generally* Sheldon Nahmod, *Damages and Injunctive Relief Under Section 1983*, 16 URB. LAW. 201–16 (1984) (explaining that both compensatory damages and equitable relief are available remedies for individuals whose Fourth Amendment rights have been violated by unlawful police conduct).

243. Ross, *Blaming the Victim*, *supra* note 33, at 8.

Ideally, the people harmed will be able to sue for damages. Civil suits are usually not worth the cost of litigation when the harms do not include serious bodily injury, so the model legislation contains a few sweeteners to tempt lawyers to accept innocent clients who have been wronged, such as punitive damages.²⁴⁴ Hopefully, the legislation will prompt lawyers to represent people in Mr. Bembury's situation, where the indignity was short and he was eventually allowed to walk away. In addition to suing for compensation for the individual harm suffered, the model legislation allows class actions, making it more cost-effective for lawyers to proceed in vindicating rights.²⁴⁵

Class actions are also useful for organizations such as the American Civil Liberties Union (ACLU) that seek injunctive relief to end illegal police conduct.²⁴⁶ In *Los Angeles v. Lyons*,²⁴⁷ the Supreme Court vacated a preliminary injunction against illegal chokeholds, holding that although the plaintiff was choked and rendered unconscious by the police, it was mere speculation that he would be targeted again.²⁴⁸ Class actions help avoid this conundrum, and the model legislation invites the action to stay in state court. Moreover, the model legislation allows lawyers to creatively fashion equitable relief.

There is an independent agency in D.C. that investigates police complaints from the public.²⁴⁹ Although the model legislation does not mention this board among the remedies, if passed, this act will close the consent loophole there too, making it easier for people to seek redress for harassing stops and searches. Several jurisdictions already have independent police oversight boards to receive complaints and

244. *Infra* Appendix: Limitations on Consent Searches § (c).

245. *Infra* Appendix: Limitations on Consent Searches § (c).

246. See, e.g., *Plaintiffs Win Justice in Illegal Arrests Lawsuit Settlement with the Baltimore City Police Department*, ACLU MARYLAND (June 23, 2010, 12:00 AM), <https://www.aclu.org/press-releases/plaintiffs-win-justice-illegal-arrests-lawsuit-settlement-baltimore-city-police> [<https://perma.cc/BE2Y-X55G>] (highlighting how an ACLU class action lawsuit resulted in changes to Baltimore police rules governing arrests and use of force for loitering, failure to obey, and other low-level, non-violent offenses).

247. 461 U.S. 95 (1983).

248. *Id.* at 99, 102 (The fact that Lyons had been choked once did nothing to establish “a real and immediate threat that he would again be stopped . . . by an officer who would illegally choke him into unconsciousness”).

249. *About Office of Police Complaints*, OFF. OF POLICE COMPLAINTS, <https://police.complaints.dc.gov/page/about-office-police-complaints>.

adjudicate police conduct.²⁵⁰ For those that do not, that would be an eminently useful companion piece of legislation.

IV. PROGRESS IN THE DISTRICT OF COLUMBIA

The District of Columbia could become the first jurisdiction in the United States to abolish the pernicious consent doctrine legislatively. In response to the Black Lives Matter protests that swept the country that spring, the D.C. City Council passed an Emergency Amendment in July 2020 to change policing practices for 90 days.²⁵¹ The Council simultaneously created a Reform Commission to advise the Council on long-term changes.²⁵² The Commission was charged with “re-envision[ing] policing” given the “scourge of gun violence,” police killings, and racial profiling.²⁵³ When the Commission issued a report on April 1, 2021, one proposal would eliminate consent searches for adults and juveniles.²⁵⁴

The consent section of “Decentering Police to Improve Public Safety” examined race and effectiveness data.²⁵⁵ It merits reproduction here:

MPD [Metropolitan Police Department] has only recently begun to make data available on the scope and efficacy of its consent searches during stops. The data show that, between July 22, 2019 and December 31, 2020, MPD officers conducted 4,427 consent searches of persons. Only 2.3% resulted in the seizure of a gun and only 9.5% resulted in the seizure of any evidence of a crime. And those figures assume that officers reported *all* of their consent searches of individuals (including, e.g., all the times they asked someone on the street to lift their shirt and show their waistband), which is doubtful.

MPD officers are also conducting a disproportionate number of consent searches of Black people. From July 22, 2019 through December 31, 2020, 92% (4,779 out of 5,188) of all consent searches were of Black people. These figures confirm the concerns expressed

250. *Citizens Police Oversight Commission*, CITY OF PHILA., <https://www.phila.gov/departments/citizens-police-oversight-commission> [<https://perma.cc/B66V-ZUNH>]; *Independent Police Oversight Board (IPOB)*, CITY OF HOUS., <https://www.houston.tx.gov/boards/ipob.html> [<https://perma.cc/A8HH-USV3>].

251. The Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020 (Act 23-336), July 22, 2020.

252. *Id.* § 122 (The District of Columbia Police Reform Commission was established by D.C. Council through this Act).

253. *Decentering Police*, *supra* note 208, at 5, 9, 11.

254. *Id.* at 104.

255. *Id.*

by the District's Office of Police Complaints in 2017: "This disproportionate use of consent searches causes concern for the Police Complaints Board that the practice is undermining community trust in the police, especially in areas with substantial minority populations."

. . . There is no justifiable reason to permit a practice that is not only inherently coercive and intrusive, but also ineffectual and prone to extreme racially disparate effects. By enacting legislation to prohibit consent searches altogether, the Council will properly require officers who wish to conduct searches to properly focus on *safety*, rather than on targeting individuals who are likely to consent.²⁵⁶

Elsewhere in the report, the Commission put it more bluntly: "The Council should correspondingly pass legislation curtailing several invasive, ineffectual enforcement tactics . . . [i]t should prohibit consent searches, given that voluntary consent is an oxymoron in the policing context and that residents, especially in over-policed communities, rarely feel sufficiently free and safe to voluntarily consent."²⁵⁷

This recommendation is part of a larger panoply of changes that work well together and would end the worst abuses while opening the door to a police force focused on creating goodwill across the city. After all, when the police frisk our bodies and search our property based on our supposed consent, the practice will undoubtedly sow antipathy to the police and potentially create psychological harm, especially when encounters appear fraught with racial bias. The Commission's report brings abolishing consent one step closer to fruition. Now we need the D.C. Council or another state or municipality to heed the advice and become the first jurisdiction to abolish the cynical doctrine legislatively.

256. *Id.* at 104–05. This follows Recommendation 8, which reads: "The Council should modify Section 110 of Act 23-336 ("Limitations on Consent Searches") by prohibiting all consent searches—warrantless searches permitted based solely on the consent of the individual whose person or property is searched—and, in criminal cases, should require the exclusion of any evidence obtained from a consent search." *Id.* at 104.

257. *Id.* at 21 ("[The Council] should allow 'pretext' stops—stops for minor offenses when the actual purpose is to conduct a fishing expedition on a more serious offense—only with supervisory approval and only to investigate violent crimes.").

CONCLUSION

May of 2023 marks fifty years since the Supreme Court announced in *Schneckloth v. Bustamonte*²⁵⁸ that the person consenting need not know that they had a right to refuse.²⁵⁹ In this day of bold proposals, one wonders why so few activists have included abolishing consent on their wish list.²⁶⁰ Perhaps what accounts for this gap is a lopsided understanding of the loophole's importance in the overall scheme of the over-surveillance of Black and Brown communities and how consent shields officers from scrutiny and reprimand for otherwise illegal behavior. Alternatively, perhaps our collective imagination has been hampered by Supreme Court doctrine, which cemented the consent search loophole into the Fourth Amendment fifty years ago.²⁶¹

Consent searches are ubiquitous across the United States. The video of Salehe Bembury's stop should inspire outrage towards a legal trick that encouraged the police to violate his rights and then blamed him for choosing to comply. After all, the consent doctrine provided legal cover for the police to frisk and humiliate the shoe designer for walking while Black. In this age where the police kill over one thousand people per year and Black adults and children often view a steady diet of videos of killings of unarmed Black men, resisting police requests must feel scary or even suicidal for many people stopped. As the D.C.

258. 412 U.S. 218 (1973).

259. *Id.*

260. The Vision for Black Lives supports incremental policy changes that "are necessary to address the current material conditions of our people and will better equip us to win the world we demand and deserve." *The Preamble*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/the-preamble> [<https://perma.cc/ARC5-TC45>]. There are a variety of activists working to change policing policy. For example, Fayetteville PACT of North Carolina works to create citizen review boards and end racial profiling, selective enforcement, and excessive force by police officers. See *Mission Statement*, FAYETTEVILLE PACT, <https://www.fayettevillepact.com> [<https://perma.cc/DT6M-58NJ>]. Defund the Police creates a website for activists working on various issues, including keeping police out of schools, demilitarizing the force, and giving the community a voice in approving union contracts. *What is Defund the Police*, DEFUND THE POLICE, <https://defundpolice.org> [<https://perma.cc/QN2G-S235>]. Another grassroots group pushes to "repeal laws that criminalize survival." *How*, #8TOABOLITION, 8toabolition.com [<https://perma.cc/49PJ-F8X3>]. Abolishing consent would complement all these proposals.

261. See *Schneckloth*, 412 U.S. at 248–49 (permitting consent searches where there is "voluntary" consent from subjects not in custody, even where a subject does not know of their right to refuse).

Reform Commission stated, “voluntary consent is an oxymoron in the policing context.”²⁶²

Do not look to the Supreme Court to change course. Instead, states should follow Scotland’s lead and end the practice through legislation. Statutory reform at the state level will cover multiple police departments and, therefore, improve a wider swath of lives than an individual city ordinance. However, if state-level legislation proves impractical, the legislation may be introduced city by city. The model legislation supplied in the appendix may be crafted to fit every jurisdiction in the United States. It pairs well with many other reforms that are aimed at ending police harassment and unnecessary violence, particularly among Black and Brown communities.

262. *Decentering Police*, *supra* note 208, at 21.

APPENDIX: MODEL LEGISLATION

I: *LIMITATIONS ON CONSENT SEARCHES*²⁶³

(a) In cases where a search is based solely on the subject's consent to that search, and is not executed pursuant to a valid warrant or conducted pursuant to another exception to the warrant requirement, the search is invalid, and any evidence seized as a result of that search is inadmissible against any person in a criminal trial, unless the subject:

- (1) Is given a reasonable opportunity to confer privately and confidentially with an attorney; and
- (2) Through an attorney, knowingly, intelligently, and voluntarily waives their right to decline the search in writing.

(b) It shall be unlawful for a law enforcement officer to knowingly conduct an invalid search and the Police Complaints Board shall promulgate rules to implement the provisions of this section, pursuant to D.C. Code § 5-1106(d).

(c) Any civilian or class of civilians who suffer one or more violations of section (a) of this section may bring an action in the Superior Court of the District of Columbia to recover or obtain any of the following:

- (1) A declaratory judgment;
- (2) Injunctive relief;
- (3) Reasonable attorney's fees and costs;
- (4) Actual damages;
- (5) Punitive damages; and
- (6) Any other equitable relief which the court deems proper.

263. Much of the credit for this legislative drafting goes to Patrice Sultan, Founder and Executive Director of D.C. Justice Lab.