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## If You're Reading This, It's Too Late: The Unconstitutionality of Notice Effectuating Implied Consent

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# IF YOU'RE READING THIS, IT'S TOO LATE: THE UNCONSTITUTIONALITY OF NOTICE EFFECTUATING IMPLIED CONSENT<sup>†</sup>

## ABSTRACT

*Reasonableness is the touchstone of the Fourth Amendment; a search is per se unreasonable absent a warrant, but if the state has garnered consent from an individual, the subsequent search is deemed reasonable and not to have violated the Fourth Amendment. Because consent is a powerful exception, governments looking to establish valid search schemes are attempting to garner consent, specifically implied consent, by notifying individuals that specific actions will serve as consent to search.*

*Such attempts are not rare. This Comment focuses on three examples: the Denver Police Department's use of signs notifying individuals in particular areas that their biometric data is being gathered, the City of Bristol's street signs notifying individuals that parking in public spots serves as consent to search their vehicles for parking enforcement purposes, and, most famously, implied consent laws claiming that the issuance of a driver's license serves as consent to a breathalyzer test. These examples all illustrate government attempts to use notice to effectuate implied consent to search.*

*This Comment argues that this approach to garnering implied consent to search is largely dishonest, despite the ubiquity of such laws in American society. The vast majority of attempts to use this approach do not comport with any definition of consent, especially not implied consent. Further, the Fourth Amendment's consent exception requires a number of elements be met before consent can be satisfied. However, turning to the pervasively regulated industries exception for inspiration, this Comment proposes a four-element dispositive test to determine when notice can effectuate implied consent to search: tradition of search, consistency of search, revocability of consent, and most importantly, furthering of public safety.*

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## INTRODUCTION

The Fourth Amendment protects the right of citizens to be free from unreasonable searches and seizures.<sup>1</sup> This right “belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”<sup>2</sup> “No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others.”<sup>3</sup>

These epic proclamations make clear that no act or interest is too small to warrant protection under the Fourth Amendment. A recent case from the Sixth Circuit demonstrates just how far this sentiment goes. In *Taylor v. City of Saginaw*,<sup>4</sup> the court held that the practice of tire chalking for parking enforcement purposes constitutes a search under the Fourth Amendment.<sup>5</sup> In the aftermath of this case, parking enforcement officers subject to the law of the Sixth Circuit may<sup>6</sup> need a warrant prior to chalking a vehicle’s tires.

But in an interesting twist, not long after this decision was handed down, new signs began popping up on the streets of Bristol, Tennessee,<sup>7</sup> a small town

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<sup>1</sup> U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

<sup>2</sup> *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968).

<sup>3</sup> *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

<sup>4</sup> *Taylor v. City of Saginaw*, 922 F.3d 328, 336 (6th Cir. 2019) (holding that use of chalk to mark tires to determine how long vehicles had been parked was a “search” within the definition of the Fourth Amendment, and that the city and officer failed to meet their burden of showing that marking tires fell within exception to warrant requirement.).

<sup>5</sup> See Campbell Robertson, *Lose the Chalk, Officer: Court Finds Marking Tires of Parked Cars Unconstitutional*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/tire-chalk-parking-unconstitutional.html>.

<sup>6</sup> Some scholars are suggesting that this case’s holding is much narrower than initially suspected. Because the ruling was based on a Rule 12(b)(6) motion to dismiss, some argue that the Court was holding only that the Plaintiff had in fact stated a plausible claim, and not making any substantive ruling on the constitutionality of the search. The Sixth Circuit issued an amended opinion in which it states, “we hold that chalking is a search under the Fourth Amendment, specifically under the Supreme Court’s decision in *Jones*. This does not mean, however, that chalking violates the Fourth Amendment. Rather, we hold, based on the pleading stage of this litigation, that two exceptions to the warrant requirement—the ‘community caretaking’ exception and the motor-vehicle exception—do not apply here. Our holding extends no further than this. When the record in this case moves beyond the pleadings stage, the City is, of course, free to argue anew that one or both of those exceptions do apply, or that some other exception to the warrant requirement might apply.” *Taylor*, 922 F.3d at 336.

<sup>7</sup> Blake Lipton, *New Parking Signs to Notify People About Tire Chalking Come to Downtown Bristol, TN*, WJHL NEWS CHANNEL 11 (Aug. 21, 2019, 5:42 PM), <https://www.wjhl.com/news/local/new-parking-signs-to-notify-people-about-tire-chalking-come-to-downtown-bristol-tn/>.

within the Sixth Circuit.<sup>8</sup> These signs read, “By parking in timed spaces, you consent to your tires being chalked for parking enforcement.”<sup>9</sup> In other words, after the court held a practice to be a violation of the people’s Fourth Amendment rights,<sup>10</sup> the City of Bristol immediately used its authority to post signs that served to nullify the court’s decision by claiming to obtain implied consent from its citizens. This example begs an important question: can the state turn an unconstitutional search into a constitutional search simply by putting individuals on notice?

Bristol, Tennessee’s use of signs to imply consent to search is neither the only nor the most serious attempt by a jurisdiction to do so. The Denver Police Department uses a surveillance system called the High Activity Location Observation system, or HALO.<sup>11</sup> Employing 256 cameras around the city,<sup>12</sup> the police are constantly monitoring almost every corner of Denver.<sup>13</sup> While simply monitoring a city via pole camera surveillance is a constitutional practice,<sup>14</sup> these cameras can now be combined with other software to cross-reference data they gather with other systems of biometric data collection and analysis to find people of interest.<sup>15</sup> The Colorado Bureau of Investigations already has plans to

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<sup>8</sup> *Geographical Boundaries of the United States Courts of Appeals and United States District Courts*, ADMIN. OFF. U.S. CTS., <https://www.supremecourt.gov/about/Circuit%20Map.pdf>.

<sup>9</sup> Lipton, *supra* note 7 (quoting language directly from the sign pictured in the article).

<sup>10</sup> The court later released a clarification stating that they did not necessarily decide that the practice of tire chalking was *per se* unconstitutional, rather that the practice constituted a search. See Orin Kerr, *Chalking Tires and the Fourth Amendment*, VOLOKH CONSPIRACY (Apr. 23, 2019, 5:49 AM), <https://reason.com/2019/04/23/chalking-tires-and-the-fourth-amendment/>.

<sup>11</sup> *Facial Recognition Technology: Does It Violate Privacy or Protect Community?*, DENVER CHANNEL (July 9, 2018, 9:36 PM), <https://www.thedenverchannel.com/news/360/facial-recognition-technology-does-it-violate-privacy-or-protect-community->.

<sup>12</sup> David Sachs, *The Denver Police Essentially Have 256 Sentinel Robots Watching over the Streets, and Here’s Where You’ll Find Them*, DENVERITE (Dec. 21, 2018, 2:22 PM), <https://denverite.com/2018/12/21/the-denver-police-essentially-have-256-sentinel-robots-watching-over-the-streets-and-heres-where-youll-find-them/>.

<sup>13</sup> *Id.*

<sup>14</sup> See *United States v. Houston*, 813 F.3d 282, 290 (6th Cir. 2016) (“Thus, notwithstanding the concurrences in *Jones* and dicta in our unpublished opinion, the results in *Knotts*, *Forest*, and *Skinner* indicate that long-term warrantless surveillance via a stationary pole camera does not violate a defendant’s Fourth Amendment rights when it was possible for any member of the public to have observed the defendant’s activities during the surveillance period.”); see also Bob Farb, *Pole Camera Surveillance Under the Fourth Amendment*, N.C. CRIM. L. (July 12, 2016, 10:24 AM), <https://nccriminallaw.sog.unc.edu/pole-camera-surveillance-fourth-amendment/> (“Nothing in *Jones* or lower court cases after *Jones* calls into question the use of surveillance cameras that are focused on public streets, parks, and other public areas. For example, if drug activity is commonplace at a particular intersection, the Fourth Amendment does not preclude placing a surveillance camera on a light pole facing that intersection.”).

<sup>15</sup> See Const. Project’s Task Force on Facial Recognition Surveillance & Jake Laperruque, *Facing the Future of Surveillance*, PROJECT ON GOV’T OVERSIGHT (Mar. 4, 2019), <https://www.pogo.org/report/2019/03/facing-the-future-of-surveillance/#heading-8> (last visited Sept. 1, 2020) (“Such data could be used for an

combine the HALO system with software called Morpho Argus,<sup>16</sup> a real-time video screening system that processes faces captured in live or recorded video,<sup>17</sup> to turn the HALO cameras from tools that monitor the public to tools that scan, collect, and store the biometric data of Denver's citizens.<sup>18</sup> All of this data is obtained without the express consent of its citizens. However, the city has posted signs stating, "Attention: This area is monitored by video cameras to enhance your safety and security."<sup>19</sup>

A third example animating the role notice plays in the Fourth Amendment is classic DUI implied consent laws. These statutes claim to confer consent to search via breathalyzer (and possibly blood test) through the issuance of a driver's license. The statute provides the "notice," which, combined with the issuance of the driver's license, provides law enforcement with your "consent" to a breathalyzer test, should you be suspected of driving while intoxicated. While the constitutionality of these schemes has been questioned, they still exist in all fifty states today.<sup>20</sup>

These three examples, although spanning the spectrum of technological sophistication, give rise to important questions about the meaning of implied consent and the role notice plays in the Fourth Amendment search equation. Where does the theory of implied consent fit within the Fourth Amendment?<sup>21</sup> Is notice alone enough to generate the implied consent to search?

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immense array of future government activities, ranging from profiling, to selective law enforcement investigations, to applications for background checks, to evaluations for civil service employment opportunities.").

<sup>16</sup> *MorphoManager: Centralizing User Database and Biometric Terminal Management*, IDEMIA, <https://www.idemia.com/morphomanager> (last visited June 28, 2020).

<sup>17</sup> *Id.*

<sup>18</sup> *Facial Recognition Technology: Does It Violate Privacy or Protect Community?*, supra note 11; cf. PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFF. PRESIDENT, REPORT TO THE PRESIDENT: BIG DATA AND PRIVACY: A TECHNOLOGICAL PERSPECTIVE, at x (2014). The merging of data systems is drastically increasing law enforcement capabilities—this phenomenon is referred to as "data fusion." *Id.* "Data fusion occurs when data from different sources are brought into contact and new facts emerge . . . Individually, each data source may have a specific, limited purpose. Their combination, however, may uncover new meanings. In particular, data fusion can result in the identification of individual people, the creation of profiles of an individual, and the tracking of an individual's activities. More broadly, data analytics discovers patterns and correlations in large corpuses of data, using increasingly powerful statistical algorithms. If those data include personal data, the inferences flowing from data analytics may then be mapped back to inferences, both certain and uncertain, about individuals." *Id.*

<sup>19</sup> *Facial Recognition Technology: Does It Violate Privacy or Protect Community?*, supra note 11.

<sup>20</sup> Robert Voas, Tara Kelley-Baker, Eduardo Romano & Radha Vishnuvajjala, *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. SAFETY RES. 77, 78 (2009).

<sup>21</sup> In a 1991 essay, Stephen Kruger argued that the doctrine of implied consent lacks any constitutional foundation whatsoever: "Whether the Search Clause should be read with Brennanite expansiveness or

The answers to these questions have important implications as legislatures begin creating laws regulating the collection of biometric data, and courts will undoubtedly begin hearing challenges to these laws almost as soon as they are enacted. Currently, there is no federal biometric data collection law, and only a few states have legislation regulating biometric data collection.<sup>22</sup> Washington State is the next in line—Washington’s House of Representatives has drafted a bill regulating the gathering of biometric data that is currently working its way through the legislature.<sup>23</sup> Before creating these laws, legislatures should have a concrete understanding of the role implied consent plays in various Fourth Amendment doctrines, especially if they rely on implied consent rationales to justify their new laws. As an initial matter, the Fourth Amendment requires law enforcement to obtain a warrant prior to conducting a search of a private area.<sup>24</sup> Warrantless searches are presumptively unreasonable;<sup>25</sup> however, this presumption can be overcome when an individual gives valid consent, either express or implied.<sup>26</sup>

Theories of implied consent permeate two separate exceptions to the Fourth Amendment warrant requirement: the general consent exception<sup>27</sup> and the pervasively regulated industries exception, housed within the administrative search doctrine.<sup>28</sup> The general consent doctrine of the Fourth Amendment is the most commonly used exception to the warrant requirement;<sup>29</sup> it deems searches

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Rehnquistian narrowness is a red herring, because nothing in the writings of the Framers or of their contemporaries substantiates the implied consent doctrine . . . . Absent original intent and an original understanding of the Constitution, its protections are illusory. Implied consent finds no anchor in the Constitution as understood at the time of its ratification. Therefore, the doctrine is Fourth Amendment fakery. Considering judicial lawlessness, however, it is too much to expect that implied consent will be declared unconstitutional.” Stephen Kruger, *Implied Consent Is Fourth Amendment Fakery*, 45 WASH. ST. BAR NEWS 45, 45–46 (1991).

<sup>22</sup> *Biometric Data and Data Protection Regulations (GDPR and CCPA)*, THALES, (May 12, 2020), <https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/biometrics/biometric-data>.

<sup>23</sup> Brian Higgins, *Congress, States Introduce New Laws for Facial Recognition, Face Data – Part 2*, A.I. TECH. & L. (Apr. 12, 2019), <http://aitechnologylaw.com/2019/04/congress-states-new-laws-facial-recognition-face-date-part2/>.

<sup>24</sup> *See Katz v. United States*, 389 U.S. 347, 357–58 (1967) (noting that “[s]earches conducted without warrants have been held unlawful” without an exception, including private areas such as a phonebooth).

<sup>25</sup> WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT*, § 8.2(1) (5th ed. 2019) (quoting *State v. Banks*, 434 P.3d 361, 371 (Or. 2019)).

<sup>26</sup> *See id.*

<sup>27</sup> Ric Simmons, *Not “Voluntary” But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 773 (2005).

<sup>28</sup> The administrative search doctrine refers to searches that are usually done for regulatory, as opposed to criminal investigation, purposes. These include safety inspections, drug testing of employees, and school searches of children’s purses and are usually not conducted by police officers. JAMES TOMKOVICZ & WELSH WHITE, *CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF* 612 (8th ed. 2017).

<sup>29</sup> Simmons, *supra* note 27.

reasonable once an individual has consented to the search.<sup>30</sup> Under this doctrine, consent can be given either explicitly or implicitly, as long as it meets the common law requirements.<sup>31</sup> The pervasively<sup>32</sup> regulated industries exception is continuing to develop, and courts are still determining the scope and reach of this exception's application. It is premised on the notion that because business-owners entering a pervasively regulated industry are on notice of the possibility of warrantless searches, the *act* of entering the industry serves as implied consent to particular searches and, therefore, these searches are reasonable absent a warrant.<sup>33</sup>

This Comment draws on philosophical and legal approaches to implied consent to argue that notice alone is never sufficient to generate implied consent under the Fourth Amendment. Every formulation of consent used in law requires an affirmative, communicative act on the part of the consenter. Using notice alone to attempt to garner implied consent to search, thereby deeming a search reasonable, does not meet the requirements set forth in any Fourth Amendment doctrine. However, borrowing from the pervasively regulated industry exception, only if the government can show the presence of four elements should it be allowed to rely on implied consent effectuated from notice.

Part I of this Comment evaluates the philosophical foundations of consent. It does so by looking at both the ontology of consent as well as the elements that comprise consent. Part II explores applications of implied consent within the legal realm. Specifically, it reviews applications of various implied consent-based rationales in contract law, sexual assault law, and Fourth Amendment jurisprudence. The Fourth Amendment analysis focuses on both the general consent exception and the pervasively regulated industries exception and analyzes the evolution of the implied consent doctrine in Fourth Amendment jurisprudence specifically. Part III focuses on the role of notice; it addresses the ambiguous role notice plays in consent theory. First, it provides an example of courts explicitly rejecting a notice-based implied consent approach in the private

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<sup>30</sup> See *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

<sup>31</sup> See LAFAVE, *supra* note 25; *infra* Part II.

<sup>32</sup> Some scholars use the term “highly” or “closely” regulated industry instead. See, e.g., Note, *Rethinking Closely Regulated Industries*, 129 HARV. L. REV. 797, 797 (2016).

<sup>33</sup> LAFAVE, *supra* note 25 (“The Supreme Court has said, for example, by way of justifying official inspections of the premises where certain types of business enterprises are carried on, that the ‘businessman in a regulated industry in effect consents to the restrictions placed upon him.’ This, so the analysis proceeds, is because when he ‘chooses to engage in [a] pervasively regulated business’ he ‘does so with the knowledge that his business . . . will be subject to effective inspection.’”) (alterations in original). See generally *Rethinking Closely Regulated Industries*, *supra* note 32 (exploring the exception and arguing in favor of restricting it to protect customer privacy).



law setting (specifically clickwrap and browsewrap website agreements). Second, it evaluates the courts' treatment of notice within the Fourth Amendment consent and pervasively regulated industries exceptions. Part IV combines philosophical and legal approaches to implied consent to show why notice alone should never be sufficient to generate the consent necessary to deem a search reasonable under the Fourth Amendment. Finally, Part V of this comment draws the line by arguing for a four-element approach to determine when notice can serve to generate implied consent for the purposes of a Fourth Amendment search.

## I. THE THEORETICAL UNDERPINNINGS OF CONSENT: ONTOLOGY AND ELEMENTS

This section explores the meaning of consent through a philosophical lens. Sections A and B seek to establish a basic, foundational definition of consent necessary to understand legal permutations of consent in different areas of law.

### A. *Philosophical Ontology of Consent*

Any meaningful discussion of implied consent must begin with an understanding of the ontology<sup>34</sup> of consent. In the broadest sense, consent theory is “any political, moral, legal, or social theory that casts society as a collection of free individuals and then seeks to explain or justify outcomes by appealing to their voluntary actions.”<sup>35</sup> Consent philosophers often use the term “morally transformative consent,”<sup>36</sup> which refers to consent that has made it “permissible for A to act with respect to B in a way that would be impermissible absent valid consent.”<sup>37</sup> Morally transformative consent is a subset of consent that focuses on justifying actions between parties. There are three primary approaches to what constitutes morally transformative consent: psychological phenomenon, observable behavior, and the hybrid view.<sup>38</sup>

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<sup>34</sup> While the term “ontology” can refer to a few distinct aspects of a concept, for the purposes of this Comment it will refer to “problems about the most general features and relations of the entities which . . . exist.” *Logic and Ontology*, STAN. ENCY. PHIL. (Oct. 11, 2017), <https://plato.stanford.edu/entries/logic-ontology/>.

<sup>35</sup> Don Herzog, *Happy Slaves: A Critique of Consent Theory*, 88 MICH. L. REV. 1668, 1668 (1990) (book review).

<sup>36</sup> Franklin Miller & Alan Wertheimer, *Preface to a Theory of Consent Transactions: Beyond Valid Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 79, 79 (Franklin Miller & Alan Wertheimer eds., 2010).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 84.

Consent as a psychological phenomenon means that “B consents if and only if she has the relevant mental state.”<sup>39</sup> This definition tracks with scholar Heidi Hurd’s definition of consent as “an act of will—a subjective mental state akin to other morally and legally significant *mens rea*.”<sup>40</sup> Scholar Peter Westen has described it as “a state of mind of acquiescence.”<sup>41</sup> Ultimately, the psychological phenomenon approach to consent holds that the only necessary and sufficient element of valid consent is an individual’s mental state of consent. The communication of that mental state is an irrelevant inquiry when determining if one consented under this approach. In other words, regardless of external manifestations or actions, if one does not possess a mental state of consent to a particular course of action, she has not consented.

The observable behavior model of consent states that “B consents if and only if she tokens or expresses consent in a conventionally appropriate way.”<sup>42</sup> While we assume that people act according to their internal beliefs, this approach dictates that we ought not to inquire into the mental state of the consentor. Instead, we ought to focus on her behavior alone. In his piece, *The Nature of Consent*, John Kleinig defines consent through the logical equation “A consented (to B) to X,” where A and B are people and X is a course of action for which A’s authorization, permission, or agreement is required.<sup>43</sup> Kleinig argues that consent is primarily (and most importantly) a *communicative* act that “serves to alter the moral relations in which A and B stand—and that for the moral relations to have been altered for B, a communicative act *must* have occurred.”<sup>44</sup> Most of the time, one’s expression of consent usually reflects an internal mental state of consent. However, this theory becomes problematic in instances of miscommunication, where A may have thought she was consenting to one act, but due to a misunderstanding (in good or bad faith), she was perceived as consenting to a different act. In this example, A outwardly expressed consent, although her mental state was not aligned with that consent. According to this theory, only communication of consent is necessary and sufficient. Therefore, in the previous example, A’s expression of consent is sufficient to establish her morally transformative consent.

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<sup>39</sup> *Id.*

<sup>40</sup> Heidi Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 121 (1996).

<sup>41</sup> Peter Westen, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 5 (2004).

<sup>42</sup> Miller & Wertheimer, *supra* note 36, at 84.

<sup>43</sup> John Kleinig, *The Nature of Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 3, 5–8 (Franklin Miller & Alan Wertheimer eds., 2010) (variables altered).

<sup>44</sup> *Id.* at 5 (emphasis added).

The mode of the expression, however, can be problematic when seeking to determine true mental consent. Take silence, for example. In a situation where silence is deemed to be consent,<sup>45</sup> imagine an individual who is not paying attention and thus does not speak up when necessary; she will be deemed to have consented. Why? Because it is reasonable for others to act as if the person's silence indicated consent.<sup>46</sup> This example illustrates one problem inherent in the observable behavior model. Thus, for some scholars, the answer to such a problem lies in the hybrid approach: valid consent requires both a mental state of consent *and* the appropriate communicative expression of consent.<sup>47</sup>

The variety of consent definitions already creates some serious issues, or at least questions, for the theory of implied consent; the differences between these definitions have important implications for implied consent. Under Kleinig's theory, if consent rests exclusively on the mental state being communicated, implied consent is a particularly weak theory because valid consent requires some form of expression of consent, which arguably transforms it from implied to express consent. However, if consent is a subjective mental state, the theory of implied consent is more justifiable, since consent happens inside one's mind and does not need to be communicated to be "real." And yet, if consent permits others to act differently toward us, outward expressions perceived by those others arguably ought to be a necessary predicate.

### *B. Philosophical Elements of Consent*

The ontology of consent is a different issue than the elements that comprise consent. John Kleinig's approach in *The Nature of Consent* provides four necessary elements of consent: competence, voluntariness, knowledge, and intention.<sup>48</sup> As Don Herzog explains, "Since consent theory explains moral obligations by specifying what the individual has voluntarily chosen . . . obstacles to voluntary choice, if inexorable, will compromise the usefulness of consent theory as a descriptive map and normative guide."<sup>49</sup> Two points emerge from this excerpt. First, consent is based on voluntary choice. Second, the meaning of consent is seriously compromised, even destroyed, when individuals lose, or never had, the ability to make a voluntary choice in the first place. One cannot justify an action through consent if a voluntary choice was never made. Voluntariness is the philosophical bedrock of consent.

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<sup>45</sup> For example, if someone says, "Speak now if you do not consent."

<sup>46</sup> Miller & Wertheimer, *supra* note 36, at 85.

<sup>47</sup> *Id.* at 84.

<sup>48</sup> Kleinig, *supra* note 43, at 13–20.

<sup>49</sup> Herzog, *supra* note 35, at 1674.

Implied consent works well to explain how an individual moves through the world on her own—we do not question the voluntariness of most of her daily actions; rather, we simply assume she is voluntarily acting and doing exactly as she pleases. However, implied consent becomes more complicated when we use it to explain interactions between two parties, especially two parties at arm’s length, like a citizen and a law enforcement agent. Without express consent, it can require a bit more work to ensure that an encounter was consensual. The use of this theory is further complicated when there is an unequal power dynamic between the two interacting parties, as exists between an individual and the state.

Philosophy provides an important foundational understanding of consent and its elements. As consent theory, particularly implied consent, is operationalized in various areas of law, this foundational framework is tweaked and augmented in important ways.

## II. IMPLIED CONSENT IN VARIOUS AREAS OF LAW

Theories of implied consent play a role in various fields of law, both civil and criminal. The fundamental framework in which we approach consent varies drastically between civil and criminal law.<sup>50</sup> “[I]n the criminal law, ‘legal consent’ may be a mental state, whereas in torts or contracts ‘legal consent’ may be . . . performative.”<sup>51</sup> In fact, criminal law, “at its boldest, almost pretends to judge a suspect’s thoughts.”<sup>52</sup> In an effort to better understand the conceptual framework of implied consent, it is worth briefly analyzing how different areas of law, specifically contract, sexual assault law, and the Fourth Amendment, approach and justify this theory.

### A. *Implied Consent in Contract Law*

The area of law that arguably leans most heavily on consent is contract law. The fundamental assumption of a contract, and the assumption most relevant to its validity, is that both parties consented, or agreed, to its terms.<sup>53</sup> For centuries, contract law has used a theory of implied consent, referred to as “implied-in-

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<sup>50</sup> Tom Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. RES. L. REV. 17, 24 (2010) (quoting Lawrence B. Solum, *Legal Theory Lexicon 042: Consent*, LEGAL THEORY LEXICON, [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/11/legal\\_theory\\_le.html](http://lsolum.typepad.com/legal_theory_lexicon/2004/11/legal_theory_le.html) (last updated Jan. 19, 2020)).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.3 (2020) (“The merit of these definitions is that they acknowledge that a contract establishes a relationship among the contracting parties that goes well beyond their express promises.”).

fact” and “implied-in-law,” to fill gaps where contracts lack express consent.<sup>54</sup> These gap-fillers are justified on principle and policy rather than on the true consent of the parties.<sup>55</sup> In fact, gap-filling only takes place when parties have not expressly manifested agreement to the terms of a contract. “Implied-in-fact” refers to terms or creation of a contract that can be gleaned from a person’s behavior.<sup>56</sup> Based on one party’s behavior, another party performs a service without being verbally asked to do so, and expects payment (or some other form of consideration).<sup>57</sup> The prime example is the act of ordering food at a restaurant creating a contract for payment. No contract is signed, and no terms are discussed, but a contract has been created implicitly.

Some scholars suggest that a more accurate conceptualization of implied consent in contract law is a “default” rules model, as opposed to an “implied” rules model when filling gaps in contracts.<sup>58</sup> As scholar Randy Barnett argues, because contracts are grounded in the parties’ manifestation of their intent to be legally bound, they have actually consented, in the broadest sense, to a set of default rules. He analogizes default rules to the setting of a word processing program—while we do not explicitly set our margins and font each time we open a document, we consent to the settings, unless we manually override them.<sup>59</sup> In certain contexts, rather than looking to justify ubiquitous contract terms via implied consent, it is more accurate to treat these terms as default rules that one must opt out of, as opposed to opt in to. The notion that these gap-fillers are so much a part of contract law as to be considered “default rules” demonstrates how inseparable the theory of implied consent is from contract law.

### *B. Implied Consent in Sexual Assault Law*

Consent plays a notorious, oft critiqued, and particularly nebulous role in sexual relations and rape law. Superficially, one might say that the law criminalizes nonconsensual sex and allows consensual sex; but this is highly simplified and fails to account for the gradations within the meaning of consent. Over time, as feminist theory has developed, scholars have taken a closer, more

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<sup>54</sup> Willard L. Boyd III & Robert K. Huffman, *The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U. L. REV. 605, 606–09 (1991).

<sup>55</sup> Randy Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 822 (1992); Brian Bix, *Contracts*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 251, 261 (Franklin Miller & Alan Wertheimer eds., 2010).

<sup>56</sup> Bix, *supra* note 55.

<sup>57</sup> *Quasi Contract*, WOLTERS KLUWER BOUVIER L. DICTIONARY (2012).

<sup>58</sup> Barnett, *supra* note 55.

<sup>59</sup> *Id.* at 824.

nanced look at what consent to sex actually means. Coercion, competency, deception, and intoxication can complicate the consent inquiry.<sup>60</sup>

Society has come a long way in its understanding of consent, particularly implied consent, within rape law. Common law theories of consent offered wide latitude to imply consent from behavior, largely based on the idea that women were either apathetic toward sex or embarrassed by their desires for sex; they therefore needed to be forced into the act to overcome these obstacles.<sup>61</sup> Of course, women have also traditionally been viewed as an inferior population, their free will being both dominated and overridden by men.<sup>62</sup> These misguided rationales led courts to find implied consent based on many “normal” female behaviors. Some judges were not looking for actual verbal consent, but rather behavior that signaled sexual availability.<sup>63</sup>

The tides have certainly turned in this regard. The idea that sexually promiscuous behavior (or even normal behavior) somehow implies that one is consenting to sexual relations with whomever one encounters now seems ludicrous,<sup>64</sup> and the law largely reflects such. Canada has gone so far as to explicitly hold that “[n]o defense of implied consent to sexual assault exists in Canadian law.”<sup>65</sup>

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<sup>60</sup> See Alan Wertheimer, *Consent to Sexual Relations*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 195, 204–17 (Franklin Miller & Alan Wertheimer eds., 2010).

<sup>61</sup> *Forcible Rape and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 *YALE L.J.* 55, 67 (1952) (“A woman’s need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might occur after willing participation.”); see also BYRON, *DON JUAN*, Canto I, stanza 117 (Marchand ed., 1958) (“A little still she strove, and much repented / And whispering, ‘I will ne’er consent, —consented.”).

<sup>62</sup> See, e.g., *Muller v. State of Oregon* 208 U.S. 412, 421–422 (1908) (“Still again, history discloses the fact that woman has always been dependent upon man. . . . [B]ut looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. . . . It is impossible to close one’s eyes to the fact that she still looks to her brother and depends upon him.”); *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (“Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”).

<sup>63</sup> See *State v. Myers*, 606 P.2d 250, 252 (Utah 1980) (overruling trial judge’s arrest of judgment where rape based upon a victim’s “friendly” behavior when judge stated that “if under those facts and circumstances a man has sexual intercourse with a woman, it seems to me, *even if it can technically be said without her consent*, I don’t think that we can, in any sense of the word, justify imposing a prison sentence upon him on that fact situation”).

<sup>64</sup> See Lindsay Bever, *The Persistent Myth That Revealing Clothing Leads to Rape*, *WASH. POST* (Jan. 10, 2018, 10:58 AM), <https://www.washingtonpost.com/news/worldviews/wp/2018/01/10/the-persistent-myth-that-revealing-clothing-leads-to-rape/>.

<sup>65</sup> *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.).

Nonetheless, the theory of implied consent is still used today to justify the marital rape exemption.<sup>66</sup> This exemption can be traced to ancient biblical ideology of women as property and marriage as a contract.<sup>67</sup> “The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”<sup>68</sup> Because sexual intercourse within a marriage was assumed to be consensual and irrevocable,<sup>69</sup> intramarital rape could not occur.<sup>70</sup> While this understanding of implied consent is inconsistent with nearly every other conception of consent within criminal law,<sup>71</sup> the marital rape exemption persists in at least a dozen states.<sup>72</sup>

It is difficult to comprehensively survey consent in sexual assault law because of the variety of statutes and approaches throughout the states. Culturally, there seems to be a movement toward stricter conceptions of consent, but criminal law has not necessarily tracked this evolution. While at least three states have affirmative consent laws,<sup>73</sup> the definition of consent, and thus of implied consent, in sexual assault law is inconsistent. In some jurisdictions, a

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<sup>66</sup> *But see* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES* 435 (2017). Recent statutory reforms have substantially eroded this exception. *Id.*

<sup>67</sup> *See* SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE*, 380 (1st ed. 1975). The exemption of husbands from rape prosecutions can be traced to our biblical forefathers’ interpretation of the definition of rape. Any carnal knowledge outside the marriage contract was deemed unlawful, while any carnal knowledge within the marriage contract was considered lawful. *See also* *United States v. Yazell*, 382 U.S. 341, 361 (1966) (Black, J., dissenting) (“This rule [for coverture laws] has worked out in reality to mean that though the husband and wife are one, the one is the husband.”).

<sup>68</sup> 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 629 (photo. reprint 2003) (E. & R. Nutt & R. Gosling 1736) (spelling updated).

<sup>69</sup> *But see* Theresa Fus, *Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches*, 39 *VAND. J. TRANSNAT’L L.* 481, 483 (“Variations on Hale’s strict irrevocability principle allow for a wife to revoke her implied sexual consent only in times when ‘ordinary relations’ in the marriage are suspended. For example, a woman can revoke her implied consent when she and her husband are separated.”).

<sup>70</sup> Anne L. Buckborough, *Family Law: Recent Developments in the Law of Marital Rape*, 1989 *ANN. SURV. AM. L.* 343, 345–46 (1990) (“According to the theory of implied consent, marital rape is impossible because all sexual contact within a continuing relationship is presumed to be consensual. . . . Thus, under statutes grounded in the theory of implied consent, nonconsensual sexual intercourse is not a crime in the context of an ongoing sexual relationship.”).

<sup>71</sup> *See* Lalena Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 *CLEV. ST. L. REV.* 351, 354 (1995).

<sup>72</sup> Briana Bierschbach, *This Woman Fought to End Minnesota’s “Marital Rape” Exception, and Won*, NPR (May 4, 2019, 7:52 AM), <https://www.npr.org/2019/05/04/719635969/this-woman-fought-to-end-minnesotas-marital-rape-exception-and-won> (“Roughly a dozen states shield a spouse from prosecution in a rape case, including South Carolina, where a married victim has to prove a threat of physical violence within 30 days of the rape. Ohio lawmakers are also debating removing a marital rape exception on their law books.”).

<sup>73</sup> Jocelyn Noveck, *In Defining Consent, There’s a Gap Between the Law, Culture*, *CLAIMS J.* (May 21, 2019), <https://www.claimsjournal.com/news/national/2019/05/21/291029.htm>.

lack of force suggests the victim did not resist and thus, consented.<sup>74</sup> In the absence of affirmative consent, consent is implied through silence or lack of resistance—a clear example of consent being implied in the absence of affirmative consent. This conception of consent most closely reflects the “psychological phenomenon” approach.<sup>75</sup> Although there is no communication of consent, behavior is used to assume a mental state of consent exists.

### *C. Implied Consent under the Fourth and Fifth Amendments*

The text of the Fourth Amendment provides the people the right to be “secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”<sup>76</sup> Reasonableness is the touchstone of the Fourth Amendment.<sup>77</sup> Warrantless searches are unreasonable unless they fall under an exception to the warrant requirement.<sup>78</sup> Rationales rooted in implied consent permeate both the general consent exception and the pervasively regulated industries exception.

These exceptions have developed over time, but the role of implied consent remains ambiguous in application. Classic implied consent DUI laws, for example, are justified on a theory of, not surprisingly, implied consent. Although the precise laws differ from state to state, these statutes generally specify that a citizen, upon obtaining her driver’s license or driving on public roadways, has consented to a breathalyzer test (and sometimes a blood test) if pulled over by law enforcement and suspected of driving under the influence.<sup>79</sup> These laws are discussed in more detail later.<sup>80</sup> Before addressing the controversy around implied consent laws, it is necessary to first understand the court’s jurisprudence concerning its approach to the general consent exception.

#### *1. The General Consent Exception*

The Fourth Amendment generally requires that law enforcement officers

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<sup>74</sup> Patricia Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 44 (1997) (“Without proof of force, actual or constructive, evidenced by words or conduct of the defendant . . . , sexual intercourse is not rape. This is so even though the intercourse may have occurred without the actual consent and against the actual will of the alleged victim.” (quoting *Goldberg v. State*, 395 A.2d 1213, 1219–20 (Md. Ct. Spec. App. 1979))).

<sup>75</sup> Miller & Wertheimer, *supra* note 36.

<sup>76</sup> U.S. CONST. amend. IV.

<sup>77</sup> *Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

<sup>78</sup> *Id.*

<sup>79</sup> *Implied Consent Laws*, IMPLIEDCONSENT.ORG, <http://www.implicitconsent.org/implicitconsentlaws.html> (“When you signed forms to apply for a driver’s license, you agreed to comply with requests by law enforcement officers to take chemical testing to determine your blood-alcohol content (BAC).”).

<sup>80</sup> *See infra* Part II.C.1.e.



obtain a warrant prior to conducting a search of private property.<sup>81</sup> However, because the Fourth Amendment only guarantees freedom from unreasonable searches and seizures, searches deemed reasonable do not trigger the Fourth Amendment.<sup>82</sup> One type of reasonable search is a consent-based search.<sup>83</sup> In other words, once an officer obtains valid consent to search, the subsequent search is reasonable and thus in compliance with the Fourth Amendment. But ascertaining the meaning of valid consent is a complicated inquiry. Traditionally, courts analyze four factors to determine if officers obtained valid consent: indication, authority, voluntariness, and scope. While all of these factors are relevant to determining if an individual gave consent, the evaluation of each factor is slightly more complicated if a search is justified on implied, rather than express, consent.

*a. Indication*

The first factor, indication, is a key component differentiating consent from implied consent. Generally, courts are looking for any act communicating consent—an affirmative statement or a shrug could both qualify.<sup>84</sup> Requiring indication of some sort fits with the philosophical conception of consent that requires a communicative act. Indication plays a key role in morally transformative consent according to the behavioral model;<sup>85</sup> it is necessary to

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<sup>81</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>82</sup> *Id.* at 361.

<sup>83</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”).

<sup>84</sup> *See, e.g., United States v. Faler*, 832 F.3d 849, 851 (8th Cir. 2016) (finding “implied consent” where the officer asked, “mind if we come in?” and the apartment tenant “opened the door wider, moved out of the way, and then officers entered”); *Wallace v. State*, 62 A.3d 1192, 1195 (Del. 2012) (finding that the person who answered the door upon announcement of “probation and parole” had “opened the front door of the home wide enough to be considered an implied invitation to enter”); *United States v. Scroggins*, 599 F.3d 433, 438 (5th Cir. 2010) (finding that where the defendant, arrested on front porch, asked to be allowed to enter the house to put on more appropriate clothing, and officer said she could not enter unless he accompanied her, her subsequent entry constituted “implied consent” for officer to enter); *Brown v. United States*, 983 A.2d 1023, 1027 (D.C. 2009) (finding that although the defendant “did not give explicit, verbal permission, she nonetheless impliedly consented to the search by handing the bottle to” the officer “in response to a question about whether she had any ‘guns, drugs, or narcotics’”); *Brown v. State*, 856 S.W.2d 177, 181 (Tex. Crim. App. 1993) (using the concept of “implied consent” to conclude that a homeowner who calls the police to a murder scene and asserts a crime was committed by a third party may be deemed to have allowed the police to enter for purposes of “a search of the premises reasonably related to the routine investigation of the offense”). The concurring opinion in *Brown v. State* helpfully notes that in lieu of the fiction of implied consent, it would be better to say that what is needed is “the actual consent of the owner, express or implied.” 856 S.W.2d at 184 (McCormick, J., concurring).

<sup>85</sup> Miller & Wertheimer, *supra* note 36.

satisfy half of the equation in the hybrid model, which conditions valid consent on both the indication of consent and the mental state of consent.

In the context of implied consent, indication is almost always given in the form of an act. Words and assertive behavior (such as a nod or gesture) serve as express indication, whereas taking an action (like parking one's car, obtaining a driver's license, or walking on public streets) can only serve as implied indication in certain situations. For example, to return briefly to Bristol's street signs, if challenged in court, the government would likely argue that in light of the posted signs, the act of parking one's car is the indication of consent. Although no words are exchanged or affirmative acknowledgements given, the act alone is enough to indicate consent.

However, there are serious concerns with this approach to indication of implied consent.<sup>86</sup> The primary concern is illustrated by the individual who fails to notice the posted sign. Tying indication of consent to an action assumes that the individual is aware of the consent associated with her action in a particular scenario. The government is resting on the assumption that an individual sees the parking sign on the Bristol streets; or, in the case of the Denver monitoring signs, assumes the individual notices the sign making her aware of the data collection. In the case of DUI implied consent laws, the government is assuming an individual is aware of the statute. The fallacy of this approach lies in these incorrect assumptions—absent actual awareness of the notice, one's behavior does not indicate consent.

### *b. Authority*

The second factor, authority, requires that valid consent be obtained either from someone who had the actual authority to consent to the search,<sup>87</sup> or who the police reasonably believed had the authority to consent.<sup>88</sup> Consent can be

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<sup>86</sup> See LAFAVE, *supra* note 25, at § 8.2(g) (“While . . . cooperative action in connection with the search itself may be a factor appropriately cited by a court to add strength to the conclusion that a particular consent was voluntary when no highly coercive elements are present, or even when the issue is what interpretation is to be given to an ambiguous or equivocal response to a police request for consent, there will be other situations in which it is not a useful indicator of consent.”).

<sup>87</sup> *United States v. Matlock*, 415 U.S. 164, 169–70 (1974) (noting that the police can obtain consent for a search from a third party if that third party has common authority over the premises).

<sup>88</sup> *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (holding that a warrantless search does not violate the Fourth Amendment if the police reasonably believed that the person who consented to the search had the authority to do so). There is a major implication of the shift from relinquishment theory to reasonable search theory. A search justified on apparent authority, as established in *Rodriguez*, does not rest on the target's relinquishment of her expectation of privacy. In fact, by definition, the target has not relinquished any privacy expectation. Rather, the justification is that if the police acted reasonably in believing that the consenter had the

obtained “either from the individual whose property is searched . . . or from a third party who possesses common authority over the premises.”<sup>89</sup> Common authority rests “on mutual use of the property by persons generally having joint access or control for most purposes.”<sup>90</sup> The Court has justified this approach on an assumption of the risk theory. In other words, when we expose and share our space with someone else, we assume the risk that they will allow others, including police officers, into our shared space, thereby exposing it to the public. With the explosion of social networking and apps gathering users’ personal information, authority as it pertains to the third-party doctrine is a hot topic amongst Fourth Amendment scholars.

The controversy stems from a fundamental change in how, where, and with whom people share their personal data.<sup>91</sup> Social networking websites and apps like Facebook and TikTok gather and store users’ data. This website or app now owns the data and can consent to its release. The massive expansion in the use of these apps, combined with the highly personal data being shared, raises questions about the efficacy of the third-party search doctrine<sup>92</sup> in our highly integrated world. Regardless of who can authorize consent, that consent must be given voluntarily.

### c. *Voluntariness*

The third factor, voluntariness, requires that valid consent be obtained voluntarily. The seminal case analyzing voluntariness is *Schneckloth v. Bustamonte*.<sup>93</sup> In *Bustamonte*, officers obtained consent to search a vehicle, which contained stolen checks.<sup>94</sup> The officers asked the occupants if they could search the glove compartment, to which one of the occupants responded, “Sure, go ahead.”<sup>95</sup> The state filed charges after the search uncovered stolen checks in the defendant’s glove compartment.<sup>96</sup> The defendant moved to suppress the

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authority to consent to the search (although she did not, in fact, have such authority), there is no behavior to deter and therefore no reason to suppress the evidence gathered during the search.

<sup>89</sup> *Id.* at 181.

<sup>90</sup> *Matlock*, 415 U.S. at 171 n.7.

<sup>91</sup> See Lisa Schmidt, *Social Networking and the Fourth Amendment: Location Tracking on Facebook, Twitter and Foursquare*, 22 CORNELL J.L. & PUB. POL’Y 515, 524 (2012).

<sup>92</sup> See generally *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (officially adopting the third-party search doctrine, stating “this Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties”). For a more recent and robust discussion of this doctrine, see *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

<sup>93</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>94</sup> *Id.* at 220.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

checks, arguing that the consent was not valid because he was not notified of his right to refuse to consent to the search.<sup>97</sup> The issue before the Supreme Court was whether consent is voluntary if given without the police notifying the consenter of her right to refuse.<sup>98</sup>

The Supreme Court reversed the Ninth Circuit, holding that the state need not prove that the consenter knew she had the right to refuse in order for consent to be deemed voluntary.<sup>99</sup> It instead relied on the “traditional” definition of consent,<sup>100</sup> which does not require proof of knowledge that one can refuse to consent. Voluntariness, in the Court’s eyes, can only be determined by looking at the “totality of the circumstances”<sup>101</sup>:

While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a ‘voluntary’ consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.<sup>102</sup>

*Bustamonte* holds that voluntariness of consent requires individual inquiries into the particular set of circumstances surrounding consent.<sup>103</sup> The court should look to both characteristics of the accused and the details of the interrogation.<sup>104</sup>

The 2018 case of *Carpenter v. United States* clarified what it means to act voluntarily in a world inundated with technology.<sup>105</sup> Although in the context of the third-party doctrine, the Court in *Carpenter* rejected the notion that using a

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<sup>97</sup> *Id.* at 219.

<sup>98</sup> *Id.* at 222.

<sup>99</sup> *Id.* at 248–49.

<sup>100</sup> *Id.* at 225–26 (“The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.”).

<sup>101</sup> *Id.* at 227.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 226. Characteristics of the accused include age, education, intelligence, level of intoxication, cognitive deficits, experience with the justice system, and knowledge of the right to refuse. *Id.* Characteristics of the encounter include the number of officers present, their attitude toward the target, the issuance of threats, the presence of weapons, whether they advised target of her right to leave, time of detention, and whether they falsely claimed they had a warrant. *Id.*

<sup>105</sup> *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

cell phone and thereby subjecting oneself to constant tracking<sup>106</sup> is truly voluntary for two reasons:

In the first place, cell phones and the services they provide are ‘such a pervasive and insistent part of daily life’ that carrying one is indispensable to participation in modern society. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up.<sup>107</sup>

Because cell phones are so necessary to modern life and because the generation of location information is not based on any affirmative action of the cell phone owner,<sup>108</sup> the data is not generated “voluntarily” in any meaningful sense.

*d. Scope*

The last factor in the analysis concerns the scope of the search. The consentor has control over the scope of the search to which she consents, and a consent-based search is only valid if it does not exceed the scope to which the consentor agreed. However, the Court has again relied on a reasonableness standard when questions of scope arise. In *Florida v. Jimeno*, an officer pulled over Enio Jimeno and informed him that he believed there were drugs in Jimeno’s vehicle.<sup>109</sup> Jimeno consented to a search of his vehicle, which turned up a small paper bag which contained cocaine.<sup>110</sup> At trial, Jimeno argued that his consent did not extend to the bag found within his car.<sup>111</sup> The Supreme Court disagreed and held that the Fourth Amendment is “satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect’s consent permitted him to open a particular container”<sup>112</sup> within the automobile. The Court relied heavily on the fact that the officer had informed the consentor of his intent to search for drugs. “We think it was objectively reasonable for the police to conclude that the general consent to

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<sup>106</sup> Cell phones continuously track location by sending signals to the nearest cell phone tower at various times. *Id.* at 2210. Signals are sent whenever a user uses her phone, but also when a call or text is received, and at random by the cell phone company. *Id.* The precision of the user’s GPS location depends on the density of the towers in a given city. This historical data can be gathered and essentially creates a map of the user’s movement, wherever he she goes. *Id.*

<sup>107</sup> *Carpenter*, 138 S. Ct. at 2220.

<sup>108</sup> This important rationale distinguishes *Carpenter* from *Smith v. Maryland*. 442 U. S. 735, 744 (1979). In *Smith*, because information was only gathered when the defendant *placed* a call, he “voluntarily conveyed” the dialed numbers to the phone company by “expos[ing] that information to its equipment in the ordinary course of business.” *Id.*

<sup>109</sup> *Florida v. Jimeno*, 500 U.S. 248, 249 (1991).

<sup>110</sup> *Id.* at 249–50.

<sup>111</sup> *Id.* at 250.

<sup>112</sup> *Id.* at 248.

search respondent's car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in . . . a container."<sup>113</sup>

The scope of consent was addressed again twenty-two years after *Jimeno* in *Florida v. Jardines*,<sup>114</sup> which specifically looked at the scope of an implied license. In this case, two officers and a trained police dog approached the defendant's front door, without a warrant, on a tip regarding marijuana growth inside the home.<sup>115</sup> After sniffing around the defendant's front porch, the dog detected an odor, and based on this information, the detectives received a warrant to search the home.<sup>116</sup> At trial, the judge suppressed the evidence on the grounds that the canine search was an unreasonable search.<sup>117</sup> The Supreme Court granted cert on the question of "whether the officers' behavior was a search within the meaning of the Fourth Amendment."<sup>118</sup>

The Court held that the officers' behavior was an unconstitutional search under the Fourth Amendment.<sup>119</sup> In coming to this conclusion, the Court analyzed whether the defendant "had given his leave (even implicitly)" for them to approach.<sup>120</sup> The answer turns on the implied social license, which stems from a theory of implied consent.<sup>121</sup> As the Court explained, there are certain signs—for example, a knocker on a door—that invite specific actions from the public.<sup>122</sup> In these situations, explicit consent to engage in the invited behavior is not necessary because these practices are so woven into society that we assume everyone is aware of their meaning. However, implied licenses are still limited: "The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose."<sup>123</sup> Because *Jardines* involved the approach to a house for criminal investigation purposes, the Court found the officers acted outside the bounds of the implied social license, and thus, there was no consent, and the search was unconstitutional.

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<sup>113</sup> *Id.* at 251.

<sup>114</sup> *Florida v. Jardines*, 569 U.S. 1 (2013).

<sup>115</sup> *Id.* at 3–4.

<sup>116</sup> *Id.* at 4.

<sup>117</sup> *Id.* at 4–5.

<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.* at 11–12.

<sup>120</sup> *Id.* at 8.

<sup>121</sup> *Id.* ("A license may be implied from the habits of the country." (quoting *McKee v. Gratz*, 260 U.S. 127, 135 (1922))).

<sup>122</sup> *Id.* ("This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge.").

<sup>123</sup> *Id.* at 9.

Implied licenses raise important questions about the revocability of the implied consent to engage in the invited behavior. Based on the *Jardines* Court's justification for the implied license, an individual who does not wish to grant a license could presumably revoke it.<sup>124</sup> However, courts are split on the extent to which citizens must make clear their efforts to revoke implied licenses. There is contradictory authority as to the validity and efficacy of the most common means of keeping people off one's property: the "No Trespassing" sign.<sup>125</sup> Because consent is only valid as to the scope set by the consenter, it must be revoked to be valid. This fact has important implications when analyzing the role of notice, since a sign conferring consent often offers no possibility of revocation. Additionally, the implied license rests on the assumption that everyone is invited to perform the specific act that the implied license permits. That is to say, there could not be an implied license that extends to or limits only law enforcement officers.

*e. Implied Consent Laws in the DUI Context*

Traditional implied consent laws rest on shaky Fourth Amendment footing. Courts have struggled with the constitutionality of implied consent statutes seeking to ensure public safety by curtailing drunk driving. These laws differ from state to state, but most condition the receipt of a driver's license on an individual's preemptive consent to a breath and blood test when pulled over on suspicion of driving while intoxicated.<sup>126</sup> The state statute serves to provide

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<sup>124</sup> For example, a "No Trespassing" sign could function as notice to the public that this specific person has revoked the otherwise implied license to approach one's house for certain purposes.

<sup>125</sup> See *United States v. Carlross*, 818 F.3d 988, 996 (10th Cir. 2016) (holding that multiple "No Trespassing" signs including a sign stating "Posted Private Property Hunting, Fishing, Trapping or Trespassing for Any Purpose Is Strictly Forbidden Violators Will Be Prosecuted" was not an unambiguous and clear revocation of the implied license to approach and thus, an objective officer would not have understood that the implied license he would ordinarily have to approach the porch and knock on the front door of a home had been revoked at this house); *United States v. Jones*, No. 4:13cr00011-003, 2013 WL 4678229, at \*5 (W.D. Va. Aug. 30, 2013) (holding, post-*Jardines*, that officers did not violate the Fourth Amendment by entering rural property, driving past "No Trespassing" signs on either side of the driveway, passing another sign on their way to the house and another affixed to the house, and walking past a "No Trespassing" sign hanging to the right of the front door in order to conduct a knock-and-talk). *But see* *United States v. Holmes*, 143 F. Supp. 3d 1252, 1270 (M.D. Fla. 2015) ("However, it may be inferred from these cases that the combination of posting a 'No Trespassing' sign along with the physical act of closing the gate does serve to seal the property and manifest the resident's intent to revoke the implied license to enter."). See generally, Andrew Guthrie Ferguson & Stephen E. Henderson, *LAWn Signs: A Fourth Amendment for Constitutional Curmudgeons*, 13 Ohio St. J. Crim. L. 487 (2016).

<sup>126</sup> *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2169 (2016) ("They provided that cooperation with BAC testing was a condition of the privilege of driving on state roads and that the privilege would be rescinded if a suspected drunk driver refused to honor that condition.").

notice of an individual's consent.<sup>127</sup> Essentially, drivers must "consent" to a potential future breath and blood test at the time they receive their license.<sup>128</sup> As the court's consent doctrine dictates, valid consent must be indicated by someone with actual or apparent authority, and voluntarily given, based on a totality of the circumstances. It is dishonest to suggest that an application of the classic consent doctrine would render these "consents" valid. It cannot be said that every person with a driver's license has truly consented to an unknown search potentially years or decades before it happens.<sup>129</sup> Instead, legislatures have justified these laws under the theory of implied consent.

The Supreme Court's DUI implied consent law jurisprudence suggests an unwillingness to engage with these laws on consent exception grounds. In the three most recent Supreme Court cases implicating these laws with respect to the Fourth Amendment, the Court has chosen to justify warrantless roadside breath and blood tests using either the exigent circumstances doctrine or the search-incident-to-arrest doctrine.<sup>130</sup> This may be because, despite their name, implied consent laws are theoretically and analytically distinct from the notion of consent, so much so that it may strain credulity to suggest that these laws create any meaningful consent at all.

Justices Sonia Sotomayor, Elena Kagan, and Ruth Bader Ginsburg recently asserted their skepticism of implied consent laws in *Mitchell v. Wisconsin*.<sup>131</sup> In her dissent, Justice Sotomayor rejected the consent rationale that was argued by the state but rejected by the plurality: "The plurality does not rely on the consent exception here. With that sliver of the plurality's reasoning I agree. I would go further and hold that the state statute, however phrased, cannot itself create the actual and informed consent that the Fourth Amendment requires."<sup>132</sup> During

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<sup>127</sup> Implied Consent Laws, *supra* note 79.

<sup>128</sup> *Id.*

<sup>129</sup> Douglas Husak refers to this concept as "hypothetical consent" and argues that it is impossible to give consent non-contemporaneously with the act to which you are consenting. Douglas Husak, *Paternalism and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 107, 113–15 (Franklin Miller & Alan Wertheimer eds., 2010).

<sup>130</sup> See *Birchfield*, 136 S. Ct. at 2185 (holding that a breath test, but not blood test, can be administered as a search incident to arrest for drunk driving); *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2539 (2019) (holding that in almost all situations, when the police have probable cause to believe a person had committed a drunk-driving offense and the driver's unconsciousness required him to be taken to the hospital before the police had a reasonable opportunity to administer a breath test, they can order a warrantless blood test); *Missouri v. McNeely*, 569 U.S. 141, 156 (2013) (holding that a warrantless roadside blood test is not categorically constitutional, but the exigency justification must be determined on a case by case basis).

<sup>131</sup> *Mitchell*, 139 S. Ct. at 2541.

<sup>132</sup> *Id.* at 2545.



oral arguments for this case, Justice Ginsburg also rejected the idea that implied consent is based on real consent:

But it's a fiction, isn't it? It's not consent, no matter how much you call it implied or presumed. And it's typical of the original non-resident motor vehicle statutes. They said, if you drive on our roads, then you will be deemed to have consented to appoint a secretary of state as your agent, and in time, we came to appreciate that that is not genuine.<sup>133</sup>

The majority did not address the theoretical underpinnings of implied consent laws, but its unwillingness to answer the question on which they granted cert<sup>134</sup> suggests discomfort with the notion, or inability to justify, that implied consent laws are based on a meaningful definition of consent.

## 2. *The Administrative Search Doctrine and Pervasively Regulated Industries Exceptions*

Although less obvious, the theory of implied consent is foundational to another exception to the Fourth Amendment warrant requirement—the closely regulated industry exception under the administrative search exception.<sup>135</sup> This prong of Fourth Amendment analysis has largely escaped scrutiny. The administrative search doctrine, first formulated a half-century ago, justifies broad searches for safety purposes of schools, businesses, government employees, and more.<sup>136</sup> This doctrine is justified on the government's need to ensure compliance with laws and regulations through inspection,<sup>137</sup> and it allows warrants to be issued based not on probable cause, but lower legislative or regulatory standards.<sup>138</sup>

The pervasively regulated industries exception is an exception to the administrative search doctrine. This exception allows law enforcement to inspect businesses in certain industries, under certain conditions, absent a

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<sup>133</sup> Transcript of Oral Argument at 40, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

<sup>134</sup> *Mitchell*, 139 S. Ct. at 2542–43 (Sotomayor, J., dissenting) (“The Court granted certiorari to decide whether a statute like Wisconsin’s, which allows police to draw blood from an unconscious drunk-driving suspect, provides an exception to the Fourth Amendment’s warrant requirement.”).

<sup>135</sup> See Eve Brensike Primus, *Bringing Clarity to Administrative Search Doctrine: Distinguishing Dragnets from Special Subpopulation Searches*, 39 SEARCH & SEIZURE L. REP. 61 (2012).

<sup>136</sup> G. S. Hans, *Curing Administrative Search Decay*, 24 B.U. J. SCI. & TECH. L. 1, 3 (2018).

<sup>137</sup> *Id.* (“The administrative search exception permits government officials, to perform this duty without having to seek warrants for every inspection of business records or premises, increasing efficiency and allowing the government to promote regulatory compliance, consumer protection, and public safety.”).

<sup>138</sup> *Camara v. Mun. Ct.*, 387 U.S. 523, 538–39 (1967).

warrant.<sup>139</sup> Courts have accepted Congress's broad power to design inspection schemes deemed necessary to ensure safety of certain industries.<sup>140</sup> This exception warrants analysis when looking at justifications of theories of implied consent because it turns on the notion that business-owners entering pervasively regulated industries are aware of the regulations in place, and thus implicitly consent to warrantless inspections simply by entering the industry.<sup>141</sup> This doctrine also assumes that searching a commercial property results in a lesser intrusion of privacy than searching a home, and that the government has a strong interest in conducting the search, usually on public safety grounds.<sup>142</sup>

The historical evolution of this doctrine illustrates why the Court has carved out this exception to the warrant requirement. The 1972 case of *United States v. Biswell*<sup>143</sup> established the doctrine and crafted its first iteration. The Court upheld the constitutionality of a statute authorizing law enforcement to enter and search businesses in the firearms industry.<sup>144</sup> The *Biswell* Court held that where "regulatory inspections further urgent federal interests, and the possibility of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute."<sup>145</sup>

While *Biswell* created this exception, *Marshall v. Barlow's, Inc.*<sup>146</sup> and *Donovan v. Dewey*<sup>147</sup> set its scope. In *Barlow's*, the Supreme Court held that the warrantless inspection provisions of the Occupational Safety and Health Act (OSH Act) at issue in this case were unconstitutional.<sup>148</sup> These provisions allowed warrantless searches of any employment facility under Occupational Safety and Health Administration's (OSHA) jurisdiction.<sup>149</sup> The Court found the OSH Act provision far too broad to fit within the rationales on which this exception rests. Specifically, the Court pointed to a notice and implied-consent

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<sup>139</sup> *Rethinking Closely Regulated Industries*, *supra* note 32.

<sup>140</sup> *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76 (1970).

<sup>141</sup> *Rethinking Closely Regulated Industries*, *supra* note 32, at 803.

<sup>142</sup> *Id.* at 797–98.

<sup>143</sup> *United States v. Biswell*, 406 U.S. 311 (1972).

<sup>144</sup> *Id.* at 317.

<sup>145</sup> *Id.* Notably, the Court explicitly distinguished between the exception it was creating and the consent exception: "In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute." *Id.* at 315.

<sup>146</sup> *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

<sup>147</sup> *Donovan v. Dewey*, 452 U.S. 594 (1981).

<sup>148</sup> *Barlow's*, 436 U.S. at 307.

<sup>149</sup> *Id.* at 309. ("Section 8 (a) of the Occupational Safety and Health Act of 1970 . . . empowers agents of the Secretary of Labor (Secretary) to search the work area of any employment facility within the Act's jurisdiction.").

rationale to justify this exception in only a limited subset of industries: “when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.”<sup>150</sup> The *Barlow’s* Court required a history of distinctive regulation in a particular industry for this exception to apply: the history of regulation provides the necessary notice.

Essentially, the Court reiterated that notice is a key element of this exception: business-owners are aware that entering a certain industry will subject them to warrantless inspections.<sup>151</sup> Where an inspection scheme is too broad and unparticular, business-owners cannot truly be on notice that they will be subject to its terms.<sup>152</sup> Therefore, the act of entering any industry cannot really serve as “consent.”<sup>153</sup> But just three years later, in *Donovan v. Dewey*, the Court weakened this rationale.<sup>154</sup> While the Court did not eliminate history of regulation as a factor, the Court transformed it from a requirement to a non-dispositive factor. Warrantless searches could still be upheld under this exception, but only if Congress’s inspection regime “establishes a predictable and guided federal regulatory presence.”<sup>155</sup> In other words, after *Dewey*, predictability was the key inquiry, and a history of industry regulation that put business-owners on notice of potential warrantless searches was one way to show the inspection was predictable.<sup>156</sup> History of regulation was no longer required to justify a search under the pervasively regulated industry exception; it was simply part of the analysis.<sup>157</sup>

Fifteen years later, in *New York v. Burger*,<sup>158</sup> the Court expounded the requirements that must be met in order for a search to qualify as reasonable, and thus fall within this exception.<sup>159</sup> It articulated three factors.<sup>160</sup> First, the search regime must advance a substantial government interest.<sup>161</sup> Second, the search must be a necessary component of the regulatory scheme.<sup>162</sup> Third, the

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<sup>150</sup> *Id.* at 313; *see also* *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973) (“[B]usinessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade . . . [and] in effect consent[] to the restrictions placed upon [them].”).

<sup>151</sup> *Barlow’s*, 436 U.S. at 313.

<sup>152</sup> *See id.*

<sup>153</sup> *Id.* at 313–14.

<sup>154</sup> *Donovan v. Dewey*, 452 U.S. 605–06 (1981).

<sup>155</sup> *Id.* at 603–04.

<sup>156</sup> *Id.* at 606.

<sup>157</sup> *Id.* at 605–06.

<sup>158</sup> *New York v. Burger*, 482 U.S. 691 (1987).

<sup>159</sup> *Id.* at 691–92.

<sup>160</sup> *Id.* at 702.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

inspection program must provide a constitutionally adequate substitute for a warrant by providing notice to the owner and must limit police discretion.<sup>163</sup> The *Burger* Court believed notice played an important role in determining whether a warrantless search is reasonable, even when a statutory scheme allowing such inspection is in place.

*Burger* was part of a series of cases that led to the expansion of the pervasively regulated industries exception. Not until the 2015 case of *City of Los Angeles v. Patel*<sup>164</sup> did the Court contract the application of this exception. The *Patel* Court struck down a city ordinance allowing law enforcement officers to inspect a hotel's guest registry without a warrant.<sup>165</sup> The Court held that the regulation scheme for hotels was not comprehensive enough to qualify under this exception and was instead more of a general regulation scheme, like a set of minimum wage laws.<sup>166</sup> Again, the Court reiterated the importance of notice—the regulation scheme must be comprehensive enough to put business-owners on notice of possible warrantless inspections.<sup>167</sup> Notice is important because it curtails a business-owner's reasonable expectation of privacy in the documentation and operation of the business.

Though the pervasively regulated industries exception to the Fourth Amendment warrant requirement is still evolving, the Court has consistently stressed the importance that both notice and governmental interest, particularly public safety, play in justifying this exception. The fact that business-owners entering a particular industry are *aware* of regulation and inspection schemes already in place, combined with the important public safety goals that often underlie these regulation schemes, reduces any claims business-owners have to an expectation of privacy. This reduction in privacy has led the Court to justify a warrant exception rooted in a theory of implied consent. In other words, the reduction in privacy interest is so great in these settings as to be the functional equivalent of consent. The pervasively regulated industries exception provides a helpful guidepost for courts evaluating the appropriate relationship between consent and notice. This Comment now turns to a more comprehensive look at the role notice plays in consent theory throughout various areas of law.

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<sup>163</sup> *Id.* at 703.

<sup>164</sup> *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015).

<sup>165</sup> *Id.* at 2447.

<sup>166</sup> *Id.* at 2455. *Barlow's* had already rejected the idea that minimum wage and maximum work hour laws were enough to qualify a business or industry as "highly regulated." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314 (1978).

<sup>167</sup> *Id.*

### III. THE AMBIGUOUS ROLE OF NOTICE IN CONSENT THEORY

Nearly all conceptualizations of consent in the legal realm require or assume that an individual is aware of two things: the fact that she is consenting, and the things to which she is consenting.<sup>168</sup> Because these factors are foundational, any meaningful theory of implied consent should at the very least require that some form of notice be given before consent can potentially be implied. It is certainly necessary, but is it sufficient? It is helpful to analyze the treatment of notice with respect to consent across various areas of law.

#### A. *Notice in the Private Law Setting: Clickwrap Versus Browsewrap*

The explosion of the internet's role in daily transactions has forced courts to determine what qualifies as adequate notice to users of a website's terms and conditions. There are traditionally two approaches websites use: clickwrap and browsewrap.<sup>169</sup> Clickwrap agreements require a user to click an "I agree" (to the terms and conditions of the website) button before they can use or browse a website.<sup>170</sup> These agreements have generally received favorable treatment from courts,<sup>171</sup> likely because this approach makes it practically impossible to proceed using a site without being notified and explicitly consenting to the terms.

Browsewrap agreements also serve to inform users of the terms and conditions of a website, but these agreements are simply presented to the user on the page and do not require the user to affirmatively consent to the terms before using the site.<sup>172</sup> "A party instead gives his assent simply by using the website."<sup>173</sup> Courts have not been as impressed with these types of agreements.<sup>174</sup> The validity of browsewrap agreements "turns on whether a

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<sup>168</sup> Of course, the purely psychological approach does not require these elements, but that theory does not appear in the legal context. See Miller & Wertheimer, *supra* note 36.

<sup>169</sup> 1 LAW OF THE INTERNET (MB) ch. 1, § 1.03 (2019).

<sup>170</sup> Kaustuv M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the Reasonably Communicated Test*, 77 WASH. L. REV. 481, 482 (2002) ("Clickwrap agreements typically consist of a window containing the terms of the agreement that 'pops up' on the computer screen when a user tries to download or install software. The user has to click on a button labeled 'I AGREE' or 'I ACCEPT' to continue.").

<sup>171</sup> 1 LAW OF THE INTERNET, *supra* note 169.

<sup>172</sup> Das, *supra* note 170, at 482 ("Browsewrap agreements appear in the form of a hyperlink on the vendor's website. Unlike clickwrap agreements, the terms of a browsewrap agreement are not displayed on the computer screen unless the user clicks on the hyperlink.").

<sup>173</sup> *Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 WL 4823761, at \*4 (N.D. Tex. Sep. 12, 2007).

<sup>174</sup> See *Ticketmaster v. Tickets.com*, No. CV 99-7654 HLH (BQRx), 2000 U.S. Dist. LEXIS 4553, at \*7-8 (C.D. Cal. Mar. 27, 2000) (holding that Tickets.com could not be held to terms on a website because "[i]t cannot be said that merely putting the terms and conditions in this [browsewrap] fashion necessarily creates a

website user has actual or constructive knowledge of a site's terms and conditions prior to using the site.”<sup>175</sup> The courts' treatments of clickwrap versus browsewrap agreements show a clear preference for affirmative consent as opposed to simply assuming users are aware of terms that are posted on a site.

### *B. The Role of Notice in Fourth Amendment Searches*

Notice plays a role, albeit an ambiguous one, in the Fourth Amendment consent doctrine as well. Courts are skeptical of the claim that notice alone can be sufficient to establish valid implied consent to search. As the court states in *McGann v. Northeast Illinois Regional Commuter Railroad Corp.*,<sup>176</sup> “there is a view that the doctrine of implied consent really has little to do with consent as that term is generally understood, but is in reality a separate exception to the warrant requirement comparable to the exception for regulatory searches undertaken for an administrative purpose.”<sup>177</sup> *McGann*,<sup>178</sup> a case out of the Seventh Circuit, addressed the role of notice in the Fourth Amendment consent search doctrine head on.

*McGann* involved the search of vehicles parked in a lot displaying a sign giving notice of potential vehicle searches.<sup>179</sup> Plaintiffs, employees of Metra Rail, parked their cars at Metra's lot prior to work.<sup>180</sup> The lot was fully enclosed by a fence and had two entrances.<sup>181</sup> At each entrance, there was a prominent sign that read, “VEHICLES ENTERING OR EXITING METRA PROPERTY ARE SUBJECT TO SEARCH BY METRA POLICE.”<sup>182</sup> The plaintiffs were stopped by Metra police officers while leaving the lot, asked to exit their vehicles, and told by the officers that they had already “submitted to that.”<sup>183</sup> There were disputed facts as to the parties' actual consent when Metra attempted

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contract with anyone using the web site”); *see also* *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002) (holding a browsewrap contract invalid and unenforceable because “a reasonably prudent Internet user in circumstances such as these would not have known or learned of the existence of the license terms . . . . In consequence, plaintiffs' bare act of downloading the software did not unambiguously manifest assent”). *But see* *Handy v. LogMeIn, Inc.*, No. 1:14-cv-01355-JLT, 2015 U.S. Dist. LEXIS 97021, at \*22–23 (E.D. Cal. July 24, 2015) (holding a browsewrap notice provided notice to prospective purchasers of terms of purchase).

<sup>175</sup> *Southwest Airlines Co.*, 2007 WL 4823761, at \*5.

<sup>176</sup> *McGann v. Ne. Ill. Reg'l Commuter R.R.*, 8 F.3d 1174 (7th Cir. 1993).

<sup>177</sup> *Id.* at 1181 (internal quotations and citations omitted).

<sup>178</sup> *Id.* at 1174.

<sup>179</sup> *Id.* at 1176.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1177.

to search their vehicles.<sup>184</sup> Metra moved for summary judgment, arguing that the plaintiffs consented to the search by entering the lot with knowledge of the posted sign.<sup>185</sup> The district court granted summary judgment against the plaintiffs, but did not directly address the validity of the consent based upon the signage alone.<sup>186</sup>

On appeal, the Seventh Circuit took up the plaintiff's argument that the sign alone was not enough to effectuate the implied consent necessary to conduct the search.<sup>187</sup> In response, Metra directed the court to other cases where courts have found implied consent where a person "voluntarily undert[ook] conduct which the person was aware could subject him to a search."<sup>188</sup> The examples Metra provided were all searches at security checkpoints, which are reasonable searches pursuant to the administrative search doctrine, *not* the general consent exception.<sup>189</sup> Metra argued that knowledge of the sign giving notice of potential search and voluntary conduct subjecting the person to a search were the sole requirements for a court to imply consent.<sup>190</sup>

The Seventh Circuit rejected Metra's argument for two primary reasons: (1) the protection of the important interests of the Fourth Amendment generally, and (2) the lack of support for Metra's argument in either the consent doctrine or case law. Recognizing its position as a fierce defender of the constitutional protections granted by the Fourth Amendment,<sup>191</sup> the court reiterated its duty to "guard[] jealously against tactics taken to obtain a person's consent, and to be especially wary of those which may appear least objectionable."<sup>192</sup> The court was particularly concerned about schemes conditioning access to a facility or service on the waiver of a constitutional right, noting that these schemes diminish the voluntariness aspect necessary for valid consent.<sup>193</sup>

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1176, 1179, 1187–88.

<sup>187</sup> *Id.* at 1181.

<sup>188</sup> *Id.* at 1179.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1180.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*; cf. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt."); *Boyd v. United States*, 116 U.S. 616, 635 (1886) ("It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the

In addition to the broader constitutional objections to notice-only implied consent, the court noted that courts faced with similar issues have looked at a number of factors, not just notice and voluntary action:

(1) the person searched was on notice that undertaking certain conduct, like attempting to enter a building or board an airplane, would subject him to a search, (2) the person voluntarily engaged in the specified conduct, (3) the search was justified by a vital interest, (4) the search was reasonably effective in securing the interests at stake, (5) the search was only as intrusive as necessary to further the interests justifying the search and (6) the search curtailed, to some extent, unbridled discretion in the searching officers.<sup>194</sup>

Essentially, the court is requiring a balancing approach in order to find implied consent under the Fourth Amendment. Interestingly, while this search is not discussed in the context of the administrative search doctrine, the factors listed by the court reflect considerations more akin to those of the pervasively regulated industries exception. In any case, the court explicitly states that these factors are not dispositive and should be weighed in each case.<sup>195</sup> The *McGann* court reversed summary judgment, finding that whether the sign and the voluntary act were enough to imply consent of the plaintiffs presented a question of fact for the jury.<sup>196</sup>

*McGann* is a prototypical example of a court rejecting the argument that providing notice, by itself, is sufficient to provide consent under the Fourth Amendment. However, other circuits have addressed the issue of notice and consent differently, holding that notice alone *did* provide the government the implied consent it needed to search. *United States v. Woodrum*<sup>197</sup> involved the Boston Police Department's program, Taxi Inspection Program for Safety (TIPS), which was designed to increase cab driver safety in the city.<sup>198</sup> It allowed officers to randomly pull over participating taxis to check on their safety.<sup>199</sup> This program provided window decals to taxis of drivers who voluntarily chose to participate in the program.<sup>200</sup> The decals read, in all capital letters, "Public

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rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.".)

<sup>194</sup> *McGann*, 8 F.3d at 1181.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1186–87.

<sup>197</sup> *United States v. Woodrum*, 202 F.3d 1 (1st Cir. 2000).

<sup>198</sup> *Id.* at 3–4.

<sup>199</sup> *Id.* at 4.

<sup>200</sup> *Id.*



Notice: Boston Police Taxi Inspection Program for Safety,” and “This vehicle may be stopped and visually inspected by the Boston Police at any time to ensure driver’s safety.”<sup>201</sup> The First Circuit held that notice provided by a decal on a taxicab was sufficient to obtain consent from passengers riding in the cab.<sup>202</sup> Interestingly, the court in *Woodrum* did not use a similar, factors-based totality of the circumstances approach used in *McGann*.

When evaluating the validity of the consent, the court analyzed it vis-à-vis the owner of the cab, the driver of the cab, and the passengers of the cab. Although this case involved a seizure as opposed to a search,<sup>203</sup> the court relied on case law dealing with searches because the rationale is similar. The court reasoned that there was valid consent vis-à-vis the owner because he “freely chose to register for the program of taxi safety stops, and the TIPS decals furnish tangible proof of this consent. Although the consent was anticipatory and unparticularized, it was direct.”<sup>204</sup> Here, the owner’s voluntary enrollment, along with the decal on the car providing notice, were enough to effectuate consent to search the vehicle vis-à-vis the owner of the cab.

The court’s reasoning in finding consent as to the driver, however, is particularly interesting. Finding that because the owner acted on behalf of both himself and his employee drivers when signing up for the TIPS program, the seizure was reasonable.<sup>205</sup> To justify this rationale, the court cites *Marshall v. Barlow’s, Inc.*,<sup>206</sup> the case rejecting the reasonableness of a warrantless search under the pervasively regulated industries exception.<sup>207</sup> Additionally, the court noted that the decals provided adequate notice to both the driver and the passengers that the cab was enrolled in the TIPS program, and thus have

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 11–12. On the night of January 22, 1998, the defendants were passengers in a TIPS cab. The cab was pulled over, and without a warrant, the passengers were asked to exit the vehicle. *Id.* at 4. In the course of exiting the vehicle, a gun fell from one of the passenger’s coats, and a search of the vehicle turned up crack cocaine, a pipe, a pager, and cash. *Id.* at 5. The defendant passengers were ultimately charged with felony possession of a firearm and ammunition and possessing cocaine with intent to distribute. *Id.* The defendants moved to suppress the evidence obtained during the stop, but the district court upheld the stop on a couple grounds, notably, that the TIPS decal provided the consent necessary for the stop and seizure. *Id.* The defendants proffered a three-fold argument. First, there was insufficient evidence to establish either the taxi owner’s or taxi driver’s consent. *Id.* at 8. Second, the TIPS program is unconstitutional because it conditioned employment on a waiver of Fourth Amendment rights and does not limit the discretion of the officers making the stops. *Id.* at 10. Third, even if the TIPS consent legitimizes some stops, the scope of the program does not include this particular stop because it was not motivated by driver safety. *Id.* at 8.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 9.

<sup>205</sup> *Id.* at 9–10.

<sup>206</sup> *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 325 (1978).

<sup>207</sup> *Id.*

submitted to being stopped and searched.<sup>208</sup> In this case, the decal on the taxi window served as sufficient notice for the court to find implied consent to the subsequent search by the police.

Another major example of notice playing a fundamental role in garnering implied consent is one with which many citizens are familiar—the Transportation Security Administration’s (TSA) airport security checkpoint search.<sup>209</sup> Notably, the Supreme Court has not explicitly held that airport searches are constitutional,<sup>210</sup> but it has implied their constitutionality in dicta.<sup>211</sup> These searches are justified under the administrative search doctrine,<sup>212</sup> which is largely rooted in public health and safety concerns.<sup>213</sup> While public safety concerns serve as the policy justification for an administrative search, the search regime itself must still be constitutional. This is where notice comes into play. As the court explained in *United States v. Hartwell*,

[T]he entire procedure is rendered less offensive—if not less intrusive—because air passengers are on *notice* that they will be searched. Air passengers choose to fly, and screening procedures of this kind have existed in every airport in the country since at least 1974. The events of September 11, 2001, have only increased their prominence in the public’s consciousness. It is inconceivable that Hartwell was unaware that he had to be searched before he could board a plane.<sup>214</sup>

The court easily justified the search in *Hartwell* under the administrative search doctrine because it was both based on the need to secure public safety and provided adequate notice to citizens that a search would occur if they wished to board a plane. Importantly, the court acknowledged that while some courts have attempted to justify airport searches on the consent doctrine,<sup>215</sup> this justification is highly illogical.<sup>216</sup> In support of this, the court cited Fourth

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<sup>208</sup> *United States v. Woodrum*, 202 F.3d 1, 10–11 (1st Cir. 2000).

<sup>209</sup> *Security Screening*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/travel/security-screening> (last visited Sept. 1, 2020).

<sup>210</sup> *See United States v. Hartwell*, 436 F.3d 174, 178 n.5 (3d Cir. 2006) (“While the Supreme Court has not directly spoken on airport administrative searches, it has discussed them in dicta in two cases.”).

<sup>211</sup> *Id.*; *see also Chandler v. Miller*, 520 U.S. 305, 323 (1997) (“We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’—for example, searches now routine at airports and at entrances to courts and other official buildings.”).

<sup>212</sup> *See supra* Part II.C.2.

<sup>213</sup> *Id.*

<sup>214</sup> *Hartwell*, 436 F.3d at 180–81.

<sup>215</sup> *See, e.g., United States v. Henry*, 615 F.2d 1223, 1230–31 (9th Cir. 1980); *United States v. Edwards*, 498 F.2d 496, 500–01 (2d Cir. 1974); *United States v. Mather*, 465 F.2d 1035, 1036 (5th Cir. 1972).

<sup>216</sup> *Hartwell*, 436 F.3d at 180 n.11.

Amendment scholar Wayne R. LaFave's search and seizure treatise,<sup>217</sup> which explains that "consent theories are 'basically unsound' in the airport context because screening systems rarely meet the requirements for express consent under *Schneekloth v. Bustamonte*."<sup>218</sup> *Bustamonte* requires courts to look at the totality of the circumstances, including whether an individual knew he could refuse the search, when determining if the obtained consent is valid.<sup>219</sup> It is impossible for a search to be deemed consensual under *Bustamonte* without an inquiry into the circumstances of each search.<sup>220</sup> Additionally, "an implied consent analysis merely 'diverts attention from the more fundamental question of whether the nature of the regulation undertaken by the government is in fact reasonable under the Fourth Amendment.'"<sup>221</sup> The court intimates that airport security searches would be unconstitutional based on implied consent and that their constitutionality rests on the administrative search doctrine alone. The court's holdings on airport searches support the idea that notice alone is not enough to obtain consent under the Fourth Amendment consent doctrine.

An implied consent-based rationale is also used in Fifth Amendment jurisprudence to secure waiver of a defendant's *Miranda* rights.<sup>222</sup> The Court held in *Mirada v. Arizona* that no custodial interrogations are permitted unless law enforcement first notifies the arrestee of her Fifth Amendment rights<sup>223</sup> and obtains a knowing, voluntary, and intelligent waiver of these rights.<sup>224</sup> In *Miranda*, Chief Justice Warren made clear that a defendant's valid waiver must be express:

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.<sup>225</sup>

He then quoted a particularly apt passage from *Carnley v. Cochran*,<sup>226</sup> in which the Court expressly rejected an implied waiver from silence: "Presuming waiver

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<sup>217</sup> WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 10.6(g) at 307–09 (4th ed. 2004).

<sup>218</sup> *Hartwell*, 436 F.3d at 181 n.11.

<sup>219</sup> *See supra* note 93.

<sup>220</sup> *See supra* note 101.

<sup>221</sup> *Hartwell*, 436 F.3d at 181 n.11.

<sup>222</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>223</sup> *Id.* at 444. These rights include the right against self-incrimination, the right to counsel, and the right to know that their statements may not be used against them in a court of law. *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 475.

<sup>226</sup> *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.”<sup>227</sup>

However, the standards for obtaining a waiver have been relaxed in *Miranda*'s progeny. The first case to recognize an implied waiver to *Miranda* was *North Carolina v. Butler*.<sup>228</sup> In *Butler*, the Court held that silence, combined with a demonstrated understanding of one's rights, and behavior that indicates a willingness to communicate with law enforcement, can serve to effectuate a *Miranda* waiver.<sup>229</sup> Thirty-one years later, in *Berghuis v. Thompkins*,<sup>230</sup> the Court further diluted the express waiver requirement by holding that if someone has full knowledge and understanding of her *Miranda* rights and chooses not to invoke them, an implied waiver can be found.<sup>231</sup>

Despite the changing waiver requirements, one thing remains clear throughout *Miranda* jurisprudence: a waiver cannot be effectuated if an arrestee is not first notified of her rights. In the realm of *Miranda*, notification of one's rights is the threshold inquiry before a court can evaluate whether a suspect consented to a waiver, either expressly or implicitly. Notification is necessary, but far from sufficient to render a *Miranda* waiver valid.

These examples are illustrative of courts' varying and inconsistent approaches to the effect of notice on Fourth and Fifth Amendment consent validity. Part IV argues that notice-based implied consent theories under the Fourth Amendment should create a rebuttable presumption of unconstitutionality.

#### IV. WHY NOTICE ALONE IS NOT SUFFICIENT TO EFFECTUATE VALID IMPLIED CONSENT

Our world is changing in ways that seriously compromise our reasonable expectations of privacy. The rapidity with which technology is developing and being deployed by both private and public entities has serious consequences for how we understand our privacy rights; it has caused us to question what is truly private anymore. Though we have always interacted in public, before cameras,

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<sup>227</sup> *Miranda*, 384 U.S. at 475 (quoting *Carnley*, 369 U.S. at 516).

<sup>228</sup> *North Carolina v. Butler*, 441 U.S. 369 (1979).

<sup>229</sup> *Id.* at 369.

<sup>230</sup> *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

<sup>231</sup> *Id.* at 384.

facial recognition technology, and biometric data collection, it was a given that our face, our gait, and the profile of how we moved was observable, but not able to be tracked, traced, collected, and stored. There was no way to scan a face, record the data corresponding to the contours of one's eyes, nose, mouth, and bone structure with mathematical certainty, and then store that data in such a way that it could be used to identify that person in the future. However, this is now our reality.<sup>232</sup> Larger normative and policy questions implicated by the drastic increase in surveillance and use of tracking technology are important to grapple with, but they are beyond the scope of this Comment. Surveillance technology is deployed all around us, often without our knowledge and certainly without our consent.

These technologies have permeated our world and, at least early on in their inception, flew completely under the legal radar. However, since the use of these technologies is now ubiquitous, the law is being forced to catch up. Concerned citizens and legislatures have only recently begun developing laws to regulate the use of biometric data collection.<sup>233</sup> Naturally, considerations of the Fourth Amendment and expectations of privacy are essential to the development of these laws. At the heart of the debate is our understanding of implied consent within the Fourth Amendment, and particularly the role notice plays in this strain of jurisprudence. Despite both public and private entities' attempts to legitimize their collection of data using notice to imply consent, this understanding is fundamentally at odds with both philosophical and legal conceptions of implied consent.

While technology presents the current threat, government efforts to use notice to vitiate Fourth Amendment protections is not a new threat. Justice Thurgood Marshall expressed concern in his 1979 dissent in *Smith v. Maryland*,<sup>234</sup> worrying about allowing "the government to define the scope of Fourth Amendment protections."<sup>235</sup> He pointed specifically to the example of "law enforcement officials, simply by announcing their intent to monitor the content of random samples of first-class mail or private phone conversations, could put the public on notice of the risks they would thereafter assume in such

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<sup>232</sup> See generally Margaret Hu, *Small Data Surveillance v. Big Data Cybersurveillance*, 42 PEPP. L. REV. 773, 818–25 (2015) ("[N]either preexisting statutory frameworks (e.g., surveillance and privacy statutes) nor constitutional frameworks (e.g., current Fourth Amendment privacy jurisprudence), are likely to operate to protect against the new types of surveillance harms implicated by emerging biometric data tracking technologies.").

<sup>233</sup> See *supra* note 22.

<sup>234</sup> *Smith v. Maryland*, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting).

<sup>235</sup> *Id.*

communications.”<sup>236</sup> His fear was not in vain. As this Comment has discussed, two uses of personal data collection—biometric data collection and breath testing—and one much more rudimentary instance—tire chalking—provide dangerous examples of the government’s attempt to use notice alone to imply consent to searches. Regardless of their notice schemes, none of these examples should be constitutional under a theory of consent.

First is the combination of Denver Police Department’s surveillance system, HALO, and Morpho Argus, a technology that captures, scans, and stores faces picked up by surveillance footage.<sup>237</sup> While Denver has not yet merged the HALO system with Morpho Argus, the Colorado Bureau of Investigations has confirmed its intention to do so.<sup>238</sup> This will transform the HALO system from one of pure surveillance to one of data capturing and searching, triggering Fourth Amendment concerns. Notably, Colorado does not have any laws regulating the use of facial recognition technology.<sup>239</sup> Throughout Denver, there are signs notifying citizens that HALO cameras are in use.<sup>240</sup>

The second example raising concern is new parking enforcement practices in Bristol, Tennessee, where law enforcement is attempting to glean consent to search from notice alone. After the Sixth Circuit held that tire chalking is a search under the Fourth Amendment, Bristol posted signs stating that if one parks in a public spot, she is deemed to have consented to a search for the purposes of parking enforcement.<sup>241</sup> Although the dangers that stem from a tire chalking search seem far less serious than storing biometric data, the principles of the Fourth Amendment’s consent doctrine are offended nonetheless. Finally, DUI implied consent laws claim to secure drivers’ consent from notice provided via statute. The act of procuring a driver’s license serves as the necessary “act” to trigger the implication of consent, regardless of whether one is actually aware of the statute or that she is consenting.

In all three of these examples, the state is attempting to gain consent to search based exclusively on notice. If challenged, the state’s justification would presumably be that the signage provided notice, and that by engaging in the specified act, the individual consented to the terms of the search. And yet, under

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<sup>236</sup> *Id.*

<sup>237</sup> See Robertson, *supra* note 5.

<sup>238</sup> *Id.*

<sup>239</sup> *But see* Esteban Hernandez, *A Proposed Denver Law Would Ban Police from Using Facial Recognition Technology*, DENVERITE (Sept. 4, 2019, 4:24 PM), <https://denverite.com/2019/09/04/a-potential-denver-law-would-ban-law-enforcement-from-using-facial-recognition-technology/>.

<sup>240</sup> *Facial Recognition Technology: Does It Violate Privacy or Protect Community?*, *supra* note 11.

<sup>241</sup> Lipton, *supra* note 7.

either the general consent exception or the pervasively regulated industries exception to the Fourth Amendment, notice alone is not enough to imply consent as it does not meet the requirements of either framework.

*A. Notice and the General Consent Exception*

Under the consent exception to the Fourth Amendment warrant requirement, in determining whether officers obtained valid consent to search, courts look to indication, authority, voluntariness, and scope.<sup>242</sup> Additionally, valid consent must be revocable<sup>243</sup> and is assessed based on the totality of the circumstances.<sup>244</sup> Laws attempting to use notice alone to obtain consent do not meet these requirements for five especially salient reasons.

First, when the state uses notice alone, particularly through posting a sign specifying that performing a certain act will result in consent to a particular thing, there is likely not the necessary indication required by the consent doctrine. While indication can be a low bar, it almost always requires some level of affirmative action in response to the attempt to acquire consent.<sup>245</sup> For example, when *X* is asked by officers if they can search her home, an affirmative nod or the act of stepping aside and gesturing into the home would be considered indication of consent.<sup>246</sup> However, actions in response to a posted sign assuming consent based on that specified action cannot absolutely and necessarily be considered an indication of consent. For example, in the case of a parking sign stating that by parking in public spots, one consents to her tires being chalked, an individual who did not see the sign but parked in the spot cannot be said to have indicated consent; she was utterly unaware of the state's attempt to gain her consent in the first place. Someone who did see the sign and parked in the spot can arguably be perceived as indicating consent, but the sign along with the specified action cannot automatically serve as indication of consent. The attempt to garner consent from the HALO camera "warnings" is even more indefensible. Since these cameras will be gathering the data of those present in public spaces,<sup>247</sup> there is certainly no *act* that can qualify as granting consent. Simply being present in a public space makes no affirmative statement regarding

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<sup>242</sup> See *supra* Part II.C.1.a.

<sup>243</sup> *Florida v. Jimeno*, 500 U.S. 248, 249 (1991).

<sup>244</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

<sup>245</sup> See *supra* note 84.

<sup>246</sup> *United States v. Faler*, 832 F.3d 849, 851 (8th Cir. 2016) (finding implied consent where the officer asked, "mind if we come in?", and in response the apartment tenant "opened the door wider, moved out of the way, and the officers entered").

<sup>247</sup> Const. Project's Task Force on Facial Recognition Surveillance & Jake Laperruque, *supra* note 15.

consent to search and gather data. As to DUI implied consent laws, the “notice” is provided through statute.<sup>248</sup> There can be no behavior indicating consent if someone is not aware of the statute in the first place, and thus, completely unaware that her procurement of a driver’s license is serving as indication of consent.

Second, the voluntariness requirement poses an impossible hurdle to governments hoping to effectuate consent from notice alone. Voluntariness is the philosophical bedrock of consent and as such, “obstacles to voluntary choice, if inexorable, will compromise the usefulness of consent theory as a descriptive map and normative guide.”<sup>249</sup> In the Fourth Amendment context, we know that voluntary consent does not require the government to inform an individual of her right to refuse; rather, knowledge of the right to refuse is just one factor in the totality of circumstances analysis.<sup>250</sup> Additionally, *Carpenter* tells us that performing acts that are innocent and largely inescapable in modern life, like owning and using a cell phone, will likely not be considered voluntary.<sup>251</sup> While these fundamental acts are performed voluntarily in the philosophical sense, it is dishonest and disingenuous to suggest that their performance amounts to voluntary consent.

Whether specific acts are considered an inescapable part of modern life is certainly debatable, and parking in public spaces, for example, toes the line. On the one hand, the ability to park publicly on the city streets is an inescapable part of modern life, especially in commuter-heavy cities. It enables residents to use the streets for which their tax dollars pay, to run necessary errands, to patronize community businesses, and to engage with fellow citizens in the public square. On the other hand, the ability to use public transportation or to park in private lots makes parking publicly less “inescapable.” Ultimately, public parking is more akin to the use of a cellphone—while its use is not absolutely necessary to survive, it is so convenient and common as to be virtually necessary to function effectively in society.

While conditioning parking on consent is debatably voluntary, implying consent to gather one’s biometric data in public places based on notice via a posted sign certainly is not. Imagine, for example, someone walking to the grocery store or the Department of Motor Vehicles on the public streets. She looks up and sees a sign reading, “Attention: By being present on these streets,

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<sup>248</sup> Voas, *supra* note 20.

<sup>249</sup> Herzog, *supra* note 35, at 1674.

<sup>250</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 226–27 (1973).

<sup>251</sup> *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018).



you are consenting to the collection of your biometric data.” The use of public streets and spaces is certainly an inescapable, necessary part of modern life. There is also no realistic way to hide the majority of one’s biometric data—wearing a mask or changing one’s gait is not a realistic alternative to exposing one’s biometric data publicly. Therefore, implying consent based on presence in public is not valid because it is not truly voluntary.

DUI implied consent laws raise interesting questions of voluntariness. In fact, much ink has been spilled over the unconstitutional conditions doctrine, which holds that “[the] government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”<sup>252</sup> Conditioning a driver’s license, a necessity to modern life, on the surrender of Fourth Amendment rights vitiates any legitimate claim to voluntariness. The Supreme Court has been unwilling to hold these statutes constitutional.<sup>253</sup> In all three recent implied consent law cases, the Court has refused to validate the searches on implied consent grounds, despite the implied consent statutes in place.<sup>254</sup>

The third reason that notice alone is insufficient to validate a search on consent grounds is that implying consent through notice is not revocable. As the Court stated in *Jardines*, implied licenses (which are the functional equivalent of implied consent) must be revocable.<sup>255</sup> While there is debate about what serves as successful revocation of the implied license,<sup>256</sup> the ability to revoke is necessary. In the parking example, an individual could possibly revoke the implied consent by placing a sign on her car expressly revoking any consent the city attempts to garner.<sup>257</sup> In the biometric data collection case, there is no ability to revoke. While the Fourth Amendment does not require officers to notify an individual of her right to revoke consent, some state constitutions do require such notification before consent to search can be obtained.<sup>258</sup> Revocability is a

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<sup>252</sup> Sullivan, *supra* note 193 (“It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.”).

<sup>253</sup> See *supra* Part II.C.1.e.

<sup>254</sup> See *Missouri v. McNeely*, 569 U.S. 141, 164 (2013) (holding unconstitutional a forcible, warrantless blood test despite the state’s implied consent laws); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2169 (2016) (holding a blood test unconstitutional pursuant to the arrest of the individual, despite implied consent laws); *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2526 (2019) (finding a blood test of an unconscious driver constitutional based on the exigency exception to the Fourth Amendment, not implied consent).

<sup>255</sup> *Florida v. Jardines*, 569 U.S. 1, 9 (2013).

<sup>256</sup> See *supra* note 125.

<sup>257</sup> For an interesting and entertaining look at an operationalized attempt to help individuals revoke consent, see FOURTH AMEND. SEC., <https://fourthamendmentsecurity.com>.

<sup>258</sup> Fern Kletter, Annotation, *Construction and Application of Rule Permitting Knock and Talk Visits*

crucial feature of valid implied consent since it rests on the idea of a voluntary choice and a communicated mental state. A person can change her mind, and once the mind has been changed and that has been communicated, there is no longer the consent necessary to premise a search on consent. In fact, the Ninth Circuit has held that consent is no longer valid when officers interfere with a suspect's ability to revoke her consent.<sup>259</sup> Consequently, the impossibility of revoking consent in searches premised on notice deems implied consent an invalid theory.

Scope presents a fourth hurdle to using notice alone to unequivocally imply consent. Because consenters can set the scope of the search to which they are consenting,<sup>260</sup> it is doctrinally unsound to force a uniform scope of consent upon each consentor. For example, one can consent to a search of her kitchen and living space, but not her bedroom. The parking example is largely about the scope of the license a motorist gives parking enforcement to monitor her car while parked. Under *Jardines*, it is possible that a court would reject a theory of implied consent in this situation because there is “no customary invitation”<sup>261</sup> to allow officers to chalk car tires. The question then becomes whether the city can change the nature of the driver's implied license by posting a sign. If a court answered this question in the affirmative, it would be saying that the state can turn a trespass search into a reasonable search by virtue of a posted sign. This approach is fundamentally contrary to the reasoning in *Jardines* and *Jimeno*, which both focus on the implied license stemming from expectations of how everyday citizens, not law enforcement, interact with each other.<sup>262</sup> Additionally, this is exactly the type of state action Justice Marshall warned against in *Smith v. Maryland*.<sup>263</sup> An implied license cannot extend to law enforcement only, so, although narrow in the parking context, a sign cannot create an implied license that extends to officers only.

Implied licenses extending identically to public and private entities is an approach supported by William Baude and James Stern in their article, *The*

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*Under Fourth Amendment and State Constitutions*, 15 A.L.R. 6th 515 (2006).

<sup>259</sup> See *United States v. McWeeney*, 454 F.3d 1030, 1036–37 (holding that if the officers coerced defendants into believing that they did not have the ability to withdraw their consent to the search, this was a violation of their Fourth Amendment rights).

<sup>260</sup> See *supra* Part II.C.1.d.

<sup>261</sup> *Florida v. Jardines*, 569 U.S. 1, 2 (2013).

<sup>262</sup> See *Jardines*, 569 U.S. at 1–2; *Florida v. Jimeno*, 500 U.S. 248, 249–51 (1991).

<sup>263</sup> *Smith v. Maryland*, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting) (“[L]aw enforcement officials, simply by announcing their intent to monitor the content of random samples of first-class mail or private phone conversations, could put the public on notice of the risks they would thereafter assume in such communications.”).

*Positive Law Model of the Fourth Amendment.*<sup>264</sup> Baude and Stern argue for an entirely new approach to the Fourth Amendment<sup>265</sup> that does not look to privacy as the source of Fourth Amendment protection, but rather looks to citizens' expectations of privacy based exclusively on protections derived from private law.<sup>266</sup> According to Baude and Stern,

Instead of making Fourth Amendment protection hinge on whether it is "reasonable" to expect privacy in a given situation, a court should ask whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform. That is, stripped of official authority, has the government actor done something that would be tortious, criminal, or otherwise a violation of some legal duty? Fourth Amendment protection, in other words, is warranted when government officials either violate generally applicable law or avail themselves of a governmental exemption from it.<sup>267</sup>

Under the positive law model, the parking signs, the biometric data-gathering, and DUI implied consent laws would violate Fourth Amendment protection. In all three of these cases, the government is far exceeding the scope of what is legal for an ordinary citizen to do without a warrant, and according to Baude and Stern, that is the linchpin for valid searches under the Fourth Amendment.<sup>268</sup>

The fifth problem with gleaning consent based on notice alone is the court's insistence on evaluating consent based on the totality of the circumstances.<sup>269</sup> Evaluating consent individually in each case and on the totality of the circumstances creates an important bulwark against the all-powerful state. The courts recognize time and again that the particular circumstances under which an individual consents to law enforcement requests are crucially important to the validity of the consent itself.<sup>270</sup> The *McGann* Court named seven factors

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<sup>264</sup> William Baude & James Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1823 (2016).

<sup>265</sup> *Id.* at 1825.

<sup>266</sup> *Id.* at 1823 ("In short, Fourth Amendment protection should depend on property law, privacy torts, consumer laws, eavesdropping and wiretapping legislation, anti-stalking statutes, and other provisions of law generally applicable to private actors, rather than a freestanding doctrine of privacy fashioned by courts on the fly.").

<sup>267</sup> *Id.* at 1825–26 (2016).

<sup>268</sup> *Id.*

<sup>269</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 218 (1973); *McGann v. Ne. Ill. Reg'l Commuter R.R.*, 8 F.3d 1174, 1178 (7th Cir. 1993).

<sup>270</sup> See *Bustamonte*, 412 U.S. at 218; *McGann*, 8 F.3d at 1178.

specifically,<sup>271</sup> but the crucial holding was that each factor needs to be assessed in each case—no one factor is dispositive in finding implied consent. If the state were to try and imply consent based off of a sign alone, this would violate precedent and completely vitiate the individual inquiry based on the totality of the circumstances requirement. Courts finding that notice alone suffices to imply consent could allow the government to engage in extremely bold invasions of privacy, all premised on a simple sign posted in public areas.

Claiming that notice alone effectuates implied consent without any further inquiry into the individual circumstances of a case is nothing short of pure “fiction.”<sup>272</sup> The most obvious example highlighting the importance of individual inquiry is an instance where someone did not see a posted sign, either because she was distracted or because she could not see. If the court were to adopt the government’s implied consent theory, a sign alone would trigger her “consent” to the specified action, despite her having absolutely no idea that she had “consented.” While this is only one example, there are many potential instances where notice might not have actually served its purpose in notifying; thus, implying consent premised on the notice and nothing more is absurd. Notice cannot provide blanket consent and eliminate the need for courts to engage in an individual inquiry based on the totality of the circumstances.

#### *B. Notice and the Administrative Search and Pervasively Regulated Industries Exceptions*

A second route by which the government could attempt to justify notice alone serving to effectuate implied consent is through the administrative search and pervasively regulated industries exceptions to the Fourth Amendment. These exceptions apply to both government and commercial entities with a history of regulation, a consistency of regulation, and engagement in work with an important public health and safety component.<sup>273</sup> Analyzing these exceptions highlights important differences between the parking sign example, the biometric data-gathering example, and DUI consent laws. Taking the parking sign and biometric data-gathering examples together, they simply do not meet

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<sup>271</sup> *McGann*, 8 F.3d at 1181 (holding that “[g]enerally, in deciding whether to uphold a warrantless search on the basis of implied consent, courts consider whether (1) the person searched was on notice that undertaking certain conduct, like attempting to enter a building or board an airplane, would subject him to a search, (2) the person voluntarily engaged in the specified conduct, (3) the search was justified by a vital interest, (4) the search was reasonably effective in securing the interests at stake, (5) the search was only as intrusive as necessary to further the interests justifying the search[,] and (6) the search curtailed, to some extent, unbridled discretion in the searching officers”).

<sup>272</sup> See *supra* note 133.

<sup>273</sup> See *supra* text accompanying notes 135–42.

the requirements of these exceptions. While there is arguably a history of regulation when it comes to monitoring cars for parking enforcement, the same cannot be said of collecting and storing biometric data. And while the biometric data gathering might be consistent, the same cannot be said of parking enforcement searches. Finally, neither of these searches is premised on the triggering rationale: furthering health and public safety.<sup>274</sup> It is difficult to imagine a situation where parking enforcement poses enough of a threat to public safety that courts would consider it under these exceptions. Additionally, while gathering biometric data could be justified as a means of securing public safety, the method by which these systems work casts much too wide a net. These doctrines apply to business-owners and government entities performing very *particular* searches.<sup>275</sup> It does not apply to broad and general law enforcement searches for safety purposes. In fact, these types of searches are *exactly* the searches from which the Fourth Amendment was designed to protect against.

DUI implied consent laws, on the other hand, force uniform consent upon any individual that obtains a driver's license. While these searches meet the history of search, consistency of search, and public safety requirements of the administrative search and pervasively regulated industries exceptions, they are conducted by law enforcement officers for criminal enforcement purposes. These factors are threshold requirements for these exceptions. Additionally, and most importantly for the purposes of this Comment, DUI implied consent laws do not provide the necessary notice. If a driver's license applicant is not aware of the statute, the idea that her procurement of the license indicated her consent is entirely fictitious. These three examples demonstrate why notice alone cannot serve to garner the consent necessary to search under the Fourth Amendment, using neither the theory of consent nor administrative search. However, this Comment argues that a consent theory may be justified if the state meets a robust set of requirements, including meaningful notice.

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<sup>274</sup> Taylor v. City of Saginaw, 922 F.3d 328, 335–36 (6th Cir. 2019). Notably, Saginaw tried to argue that parking poses a threat to public safety, but this argument was vehemently rejected by the Sixth Circuit. “[O]n these facts, the City fails to demonstrate how this search bears a relation to public safety. The City does not show that the location or length of time that Taylor’s vehicle was parked created the type of ‘hazard’ or traffic impediment amounting to a public safety concern. Nor does the City demonstrate that delaying a search would result in injury or ongoing harm to the community . . . . No similar ongoing public disturbance exists here to justify a warrantless search.” *Id.*

<sup>275</sup> See *supra* text accompanying notes 135–38.

## V. DRAWING THE LINE: WHEN IS NOTICE “ENOUGH?”

This Comment does not suggest that there are absolutely no circumstances under which the state can use notice to generate implied consent. Rather, it argues that those circumstances should be extremely limited, and a court should be highly suspicious and skeptical toward the state’s attempts to use a notice-based implied consent rationale. Courts should be wary of attempts to expand any warrant exception when the justification is based on notice effectuating implied consent. Notice should be enough to effectuate implied consent in an extremely limited set of circumstances. Borrowing from the pervasively regulated industries exception, four elements should each be met before a court finds notice alone sufficient to generate implied consent: tradition of search, consistency of search, revocability of consent, and most importantly, furthering of public safety. In fact, when accompanied by these four elements, the notice itself simply ensures individuals are aware of an already robust search scheme.

First, courts should look for a tradition or history of search. A tradition of a particular search taking place creates an expectation for future individuals that, in a particular situation, a search will take place. This expectation allows individuals to conform their behavior to those expectations. Knowing one is likely going to be subjected to a search changes one’s expectations of privacy. In other words, it reduces our expectation of privacy in that situation, which is a key inquiry when evaluating the reasonableness of a search. A lesser expectation of privacy makes a search more likely to be reasonable, or, not a search at all.<sup>276</sup>

Second, a search scheme should be highly consistent for notice to be an effective form of garnering implied consent. Consistency is a hallmark of the pervasively regulated industries exception. If a search is conducted in a highly regular, predictable fashion, it will reduce an individual’s expectations of privacy in that particular situation. Consistency and regularity eliminate uncertainty. For example, if a search scheme is in place, but rarely enforced, it may not actually reduce an individual’s expectation of privacy because it is natural to assume that a search will not *actually* take place. However, if every single time one subjects herself to the situation in which the search scheme is in place, the search actually takes place, then one’s expectation of privacy is necessarily reduced. She knows, with certainty, that that situation will lead to a search. Such predictability, combined with an individual voluntarily subjecting

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<sup>276</sup> See *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *California v. Ciraolo*, 476 U.S. 207, 207 (1986).

herself to the particular situation, eliminates any claim that individual may have had to her privacy.

Third, the implied consent must be revocable. Because the scope of the search must be able to be limited by the consentor, the consentor must be aware of the exact circumstances under which the search will occur to be able to properly consent and to potentially revoke consent to a search. Therefore, notice cannot claim to effectuate implied consent to a search that is not imminent. This is one reason DUI implied consent laws should be void. A statute claiming to imply consent to a breathalyzer in exchange for a driver's license is too attenuated to the actual search, should it ever even occur. These statutes also frequently impose criminal sanctions for revoking the implied consent.<sup>277</sup> Imposing criminal sanctions as a punishment for revocation renders this "consent" practically and functionally irrevocable. It strains credulity to claim that one can truly revoke her consent if that revocation comes with criminal sanctions, including potential jail time.

Fourth, and most importantly, a search scheme attempting to use notice to garner implied consent must be rooted in legitimate and specific public safety goals. The government, and law enforcement officials specifically, bear the burden of protecting the public and controlling crime. On the one hand, safe environments allow cities and their citizens to flourish. On the other hand, officers' pursuit of public safety goals is constrained by citizens' right to privacy and non-interference in their daily lives. This balance is at the heart of the Fourth Amendment. Law enforcement officers are at their peak power when taking actions objectively aimed at maintaining public safety.<sup>278</sup> This is the essence of their purpose. In fact, many campus police forces are referred to as "Department(s) of Public Safety." Regardless of how traditional or predictable a search scheme is, if it is not designed to further public safety, then it simply cannot be important enough to compromise the protections guaranteed to us by the Fourth Amendment.<sup>279</sup>

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<sup>277</sup> See *Refusing to Take a Breathalyzer Test*, ALCOHOL.ORG, <https://www.alcohol.org/dui/breathalyzer/> ("Laws still vary greatly by state. In some states, refusing a [portable breathalyzer test] is a misdemeanor that is punishable by a fine and/or up to 90 days in jail.").

<sup>278</sup> Jeremiah Mosteller, *The Role of Police in America*, CHARLES KOCH INST., <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/role-of-police-in-america/> ("The purpose of law enforcement in a free society is to promote public safety and uphold the rule of law so that individual liberty may flourish.").

<sup>279</sup> In *Taylor v. City of Saginaw*, the government argued that enforcing parking limits was a public safety goal. See 922 F.3d 328, 335 (6th Cir. 2019). "Not only does this regulation facilitate convenience for City drivers, it also promotes public safety through the orderly movement and parking of traffic (among numerous other significant purposes)." Defendants-Appellees' Brief on Appeal at 16, *Taylor v. City of Saginaw*, 22 F.3d 328

A prime example of when signs provide the robust notice to effectuate implied consent is in the airport search context. As we enter the airport, we immediately see signs directing us toward security checkpoints. While waiting in line to pass through security, we see TSA signs notifying us that a search will be conducted. Additionally, the forthcoming search is not a surprise. Why? Security searches at airports have been in place for decades.<sup>280</sup> We have encountered them since we were children, seen them portrayed on television shows, or discussed on the news. We know that buying a plane ticket will subject us to a particular TSA search. These searches are consistent and predictable. No one is immune from search and the searches are not waivable. TSA conducts a search of each and every individual, every single time she boards a commercial flight. The tradition and consistency of search make the notification signage almost superfluous. Further, commercial flight poses uniquely grave public safety threats. Flights carry hundreds of passengers, through the air for thousands of miles, siloed off from police officers and offering no escape to passengers, should something go wrong. The safety stakes are about as high as they get, and enforcing public safety via a traditional, predictable, consistent search is necessary. The notice of search given to passengers prior to security checkpoints meets the requirements proposed by this Comment to effectuate valid implied consent to search under the Fourth Amendment. In a situation that does not meet all four requirements, the government cannot conduct a search pursuant to the consent exception, regardless of notice or signage claiming to effectuate implied consent.

## CONCLUSION

Consent is a concept as old as time. Granting permission for others to act toward you in a particular way is not a new rationale, nor is it philosophically distinct in the Fourth Amendment context. However, because of the power dynamic between citizens and the state, it is imperative that society and the courts protect against the state's abuse of its power in an effort to garner consent, specifically implied consent. This Comment argues that notice alone, particularly through the use of signage, creates a rebuttable presumption against courts finding valid implied consent under the Fourth Amendment. The state

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(6th Cir. 2019) (No. 17-2126). However, this is an objective inquiry that was rejected by the Sixth Circuit. *Taylor*, 922 F.3d at 335.

<sup>280</sup> While there was a dramatic increase in flight security in terms of both invasiveness and frequency of search after the September 11, 2001 attacks, there was some form of passenger searches, although less consistently than today, since the 1970's. See Bryan Gardiner, *Off with Your Shoes: A Brief History of Airport Security*, WIRED (June 14, 2013, 6:30 PM), [https://www.wired.com/2013/06/fa\\_planehijackings/](https://www.wired.com/2013/06/fa_planehijackings/).



cannot claim to make an unconstitutional search constitutional simply by declaring it to be so.

As technology rapidly advances, it becomes increasingly important to regulate the circumstances under which we allow the government to track, monitor, and collect our personal information. Yet the government's attempt to use signage alone to effectuate consent is not isolated to the technological sphere: as the City of Bristol's response to the tire-chalking case demonstrates, states are capable of using their unique power to create implied consent in myriad situations. In fact, DUI implied consent laws are the most common use of this method of creating implied consent to search. However, there is no warrant exception that justifies this method of garnering consent—not the general consent exception, nor the administrative search exception, nor the pervasively regulated industries exception. Courts should remain wary of this potential abuse of government power and strike down alleged implied consent-based Fourth Amendment searches when notice alone is the foundation on which the “consent” rests. However, when the government's search scheme creates robust notice—including a history of search, consistency of search, the ability to revoke consent, *and* the furthering of public safety goals—courts should be willing to entertain an argument that the notice, particularly via signage, created the necessary implied consent to justify a warrantless search. Only then can the Fourth Amendment continue to be the bulwark against abuse of state power, large or small, that it was intended to be.

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