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LINGUISTICS IN THE COURTROOM: INCORPORATING CONSIDERATIONS OF LANGUAGE AND CONTEXT TO IMPROVE CRIMINAL COURT CONSENT ANALYSIS[†]

ABSTRACT

A legal conundrum occurs every day: suspects regularly incriminate themselves by voluntarily granting their verbal consent to requested searches by law enforcement officers, yet later move to suppress on the basis that they never agreed to such a thing. When these disputes arise, fact finders are left to adjudicate a fundamentally linguistic issue—whether the presence of voluntary consent existed. Herein lies the problem. The current totality test that is used to make this determination gives judges enormous discretionary power to evaluate the merits of the case, but is completely devoid of methodology grounded in linguistic theory that could guide the court to a rational conclusion regarding the effect of language upon the interaction. Accordingly, voluntary consent to search jurisprudence appears disorderly, and suspects are routinely disadvantaged.

The solution to this problem is both simple and more attuned to the realities of human interaction: linguistics. In recent years, scholars have called attention to the utility of certain linguistic considerations, such as pragmatics, the study of how context contributes to meaning, and its relevant sub-theories, in analyzing officer-suspect interactions in related contexts such as Miranda *rights jurisprudence. However, even though linguistics promises greater equality and more precise findings, courts today fail to consider linguistic inputs with any consistency, if at all.*

This Comment reinvigorates the conversation about pragmatics in the courtroom—specifically emphasizing its value as a tool to better understand how suspects interpret requests for consent by power figures, such as law enforcement officers. Ultimately, this Comment will break new ground by proposing a series of solutions that can be implemented both in and out of court to reduce the effect of linguistically problematic language. First and foremost, courts should eliminate elements of the current totality test that find no support, or, even worse, contradictory evidence, in linguistic research, such as that which accounts for the cordiality of the exchange. Furthermore, by adopting the lens used in Fourth Amendment seizure analysis and Miranda *custody jurisprudence—that of the reasonable suspect—courts can take steps toward correcting the systemic inequities that suspects face in the courtroom without*

[†] This Comment recieved the Mary Laura "Chee" Davis Award for Writing Excellence.

overburdening themselves. Finally, the institution of a series of best practices for officers who seek to procure consent would not only provide suspects with a true opportunity to understand the nature of the questions being asked of them and protect themselves from unwanted privacy intrusions, but also decrease frivolous litigation over the merits of consent

INTRODUCTION

In Fourth Amendment cases today, courts act as arbiters of conversation. On one side stands the law enforcement officer, who describes a simple interaction in which the suspect's consent was requested and given. The suspect stands in vehement opposition to this narrative—never would she have allowed the officer

to search her property had the officer given her a choice. And in the middle lies the judge, now asked to make a finding that exceeds the bounds of traditional Fourth Amendment jurisprudence. The central issue is no longer whether the search of a given location was permissible, but rather hinges on the way in which the officer expressed his desire to search or the way that the suspect expressed her reticence. Thus, the question arises, should we be allowing judges to make these kinds of linguistic determinations?

In their influential work, *Cops and Robbers: Selective Literalism in American Criminal Law* (also known in this Comment as "Cops and Robbers"), Peter Tiersma and Lawrence Solan argue that trust in the courts to perform this function would be misplaced.[1] Historically, courts have been unable to take linguistic inputs into consideration with accuracy and consistency, leading to unjust results.[2] Accordingly, to make up for fact finders' neglect of these important considerations, prescribed linguistic guidance should be put into place.[3] This guidance would be best informed by pragmatic theory, the study of how context contributes to meaning.[4] More specifically, because it can provide insight into how conversationalists interpret language in different settings, pragmatic theory may help to illuminate troubling elements of officer-suspect interactions. Ultimately, knowledge of and response to the way that language operates in these situations could vastly improve the quality of judgments in the Fourth Amendment arena.

Linguistic experts further assert that we should be concerned about "selective literalism"—the tendency of "courts [to] selectively consider pragmatic circumstances in interpreting the speech of suspects."[5] This method of selective interpretation creates systemic inequities, as "courts are significantly more likely to take pragmatic information into account when it benefits the

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[1] *See* Peter M. Tiersma & Lawrence M. Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229, 232 (2004) ("It is clear that judges consider pragmatic information to interpret utterances when it suits their purposes. We believe that justice requires that they do so more evenhandedly.").

[2] *Id.*

[3] *See id.* at 260 (proposing a number of solutions, including: (1) the "legal system should recognize indirect requests for counsel;" (2) law enforcement officers should be required to explain that a suspect's "request [for counsel] will be respected and that if he wants to have a lawyer present, he only has to say so;" (3) encounters between suspects and officers should be recorded to provide firsthand evidence in court; and (4) interrogators should inform the suspect that specific "magic words" will stop an interrogation).

[4] *See* YAN HUANG, PRAGMATICS 2 (Keith Brown et al. eds., 2007) ("Pragmatics is the systematic study of meaning by virtue of, or dependent on, the use of language.").

[5] *See* Tiersma & Solan, *supra* note 1, at 229. "We use 'selective literalism' as a convenient phrase to describe the way in which courts opportunistically cling to a word's default meaning even when pragmatic factors would dictate that another sense of the word was intended." *Id.* at 248.

government, and less so when it helps the accused."[6] For this reason, selective literalism has been accused of "devalu[ing] the constitutional protections that all of us hold dear."[7]

Despite these warnings from linguistics scholars, courts acknowledge pragmatic inputs rarely, if at all.[8] As a result, suspects are not only up against a doctrine that interprets the facts in favor of finding consent, but also a legal system that perpetuates this inequity by permitting the introduction of pragmatic context on a discretionary basis.[9] This Comment proposes a potential solution to the inequities that dominate the current voluntary consent to search doctrine. Ultimately, change would be best implemented both in and out of the courtroom by training judges on the core tenents of linguistics, reshaping the totality test, and shifting the language that officers use to request consent in the first place.

Part I of this Comment sets out the history and development of the voluntary consent to search doctrine. It begins in Section A by introducing *Schneckloth v. Bustamonte*, which established that a totality of the circumstances test should be used to discern the presence of voluntary consent and, perhaps more importantly, that voluntariness does not require officers to inform citizens of the right to refuse consent to a search.[10] This holding greatly restricted the latitude of courts in deciding whether consent is voluntary, as it eliminated the possibility of using the analytical framework applied in the *Miranda* rights context—requiring informed consent in addition to a valid wavier—as a template for search cases. The *Bustamonte* reasoning was revisited almost twenty years later in *Florida v. Jimeno*, addressed in Section B. In *Jimeno*, the Court wrestled with whether a suspect's knowledge of his right to delimit the scope of a search is a relevant inquiry.[11] The continued relevance of *Bustamonte* is exemplified in Section C, which features *United States v. Ruiz*—a Seventh Circuit case decided in 2015.[12]

Part II of this Comment provides insight into various pragmatic theories that help to explain the legal conundrum detailed above. Though they operate in

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[6] *Id.* at 247.

[7] *Id.* at 260.

[8] *See id.* at 247 ("Courts thus seem to be rather inconsistent in their consideration of pragmatic information. . . . [In various contexts,] courts suddenly shy away from considering the pragmatic context and tend to interpret the language in a more literal manner.").

[9] *See id.* at 232 (noting that courts are likely to introduce pragmatic information when it benefits the prosecution, yet do not afford the same consideration to the defendant).

[10] Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

[11] Florida v. Jimeno, 500 U.S. 248, 249 (1991).

[12] *See generally* United States v. Ruiz, 785 F.3d 1134 (7th Cir. 2015). While *Ruiz* is not representative of all voluntary consent to search jurisprudence, the court was particularly precise in its application of the totality test. Accordingly, it is quite helpful for gaining an understanding of this analytical framework.

slightly different ways, both the co-operative principle,[13] featured in Section A, and speech act theory,[14] addressed in Section B, seek to explain why suspects may perceive officers as commanding rather than requesting their consent, despite police use of seemingly nonconfrontational language. Section C expands upon these language-perception gaps and emphasizes the relevance of these linguistic elements in context by applying the aforementioned pragmatic theories to the facts of *Bustamonte*. Finally, Section D provides a glimpse into how pragmatics can be integrated into the courtroom by looking at *Miranda* rights jurisprudence. This section reviews Tiersma and Solan's work, as well as the work of other scholars, who have emphasized consideration of extralinguistic factors in this related area of law.

Part III of this Comment delineates the failures of the current assessment framework: it neither accounts for the broad discretion given to judges in their determination of voluntary consent nor is it attuned to any interdisciplinary considerations. These arguments are addressed in Sections A and B, respectively, and are illustrated by the inclusion of recent voluntary consent to search cases.

Finally, Part IV of this Comment suggests that we can make improvements to voluntary consent doctrine by implementing changes both in and out of the courtroom. Section A focuses on the former by suggesting, first, that courts should eliminate misleading elements, specifically that which accounts for the cordiality of the exchange. Case law dictates that many courts look to this factor as a means of determining whether the officer-citizen interaction was coercive in nature.[15] While this is not inherently problematic, the inverse presumption—that cordial exchanges are not inherently coercive—is troublesome. The view that a polite, casual exchange is likely to produce the suspect's consent voluntarily is not consistent with the linguistic principles that govern conversation.[16] Furthermore, in-court analysis could also benefit from adopting the lens employed in *Miranda* rights custody and Fourth Amendment seizure jurisprudence—that of the reasonable suspect. By doing so, courts can push back against some of the systemic inequities that suspects face without inundating themselves in completely individualized determinations. Finally, in Section B, this Comment proposes a series of out-of-court best practices that would be better suited to produce consent that is truly voluntary in the moment by eliminating linguistically problematic speech forms.

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[13] *See infra* Section II.A.

[14] *See infra* Section II.B.

[15] *See infra* note 80 and accompanying text.

[16] *See infra* notes 130–40 and accompanying text.

I. THE HISTORY AND DEVELOPMENT OF THE VOLUNTARY CONSENT TO SEARCH DOCTRINE

The Fourth Amendment to the United States Constitution guarantees the right of individuals to be free from unreasonable searches and seizures.[17] By virtue of this protection, officers must generally obtain a search warrant to conduct a valid search of private premises and property.[18] However, the Court has recognized several exceptions to the warrant requirement—one being that a search conducted pursuant to valid consent is constitutional.[19] When this exception was created, the meaning of voluntary consent became contested. In what has arguably become the most well-recognized Supreme Court case on the subject, *Schneckloth v. Bustamonte*, the Justices addressed this question directly.[20] After the introduction of *Bustamonte* in Section A, Section B focuses on *Jimeno*, in which the Supreme Court concluded that a suspect's knowledge of the right to delimit the scope of a search is not of consequence in the voluntary consent inquiry.[21] Finally, Section C establishes the continued relevance of *Bustamonte* by examining a more recent Seventh Circuit case: *United States. v. Ruiz*.

A. The Bustamonte *Case*

In order to understand the Court's framing of the voluntariness question, it is important to first examine the facts of the interaction at issue. In *Bustamonte*, Officer Rand stopped an automobile upon observing that "one headlight and its license plate light were burned out."[22] Six men were in the car, including Joe Alcala, whose brother owned the vehicle, and Robert Bustamonte, the respondent.[23] After the occupants stepped out of the car and two additional

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[17] U.S. CONST. amend. IV.

[18] Katz v. United States, 389 U.S. 347, 357 (1967) ("'Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes' . . . and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . ." (quoting United States v. Jeffers, 342 U.S. 48, 51 (1951)).

[19] *See* United States v. Matlock, 415 U.S. 164, 165–66 (1974) ("In . . . *Bustamonte* . . . , the Court reaffirmed the principle that the search of property, without warrant and without probable cause, but with proper consent voluntarily given, is valid under the Fourth Amendment."); *see also* Illinois v. Rodriguez, 497 U.S. 177, 177 (1990) ("A warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises . . . ."); Fernandez v. California, 571 U.S. 292, 292 (2014) ("Consent searches are permissible warrantless searches . . . and are clearly reasonable when the consent comes from the sole occupant of the premises.").

[20] *See generally* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that voluntariness should be defined on a case-by-case basis).

[21] *See generally* Florida v. Jimeno, 500 U.S. 248 (1991) (focusing, instead, on the perspective of a reasonable officer).

[22] *Bustamonte*, 412 U.S. at 220.

[23] *Id.*

policemen arrived on the scene, Officer Rand asked Alcala if he could search the car.[24] Alcala replied, "[s]ure, go ahead."[25] The Court found no evidence that officers threatened the occupants with arrest or intentionally intimidated them at any time during their interaction.[26] Gonzales, the vehicle's driver, testified that the police officer asked Alcala, "Does the trunk open?" to which Alcala replied, "[y]es," before retrieving the keys and opening the trunk himself.[27] The search revealed "three checks that had previously been stolen from a car wash" wadded up under the left rear seat.[28] Those checks were introduced as evidence in a criminal case against Bustamonte, and he was convicted.[29]

The Supreme Court granted certiorari to specify the burden required to prove that consent was voluntarily given—a greatly contested issue in state and lower federal courts at the time.[30] After conducting a perfunctory review of relevant case law,[31] the Court concluded that "no talismanic definition" of voluntariness mechanically applied to the varying contexts in which the issue arises.[32] Rather, especially in the law enforcement context, the meaning of voluntariness has vacillated on a case-by-case basis to accommodate the complex societal views implicated in police questioning of a subject.[33] In the face of these challenges, the Court resorted to the "only clearly established test in Anglo-American courts for two hundred years," the test for the voluntariness of confessions captured in *Culombe v. Connecticut*:

> 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

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[24] *Id.*

[25] *Id.*

[26] *Id.* ("[A]ccording to Officer Rand's uncontradicted testimony, it 'was all very congenial at this time.'").

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *See id.* at 221–22 (comparing the standard used by the California Court of Appeals for the First Appellate District, which placed the burden on the prosecution to show consent, with that used by the Court of Appeals for the Ninth Circuit, which stated that "the State was under an obligation to demonstrate, not only that the consent had been uncoerced, but that it had been given with an understanding that it could be freely and effectively withheld").

[31] *See id.* at 223 (reviewing "some 30 different cases" decided during the era between *Brown v. Mississippi*—which "held that a criminal conviction based upon a confession obtained by brutality and violence was constitutionally invalid"—and *Escobedo v. Illinois* for guidance on the meaning of voluntariness).

[32] *Id.* at 224.

[33] *See id.* at 225 (balancing the "acknowledged need for police questioning as a tool for the effective enforcement of criminal laws" with the "deeply felt belief that the criminal law cannot be used as an instrument of unfairness").

offends due process.[34]

In determining whether a defendant's will was overborne in a given context, trial courts should assess the "totality of all the surrounding circumstances," including factors such as the youth of the defendant;[35] the defendant's lack of education[36] or low intelligence;[37] "lack of any advice to the [defendant] of his constitutional rights;"[38] "length of detention"[39] of the defendant; "the repeated and prolonged nature of the [police] questioning;"[40] and "the use of physical punishment such as the deprivation of food or sleep."[41] In *Bustamonte*, the Court affirmed this analytical framework for voluntary consent to search questions, specifying that the question of whether consent was voluntary should be a "question of fact to be determined from the totality of all the circumstances."[42] While part of this consideration may consist of one's knowledge of the right to refuse consent, the "government need not establish such knowledge as the *sine qua non* of an effective consent."[43]

Furthermore, the Court distinguished efforts to liken the voluntary consent doctrine to a waiver of a person's rights where the latter is controlled by the "knowing and intelligent wavier requirement" drawn out of *Johnson v. Zerbst*[44] and most closely associated with the *Miranda* rights doctrine.[45] Based upon the belief that the interests being weighed in the two contexts are vastly different,[46] the Justices ultimately concluded that it "would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman . . . could make the detailed type of examination demanded by *Johnson*."[47] Though the

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[34] *Id.* at 225–26 (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

[35] *Id.* at 226 (citing Haley v. Ohio, 332 U.S. 596 (1948)).

[36] *Id.* (citing Payne v. Arkansas, 356 U.S. 560 (1958)).

[37] *Id.* (citing Fikes v. Alabama, 352 U.S. 191 (1957)).

[38] *Id.* (citing Davis v. North Carolina, 384 U.S. 737 (1966)).

[39] *Id.* (citing Chambers v. Florida, 309 U.S. 227 (1940)).

[40] *Id.* (citing Ashcraft v. Tennessee, 322 U.S. 143 (1944)).

[41] *Id.* (citing Reck v. Pate, 367 U.S. 433 (1961)).

[42] *Id.* at 227.

[43] *Id.*

[44] *Id.* at 235 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). "[T]o establish such a 'wavier' the State must demonstrate 'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* (quoting *Zerbst*, 304 U.S. at 464). Note that *Johnson v. Zerbst* concerns the Sixth Amendment right to counsel. *Zerbst*, 304 U.S. at 459.

[45] *See, e.g.*, *Bustamonte*, 412 U.S. at 241 ("There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing . . . suggests that [a knowing and intelligent wavier requirement] ought to be extended to the constitutional guarantee against unreasonable searches and seizures.").

[46] *See id.* at 242 ("The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial[,] . . . [but rather relate to the] right of each individual to be let alone.").

[47] *Id.* at 245.

Justices were unwilling to provide the suspect with the kinds of protective measures recognized in the *Johnson* or *Miranda* context, the Court acknowledged that there are cognizable dangers to the defendant in the consent to search context.[48] For that reason, the Court suggested that "account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."[49]

The dissenting Justices—Douglas, Brennan, and Marshall—were appalled by the majority's assertion that knowledge of the right to refuse consent is not a rightful prerequisite for voluntariness.[50] They rested their conclusion on linguistic, constitutional, and practical grounds, respectively. Justice Douglas began by emphasizing that "[u]nder many circumstances, a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by the force of law."[51] For this reason, he condemned the Court for issuing an "advisory opinion" and urged the need for remand to allow the lower court to engage in further factual analysis of the nature of Alcala's consent.[52]

Justice Brennan opposed the majority's position because it failed to adequately protect "something as precious as a constitutional guarantee."[53] He implied that the Court's decision in *Bustamonte* ran contrary to the fierce protection generally provided to the individual by the Fourth Amendment through the search warrant and the probable cause requirements.[54] Given the apparent incongruity between the holding articulated in *Bustamonte* and Fourth Amendment jurisprudence at-large, Brennan suggested that "the Court's conclusion is supported neither by 'linguistics,' nor by 'epistemology,' nor, indeed, by 'common sense.'"[55]

Finally, Justice Marshall aimed to undermine the majority's argument by

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[48] *See id.* at 228–29 ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." (quoting Boyd v. United States, 116 U.S. 616, 635 (1886))).

[49] *Id.* at 229 (maintaining that coercion is improper and unconstitutional in these circumstances).

[50] *Id.* at 275–76 (Douglas, J., dissenting); *id.* at 276–77 (Brennan, J., dissenting); *id.* at 277 (Marshall, J., dissenting).

[51] *Id.* at 275–76 (Douglas, J., dissenting) (quoting Bustamonte v. Schneckloth, 448 F.2d 669, 701 (9th Cir. 1971)).

[52] *Id.* at 276.

[53] *Id.* at 277 (Brennan, J., dissenting) ("It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence.").

[54] *See id.* at 276 ("Here, however, as the Court itself recognizes, no search warrant was obtained and the State does not even suggest 'that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants.'").

[55] *Id.* at 277; *see also id.* at 284 (Marshall, J., dissenting) ("I am at a loss to understand why consent 'cannot be taken literally to mean a "knowing" choice.' In fact, I have difficulty comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all." (quoting *id.* at 224 (majority opinion))).

emphasizing the practical incentives for the Court, on behalf of law enforcement, to endorse such a low bar for voluntariness. He began by drawing a distinction between consent and coercion, arguing that freedom from coercion is a substantive right guaranteed by the Fifth and Fourteenth Amendments and, accordingly, should not be an issue here.[56] Because presence of meaningful choice and absence of coercion run independently, the majority's test conflating the two was not only improper but also in defiance of the Constitution.[57] Furthermore, Marshall attacked the majority's goal of preserving the informality of the exchange,[58] claiming that this objective masks the Court's desire to continue allowing police officers to "capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights."[59] Marshall feared that the Court obscured the Fourth Amendment's intended governance of the relationship between officers and citizens and sanctioned a "game of blindman's buff, in which the police always have the upper hand, for the sake of nothing more than the convenience of the police."[60]

B. After Bustamonte*: Defining the Limits of Consent*

About twenty years later, in 1991, the Court decided another voluntary consent to search case. In *Florida v. Jimeno*, it established that the scope of voluntary consent should be determined from the reasonable officer's point of view rather than from the suspect's understanding of what he agreed to.[61] The question arose in the context of a traffic stop, in which an officer, having overheard the respondent conduct what seemed to be a drug transaction over a public telephone, sought to search his car.[62] The officer was upfront with Jimeno—he detailed that he had "reason to believe that respondent was carrying

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[56] *Id.* at 282 (Marshall, J., dissenting). Rather, the consent that officers seek in *Bustamonte*-like scenarios is a separate exercise of a distinct constitutional right derived from the Fourth Amendment.

[57] *See id.* at 283 ("Our prior decisions simply do not support the view that a meaningful choice has been made solely because no coercion was brought to bear on the subject.").

[58] *See id.* at 245 (majority opinion) ("It would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman . . . could make the detailed type of examination demanded by *Johnson*."). *But see id.* at 287 (Marshall, J., dissenting) ("I doubt that a simple statement by an officer of an individual's right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he surely is entitled to know. . . . [F]or many years the agents of the Federal Bureau of Investigation have routinely informed subjects of their right to refuse consent, when they request consent to search.").

[59] *Id.* at 288.

[60] *Id.* at 289–90.

[61] Florida v. Jimeno, 500 U.S. 248, 249 (1991) ("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 within the automobile.").

[62] *Id.*

narcotics in his car," requested permission to search, and explained that respondent did not have to grant his consent.[63] Jimeno claimed that he had "nothing to hide" and gave the officer permission to search the automobile.[64] The officer saw a folded paper bag on the floorboard, picked it up, opened it, and "found a kilogram of cocaine inside."[65] Jimeno moved to suppress the evidence on the ground that his "consent to search the car did not extend to the closed paper bag inside of the car."[66]

The majority in *Jimeno* used the rule articulated in *Bustamonte* as a viable starting point for its analysis: because the officer had received Jimeno's express consent to search the automobile,[67] the Court deemed the search inherently reasonable.[68] Unlike in *Bustamonte*, the Court did not question whether Jimeno knew what he was consenting to—the search of any item, closed container or otherwise, found within the passenger compartment of his automobile—or whether he knew that he could restrict the scope of the search at all.[69] Rather, the majority acknowledged that Jimeno had the power to impose limits, and asked instead whether a reasonable officer could have understood such limits to be imposed based on this exchange.[70] The Court was quick to determine that the officer was certainly reasonable in determining that Jimeno's general consent to the search of his car extended to the paper bag.[71]

The Court explained that, because "[a] reasonable person may be expected to know that narcotics are generally carried in some form of a container," the authorization to search in this case *had* to extend beyond the surfaces of the car's interior.[72] Therefore, had the respondent desired to prevent the officer from opening closed containers, it was his responsibility to delimit the scope of the search upon granting his consent.[73] This determination was grounded in the same policy rationale that justified *Bustamonte*, which erred on the side of perceived

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[63] *Id.* Note that even though *Bustamonte* did not constitutionally require officers to advise citizens of their right to refuse consent, it did not forbid officers from doing so of their own volition. *See id.*

[64] *Id.* at 249–50.

[65] *Id.* at 250.

[66] *Id.*

[67] *See supra* note 61 and accompanying text.

[68] *See Jimeno*, 500 U.S. at 251 ("We think that it was objectively reasonable for the police to conclude that the general consent to search respondents' car included consent to search containers within that car which might bear drugs.").

[69] *See id.* at 252 ("A suspect may of course delimit as he chooses the scope of the search to which he consents.").

[70] *Id.* at 251 ("The question before us, then, is whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car.").

[71] *See supra* note 68 and accompanying text.

[72] *Jimeno*, 500 U.S. at 251.

[73] *See id.* at 252 (denying the addition of a closed container restriction to the general scope criteria for consent searches).

consent in the hope that the resulting search "may yield necessary evidence for the solution and prosecution of crime," in turn ensuring that "a wholly innocent person is not wrongly charged with a criminal offense."[74]

In his dissent, Justice Marshall took issue with this policy piece—consistent with his position in *Bustamonte*. He argued that the "majority's real concern is that if the police were required to ask for additional consent to search a closed container found during the consensual search of an automobile, an individual who did not mean to authorize such additional searching would have an opportunity to say no."[75] Accordingly, Marshall warned that the majority was not truly interested in encouraging citizens to give their consent, but rather "to be duped" by law enforcement officers.[76] Justice Marshall went on to cite to his own language in *Bustamonte*, emphasizing the façade that was the majority's practicality reasoning, which ultimately condones taking advantage of "the ignorance of citizens so as to accomplish by subterfuge what [law enforcement officers] could not achieve by relying only on the knowing relinquishment of constitutional rights."[77]

Via *Jimeno*, the Court made it clear that the onus was on suspects not only to know their right to refuse a search,[78] but also to delineate the scope of the search upfront.[79] Because neither *Bustamonte* nor *Jimeno* left a loophole for the uninformed citizen, the vicious cycle of the legal conundrum began. Suspects like Bustamonte and Jimeno began filing suppression motions, claiming the same violation of their Fourth Amendment right—their property had been searched without voluntary consent. Accordingly, it became a somewhat regular practice of the courts to review and interpret the exchanges between officers and suspects for purposes of gauging voluntariness.

C. A Glimpse at the Totality Test Today: United States v. Ruiz

Since the Court's decision in *Bustamonte*, state and federal courts have used the totality of the circumstances test to determine voluntariness.[80] Assessments

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[74] *Id.* (citing Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973)).

[75] *Id.* at 255–56 (Marshall, J., dissenting).

[76] *Id.* at 256.

[77] *Id.* (citing *Bustamonte*, 412 U.S. at 288 (Marshall, J., dissenting)).

[78] *See supra* note 73 and accompanying text.

[79] *See Jimeno*, 500 U.S. at 252 (majority opinion) ("But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization.").

[80] *See, e.g.*, United States v. Peña, 143 F.3d 1363, 1366 (10th Cir. 1998) ("Whether a defendant freely and voluntarily gave his consent to a search is a question of fact and is determined from the totality of the circumstances." (citing United States v. Mendenhall, 446 U.S. 554, 557 (1980))); People v. Hall, No. 01560-2005, 2006 WL 1341016, at *3 (Erie Cty. Ct. May 5, 2006) ("A consent search is valid only if the People prove

depend on all the facts and circumstances surrounding the giving of consent with no one factor being determinative.[81] The Supreme Court has specified that both the characteristics of the defendant and the details of the encounter with the police are relevant considerations in this assessment.[82] Beyond these specifications, however, courts are left to indulge in a fact-intensive inquiry. As a result, no one totality analysis looks identical to any other. The following case, *United States v. Ruiz*, demonstrates the kinds of wide-ranging, albeit non-exhaustive, factors that courts tend to consider in this assessment.[83]

In *United States v. Ruiz*, law enforcement officers approached Adrian Ruiz's car after they "witnessed Ruiz engage in what they deemed to be suspicious behavior."[84] The trial court found that Ruiz "consented to the search of his car and then followed the officers to a nearby police station where he showed the officers two traps in his car loaded with heroin."[85] Ruiz later appealed, contending that, among other things, he did not "consent voluntarily to go to the police station and open the traps."[86] In fact, he said that "any reasonable person in [his] circumstances would have been incapable of rendering voluntary consent."[87]

Accordingly, following the word of *Bustamonte*, the Seventh Circuit performed a totality of the circumstances analysis, considering factors such as

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by clear and convincing evidence, from the totality of the circumstances, that the defendant's consent was voluntary, that is the unequivocal product of an essentially free and unconstrained choice.").

[81] *Peña*, 143 F.3d at 1366; *Hall*, 2006 WL 1341016, at *3. The essential inquiry boils down to balancing two competing concerns: "the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." United States v. Rothman, 492 F.2d 1260, 1264 (9th Cir. 1973) (quoting *Bustamonte*, 412 U.S. at 227 (majority opinion)).

[82] *Bustamonte*, 412 U.S. at 226 (stating that "both the characteristics of the accused and the details of the interrogation" should be taken into account); *see supra* notes 35–41 and accompanying text.

[83] For example, consider the non-exhaustive, yet rather robust list of factors discussed in *Tapia v. City of Albuquerque*:

> (i) the threatening presence of several officers; (ii) the use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory, or, conversely, the officer's pleasant manner and [ ] tone of voice; (iii) the prolonged retention of person's personal effects such as identification, or, conversely, the prompt return of the defendant's identification and papers; (iv) the absence of other members of the public, or, conversely, whether the stop occurs in a public location such as the shoulder of an interstate highway, in public view; (v) the officer's failure to advise the defendant that [he or] she is free to leave. . . . Other factors include: (vi) the display of a weapon, [and (vii)] physical touching by the officer.

Tapia v. City of Albuquerque, 10 F. Supp. 3d 1207, 1295–96 (D.N.M. 2014) (internal quotation marks omitted) (quoting United States v. Anderson, 114 F.3d 1059, 1064 (10th Cir. 1997)).

[84] United States v. Ruiz, 785 F.3d 1134, 1137 (7th Cir. 2015).

[85] *Id.*

[86] *Id.* at 1138.

[87] *Id.* at 1146.

"Ruiz's age, education, and intelligence;[88] whether he was advised of his constitutional rights;[89] how long he was detained prior to consent;[90] whether he consented immediately or after police made several requests;[91] whether the police used physical coercion;[92] and whether he was in custody."[93] The court proceeded to weigh factors tending to suggest that consent was involuntary—most notably, the officer's "failure to inform Ruiz of his constitutional rights and the questioning of Ruiz about the presence of a trap after he had denied that his car contained one"[94]—against factors indicative of voluntary consent—such as "the fact that the officers used no physical coercion, they spoke to him in a calm, conversational matter, and Ruiz readily agreed to go the station"[95]—ultimately finding greater support for the conclusion of voluntariness.[96]

Apparent here is the court's interest in considering factors—such as tone—that help to characterize the interpersonal exchange between suspect and officer. While the court's attempts to be considerate of these details should be commended, its effects were fairly thin. A linguist would be a far better authority on the subject.[97] By using specialized knowledge of linguistic phenomena, like pragmatic theory, a linguist might have been able to provide a comprehensive framework for weighing extralinguistic considerations to ensure that the court's efforts were robust.

II. PRAGMATICS: A MEANS OF BRIDGING THE GAP

Pragmatics, "the systemic study of meaning by virtue of, or dependent on, the use of language,"[98] has long sought to explain the fact that there is often a substantial gap between the literal meaning of the words in a sentence and "the

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[88] *Id.* ("Ruiz was 10 days shy of his 20th birthday on the day of the encounter; his responses to the officers demonstrated him to be reasonably intelligent and educated.").

[89] *Id.* ("The officers did not inform Ruiz of his constitutional rights until after he opened the traps.").

[90] *Id.* ("Ruiz was with the officers in the driveway approximately 30 minutes prior to agreeing to go to the station, and then approximately 10–15 minutes at the station prior to opening the traps.").

[91] *Id.* ("Ruiz consented immediately when asked to go to the station, although he initially denied having traps in the car and only agreed to open them after overhearing the officers discuss the request for a canine unit.").

[92] *Id.* ("The officers used no physical coercion, displayed no weapons, and spoke to Ruiz in a calm, conversational manner.").

[93] *Id.* ("[W]e have decided that Ruiz was not in custody during the encounter.").

[94] *Id.* at 1147.

[95] *Id.*

[96] *See id.* (finding that the district court's determination that "Ruiz's consent to go to the station and open the traps was voluntary" was not "clearly erroneous").

[97] For example, expert testimony from a linguist could have yielded valuable information to guide the court's inquiry.

[98] HUANG, *supra* note 4, at 2.

messages actually conveyed by the uttering of that sentence."[99] Various linguists have explained that different functions, which occur behind the scenes, allow hearers to bridge this pragmatic gap.[100] Though the popularity of different theoretical models has changed over time, one principle remains consistent—not all language is spoken. Rather, speakers communicate and listeners understand unspoken messages through extralinguistic, pragmatic factors such as "context, real-world knowledge, and inference."[101]

Section A begins by introducing the concept of conversational implicature, which, coupled with the co-operative principle, provides one method of bridging the pragmatic gap. Essentially, these concepts are based on the premise that all speakers want to provide useful commentary in an efficient manner. However, when the speaker output and listener input do not match up, conversational implicature provides one method of helping the confused listener to tune into the intended meaning.

Section B offers an alternative pragmatic theory called speech act theory, which is built on the premise that speakers can use both direct utterance forms and indirect utterance forms to achieve a desired outcome. Linguists have very closely associated the choice of one kind over the other with acknowledgement of social and cultural considerations, such as politeness.[102] Section B culminates in an analysis of two specific kinds of speech acts, requests and commands, which can resemble one another in certain situations. This Comment highlights the perils of confusing these two distinct speech acts, especially in officer-target interactions.

Section C explores officer-target interactions in more depth and highlights the application of each of the aforementioned pragmatic theories in this context. Using the facts of *Bustamonte* as a basis for doing so, this section seeks to emphasize that linguistics truly does provide an alternative means of understanding the exchanges that occur between officers and targets when discussing consent to search.

Due to the paucity of commentary on the voluntary consent to search issue, Section D performs a case study of a related doctrine: suspect invocation of the

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[99] *Id.* at 5.

[100] *See id.* at 6 (describing this phenomenon as the linguistic underdeterminacy thesis, which explains how extralinguistic information can be responsible for bridging the gap between two opposing interpretations). Consider, for example, this utterance: John is looking for his glasses. *Id.* Here, glasses could mean spectacles or drinking vessels. *Id.* To disambiguate this expression, "contextual or real-world knowledge is needed to select the reading the speaker has intended." *Id.*

[101] *Id.*

[102] *See infra* notes 130–33 and accompanying text.

right to counsel. Because the nature of invoking the right to counsel also involves the use of language in the face of authority figures, the pragmatic issues and considerations relevant in that space are readily applicable to the voluntary consent to search doctrine.

A. Implicature and Grice's Co-operative Principle

The linguistic concept of implicature, including H.P. Grice's sub-theory of conversational implicature, provides that efficiency and effectiveness are guiding principles for all rational communication.[103] In his work, Grice introduces an original theory called the "co-operative principle" that subconsciously informs what speakers choose to say and, subsequently, how hearers interpret it.[104] The co-operative principle, and its component maxims,[105] ensure that "in an exchange of conversation, the right amount of information is provided and that the interaction is conducted in a truthful, relevant, and perspicuous manner."[106] Grice's maxims can be classified into four categories: *quality*: "try to make your contribution one that is true;" *quantity*: "make your contribution as informative as is required" and "[d]o not make your contribution more informative than is required;" *relation*: "be relevant;" and *manner*: "be perspicuous."[107]

Though most speakers know neither the co-operative principle nor the maxims by name, linguists have evidence that people are not only aware of them, but try to follow them.[108] In fact, the maxims are so deeply embedded in principles of regular communication that when they are not observed, it is noticeable to the hearer.[109] For example, imagine that Speaker A asks Speaker B, "How does your friend like working at the bank?" to which Speaker B responds, "Oh, pretty well. They like their colleagues, and they haven't been sent to prison yet."[110] While the first part of B's response does not violate any of Grice's maxims and, accordingly, does not warrant much attention, B's later

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[103] HUANG, *supra* note 4, at 25 ("In . . . conversational implicature, . . . there is an underlying principle that determines the way in which language is used with maximum efficiency and effectively to achieve rational interaction in communication.").

[104] *Id.*

[105] Grice does not provide a technical definition of the term "maxim;" however, generally speaking, each of the maxims highlights a rule of conversation. *See id*.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 27 ("There is thus evidence that speakers are not only aware of the maxims, but they are trying to follow them.").

[109] *See id.* at 26–27 (introducing the concept of *flouting*, in which the speaker purposely violates a maxim in order to communicate underlying meaning to the speaker).

[110] Bronwyn Bjorkman, *Pragmatics and the Cooperative Principle*, *in* ESSENTIALS OF LINGUISTICS 266, 268 (2018).

comment about being sent to prison is much harder to interpret—and could be jarring to A. B could be trying to communicate a number of things: "maybe B is given to telling jokes, or maybe they mean that their friend isn't usually trustworthy, or maybe they mean that if you didn't like working at a bank you'd steal money."[111] The actual meaning conveyed to A by this unconventional response will depend on context.[112]

Moreover, linguists have discovered that a speaker's failure to follow the maxims actually tends to communicate implicit meaning.[113] This process is called *flouting*.[114] Speakers can flout any one of the maxims, in which case the addressee is left to figure out why the speaker is acting in such blatant disregard for the co-operative principle.[115] While this may seem to be an impossible act of mind reading, it is performed on a regular basis by all listeners. Consider this example: Speaker A says, "John can be so rude sometimes!" to which Speaker B responds, "Oh, what a lovely day it is!" Here, the maxim of relation is being infringed upon, as B's response appears to be irrelevant in the context of the conversation. However, given that the assumption is that B is still co-operative, one must "interpret [B's] response as highly relevant at some non-superficial level."[116] One way of doing so is "to read it as conversationally implicating [B's] disapproval of [A's] bad-mouthing people behind their backs."[117]

B. Speech Act Theory

Oxford philosopher J. L. Austin introduced an alternative pragmatic theory, speech act theory, which states that all utterances, "in addition to meaning whatever they mean, perform specific acts via the specific communicative force of an utterance."[118] A speech act is made up of three facets: the *locutionary* act—

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[111] *Id.*

[112] *Id.* (including considerations such as "what A and B both know, their relationship to one another and to B's friend, and other factors").

[113] HUANG, supra note 4, at 29 ("[C]onversational implicatures can be generated by way of the speaker's deliberately flouting the maxims.").

[114] *Id.*

[115] *Id.* When this happens, the addressee generally has two options. *Id.* "One is to think that the co-operative principle has been abandoned as well." *Id.* However, the more common assumption is that "despite the speaker's apparent failure of co-operation, he or she is still observing the co-operative principle." *Id.* Accordingly, the addressee will reason:

> If the speaker is still co-operative, and if he or she is exploiting a maxim in such a way that I should recognize the infringement, then he or she is doing so in order to convey some extra message, which is in keeping with the co-operative principle at some deeper level.

Id.

[116] *Id.* at 31.

[117] *Id.*

[118] *Id.* at 102.

the words themselves created by the "basic act of speaking;"[119] the *illocutionary* act—the speaker's intended message or purpose;[120] and the *perlocutionary* act—the effect that the utterance has on the addressee.[121] For example, in the context of an armed robbery, the robber might point a gun at the cashier and utter, "the gun is loaded."[122] The locutionary act is composed of the actual words spoken—"The gun is loaded."—while the illocutionary force of this utterance would be threatening, or perhaps even ordering. Finally, the perlocutionary force would be the act induced by the utterance: the cashier opening the register. Interestingly, linguists have found that the "same linguistic expression can be used to carry out a wide variety of different speech acts, so . . . the same locutionary act can count as having different illocutionary forces in different contexts."[123] Austin sought to highlight that the social aspects of language, such as culture and convention, are often the impetus for a speaker's decision to choose one form of locution over another, even though the illocutionary force remains the same.[124]

When the type of the sentence being uttered and its illocutionary force are a direct match, the utterance constitutes a direct speech act.[125] However, where there "is no direct relationship between a sentence type and an illocutionary force," the utterance constitutes an indirect speech act.[126] Today, most usages are indirect.[127] In English, the speech act of requesting, for example, is rarely performed in its direct form through an imperative; instead, there are a variety of sentences used to make requests indirectly.[128] For this reason, it can be said

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[119] *Id.*

[120] *Id.* "The three major sentence types are typically associated with the three basic illocutionary forces, namely, asserting/stating, asking/questioning, and ordering/requesting, respectively." *Id.* at 110. However, there are many other types of illocutionary acts, such as "accusing, apologizing, blaming, congratulating, giving permission, joking, nagging, naming, promising, ordering, refusing, swearing and thanking." *Id.* at 102.

[121] *Id*. The perlocutionary act "represents a consequence or by-product of speaking, whether intentional or not." *Id.* at 103.

[122] *Id*.

[123] *Id.* To make a request to purchase a ticket, one could say any one of the following: "a. A day return to Oxford, please[;] b. Can I have a day return ticket to Oxford, please?[;] c. I'd like a day return ticket to Oxford." *Id.*

[124] *See id.* at 93 ("[T]he uttering of a sentence is, or is part of, an action within the framework of social institutions and conventions."). Consider, for example, the purchasing a ticket example above. *See supra* note 123 and accompanying text. In many cultures, speakers are taught that politeness is of the utmost importance when speaking to certain audience members. In this context, it may also be considered more polite to use the locutionary form exemplified in (b) as opposed to that in (a) or (c). A speaker in this situation would, albeit subconsciously, likely take all of these considerations into account before uttering "Can I have a day return ticket to Oxford, please?"

[125] HUANG, *supra* note 4, at 110.

[126] *Id.* For example, a request to pass the salt: "Can you pass the salt?" Here, the speaker is not asking whether the hearer physically possesses the ability to pass the salt. This constitutes an indirect request.

[127] *Id.* at 111.

[128] *Id.* Consider the following indirect requests:

that the indirect speech act has become conventionalized.[129]

Given the prevalence of indirect speech acts in English, linguists have begun to explore the rationale behind using them. One clear cut answer is that the use of indirect speech acts is "in general associated with politeness"[130]—"Will you close the window?" is perceived as more polite than "Close the window, please."[131] Scholars have developed four main theoretical models of politeness,[132] which can each be reconciled with speech act theory to highlight why the indirect form is preferred. Though the details of these models generally fall outside of the scope of this Comment, a brief foray into the "most influential and comprehensive" model—the "face-saving" model—may help to highlight how speech acts play into politeness.[133] In this model, Brown and Levinson draw on the "sociological notion of face"[134] to demonstrate why speakers choose to communicate using certain forms.[135] When evoking "positive politeness," speakers tend to choose speech strategies that emphasize solidarity with the addressee.[136] On the contrary, when speakers use "negative politeness," speakers tend to opt for "speech strategies that emphasize one's deference to the

1) "I want you to close the window." *Id.*
2) "Can you close the window?" *Id.*
3) "Will you close the window?" *Id.*
4) "Would you close the window?" *Id.*
5) "Would you mind closing the window?" *Id.*
6) "You ought to close the window." *Id.*
7) "May I ask you to close the window?" *Id.*
8) "I wonder if you'd mind closing the window." *Id.*

[129] *See id.* at 112. A speech act has become conventionalized when "of various, apparently synonymous linguistic expressions, only one may conventionally be used to convey an indirect speech act." *Id.*
Conventionalized speech act: "Can you pass the salt?"
Synonymous expressions: "Are you able to pass the salt?" and "Do you have the ability to pass the salt?" *Id*.

[130] *Id.* at 115. For an extensive literature on politeness, see generally Margaret A. DuFon, Gabriele Kasper, Satomi Takahashi & Naoko Yoshinaga, *Bibliography on Linguistic Politeness*, 21 J. PRAGMATICS 527 (1994).

[131] HUANG, *supra* note 4, at 115. Huang demonstrates the differing levels of politeness across associated with various utterances:

> Consider (i)-(v): (i) Call Lucy a taxi, please. (ii) Will you call Lucy a taxi? (iii) Would you call Lucy a taxi? (iv) Would you mind calling Lucy a taxi? (v) I wonder if you'd mind calling Lucy a taxi? The speech act of requesting is performed more indirectly, for example, using (iii) than using (i), and therefore the utterance in (iii) is considered more polite that that in (i).

Id.

[132] *See id.* at 116. The four main models are the "social norm" model, the "conversational maxim" model, the "face-saving" model, and the "conversational contract" model. *Id.* (internal citations omitted).

[133] *Id.*

[134] *Id.* (quoting PENELOPE BROWN & STEPHEN C. LEVINSON, POLITENESS: SOME UNIVERSALS IN LANGUAGE USAGE 61 (1987)) ("Simply put, face is 'the public self-image that every member wants to claim for himself.'").

[135] *Id.*

[136] *Id.* ("These strategies include claiming 'common ground' with the addressee, conveying that the speaker and the addressee are co-operators, and satisfying the addressee's wants.").

addressee."[137] In this context, linguists have noted the increased usage of indirect speech forms such as conventionalized indirect speech acts,[138] hedges on illocutionary force,[139] and apologies.[140]

Requests and commands are two closely related speech acts that attempt to induce the hearer to do or not do an act.[141] However, while "[a] request is a directive [speech act] that allows [the hearer] the option of refusal," an "order" or "command" suggests that the hearer has no other option or alternative.[142] It is a generally accepted fact that when speakers use the direct form of these speech acts, a hearer can interpret their message accordingly. However, the exchange becomes more complicated to interpret when the speaker opts to make a command or order indirectly.[143] Especially when the exchange occurs between an authority figure and a subordinate, linguists have found that it is increasingly common to couch a command in the form of a request: "a boss may ask his secretary, 'Could you type this memo?' A father may ask his son, 'Would you clean up your room?' or tell him, 'I'd like you to clean up your room.'"[144] While none of these utterances appear to be direct commands, they function as such.[145] These examples make it clear that commands and requests are indistinguishable when only the words used are considered; the most important factor is the power dynamic that threads the exchange, yet does not appear in the spoken words.[146]

In essence, the wording of a polite command usually makes it seem that the hearer has a choice in the matter, even if they do not. It is not difficult to imagine how police officers, too, may adhere to politeness norms in interacting with citizens, thereby choosing to use the indirect form of the command as long as

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137 *Id.*

138 *Id.*; *see supra* note 129 and accompanying text.

139 HUANG, *supra* note 4, at 116. Speakers generally use hedges when they wish to communicate to the listener that they are going to opt out of a conversational maxim. *See id.* Examples of hedging an illocutionary force are: "May I ask if you're married?" (has the indirect force of asking) or "I must warn you not to discuss this in public . . . ." (has the indirect force of warning). *Glossary of Linguistic Terms*, SIL INT'L, https://glossary.sil.org/term/hedged-performative (last visited Sept. 19, 2022).

140 HUANG, *supra* note 4, at 116.

141 Tiersma & Solan, *supra* note 1, at 239.

142 *Id.* (quoting DANIEL VANDERVEKEN, MEANING AND SPEECH ACTS, VOLUME 1: PRINCIPLES OF LANGUAGE USE 189 (1990)).

143 *Id.* at 240. Linguist Robin Lakoff has suggested that speakers tend to "make requests and commands indirectly because a direct request or command could cause its recipient to lose face as someone who is subject to being ordered about." *Id.* (citing ROBIN TOLMACH LAKOFF, TALKING POWER: THE POLITICS OF LANGUAGE IN OUR LIVES 30 (1990)).

144 *Id.*

145 *Id.*

146 *See id.* at 242 ("An ostensible request is most likely to be interpreted as a command when the person in power appears to the subordinate to have the authority, in this specific situation, to order the subordinate to do the requested act.").

interactions are proceeding in an amicable fashion.[147] However, most drivers would not believe that an appropriate response to being pulled over by a police officer and asked, "May I see your license?" is "No."[148] This is because the officer is an authority figure who, common sense dictates, has the right to make this command—even though it appears to be a request.[149]

C. Application of Pragmatic Theories in Officer-Target Interactions

While the aforementioned pragmatic theories may seem rather nebulous, they are applicable to, and quite possibly even at the forefront of, all interpersonal exchanges. Because they are so deeply ingrained in sociocultural phenomena such as politeness, they can influence speech and perception without conscious recognition by either speaker or listener. Consider, for example, the officer-citizen exchange at issue in *Bustamonte*. The officers had already asked Alcala for permission to search the vehicle using a direct speech act, to which Alcala acquiesced.[150] Shortly thereafter, the officer used the indirect speech form to request Alcala's permission[151] to search the trunk of his car: "Does the trunk open?" to which Alcala replied, "Yes," grabbed the keys, and opened the trunk.[152]

Here, speech act theory provides one analytical framework for understanding this exchange. The locutionary act of the officer's utterance appears to be seeking or obtaining information; however, the earlier conversation indicates that the true illocutionary force is requesting that Alcala open the trunk for the officer to search. Based on Alcala's response, it appears that the perlocutionary force of the utterance was requesting, or ordering.[153] Note, however, that using information-seeking locutionary forms to request or order a given result has become conventionalized in English.[154] This means that Alcala interpreted the officer's utterance to mean that he should open the trunk, which was not only reasonable but perhaps even expected. This particular scenario underscores the importance of using direct speech acts in officer-

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147 While an officer could order a citizen to "Get out of the car!" they may opt to phrase commands as requests: "Would you please get out of the car? or "Do you mind stepping out of your car?" *Id.* at 240.

148 *Id.* at 241 ("We assume that the officer has the right to take and examine our license, that he can enforce this right, and that refusing to hand it over will only get us into trouble.").

149 *Id.*

150 Schneckloth v. Bustamonte, 412 U.S. 218, 220 (1973).

151 Whether the officer actually needed to ask Alcala's permission to do so is irrelevant for the linguistic analysis of the officer's phrasing.

152 *Bustamonte*, 412 U.S. at 220.

153 To know specifically whether the perlocutionary force is requesting or ordering, one would have to ask Alcala whether he perceived it as a request or an order.

154 *See supra* notes 128–29 and accompanying text.

suspect interactions, as indirect forms can implicitly communicate that the target has no choice in the matter.[155]

The co-operative principle provides an alternative means of understanding what triggered Alcala to respond to the officer's information-seeking question by granting the request: because the officer had requested permission to search the car a few minutes earlier, Alcala was already primed to the purpose of the conversation. Therefore, the question at issue, if interpreted literally, would violate Grice's maxim of relation.[156] Accordingly, Alcala subconsciously interpreted the comment in a manner most relevant and most effective in light of the earlier conversation and then granted permission to the officer to search his trunk.

D. Pragmatics in the Courtroom Today: Case Study of the Invocation of the Right to Counsel

Scholars have already recognized the importance of pragmatic considerations in the context of custodial interrogation and the invocation of right to counsel. They assert that though suspects are administered *Miranda* warnings before questioning, very few people, after hearing about their right to counsel, "will expressly invoke it by saying something like, 'I hereby exercise my right to counsel' or 'I hereby request to have an attorney present before questioning continues.'"[157] Instead, because "[p]eople in custody may feel uncomfortable making a direct request or a demand for a lawyer to someone in a position of power over them," they are "inclined . . . to be polite or deferential."[158] Therefore, most requests are made indirectly—by using expressions of need or desire,[159] making the request in the form of a question,[160] or adding a condition.[161] Like in the voluntary consent to search context, problems arise when pragmatic information is considered neither by officers in the moment nor by judges at the suppression hearing.[162]

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155 *See* discussion *infra* Section IV.B.2.

156 *See supra* note 115 and accompanying text.

157 Tiersma & Solan, *supra* note 1, at 249.

158 *Id.* at 250.

159 *Id.* at 251 ("[T]he defendant state[d] that he would like to have a lawyer . . . .").

160 *Id.* at 252 ("According to the Virginia Supreme Court, for instance, a suspect's comment, 'Didn't you say I have the right to an attorney?' was not a valid invocation of the right to counsel.").

161 *Id.* at 250 (stating that requests and commands are perceived as "less imposing" when they are made "*conditional* on the good will or convenience of the addressee"). An example of adding a condition appears in *State v. Campbell*: "If I'm going to be charged with murder, maybe I should talk to an attorney." State v. Campbell, 367 N.W.2d 454, 456 (Minn. 1985).

162 *See, e.g.*, Tiersma & Solan, *supra* note 1, at 251 (citing Bane v. State, 587 N.E.2d 97, 103 (Ind. 1992)) (emphasizing that the court's holding that defendant did not invoke his right to counsel did not place value on the suspect's communicative intent); *id.* (citing Bunch v. Commonwealth, 304 S.E.2d 271, 275 (Va. 1983))

In their work, Tiersma and Solan evaluate several existing standards for considering extralinguistic context, such as Ainsworth's clarification standard,[163] and propose a series of original solutions to the problem. For example, Tiersma and Solan suggest that either the legal system "should recognize indirect requests for counsel" as operative or require that interrogators "inform the suspect that specific 'magic words' will stop an interrogation."[164] Ultimately, Tiersma and Solan urge that "a clear procedure that is easy to understand" be put in place by "legislatures and law enforcement agencies" who can work together "to produce a more professional approach to the problem."[165]

Since the publication of *Cops and Robbers*, various scholars have picked up where Tiersma and Solan left off. For example, in her recent work, Taylor Smith proposes that the "legal system adjust its language expectations to take into account indirect speech acts."[166] One way to do so, Smith suggests, would be to afford "greater protection to constitutional rights" by adding two more warnings: "one that educates the suspect on the appropriate standard of clarity in speech and behavior necessary to invoke the rights, and a second that educates the suspect on what speech and behavior will be considered a waiver of right."[167] Ultimately, Smith urges that the issue is not necessarily the exact standard applied, but rather that the linguistic disparity be "reduced such that the suspect can, through their speech, interact within a shared legal-language culture."[168] The invocation of the right to counsel does not pose exactly the same linguistic

("Another person being questioned by law enforcement officers commented that he 'felt like he might want' to talk to a lawyer; he was likewise held not to have invoked his right to counsel.").

[163] *Id.* at 252 (citing Janet Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 301–16 (1993)) ("These cases allow police to clarify a request for counsel that is considered ambiguous.").

[164] *Id.* at 260.

[165] *Id.* at 260–61.

[166] Taylor J. Smith, *Linguistic Estoppel: A Custodial Interrogation Subject's Reliance on Traditional Language Customs When Facing Unknown Expectations for Legally Efficacious Speech*, 46 BYU L. REV. 1675, 1718 (2021) (reasoning that since *Miranda* warnings are written for a lay audience, lay language should be the standard for interpreting responses to them).

[167] *Id.* at 1723–24. The added language might appear as follows:

> 5.A Silence will not be sufficient to invoke the right to silence.
> 5.B Asking about whether an attorney is available will not invoke the right to have counsel present.
> 5.C In order to invoke these rights, you must inform us explicitly that you are invoking the particular right. . . .
> 6.A Even if you do not sign the waiver, if you continue to answer our questions voluntarily it may be considered a waiver of your rights.
> 6.B If you contact us to offer additional details regarding this case without expressly invoking your rights it may be considered a waiver of your rights.

Id. at 1724.

[168] *Id.* at 1726.

issues present in the voluntary consent to search context. However, certain similarities are readily apparent. For instance, both feature the presence of spoken language complicated by an imbalanced officer-suspect power dynamic and information asymmetry, which officers may take advantage of as they are familiar with the rules, while the suspects may not be. Hence, such similarities indicate that perhaps proposed reform in one area should be likewise applicable to the other.

III. DANGERS OF THE CURRENT TOTALITY TEST

Returning to the Fourth Amendment context with an understanding of the relevant linguistic theories amplified by concerns raised in the Sixth Amendment space, this Part will enumerate various missteps of the totality test used in voluntary consent to search jurisprudence today. Due to the fact-intensive nature of the totality of the circumstances test, case-by-case analysis is used to determine the validity of consent.[169] While on one level it may seem valuable to conduct an individualized inquiry for each set of facts, doing so has significant drawbacks. More specifically, for each determination made, courts must overcome two hurdles: first, they must accurately find the facts,[170] and second, they must properly weigh the legal significance of each fact. In making these findings, there is quite a bit of room for injecting subjectivity and ignoring the sociolinguistic reality, which will influence a court's decision. This section seeks to highlight each of these concerns in turn, in Sections A and B, respectively, using recent consent to search jurisprudence as fodder for discussion.

A. Susceptible to Subjectivity

The current totality framework is dangerously subjective, thus giving judges, who are untrained from a linguistic perspective, immense discretion in evaluating voluntariness. Upon hearing a Fourth Amendment case, the judge first must determine the facts.[171] However, scholars have emphasized that doing so is rarely a straightforward process, since the defendant and officer typically give diametrically opposed versions of the facts surrounding consent.[172]

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169 John B. Macdonald, *Constitutional Law: Voluntary Consent to Search Pursuant to an Unlawful Arrest*, 28 U. FLA. L. REV. 273, 276 (1975).

170 *See* John B. Wefing & John G. Miles, Jr., *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 215 (1974) ("Thus, the question becomes whether the consenting party did in fact permit the search.").

171 *Id.*

172 *See id.* at 216 ("Consent searches frequently result in courtroom contests involving conflicting testimony by the party who gave the alleged consent and the officer who purportedly obtained it.").

Moreover, the trial court's determination of which version of the facts to believe will bear on its ultimate decision as to whether consent was voluntary or coerced. For this reason, these choices should not be taken lightly.

To better understand the gravity of this finding, consider the court's conclusion in *People v. Hall*. In *Hall*, the defendant moved to suppress two firearms seized from his automobile, contending that, among other things, he had not given consent to the officer's search.[173] After stopping the defendant's car, two officers asked the defendant "if there was 'anything in the car we need to know about;'" the defendant replied in the negative.[174] The officer then indicated that they wanted to search the vehicle and requested the defendant's keys.[175] How exactly the officers went about doing so, however, became a central issue of the case.

At the suppression hearing, "Officer Kaska testified . . . that he asked Hall, "OK if we check?;" however, he had testified at the preliminary hearing, some ten days after the encounter, that he did not "recall the exact words. Something along the lines of would you mind handing me your keys."[176] The court acknowledged that, given the circumstances, "[i]t is not inconceivable that, in light of Officer Kaska's admitted desire to get into the trunk, . . . the 'request' may have sounded more like a command."[177] Moreover, the physical attributes of the exchange—"[Hall's] vehicle [was] stopped by at least three police cars and he [was] approached and surrounded by at least four police officers with weapons at the ready"—may have intimidated the suspect.[178] The fair possibility of this "perception of intimidation on the part of the defendant . . . calls into question the existence of a free and voluntary consent to search."[179] The court proceeded to admonish the officers, albeit indirectly, for not using a more direct method of establishing unequivocal consent.[180] Accordingly, the court found

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[173] People v. Hall, No. 01560-2005, 2006 WL 1341016, at *1 (Erie Cty. Ct. May 5, 2006).

[174] *Id.* (emphasizing that the officer asked once more if there were any weapons in the car and, again, the defendant replied in the negative; the officer did not draw his weapon during the exchange).

[175] *Id.*

[176] *Id.* at *4. The first version of the utterance that he reported—"OK if we check?"—is significantly less direct than the later adopted version—"Something along the lines of would you mind handing me your keys." *Id.*

[177] *Id.* In the preceding sentence, the court makes a somewhat ambiguous statement about the nature of the exchange: "In other words, the exact nature of the request to search was not clearly established and the extent of such consent, if any, not sufficiently defined." *Id.* This statement, while hard to understand as written, emphasizes the linguistic principles that this Comment has sought to introduce. In other words, the officer did not use direct speech acts, and for that reason, it may not have been clear to the defendant (1) that the officer was making a formal request, and/or (2) that his consent was not required.

[178] *Id.*

[179] *Id.*

[180] *See id.* ("And, of course, they could establish unequivocally that consent to search was obtained by either getting a signed 'consent to search' form or, at the very least, make a complete and accurate record of how

that, "in light of the totality of the circumstances, the People have failed to establish that the defendant's consent to the search was voluntary and the unequivocal product of an essentially free and unconstrained choice."[181] As a result, the court granted the defendant's motion to suppress the evidence.[182]

This finding in *Hall* highlights first, the great discretionary power given to fact finders, and second, the gravity of such power. In regard to the former, notice how the trial court does not dwell on the presence of conflicting testimony, but rather aptly makes a determination that becomes accepted fact.[183] Alternatively, just as easily as the judge concluded that the testimony was unclear, he could have unilaterally chosen the version most favorable to law enforcement; the implications of doing so would have vastly changed the outcome of the case for Hall. While the discretionary power of fact finders is no doubt integral to the justice system as it functions today, judges are by no means all-knowing. Accordingly, the *Hall* case emphasizes the importance of fact finders being provided linguistic guidance for interpreting testimony.

Furthermore, defendants run the risk that judges will make factual determinations not only based upon their subjective preference for law enforcement, but also due to their own interest[184] in consent searches. For example, recall *United States v. Ruiz*, in which the court assessed a variety of factors[185] and ultimately determined that the defendant had provided voluntary consent.[186] The Seventh Circuit explicitly stated that to draw this conclusion, the court weighed the facts on both sides.[187] By looking at the facts specifically listed in the opinion, it becomes evident not only which facts the court valued most greatly, but also how it characterized these facts. Specifically, in the court's analysis, it gave great weight to the fact that "Ruiz readily agreed to go to the station."[188] However, this "fact" is actually no fact at all. Rather, it is a

consent was given. None of that occurred here.").

[181] *Id.*

[182] *Id.*

[183] Judge D'Amico only states briefly that "[t]he testimony in the instant case, elicited at the suppression hearing as well as at the preliminary hearing and the grand jury, is inconsistent and equivocal." *Id.*

[184] Recall the reasoning articulated in *Bustamonte* and *Jimeno*, which emphasized officers' interest in perceived consent because consent searches often lead to evidence "necessary . . . for the solution and prosecution of crime." Florida v. Jimeno, 500 U.S. 248, 252 (1991) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973)).

[185] United States v. Ruiz, 785 F.3d 1134, 1146 (7th Cir. 2015) ("To determine whether consent was provided voluntarily, we consider the totality of the circumstances, including Ruiz's age, education, and intelligence; whether he was advised of his constitutional rights; how long he was detained prior to consent; whether he consented immediately or after police made several requests; whether the police used physical coercion; and whether he was in custody.").

[186] *See supra* Section I.C.

[187] *See supra* notes 95–96 and accompanying text.

[188] *Ruiz*, 785 F.3d at 1147.

characterization of Ruiz's actions.[189] Again, here, the judge used his discretion to incorporate his subjective perception into a balancing test that already allows for interpretation. When this happens, the totality test morphs from a determination made on the basis of all of the facts into a subjective decision made on the basis of the facts as the judge chooses to see them. When there is manipulation of the facts and the test to such a great extent, what is the point of providing a prescribed test at all? This Comment urges that there is none. Subjectivity to this degree becomes purely discretionary decision-making when subject to no prescribed parameters.

B. Out of Touch with Linguistic Considerations

Even when the current totality framework attempts to incorporate linguistic elements, it fails to do so with consistency. As emphasized in the preceding sections, one inherent downside to totality tests is that they do not require any particular considerations but, rather, leave it to the court to self-select pertinent factors. Accordingly, while some courts deem linguistic factors important to their analysis, others will leave them out entirely.[190] However, the decision to do so is an enormous oversight. Unlike factors such as the brandishing of weapons or use of physical coercion, which may not be present in every case, language is inherent in every request for consent. Therefore, any totality assessment of consent that operates without consideration of linguistic factors is incomplete.

On the off chance that judges do attempt to consider linguistic factors, their lack of knowledge in the field becomes readily apparent. For example, the court in *State v. Peed* completely butchered its attempt to consider sociolinguistic factors. This issue in *Peed* arose after a local trooper sought to assess a driver's sobriety as he presented various signs of intoxication.[191] While the defendant was in the trooper's vehicle, the trooper asked him if "he would be willing to submit to an Intoxilyzer test."[192] The trooper informed the defendant that if he did not voluntarily submit, the trooper could apply for a search warrant, and then it would be up to the court to determine whether there was probable cause to obtain the defendant's blood.[193] The defendant consented to the test.[194]

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[189] The facts state that Ruiz "voluntarily consented to the search of his car, to drive to the police station, and to open the traps." *Id.* at 1140.

[190] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[191] State v. Peed, No. 1506000620, 2016 WL 1732623, at *1 (Del. Com. Pl. Apr. 27, 2016) ("Trooper Freeman smelled an odor of alcohol on Defendant's breath, and observed Defendant's eyes to be glassy and blood shot.").

[192] *Id.* Procuring blood from a defendant constitutes a search. *See id.*

[193] *Id.*

[194] *Id.*

In reviewing the parties' arguments to the trial court, the trial judge declared that the "totality of circumstances establishe[d] that Defendant voluntarily consented to submit to the Intoxilyzer test."[195] The judge emphasized a lack of anything in the record "demonstrating that Defendant's age, intelligence, or education precluded him from consenting voluntarily."[196] Furthermore, the record was devoid of any indication that the defendant was "uncooperative during his encounter with Trooper Freemen [sic], or that Defendant repeatedly refused to submit to the Intoxilyzer test after being informed that Trooper Freeman could obtain a warrant to draw his blood."[197] Finally, "the length of the detention—the time of the collision to the time Defendant gave his breath sample—lasted for approximately two hours."[198] The judge clarified that the defendant was unable to provide any case law to support his contentions that the trooper "was coercive in obtaining [his] consent," and that "Fourth Amendment jurisprudence does not forbid a law enforcement officer from attempting to persuade an individual to consent to a search."[199] Therefore, "[t]he mere act of an officer informing the defendant of his lawful intentions" to obtain a warrant does not rightfully amount to coercion.[200]

While on its face this rule—that law enforcement officers are not forbidden from attempting to persuade an individual to consent to a search—may not seem overtly problematic, the line between persuasion and coercion is very fine. To determine whether a given utterance counts as mere persuasion or dangerous coercion, one would likely rely on the speaker's spoken outputs and the listener's understanding. This analysis, however, necessarily implicates linguistics. As a result, it is probably not surprising that the court's per se rule articulated and applied in *Peed* would likely not withstand the criticism of a trained linguist. Rather, a better rule would provide a series of proven linguistic cues indicative of coercion for the court to look at in order to make this determination.

A larger concern pertaining to the consideration of linguistic factors in totality assessments is the sheer inaccuracy with which courts have made any so-called linguistic determinations in the past. The example from *Peed* above speaks directly to this concern. However, this issue also manifests in more subtle ways. More specifically, even when courts appear to consider the language

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195 *Id.* at *3.

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.* at *3–4 (emphasis omitted) (quoting State v. Mauk, No. 1310011475, 2014 WL 4942177, at *6 (Del. Super. Ct. Sept. 29, 2014)).

200 *Id.* at *4.

involved in the exchange, they rarely, if ever, incorporate any extrinsic linguistic context into their analysis of the exchange; extrinsic linguistic context, however, is an integral part of every exchange. To understand the relevance of this consideration, recall *People v. Hall*. In *Hall*, the court considered two versions of requesting consent: "OK if we check?" and "[s]omething along the lines of would you mind handing me your keys."[201] One could imagine these two utterances being construed very differently, depending upon intangible factors such as tone, body language, and the like. If a person said "would you mind handing me your keys" while standing with an outstretched arm and open palm, the listener might feel a greater pressure to comply. Unless courts are required to consider these pragmatic inputs across the board, the decisions arising out of Fourth Amendment cases will continue to look vastly different from one another.[202] Accordingly, to make the totality test more effective, the court must account for how people *actually* speak and interact.

A valiant effort was made in *U.S. v. Mendoza* to consider the defendant's body language[203] in addition to his spoken language[204]—a seemingly more comprehensive linguistic approach. In *Mendoza*, law enforcement officers sought consent to search the vehicle of a suspect who "had very limited English language ability."[205] After the translating officer arrived, "Mendoza consented to a search of his vehicle and his person."[206] The search revealed a cell phone, more than $800, and a tire repair canister featuring a hidden compartment containing cocaine residue.[207] The officers then requested Mendoza's permission to search his residence, informing him that he was not required to consent to such a search.[208] Mendoza was reticent, but eventually indicated that "he might consent if the officers promised not to question him afterwards."[209] The officers refused to add this stipulation to the consent-to-search form and Mendoza did not sign it.[210] But Mendoza "did not object when Officer Fink and

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[201] People v. Hall, No. 01560-2005, 2006 WL 1341016, at *4 (Erie Cty. Ct. May 5, 2006).

[202] *Compare* Commonwealth v. Burgos, 299 A.2d. 34, 38 (Pa. Super. Ct. 1972) (holding that because the defendant was not familiar with English, he may have felt greater pressure to acquiesce to the police officer's request), *with Peed*, 2016 WL 1732623, at *4 (applying a per se rule to avoid handling complex linguistic issues arising around persuasion).

[203] United States v. Mendoza, 677 F.3d 822, 826 (8th Cir. 2012) ("Mendoza gestured in the direction of the residence in a way that indicated consent and then headed to the house.").

[204] *Id.* ("Mendoza did not object when Officer Fink and Detective Batcheller informed him they were going to his house to search.").

[205] *Id.* at 825.

[206] *Id.* at 826.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

Detective Batcheller informed him they were going to his house to search."[211] In fact, according to the Eighth Circuit, "Mendoza gestured in the direction of the residence in a way that indicated consent and then headed to the house."[212] Incriminating evidence was found inside of Mendoza's residence.[213]

After indictment, "Mendoza moved to suppress the evidence derived from both the roadside stop" and search of his home.[214] The district court recognized the complexity of the factual record.[215] "On the one hand, Mendoza did not explicitly state the officers were permitted to search the Louis Place residence or sign the consent-to-search form, and the significant police presence at the roadside stop and the residence raise the possibility Mendoza merely acquiesced to police authority."[216] However, "[o]n the other hand, Mendoza's gestures and body language indicated his consent."[217] Moreover, "Officer Fink and Detective Batcheller specifically informed Mendoza of his right to refuse consent, and Mendoza clearly understood this right, because he initially refused consent and bargained with the officers regarding the terms of his consent."[218] Ultimately, on the basis of these facts, the Eighth Circuit affirmed the District Court's finding that Mendoza's consent to the warrantless search of his residence was voluntary.[219] While the inclusion of an extralinguistic factor here is commendable, the court appeared rather unsure how exactly to weigh these different forms of communication against one another,[220] and thus resorted to making a final determination based on other nonlinguistic factors present in the case.[221]

Five years later, in *United States v. Escamilla*, the Fifth Circuit tried its hand at using linguistic tools to assess voluntary consent, but did not fare much better than the Eighth Circuit did in *Mendoza*.[222] In *Escamilla*, the Fifth Circuit

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[211] *Id.*

[212] *Id.*

[213] *Id.* ("In the basement, the officers discovered a room coated so thickly with white residue the officers initially thought it was drywall dust. A field test of the white power indicated it was, in fact, cocaine residue. . . . In Officer Hansen's experience, all of this indicated a large-scale cocaine operation.").

[214] *Id.* at 827.

[215] *Id.* at 829 ("The district court recognized the factual record made this case a close call.").

[216] *Id.*

[217] *Id.* The court also noted that "[t]he record [did] not indicate any use of force, coercion, intimidation or deception by the officers." *Id.*

[218] *Id.*

[219] *Id.*

[220] *See id.* ("On the one hand, Mendoza did not explicitly state the officers were permitted to search the Louis Place residence or sign the consent-to-search form . . . . On the other hand, Mendoza's gestures and body language indicated his consent.").

[221] *See id.* (referring to his knowledge and understanding of the right to refuse consent confirmed by educated questions that he asked the officers).

[222] United States v. Escamilla, 852 F.3d 474, 478, 480 (5th Cir. 2017) (attempting to determine if the

reviewed a case in which Escamilla challenged the validity of his consent to search his phone during a police stop.[223] After searching his truck, Agent Garcia asked to examine the Escamilla's phone.[224] According to the record, Garcia inquired, "'do you mind if I look through your phone?[,]' and Escamilla silently handed it over."[225] To assess the validity of Escamilla's consent, the Fifth Circuit considered six factors:

> (1) the voluntariness of the suspect's custodial status; (2) the presence of coercive police procedures; (3) the nature and extent of the suspect's cooperation; (4) the suspect's awareness of his right to refuse consent; (5) the suspect's education and intelligence; and (6) the suspect's belief that no incriminating evidence will be found.[226]

Escamilla made several specific contentions about the perceived involuntariness of the exchange, many of which the court eliminated quickly.[227] However, to Escamilla's complaint about the inherently coercive nature of the exchange—"the circumstances were coercive because he was 'alone and detained by two armed U.S. Border Patrol agents . . . on a secluded road while it was still dark'"—the court offered a more robust response.[228] The Fifth Circuit immediately clarified that "the mere presence of armed officers does not render a situation coercive."[229] Rather, an assessment of coercion is only triggered upon some kind of aggressive conduct by an officer, such as drawing their weapons,[230] threatening the suspect,[231] treating the suspect rudely,[232] or "overt[ly] display[ing] their authority."[233] In the eyes of the court, the absence of any of these behaviors inhibited the possibility of a coercion claim in the present case.[234]

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agent's question, "do you mind if I look through your phone?[,]" and Escamilla's response, silently handing it over, constituted voluntary consent).

223 *Id.* at 480.

224 *Id.* at 478.

225 *Id.*

226 *Id.* at 483 (citing United States v. Macias, 658 F.3d 509, 523 (5th Cir. 2011).

227 First, Escamilla contended that he was "unaware of his *Miranda* rights." *Id.* The court responded that "[t]here is no '*Miranda* requirement' attending a simple request for permission to search." *Id.* (quoting United States v. Arias-Robles, 477 F.3d 245, 250 (5th Cir. 2007)). Next, Escamilla contended that "he was essentially uncooperative because he did not 'admit[] his involvement in criminal activity before consenting' or 'assist agents in their search.'" *Id.*

228 *Id.*

229 *Id.* (quoting United States v. Martinez, 410 F. App'x 759, 764 (5th Cir. 2011)).

230 *Id.* (quoting United States v. Mata, 517 F.3d 279, 291 (5th Cir. 2008)).

231 *Id.* at 484 (quoting *Mata*, 517 F.3d at 291).

232 *Id.* (quoting *Mata*, 517 F.3d at 291).

233 United States v. Tompkins, 130 F.3d 117, 122 (5th Cir. 1997).

234 *See Escamilla*, 852 F.3d at 483–84 ("There is no evidence that Agent Garcia or Agent Freed in any way threatened Escamilla; indeed, both agents specifically testified to the contrary.").

The Fifth Circuit then focused on the language of the exchange, looking for evidence of involuntariness. First, the court referred to the officer's reported language[235] and Escamilla's response, using precedent established in *United States v. Martinez*: "[c]onsent 'can be implied from silence or failure to object if it follows a police officer's explicit or implicit request for consent.'"[236] On this basis, the court concluded that by complying with the agent's request (by handing the phone directly to him), Escamilla's conduct "constitute[d] more than mere silence or failure to object."[237] For this reason, it can be said that "Escamilla voluntarily consented to Agent Garcia's search of the phone."[238]

From a linguistic perspective, both the *Martinez* precedent and the *Escamilla* holding are troubling. First, the claim that consent can be implied from silence or failure to object would seem to be highly dependent on the facts, and only a trained linguist is fit to assess these kinds of facts.[239] While various other cases and circuits seem to subscribe to this approach,[240] there is no indication that it is linguist-endorsed in any way. Since the court is not attuned to the technical aspects of human communication, it would seem unlikely that it is fit to draw a conclusion that implies the relative value of different communication forms. Accordingly, the totality test could be vastly improved simply by allowing trained linguists to provide the court with guidelines for weighing and understanding certain forms of communication.

Secondly, when courts are interested in incorporating linguistic evidence into their analysis, they often include factors that are well-meaning, yet misleading. The danger of doing so is exemplified in *U.S. v. Brake*.[241] In *Brake*, a local law enforcement officer felt an object that "felt like a bag" while performing a pat down search of Brake's pockets during a *Terry* stop.[242] The officer "asked Brake, '[if he] would mind just taking it out' of his pocket."[243]

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[235] Notice that the court characterized this language as the "uncontested evidence," thereby implying the weight afforded to it even though they had not learned the contents of the exchange on any legitimate or objective basis. *Id.* at 484.

[236] *Id.* (quoting United States v. Martinez, 410 F. App'x 759, 763 (5th Cir. 2011)).

[237] *Id.* The Fifth Circuit relied on a series of prior cases in which various circuits have deemed complying with a request to be valid consent. *See* United States v. Cooper, 43 F.3d 140, 148 (5th Cir. 1995) (finding "clear cooperation" when a defendant "produced his ticket when requested" and "stood up voluntarily prior to the pat down"); United States v. Zapata, 18 F.3d 971, 977 (1st Cir. 1994) ("[I]t is settled law that the act of handing over one's car keys, if uncoerced, may in itself support an inference of consent to search the vehicle.").

[238] *Escamilla*, 852 F.3d at 484.

[239] *But see* Berghuis v. Thompkins, 560 U.S. 370, 372 (2010) (holding that the right to remain silent cannot be invoked by anything other than unambiguous invocation, thereby pushing back against the idea that suspects can imply their desire to end questioning by not responding to officers).

[240] *See supra* note 237 and accompanying text.

[241] United States v. Brake, 666 F.3d 800 (1st Cir. 2011).

[242] *Id.* at 803.

[243] *Id.*

Brake responded "sure" and "did so without hesitation."[244] The officer "asked Brake whether he was curious about [the bag's] contents" and Brake responded by opening the bag.[245] After seeing its contents, "Brake threw the bag down and said 'those aren't mine.'"[246] The officer picked up the bag "and saw several hundred pills inside."[247]

Brake filed a suppression motion challenging, among other things, his consent to the search that disclosed the bag and its contents.[248] He argued "that he did not voluntarily consent to removing the bag from his pocket, but was 'acced[ing] to directives from a police officer whom he understood was continuing to detain him.'"[249] Accordingly, his act was one of "compliance and submission" rather than voluntary consent.[250]

The First Circuit reviewed the record, concluding that the "testimony shows that Brake was cooperative with [Officer] Mondene from the beginning of their interaction, and indeed he displayed no nervousness or anxiousness of any kind during the entire encounter."[251] Furthermore, the court noted that "Brake was entirely cooperative during the encounter, which lasted a few minutes, and the tone between Brake and Mondene remained cordial throughout."[252] As a result, there was "no indication that Brake was coerced in any fashion to pull the bag out of his pocket and open it for the police officer to see its contents."[253]

Here, in identifying Brake's lack of "nervousness or anxiousness" and the "cordial" tone indicative of voluntariness, the court makes a series of sweeping generalizations.[254] Primarily, cordiality is a subjective determination. The only way that the court could "know" this fact is by opting to take the word of one of the parties. While this certainly has its dangers, it is well accepted that courts regularly engage in this practice.[255] Subjectivity aside, however, the court's determination is concerning because there are various reasons why an interaction would be cordial, yet by no means indicative of consent. Consider what would happen if an officer pointed at a suspect's briefcase and said, "Does this open?" The suspect may very well reply "yes" and open the briefcase, having no

244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.*
248 *Id.* at 807.
249 *Id.* at 806–07.
250 *Id.* at 807.
251 *Id.*
252 *Id.* at 803.
253 *Id.* at 808.
254 *Id.* at 803, 807.
255 *See supra* notes 188–89 and accompanying text.

intention to allow the officer to search its contents, but rather demonstrating that the lock/unlock function works. For this reason, the per se rule that cordiality is indicative of consent can quickly become dangerous. Courts would be better off seeking the expertise of linguists, who may be able to identify more reliable indicators of voluntariness.

IV. A SERIES OF PROPOSED CHANGES TO THE VOLUNTARY CONSENT TO SEARCH DOCTRINE

In hearing suppression motions, judges surely need to retain the power to make unilateral determinations of fact. However, in the interest of justice, judges should want to be as well-equipped as possible to make such impactful decisions. This Comment urges that proper education is a key component of being well-equipped; accordingly, incorporating linguistic theory into judicial training and consent jurisprudence is a must. While the most ideal totality test for consent searches might be composed of finite factors ranked in order of reliability by members of the linguistic community or require a trained linguist to testify as an expert witness in each case to provide guidance to the judge, this Comment acknowledges that these solutions may not be easily instituted. As a result, this Comment proposes beginning with minor changes to the current totality test. First, Section A suggests adjustments to the specific factors used in court, such as eliminating misleading considerations, like the cordiality requirement, and switching the perspective from which the court considers officer-suspect interactions in the interest of creating a more even playing field. Second, Section B recommends the institution of a series of best practices that police officers may use to procure consent, which avoids the use of linguistically problematic phrasing.

A. Refine the Totality Test

The totality test has existed in a rather amorphous form since the days of *Bustamonte*.[256] Perhaps due to the nebulous nature of its unenumerated factors, little has been done in the way of trying to make it conform to any structure. However, without any kind of concrete analytical framework to guide judges, the totality test has run amuck. Accordingly, it is time for linguists to step in and ground this test in the realities of interpersonal communication. With this lens, the need for two particular changes is immediately apparent: first, the elimination of the cordiality element and next, a change of perspective.

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[256] *See* discussion *supra* Section I.A.

1. Elimination of the Cordiality Element

As described in Part II, pragmatic theory reflects the understanding that the outward appearance of a spoken utterance and the speaker's intended message need not be the same.[257] Rather, speakers often intentionally package their messages in different forms to get across an implied message, accomplish a goal, or perform a social function.[258] With this understanding, courts should be cautious in giving great weight to the words themselves that officers use to request consent—however, unfortunately, this is not in line with reality. Instead, courts have put stock in elusive—not to mention incredibly subjective—conversational qualities, such as cordiality.[259] To understand why doing so is inherently problematic, recall Brown and Levinson's theory of politeness.[260] Because conversational participants will manipulate their language in the interest of social objectives, such as trying "to preserve both their own face and their interlocutors' face[s] in a verbal interaction," using spoken language as an indicator of one's intent will sometimes be misleading.[261]

Consider, for example, how an officer might attempt to preserve the positive face of a suspect by using language that claims "'common ground' with the addressee" and conveys "that the speaker and the addressee are co-operators, and satisf[ies] the addressee's wants."[262] In this case, instead of requesting consent by stating, "Do you give me consent to search your vehicle?" an officer might say, "Hey, how about you pop the trunk for me? I'll only be a second and then you can be on your way." From this vantage point, it seems clear that the officer using the second utterance has exactly the same intention as the officer using the first utterance—procuring the suspect's consent. However, if the court uses cordiality as a key factor in its analysis, the two would be assessed entirely differently simply because the second is generally perceived as being more cordial than the first.

Likewise, an officer might employ negative politeness when asking a suspect for consent, using "speech strategies that emphasize one's deference to the addressee."[263] In this case, the officer might utter: "Sorry to bother you, sir, but would it be possible for me to take a quick look inside of your car?" The resulting perception of this utterance would be almost identical to the prior example; the

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257 *See* discussion *supra* Part II.

258 *See* discussion *supra* Part II.

259 *See infra* note 264 and accompanying text.

260 *See supra* notes 136–37 and accompanying text.

261 HUANG, *supra* note 4, at 116.

262 *Id.* (quoting PENELOPE BROWN & STEPHEN C. LEVINSON, POLITENESS: SOME UNIVERSALS IN LANGUAGE USAGE 103 (1987)).

263 *Id.*

utterance that adheres to Brown and Levinson's politeness theory will appear more cordial to the court and thus considered more likely to generate voluntary consent.

Given the misleading nature of the spoken word, it is challenging to understand why the courts would perpetuate falsehoods by recommending consideration of factors related to the tone or cordiality of the exchange.[264] Not only is how nicely an officer speaks to a suspect an unreliable indication of what they intend to convey, but it is also an invalid indication of how the suspect will interpret the officer's utterance. While issues surrounding suspect perception will be addressed primarily in the following section, it would be remiss not to mention the presence of confounding variables such as "cross-cultural/linguistic variation in . . . the expression of speech acts," which might affect how a suspect perceives an officer's so-called cordiality in the first place.[265] While in some cultures, indirectness is highly valued as an indication of respect and politeness, in others, direct language is far more prominent.[266] Furthermore, language expression also varies between native and non-native speakers.[267] Accordingly, using cordiality as a data point in the consent analysis may be misleading; therefore, it should be eliminated to produce a totality test that is more aligned with the linguistic realities of officer-suspect interactions.

2. Switching the Lens in the Courtroom: Adopting the Reasonable Suspect Standard

The current totality of the circumstances test does not specifically delineate from whose perspective the court should look when assessing the presence of valid consent. Accordingly, courts review consent cases very differently—while some of them take a greater interest in the suspect's point of view, many opt to focus on whether it can be said that an officer intended to coerce the suspect into

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[264] *See, e.g.*, United States v. Brake, 666 F.3d 800, 803 (1st Cir. 2011) ("[T]he tone between Brake and Mondene remained cordial throughout."); United States v. Ruiz, 785 F.3d 1134, 1146 (7th Cir. 2015) ("The officers . . . spoke to Ruiz in a calm, conversational manner.").

[265] HUANG, *supra* note 4, at 124–25 (comparing politeness strategies in twenty-seven different languages, such as German, Hebrew, Japanese, Russian, four varieties of English, two varieties of French, and eight varieties of Spanish, and finding vastly different customs).

[266] *See id.* (reporting findings from the Cultural Speech Act Realization Project, which discovered that "Argentinean Spanish speakers are the most direct, followed by the speakers of Hebrew;" by contrast the Australian English speakers are the least direct, while speakers of Canadian French and German are positioned at the "mid-point of the directness/indirectness continuum").

[267] *See, e.g.*, *id.* at 126 ("Kasper and Blum-Kulka (1993) contained five studies of interlanguage expression . . . , namely, apologizing, correcting, complaining, requesting, and thanking. . . . Eisenstein and Bodman (1993) pointed out that while expressing gratitude is a universal speech act, it is carried out differently in different languages/cultures.").

granting consent.[268] The challenge with this intent-focused form of assessment is two-fold: first, it is nearly impossible to accurately ascertain another's intention and, second, officer intention is not always aligned with suspect perception.

Regarding the first point, this Comment has underscored that assessing spoken language is rarely sufficient to understand intent. Rather, speakers take a variety of factors into consideration when crafting an utterance—such as their goals and the audience—that affect the form of their output.[269] While some courts have attempted to ascertain intent by considering other factors, such as body language or weapon usage in addition to the spoken word,[270] this approach still cannot account for one remaining and important unknown: the suspect's perception. This brings up the second issue with intent-focused analysis, which is that individuals perceive the world differently, and, no matter how hard a speaker tries to appeal to the listener when they converse, it is impossible to know exactly how one will perceive an output one hundred percent of the time.[271] Accordingly, any analysis of officer-suspect interactions focused solely on intent will likely be inaccurate since it cannot possibly account for the suspect's perception.

To improve the current assessment framework and better incorporate the suspect perspective, this Comment suggests adopting the lens used in Fourth Amendment seizure[272] and *Miranda* rights jurisprudence—that of the reasonable suspect.[273] In other words, a determination of voluntary consent should not hinge on officer intent at all, but rather, whether the reasonable suspect would have felt that her consent was being elicited voluntarily, considering the officer's actions and behavior throughout the encounter. The Supreme Court highlighted the value of the reasonable suspect perspective in a landmark *Miranda* rights case in 2011: *J.D.B. v. North Carolina.*

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[268] *See, e.g.*, *supra* note 92 and accompanying text.

[269] *See* discussion *supra* Part II.

[270] *See supra* notes 178, 203–04 and accompanying text.

[271] Almost all speakers can relate to saying something to another with good intention but inadvertently offending the listener. This occurs because listeners are independent actors and speakers are not always correct in their assessment of how another will perceive their utterance.

[272] *See* Florida v. Bostick, 501 U.S. 429, 439 (1991) ("[T]o determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter."); *see also* United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

[273] *See* J.D.B. v. North Carolina, 564 U.S. 261, 270 (2011) (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

In *J.D.B*, a 13-year-old seventh grade student, was interrogated for a series of burglaries[274] and provided the police with a confession.[275] Prior to the interrogation, "J.D.B. was given neither his *Miranda* warnings nor the opportunity to call his grandmother, his legal guardian."[276] Also, he was not told that he was free to leave the room.[277] Accordingly, at trial, J.D.B.'s counsel moved to suppress the statements gathered during the interrogation and evidence derived therefrom since J.D.B. "had been interrogated in a custodial setting without being afforded *Miranda* warnings and . . . his statements were involuntary."[278] Ultimately, the Supreme Court heard the case to decide "whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*."[279]

The Court recapped that the custody analysis, for *Miranda* purposes, is an objective determination involving two discrete inquiries: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave."[280] By using the objective standard of the reasonable person, "the test avoids burdening police with the task of anticipating each suspect's idiosyncrasies and divining how those particular traits affect that suspect's subjective state of mind."[281] Using this same logic, the Court decided that a child's age—when "known to the officer at the time of the interview, or would have been objectively apparent to a reasonable officer"[282]—properly informs the *Miranda* custody analysis because age would "'have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'"[283] Accordingly, courts can account for the "conclusions about behavior and perception" that "apply broadly to children as a class" by considering the child's age.[284]

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[274] *Id.* at 261 (2011) ("A uniformed police officer on detail to the school took J.D.B. from his classroom to a closed-door conference room, where police and school administrators questioned him for at least 30 minutes.").

[275] *Id.* (providing the officers with a confession followed by further salient details, including the location of the stolen items, and a written statement).

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *Id.* at 264.

[280] *Id.* at 270 (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

[281] *Id.* at 262.

[282] *Id.*

[283] *Id.* at 271–72 (quoting Stansbury v. California, 511 U.S. 318, 325 (1994)).

[284] *Id.* at 272 ("[C]hildren 'generally are less mature and responsible than adults,' . . . they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' . . . [and] they 'are more vulnerable or susceptible to . . . outside pressures' than adults.'" (first quoting Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982); then quoting Belotti v. Baird, 443 U.S. 622, 635 (1979) (plurality

This Comment recognizes that, unlike children, suspects do not comprise a cohesive class, so it would be impossible to consider one universal factor, like age, when assessing consent cases. Nonetheless, the lens applied in *J.D.B.* and in *Miranda* rights jurisprudence at large—which focuses not on the intent of the officer, but on the impact of the experience on the suspect—could be applied in the consent to search space. In doing so, the court would be more focused on whether the officer's spoken language, body language, or other actions would have made a reasonable suspect feel that their consent is being elicited on a voluntary basis—not whether the officer's spoken language, body language, or other actions evidences an intent to coerce the suspect. By creating space for the suspect's perception to be considered, the court may be able to push back against some of the systemic inequities that suspects face without overburdening itself by considering individual peculiarities that would bog down its docket.

B. Impose Best Practices for Out-of-Court Officer-Suspect Interactions

While integration of linguistic considerations into the consent to search analytical framework would be an important step toward improvement in this space, doing so will not serve as a cure-all for the inequity suspects face. Rather, the discretionary power given to fact finders will always permit personal conviction and subjective belief to influence findings to some degree in voluntary consent to search cases. For this reason, this Comment seeks to supplement the changes to the in-court analytical framework with a series of best practices for officer-suspect interactions outside of the courtroom. These conversational guidelines would decrease law enforcement use of linguistically problematic language and thereby increase one's chances of procuring consent that is truly knowing and voluntary.

1. Utilizing the Direct Speech Form

The first best practice, and perhaps the most straightforward method of procuring consent, would simply require that officers pose their request using a direct speech act, instead of an implicature or indirect speech form. In practice, this would mean that an officer should phrase their question as "Do I have your consent to . . .?" or "Do I have your permission to . . .?" when requesting consent to search. In this case, the illocutionary force of the utterance and the locution are the same—requesting consent.[285] By using the direct speech form, officers

opinion); and then quoting Roper v. Simmons, 543 U.S. 551, 569 (2005))).

[285] The direct speech form can be contrasted with the indirect speech form, in which the illocutionary force and the locutionary force differ. The question in *Bustamonte*—"Does the trunk open?"—is a perfect example of an indirect speech form since the locutionary force of the utterance appears to be seeking information, while the illocutionary force is requesting consent. Schneckloth v. Bustamonte, 412 U.S. 218, 220 (1973).

will not only communicate more clearly with suspects, but also may, in turn, improve the efficiency of voluntary consent searches. Because the direct speech form only has one layer of meaning,[286] the risk of misunderstanding is greatly decreased. Since suspects would not have to infer anything from the spoken word to comprehend what the officer is asking of them, there is less room for debate over whether the suspect knowingly consented. Accordingly, suspects will benefit from the opportunity to exercise the *choice* that the voluntary consent to search doctrine intended to give them. Similarly, law enforcement officers and the judiciary will benefit from not having to revisit voluntary consent cases to debate the merits of consent with such frequency.

Furthermore, the use of more formal language—such as words like "consent" and "permission"—is more likely to alert the suspect to the gravity of the officer's question. In conversation, listeners take cues not only from the spoken word, but also from the speaker's tone and the conversational dynamic. Accordingly, officers can obscure the impact of their questions by using informal language that maintains a relaxed, comfortable dynamic, thereby benefitting from asking the suspect for consent in a nonchalant way.[287] While using formal language might make it slightly more challenging for officers to procure consent,[288] it would also make the consent that they do receive less controversial, thereby reducing the need for future litigation.

2. Soliciting Follow-Up Questions

The second best practice would require that officers follow up all requests for consent by asking the suspect if she has any questions before the officer initiates the search. This tactic is intended to provide suspects with a moment to process their interactions with the officer and express any doubt that they may feel prior to the initiation of a search. While *Bustamonte* specified that officers are not required to tell suspects that they have the right to refuse consent,[289] it did not forbid suspects from inquiring about their rights, nor did it permit officers

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[286] While, by contrast, the indirect speech form has one layer of meaning that appears on the surface and one underlying layer of meaning that can be inferred from the context of the conversation.

[287] *See, e.g.*, *Bustamonte*, 412 U.S. at 220 ("Does the trunk open?"); United States v. Farias, 43 F. Supp. 2d 1276, 1279 (D. Utah 1999) ("You don't mind if I search the truck?").

[288] The slight "challenge" that officers might encounter when forced to adhere to these best practices is quite minimal considering the intrusive nature of consent searches. As such, it does not seem unreasonable for officers to have to take a small step—using more direct language—to rightfully gain access to such personal territory. Using direct speech forms would not thwart an officer's attempts to obtain consent, but, rather, only level the playing field between officer and suspect by ensuring that the suspect understands the officer's true intent.

[289] *See Bustamonte*, 412 U.S. at 218 ("While knowledge of a right to refuse consent is a factor to be taken into account, the State need not prove that the one giving permission to search knew that he had a right to withhold his consent.").

to dupe suspects by telling them that their consent is mandatory at any time during the interaction.[290] Accordingly, if a suspect is provided with enough time to reflect upon her prior interaction with the officer, there is a better chance that she might ask probative questions about the search or her rights. By having this moment to reflect, the suspect is less likely to feel coerced into providing consent, and the officer and the judiciary would reap benefits similar to those achieved by using the previous best practice.

CONCLUSION

The onus is on the courts to stop perpetuating this legal conundrum. While much of the world changes rapidly, often too rapidly for the legal field to keep up with in real-time, interpersonal communication is ever the same.[291] Considering how enduring linguistic phenomena are, it seems rather shocking that steps have not yet been taken to account for this specialized knowledge. This Comment requests not that judges reinvent the wheel using experimental factors to reshape Fourth Amendment jurisprudence, but simply that they apply concepts that well-respected linguists established decades ago.

The likely opposition to this call for reform is rather predictable: certain law enforcement officers and members of the judiciary favor the existing voluntary consent to search doctrine because it is the easiest and fastest method of ascertaining evidence absent a warrant. Accordingly, any imposed requirements upon in-court analysis or out-of-court interaction will likely face pushback.[292] However, the reality is that *every* test will have its downsides,[293] and this test is

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[290] Doing so would be a form of covert or implied coercion, which is strictly prohibited according to *Bustamonte*. *See id.* at 228 ("For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.").

[291] After all, linguists still hang their hats on speech act theory and Gricean implicature, which have held true since their publication in 1962 and 1989, respectively. HUANG, *supra* note 4, at 24, 101.

[292] For example, law enforcement officers may try to evade best practices because uncovering evidence during a search influences their ability to detain a suspect. Moreover, the risk of incurring litigation is rather marginal from their point of view; unlike the judiciary, the time and resources that it takes them to testify in court is rather minimal. On the other hand, judges who are in favor of consent searches may only look for bare minimum compliance with these best practices or a lack of blatant coercion. From their perspective, it would be simpler to decide a case based on the word of a law enforcement officer than wade into the depths of conflicting officer-suspect testimony.

[293] Recall the long-standing debate about whether "legal commands should be promulgated as rules or standards." Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992). While rules "entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator," standards "leav[e] both specification of what conduct is permissible and factual issues for the adjudicator." *Id.* at 560. Furthermore, both forms of law creation have requisite benefits and downsides. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 384–85 (1985). Schlag lists the fact that "[r]ules draw a sharp line between forbidden and permissible conduct, allowing persons subject to the rule to determine whether their actual or contemplated conduct lies on one side of the line or the other" as a pro, while the fact

no exception.[294] Nonetheless, any test that provides *at least some* prescribed parameters for fact finders to acknowledge the linguistic realities would be an improvement upon the totality framework used today. In ridding the in-court analytical framework of misleading considerations and implementing a new test that the linguistic community has approved of, judges could take a step toward correcting the systemic inequality that plagues officer-suspect interactions in court. Similarly, if a series of best practices were instituted to decrease the use of linguistically problematic language, suspects would be given a real opportunity to understand the nature of the questions they are being asked and protect themselves against unwanted intrusions into personal privacy. Likewise, law enforcement officers would benefit from spending less time litigating contested consent and thereby have more time to patrol the community. Finally, fact finders would find their dockets free of hopelessly confused suspects and frustrated law enforcement officers debating the merits of seemingly straightforward questions like "Does the trunk open?" The courts may have always been intended to settle disputes, but perhaps not *quite* like this; that is why this Comment proposes leaving language to the linguists by tightening the reins on voluntary consent to search jurisprudence.

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that "rules permit and encourage activity up to the boundary of permissible conduct" is a con. *Id.* More specifically, "[r]ules are more costly to promulgate than standards because rules involve advance determinations of the law's content, whereas standards are more costly for legal advisors to predict or enforcement authorities to apply because they require later determinations of the law's content." Kaplow, *supra*, at 562–63. Rules are also known for being "over- and underinclusive relative to standards." *Id.* at 565. While this list is not exhaustive, it demonstrates that expecting one test to solve all problems in a given field or completely defeat criticism from its opposition is unrealistic.

[294] It would be unrealistic to believe that those who seek to circumvent its suggestions and requirements will be completely estopped from doing so.

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