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CLEVER CONTRABAND: WHY ILLINOIS’ LOCKSTEP WITH THE U.S. SUPREME COURT GIVES POLICE AUTHORITY TO SEARCH THE BOWELS OF YOUR VEHICLE

JASON COOPER*

I. INTRODUCTION

We have all heard about it – drugs in the tire wells, money in the gas tank.¹ Those who transport drugs can get pretty brazen, hiding them in clever places; under the hood,² behind door panels,³ or even within spare tires.⁴

Giving police the constitutional capability merely to ask suspects to check these areas ensures the efficient administration of justice.⁵ But what if, like most of us,

* J.D. Candidate, May 2014. First and foremost, the author would like to thank his wife, Chrystal Marie Cooper, for voluntarily enduring him during his legal education. Additionally, the author would like to personally thank Professor Timothy O’Neill for lending his extensive knowledge and spirited debates to John Marshall night students during his exciting criminal procedure course. Finally, the author would like to dedicate this comment to Samuel Wilhelm Cooper:

the qualities of a good prosecutor are as elusive and impossible to define as those which mark a gentleman. Those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against abuse of power. The citizens safety lies in the prosecutor who tempers zeal with human kindness, who sees truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility. – Supreme Court Justice Robert Jackson.

With admiration, reverence, and love, thanks Pops.

1. *See, e.g.*, In re Seizure of \$82,000 more or less, 119 F. Supp. 2d 1013 (2000) (discussing \$24,000 of illegal drug proceeds in the battery case of the defendants automobile, and another \$82,000 floating in the gas tank); *Blow* (New Line Productions 2001) (exhibiting how to “play it cool” on a trip through customs).

2. *See, e.g.*, United States v. Sierra-Hernandez, 581 F.2d 760, 763 (1978) (hiding drugs under a car’s hood).

3. *See, e.g.*, People v. Kats, 967 N.E.2d 335, 339 (Ill. App. Ct. 2012) (hiding drugs behind a car’s door panels).

4. *See, e.g.*, United States v. Strickland, 902 F.2d 937, 940 (1990) (hiding drugs in a spare tire).

5. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) (explaining that an overly technical consent doctrine would result in “considerable inconvenience [to] legitimate searches”).

you are not carrying drugs or contraband? Imagine being pulled over for speeding and the officer requests permission to search your vehicle for weapons or contraband.⁶ Do you feel as though you could say no? When you say yes, what have you given the officer permission to do? Can he search between the seat cushions? What about in locked containers nestled in the trunk?

The answer is yes to both questions,⁷ but what is especially surprising is that the answer remains the same when the officer begins using tools to drill into the door paneling or slash open tires.⁸ In most jurisdictions, the officer gained a nearly unequivocal license to search anywhere in your vehicle when you consented to a search “for weapons or contraband.”⁹

The reason most jurisdictions allow such an invasive search is that, in state and federal courts, the resourceful trafficker is no longer the exception, but the rule.¹⁰ In addition to becoming commonplace, this ingenuity has replaced standard trafficking techniques for a multitude of suppliers, including everyone from the petty dealer to the most sophisticated drug cartels.¹¹ But the cops are not to be outmatched by the robbers. In reaction to prevalent pilferers, law

6. In fact, speeding is a relatively severe infraction considering you could be pulled over for an improperly affixed license plate, defective taillight, or even for having part of one of the vehicles tires cross the center line. *See infra* note 67 (listing minor infractions police use to pull over suspects).

7. *See Maryland v. Pringle*, 540 U.S. 366, 369 (2003) (deeming constitutional a search between a defendant’s seat cushions with his consent); *United States v. Ross*, 456 U.S. 798, 820, (1982) (deeming constitutional a search through locked containers in a defendant’s trunk).

8. *See Strickland*, 902 F.2d at 943 (explaining that the search consented to granted authority to inspect spare tire and subsequently undertaking a remedial assessment of its type and weight provided authority to cut it open where an automatic weapon and drugs were found). *See also Kats*, 967 N.E.2d at 344 (holding that using a screw driver to remove door paneling was within the scope of the defendant’s consent).

9. *See infra* Part II.B.3.b, notes 64-67 (discussing “reasonableness” as the limiting principle of a defendant’s consent so long as police ask to check the defendant’s vehicle “for contraband”).

10. *See, e.g., United States v. Zapata*, 180 F.3d 1237, 1243 (11th Cir. 1999) (listing cases among federal courts dealing with obscure hiding places in vehicles); *Kats*, 967 N.E.2d at 344 (listing cases among state courts dealing with obscure hiding places in vehicles).

11. As early as 2001, federal investigators even began confiscating submarines filled with cocaine headed towards coastal states from Central America. Michael S. Schmidt, *To Smuggle More Drugs, Traffickers Go Under the Sea*, N.Y. TIMES (Sept. 9, 2012), <http://www.nytimes.com/2012/09/10/world/americas/drug-smugglers-pose-underwater-challenge-in-caribbean.html>.

enforcement officers are becoming craftier and finding creative ways to search a vehicle's most obscure hiding places.¹² Indeed, some state legislators have even joined the fray, proposing legislation that would ban hidden compartments.¹³

Justice Marshall once said, "an individual's consent to a search of *the interior of his car* cannot necessarily be understood as extending to *containers in the car*."¹⁴ But query: what result when the interior is being used as a container? Under what circumstances can police probe the inner most portions of your vehicle? Conversely, what is the outer bounds of your consent once given?

In *People v. Kats*,¹⁵ Illinois recently joined the majority of states in holding, "as an issue of first impression [that] a defendant's consent to search his vehicle and its contents for contraband extends to the spaces behind interior door panels."¹⁶ This comment will discuss why *Kats*, a little known case, has larger ramifications for the current search, seizure, and accompanying consent doctrine, removing almost all limitations.

In Part II, this comment will discuss the history of the consent doctrine within the Fourth Amendment, including the Automobile Exception, *Terry* Stops,

12. See *United States v. Dortch*, 199 F.3d 193, 201 (5th Cir. 1999) *rev'd on other grounds*, 203 F.3d 883 (5th Cir. 2000) (arguing that the cleverness of the defendant's hiding place was an indication valid consent had been granted because there is no other reason defendant would have let police search an area he knew contained contraband); *United States v. Robinson*, 6 F.3d 1088, 1092 (5th Cir. 1993) (reporting that, of one police officer's more than 250 minor traffic stops resulting in warrantless searches, all but four were premised upon consent); *United States v. Garcia*, 897 F.2d 1413, 1419-20 (1990) (using loose screws on door paneling and police's "subjective experience" as probable cause to search within the door panel); KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 356 (LaFave, et al. eds., 13th ed. 2012) (citing cases where police have parked their vehicles on the shoulder of the road to get oncoming motorists to veer out of the way, inadvertently crossing the center line without signaling).

These tactics have led to an enormous amount of searches whose authority is rooted in consent. In 2007, the United States Department of Justice conducted a study which reported that of the approximately eighteen million drivers stopped for a minor traffic violation, over half had "consented" to a search. MATHEW R. DUROSE ET AL., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005 6 (U.S. Dept. of Justice, Apr. 2007).

13. See *Criminals Hiding Drugs In Secret Car Compartments*, (WBNS Ohio 10tv television broadcast Feb. 27, 2012) (reporting on the legislative attempt to outlaw custom made "hidden compartments" in Ohio).

14. *Florida v. Jimeno*, 500 U.S. 248, 254 (1991) (Marshall, J., dissenting).

15. *People v. Kats*, 967 N.E.2d 335 (Ill. App. Ct. 2012).

16. *Id.* at 344.

consent, and “lockstep,” and how each pertains to searching hidden compartments within vehicles. Part III will then survey the cases and arguments, ending with a discussion of Illinois’ recent decision in *Kats*, with a specific focus on whether consent to search a vehicle extends to those intricate hiding places discussed above. Part IV will propose ways the police can use *Kats* to search within compartments, bending, but not breaking, Illinois’ and the United States’ Fourth Amendment jurisprudence.

II. BACKGROUND

A. *A Brief History of the Structure and Theories Behind the Fourth Amendment*

The current state of the consent doctrine under modern Fourth Amendment jurisprudence is the inevitable eventuality of centuries of loosening.¹⁷ The Fourth Amendment prohibits the use of “unreasonable searches and seizures.”¹⁸ Originally, the Fourth Amendment was born out of “new” English case law recognized by James Madison at the framing of the constitution.¹⁹ Like any good legal test, the amendment has two main parts²⁰ and two camps to debate the meaning of each and the meaning of the Amendment as a whole.²¹ A majority of the Court has always believed

17. Compare Silas J. Wasserstrom, *The Fourth Amendment’s Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1392-94 (1989) (discussing the adoption of the amendment as a preventative measure on so called “general warrants” giving the police unfettered ability to become a roving commission), with Timothy P. O’Neill, *Vagrants in Volvos: Ending Pretextual Traffic Stops and Consent Searches of Vehicles in Illinois*, 40 LOY. U. CHI. L. J. 745, 757 (2009) (discussing Illinois’ inability to construe the Fourth Amendment so that the “manner” of a search or seizure makes its scope and intrusion violate the terms of the Amendment).

18. U.S. CONST. amend. IV.

19. Wasserstrom, *supra* note 17, at 1391-94. Wasserman contends, and many scholars agree, that the Amendment was a reaction to two things. *Id.* First, it was Madison and Jefferson’s promise to the antifederalists at the Virginia Convention, who were concerned about an overbearing federal government. *Id.* Second, it was a response to an issue that parliament was dealing with – so called “general warrants.” *Id.* (citing *Entick v. Carrington*, 19 Howell’s St. Tr. 1067 (1765)).

20. The two clauses of the Amendment state:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, [clause 1] and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized [clause 2].

U.S. CONST. amend. IV.

21. See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH.

that all searches without a warrant are “presumptively unreasonable” (the “Warrant Preference” Theory).²² At one time, a minority believed that whether a search is reasonable had nothing to do with whether a warrant will issue (the “Two Clause” Theory),²³ but that position never garnered complete control.²⁴ And, the text of the amendment itself does not provide clear answers about its structure.²⁵

Nevertheless, despite some debate, the Warrant

L. REV. 1468, 1473-1474 (1985) (discussing major inconsistencies in Fourth Amendment jurisprudence and ultimately advocating for a complete overhaul of the Amendment using two separate models); Wasserstrom, *supra* note 17, at 1389-90 (comparing the Warrant Preference Theory to the Two Clause Theory).

22. See *Katz v. United States*, 389 U.S. 347, 357 (1967) (explaining that all warrantless searches “are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions”); *Harris v. United States*, 331 U.S. 145, 162 (1947) (Frankfurter, J., dissenting) (stating that “with minor and severely confined exceptions, inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate’s authority expressed through a validly issued warrant”) *overruled by*, *Chimel v. California*, 395 U.S. 752 (1969).

This is one of the best ways to ensure the Amendment fulfilled the initial role the antifederalists ascribed to it – ensuring a check on any potential for an “overbearing government” by requiring that police commit to writing the scope of their search before undertaken, and without the benefit of hindsight. See *U.S. v. Garcia*, 474 F.3d 994, 996 (2007) (explaining that, although the neutrality of a judge may be doubted, the practical reason for the warrant requirement is simple: “it forces the police to make a record before the search, rather than allowing them to conduct the search . . . in the expectation that if [it] is fruitful a rationalization for it will not be difficult to construct, working backwards”); Bradley, *supra* note 21, at 1473 (listing prominent cases affirming that the Fourth Amendment was meant to ban “searches conducted outside the judicial process, without prior approval by judge or magistrate”). Yet, even the majority who originally established the Warrant Preference Theory became unhappy with it shortly after its formation. *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971) (Harlan J., concurring) (calling for an “overhauling” of the amendment as early as 1971).

23. See *California v. Acevedo*, 500 U.S. 565, 581-83 (1991) (Scalia, J., concurring) (stating that “[t]he Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are ‘unreasonable’”).

24. Bradley, *supra* note 21, at 1474.

25. Wasserstrom, *supra* note 17, at 1391. Wasserstrom eventually cautions against relying too heavily on the text of the amendment itself. *Id.* Madison originally wrote the Amendment as one long clause (“the right against unreasonable searches and seizures shall not be violated by warrants issued without probable cause”). *Id.* Nevertheless, the Amendment was proposed to the House of Representatives as two clauses, identical to its structure today, which was struck down in favor of Madison’s one clause version. *Id.* Yet, when the Amendment went to the Senate for approval, the two-clause house proposal had mysteriously reappeared over Madison’s original one clause version. *Id.* The proposal had somehow “smuggled” its way back into the proposal without anyone noticing, proving that the framers simply were not concerned with the Amendment’s exact language. *Id.*

Preference Theory is by far the accepted construction. Defendants may certainly argue that a search (for example, of the bowels of their vehicle) was ‘unreasonable,’ however, under the current Court’s edifice, even winning this battle seems likely to lose the war.²⁶ Instead, they start from the presumption of unreasonableness, and it is up to the prosecution and police to argue for a “warrant exception.”²⁷

*B. Three Relevant Exceptions to the Warrant
Presumption Giving Police the Authority to Access
Hidden Compartments: the Automobile Exception, a
“Terry Stop,” and Consent*

Police generally rely on categorical exceptions to the warrant requirement to search a vehicle to sidestep the word “reasonable” in the current formulation.²⁸ Three exceptions are relevant here: [1] the automobile exception, [2] reasonable suspicion, and [3] consent.²⁹

1. The Automobile Exception

First, the Court treats automobiles differently under the Fourth Amendment than any other place.³⁰ Generally, police do not need a warrant to search an automobile, only probable cause.³¹ There are at least three distinct justifications for sequestering automobiles from other places or effects.³² The original

26. Bradley, *supra* note 21, at 1473.

27. *Id.*

28. *Id.* at 1473-74 nn.22-44.

29. See *infra* Parts II.B.1 to II.B.3 (discussing the three exceptions and detailing their progeny). Beyond the exceptions listed, two possible justifications remain to search obscure areas of a vehicle: probable cause and a warrant. *Id.* However, assuming all other aspects of the search are adequate, the Supreme Court has expressly stated that probable cause would justify searching hidden compartments. *Acevedo*, 500 U.S. at 570 (stating that “if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search . . . including a ‘probing search’ of compartments”) (internal citations omitted). And, that they would treat a warrant similarly. *Id.* (stating that “[t]he scope of a warrantless search based on probable cause is no narrower-and no broader-than the scope of a search authorized by a warrant supported by probable cause”).

30. See generally *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam) (discussing the “automobile exception” to the Fourth Amendment’s privacy requirement).

31. *Id.*

32. See Steven D. Soden, *Expansion of the “Automobile Exception” to the Warrant Requirement: Police Discretion Replaces the “Neutral and Detached Magistrate,”* 57 MO. L. REV. 661, 666 (1992) (discussing the evolution of the exception from exigency in *Carroll* and *Chambers* to the public places doctrine in *Coolidge*).

justification for the exception was exigency.³³ Because cars are permanently mobile, they always threaten the preservation of evidence, as well as an investigating officer's safety.³⁴ Then, in the post-*Katz* era, courts arguing for a second justification reasoned that automobiles were immune from the Amendment's protections, not because of exigency, but because they operate almost exclusively in quintessential public places - shared municipal roads.³⁵ Finally, there is a regulatory rationale: the numerous rules of the road often require seizure "to protect public safety or to facilitate the flow of traffic."³⁶ But no matter what the rationale, the scope of the automobile exception and its vestige is at least as broad as a warrant, had one issued.³⁷

2. Reasonable Suspicion ("Terry Stop" or "Stop and Frisk")

Armed with the Automobile Exception, law enforcement could arguably search obscure places of a vehicle with only a scintilla of probable cause.³⁸ But there is another reason the great majority of vehicle searches are conducted without a warrant: a "*Terry*

33. *Id.* at 664.

34. *Id.*

35. See *United States v. Knotts*, 460 U.S. 276, 281 (1983) (explaining that society does not recognize an expectation of privacy for automobiles traveling on public roads in plain view). *But see United States v. Jones*, 132 S. Ct. 945, 961 (2012) (Alito, J., concurring) (arguing that GPS information gathered on a vehicle over an extensive period of time and putting together a comprehensive picture using an aggregation of data impinges upon an reasonable expectation of privacy even though it is "expose[d] to the plain view of outsiders").

36. *Jimeno*, 500 U.S. at 253 (Marshall, J., dissenting) *citing* *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976).

37. See *United States v. Ross*, 456 U.S. 798, 825 (1982) (explaining that where police conducted a warrantless search of Ross' trunk for contraband, the proper scope of that search is whatever scope "a magistrate could legitimately authorize by a warrant").

38. See *Labron*, 518 U.S. at 940 (explaining the depth of the automobile exception); *Acevedo*, 500 U.S. at 570 (explaining the depth of the automobile exception).

Indeed, even if searching the bowels of a vehicle is not within the scope of a defendant's consent, such a search may nonetheless be justified by probable cause. *Garcia*, 897 F.2d at 1420 (holding that defendant's consent did not extend to behind a vehicles door paneling, but the officer's observation that screws were loose on the paneling provided probable cause to search within the door).

But because most such searches are traffic stops involving either reasonable suspicion or consent, see generally *Zapata*, 180 F.3d at 1243 (compiling cases), whether the same search would be justified by probable cause is outside the scope of this comment.

Stop” or “reasonable suspicion.”³⁹ In a *Terry* Stop, probable cause is not necessarily required in stopping and searching an automobile – a slighter, more reasonable intrusion can be justified by a correspondingly smaller level of suspicion.⁴⁰

Under *Terry v. Ohio*,⁴¹ a stop is constitutional if [1] there exists a minimal level of suspicion upon the stop’s inception, and [2] the scope of the officer’s resulting actions remain “reasonably related to the circumstances that justified the interference in the first place.”⁴² Although the common law in place at the time of the Amendment indicated police did not need a warrant for crimes committed in their presence,⁴³ a *Terry* stop is the principal justification for most traffic stops.⁴⁴

3. Consent

Once the police have initiated a stop under *Terry*’s progeny, all that is left is to obtain consent. While undertaking that task, two main issues arise: whether the officer can request consent and if so, what regulates the scope of the resulting consent.

a. Asking for consent, without more, is always constitutional

Terry prevents the police from becoming a roving commission as the result of a minor traffic infraction, or worse, a mere pretext.⁴⁵ But two cases definitively hold

39. See *supra* note 12 and accompanying text (discussing other ways officers can conduct searches).

40. See *United States v. Place*, 462 U.S. 696, 723 (1983) (Blackmun, J., concurring) (justifying “minimally intrusive” searches based on a “*Terry* Stop”).

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

42. See *Id.* at 20 (discussing appropriate length of detention under the Fourth Amendment).

43. *Atwater v. City of Lago Vista*, 532 U.S. 318, 327-32 (2001) (discussing the history of the Amendment and reasoning that police may arrest for minor traffic violations, not because of the common law in place at the time of the Amendment, but because police require certainty in the field).

44. See *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (applying *Terry* to traffic stops). See also *United States v. Watson*, 423 U.S. 411, 416 (1976) (holding that police do not need a warrant for searches subsequent to an arrest). Either the *Watson-Atwater* combination or a *Terry* Stop (under *Berkemer*) can provide authority for vehicle stops based on minor traffic infractions. *Watson* discusses only arrests, not stop or detentions, a gap that *Terry* fills.

45. *But see United States v. Robinson*, 414 U.S. 218, 248 (1973) (Marshall, J., dissenting) (arguing that because in most traffic stops the decision whether to arrest or merely issue a citation is totally up to the discretion of the officer,

that *Terry* does not bear on when and whether the police can ask for consent, each addressing a separate prong of *Terry*. First, in *Whren v. United States*,⁴⁶ the Court “foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”⁴⁷ *Whren* and subsequent decisions give police unfettered discretion to stop a vehicle in violation of any traffic law.⁴⁸

In addition to *Whren*, the Court has also relegated the next prong of *Terry*. *Terry*’s second prong asks whether the scope of the stop was proper, given its initial justification.⁴⁹ In *Illinois v. Caballes*,⁵⁰ the Court definitively held that the interval of time elapsed during the stop is *the only* factor considered under *Terry*’s second prong.⁵¹ Whether the manner of the stop (or any other aspect) elevated it to an unreasonable intrusion under *Terry* has become immaterial.⁵² Thus, once a stop is legally undertaken in accordance with *Terry*’s first prong, a mere request to search a vehicle

the danger of “pretextual” arrests is high).

46. *Whren v. United States*, 517 U.S. 806 (1996).

47. *Id.* at 813. *Whren* had made an illegal U-turn in front of police, who proceeded to pull him over and find a brick of cocaine in his possession. *Id.* at 808-9. *Whren* argued that such stops should be subjected to objective reasonableness or good faith, but the Court reasoned that the Equal Protection Clause, and not the Fourth Amendment, barred selective enforcement or pretextual stops. *Id.* at 813.

48. *Id.* See also *Atwater*, 532 U.S. at 351 (holding that states are constitutionally free to give police discretion to decide when to arrest a suspect even where he only violated conceding minor license, proof of insurance, or seatbelt regulations only punishable by a \$50 fine).

49. *Terry*, 392 U.S. at 20.

50. *Illinois v. Caballes*, 543 U.S. 405 (2005).

51. *Id.* at 407. In *Caballes*, Illinois State Trooper’s stopped Caballes for going six miles per hour over the speed limit. *People v. Caballes*, 207 Ill. 2d 504, 506, (2003) *vacated and remanded sub nom.* *Illinois v. Caballes*, 543 U.S. 405 (2005). While lawfully stopped, the arresting Trooper requisitioned a canine unit to conduct a drug sniff of Caballes’ vehicle. *Id.* This activity, which was not in and of itself a search under the Fourth Amendment according to *United States v. Jacobsen*, 466 U.S. 109, 124 (1984), led the Troopers to Marijuana in Caballes’ truck which earned him a charge for drug trafficking. *Caballes*, 207 Ill. 2d at 508. The U.S. Supreme Court held that police activity conducted during a lawful detention, which does not itself violate the Fourth Amendment, by definition cannot “compromise any legitimate interest in privacy.” *Caballes*, 543 U.S. at 407-08.

52. *Id.* See also O’Neill, *supra* note 17, at 753 (arguing that the U.S. Supreme Court impermissibly put an end to Illinois complex “manner” test under *Terry*’s scope prong, which attempted to regulate the stop based on, not only the time period which the suspect was detained, but whether the officers’ actions “transformed the nature of the encounter from a routine citation stop into a [more] general investigation of [wrongdoings]”).

for contraband cannot transform a traffic stop into an unconstitutional seizure under *Terry*'s second prong.⁵³

To summarize, officers can stop a vehicle based on nearly any traffic violation, and merely asking for consent to search, without more, cannot violate the Fourth Amendment. However, once consent is granted the scope of the resulting stop is not limitless.⁵⁴

b. The scope of consent is limited by what a reasonable person would regard as the object of the search.

Because *Terry*'s progeny was reduced to only govern the timing of a traffic stop, there remains a need to balance two competing interests. There must be some limit on the scope a defendant's consent, but he must also be free to consensually relinquish his constitutional rights, including his Fourth Amendment rights.⁵⁵ Early consent doctrine in the Fourth Amendment context is rooted in the Court's case law on confessions.⁵⁶

Both consent and confessions require the Court to find an apt, but judicially malleable, definition of "voluntary."⁵⁷ In its earliest form, consent to a search was voluntarily given when the prosecution could prove that it was the result of "unconstrained choice by its maker . . . free of implied or explicit coercion."⁵⁸ The test was a "totality of the circumstances" assessment, treated as a question of fact for the trier.⁵⁹ In *Schneckloth v. Bustamonte*,⁶⁰ the Court specifically emphasized that no one fact was controlling,⁶¹ and this was especially true of the defendant's subjective knowledge of his right to reject an officer's request.⁶²

53. *But see Caballes*, 543 U.S. at 415 (Souter, J., dissenting) (claiming that "the government [cannot] take advantage of a suspect's immobility to search for evidence unrelated to the reason for the detention [which] has to be the rule unless *Terry* is going to become an open sesame for general searches").

54. *See infra* Part II.B.3.b (discussing the scope limitations on consensual searches during traffic stops).

55. *Schneckloth*, 412 U.S. at 219.

56. *See id.* at 224 (detailing the Court's agony in trying to define what is constitutionally "voluntary" in more than 30 confession cases).

57. *Id.*

58. *Id.* at 225-27.

59. *Id.* at 227.

60. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

61. Indeed, one of the factors assessed may be the cleverness of the hiding spot itself. *Dortch*, 199 F.3d at 201 (explaining that "the defendant's belief that no incriminating evidence will be found" is a factor in evaluating whether the consent was validly given).

62. *Schneckloth*, 412 U.S. at 225-26. *But see id.* at 277 (Marshall, J., dissenting) (arguing that the prosecution must prove that the defendant had

The defendant was not required to know his right to reject and the officer need not inform him of it.⁶³

More recently, the watershed case for limitations on a defendant's consent is *Florida v. Jimeno*,⁶⁴ where the Court held that an officer acts within the consent granted "when it is objectively reasonable for [him] to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile."⁶⁵ But to get sweeping consent over the entire vehicle, police must indicate that they are

knowledge of his right to reject consent before consent could ever be "voluntary"). Several scholars contend that the defendant's knowledge should be the principal concern, as it is evident that *any* consent given when one is carrying contraband *must* have been the result of coercion, except in the rarest circumstances. See Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 187 (1991) (stating that "[w]hat is baffling about consent to search is why it is ever given"; and asking "[w]hy should anyone surrender to the police, perhaps without a whimper, an interest recognized both practically and legally to be the first order and often resulting in the discovery of evidence that incriminates the consenter?"). See also Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211 (2002) (asking "[w]hy [would] someone 'voluntarily' consent to allow a police officer to search the trunk of his car, knowing that massive amounts of cocaine are easily visible there? The answer, I have come to believe, is that most people don't willingly consent to police searches").

But see Florida v. Bostick, 501 U.S. 429, 438 (1991) (reasoning that a defendant can voluntarily consent to a search of an area containing contraband because "the reasonable person test presupposes an *innocent* person [which] ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached") (internal citations omitted).

63. *Schneckloth*, 412 U.S. at 231-32 (explaining that consent could not be maintained as a useful tool of law enforcement if it turned upon the subjective knowledge of the defendant; that consent does not require positive notification, like *Miranda* warnings do; and, that consent need not be "knowing and voluntary," because it is not technically a "waiver" and does not bear on the criminal trial like other "critical stages," such as a post-indictment line-up or interrogation).

The rule that a defendant need not be made aware of his right to reject an officer's request is an important difference between the Court's consent and confession jurisprudence. Compare *id.* (holding that defendant need not be made aware of his right of rejection in the consent context), with *Escobedo v. State of Ill.*, 378 U.S. 478, 485 (1964) (holding that "[w]ithout informing [the defendant] of his absolute right to remain silent in the face of [an] accusation, the police [cannot urge] him to make a statement").

64. *Florida v. Jimeno*, 500 U.S. 248 (1991).

65. *Id.* at 249. In *Jimeno*, police suspected the defendant of drug trafficking after overhearing his conversation arranging a drug transaction, and subsequently detained him for failing to come to a complete stop at a red light. *Id.* The Court reasoned that "objective reasonableness" was the appropriate test because "the scope of a search is [adequately limited] by its expressed object [and a suspect's ability to] delimit the scope of the search to which he consents." *Id.* at 250-52.

searching the vehicle “for contraband.”⁶⁶ *Jimeno’s* “objective reasonableness” is a limiting principle; however, some argue it is a rubber stamp compared to *Schneckloth*, or just another “foot in the door” like *Whren* or *Caballes*.⁶⁷

4. Illinois and the “Limited⁶⁸ Lockstep” Doctrine

Despite the oft-repeated axiom that the Federal Constitution creates a floor and not a ceiling, leaving states free to add to the restrictions on their own government,⁶⁹ Illinois expressly chooses not to create its

66. See *id.* at 251 (requiring that “[t]he scope of a search [be] defined by its expressed object”). However, police need not indicate which parts of the vehicle will be subjected to their search, only its object. *Id.* at 255 (Marshall, J., *dissenting*).

67. See O’Neill, *supra* note 17, at 750 (claiming that *Whren* dismantled any meaningful limitation *Jimeno* established because it lets police use things like “[f]aulty” rear license plate light[s], driving 71 mph in a 65 mph zone, and a defective brake light (which turned out not to be defective)” stand as sufficient suspicion to justify a stop, arrest, and subsequent search). Indeed, *Jimeno* himself was arrested subsequent to a minor traffic violation, but likely because of the phone conversation arranging a drug transaction, overheard by officers prior to the stop. *Jimeno*, 500 U.S. at 249.

Professor O’Neill appears to advocate for the pre-*Caballes* rule to be reinstated in Illinois: that both the time and manner of the stop must comport to the officer’s cited incident giving rise to the stop. O’Neill, *supra* note 17, at 760-61.

However, this view fails to compensate for instances where reasonable suspicion justifies the stop initially, and consent obtained afterward justifies its extension. Under Illinois’ pre-*Caballes* law, consent to search for contraband would be voided if the initial reason of the stop was unrelated to contraband. *Id.* at 752 (explaining pre-*Caballes* Illinois Supreme Court cases).

It also fails to recognize the rationale for the earliest consent jurisprudence in *Schneckloth*. The primary function of consent is the “legitimate need for [searches in] situations where the police have some evidence of illicit activity, but lack probable cause to arrest.” *Schneckloth*, 412 U.S. at 227. In such instances, “a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.” *Id.*

68. The doctrine is limited rather than complete because Illinois declines to follow the U.S. Supreme Court in select portions of their exclusionary rule jurisprudence. See Matthew S. Wilzbach, *Search and Seizure and the Lockstep Doctrine-Illinois Deviates from the Lockstep Doctrine in Telling the Police That They Cannot Rely on Illinois’ Laws*, 22 S. ILL. U. L.J. 181, 187 (1997) (explaining that Illinois followed a pure lockstep doctrine before the adoption of its current constitution in 1970, which only deviates from the Federal Constitution by disallowing “good faith reliance” as an exception to the exclusionary rule). Compare *People v. Krueger*, 675 N.E.2d 604, 611-12 (Ill. 1996) (rejecting a good faith reliance on statutes), with *Illinois v. Krull*, 480 U.S. 340, 347-49 (1987) (allowing a good faith reliance on statutes).

However, those portions are not at issue in this comment. To date, Illinois’ adherence to the consent doctrine appears to be a pure and unwavering lockstep.

69. See O’Neill, *supra* note 17, at 762, n.144 and 147 (criticizing the Illinois Supreme Court for employing a limited lockstep approach as their primary

own Fourth Amendment jurisprudence.⁷⁰ Instead, Illinois unselectively adopts the U.S. Supreme Court's interpretation.⁷¹ Lower courts must follow *Terry*, *Jimeno*, and their progeny "lockstep" with the Federal Constitution because they are bound to the Illinois Supreme Court's decision-not-to-decide.⁷²

III. ANALYSIS

Between *Terry*, *Jimeno*, and the limited lockstep doctrine, consensual searches during traffic stops need to be analyzed carefully to determine whether an obscure place within the vehicle can be searched. Part III will survey the leading cases and arguments concerning consent to search obscure places within a vehicle in compliance with the Fourth Amendment. It will then provide a discussion of Illinois' recent decision in *Kats*, giving specific focus to whether consent to search a vehicle extends to those intricate hiding places discussed above.

A. *Following the Hypothetical Cop: A Step-By-Step Approach to Consent*

Because there are several permutations which can give rise to a consensual search, each being legally relevant, a sample hypothetical is offered. Assume a hypothetical police officer, Detective Martin McFadden,⁷³ pulls you over for a traffic violation. In the first place, the initial stop was almost certainly legal, *even without knowing McFadden's rationale*.⁷⁴ McFadden approaches the vehicle, and asks you for

principle to dismantle any additional protections courts in Illinois could use to add to the Fourth Amendment).

70. *Id.* See Illinois v. Caballes, 851 N.E.2d 26, 44-45 (Ill. 2006) (incorporating lockstep as a legal principle to be followed in Illinois' Fourth Amendment Jurisprudence).

71. Wilzbach, *supra* note 68.

72. See People v. Tisler, 469 N.E.2d 147, 152 (Ill. 1984) (holding that warrantless searches under Article I, §6 of the 1970 Illinois Constitution are governed by cases interpreting the Fourth Amendment to the federal Constitution, because language in the two provisions is so similar).

73. Detective McFadden is the actual officer from *Terry v. Ohio*, who arguably pioneered "stop and frisk" techniques before Chief Justice Warren had an opportunity to do so. 392 U.S. at 5.

74. See *Atwater*, 532 U.S. at 351 (holding that police can constitutionally arrest a suspect for nearly any traffic violation); *Whren*, 517 U.S. at 813 (holding that probable cause for any minor traffic violation is sufficient, irrespective of the officer's subjective intent); *Terry*, 392 U.S. at 20 (holding that police only need a small modicum of suspicion that criminal activity is "afoot" to affect a *Terry* stop).

your license and registration.⁷⁵ During that time he is free to check any outstanding warrants you may have, the legitimacy of your license, etc.⁷⁶ Remember, the only way he can violate *Terry*'s brevity prong here is by taking too much time.⁷⁷ Thus, timing is crucial to an appropriate consent request.

1. *The Timing of the Consent Request*

At this point, one can envision two scenarios. On one hand, McFadden might inquire for consent during his allotted "diligent" search time; that is, the time it would take a diligent officer to "dispel any suspicion" of wrongdoing without "measurably extending the duration of the stop."⁷⁸ On the other, the stop itself might violate *Terry* for taking too long, at which point McFadden has yet another fork in the road. He could either [1] ask for consent to search your vehicle anyways,⁷⁹ or [2] clearly end the stop and request

75. See Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1874-98 (2004) (explaining that asking for a license and registration during a traffic stop is not only routine, but indeed constitutionally proper).

76. See *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (holding that police are free to make "inquiries unrelated to the stop, so long as those inquiries do not measurably extend" the stop).

77. *Caballes*, 543 U.S. at 408. See also *United States v. Sharpe*, 470 U.S. 675, 685 (1985) (holding that the time taken need only be commensurate with the amount of time needed for police to "diligently pursue a means of investigation" likely to "dispel their suspicions quickly").

In *Sharpe*, the police were following a Pontiac and a Camper driving in tandem. *Id.* at 675. The police attempted to stop both cars but the Pontiac took evasive maneuvers. *Id.* It was about 20 minutes after the stop before officers caught up with the Pontiac, and returned to the Camper. *Id.* at 682. A subsequent search of the camper returned drugs. *Id.* at 679. The court held that this was not a violation of *Terry*, because it was reasonable to take more time with an evasive accomplice. *Id.* at 683. Moreover, that police need not undertake "the fastest" means of investigation, only means "reasonably aimed" at ending the investigation quickly. *Id.* at 685. The Court could not say, on the facts of *Sharpe*, that the stop was "unreasonable," albeit, not the fastest possible means. *Id.*

78. *Johnson*, 555 U.S. at 333; *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005). See also *supra* Part II.B.2, notes 50-53 (discussing *Caballes*' mandate that police activity conducted during a lawful detention, which does not itself violate the Fourth Amendment, by definition cannot exceed the scope of an otherwise permissible traffic stop).

Indeed, what could be more fitting than a brief request to "cut to the chase" and search a suspect's vehicle where police are commanded to use methods "diligently aimed at dispelling the officers suspicions in the shortest period of time"? *Johnson*, 555 U.S. at 333.

79. See *United States v. Melendez-Garcia*, 28 F.3d 1046, 1054 (10th Cir. 1994) (comparing cases where consent was obtained moments after an illegal seizure to cases where consent was obtained as much as forty-five minutes after an automobile was stopped).

consent after its conclusion.⁸⁰

Where McFadden remains within his allotted “diligent” search time there is no violation of *Terry* because there is no independent Fourth Amendment violation.⁸¹ However, the situation is less clear in the latter case, where a *Terry* violation occurred.

In *Ohio v. Robinette*,⁸² the Court appeared to approve of an officer’s asking for consent after ending a *Terry* stop, but narrowed its holding.⁸³ However, several courts argue that when the police ask for consent *during* a stop whose scope violates *Terry*, the police’s requisition stands as a violation of the Poisonous Fruit doctrine (i.e., that the initial illegal search “taints” related subsequent searches as “fruit of the poisonous tree”).⁸⁴ When the doctrine is applied to consensual vehicle stops, lower courts are divided as to whether an illegal vehicle stop which preceded consent (or was contemporaneous to obtaining it) “taints” the subsequent search or is “purged” for being too “attenuated.”⁸⁵

Some courts argue that the length of the stop prior to obtaining consent is irrelevant, even in circumstances where the “detention” violated *Terry*.⁸⁶

80. See *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (holding that a stop had ended once an officer handed suspect back his license and registration and that further warnings that the suspect was free to go were not required, so subsequent request for consent did not violate the scope of the stop); *People v. Cosby*, 898 N.E. 2d 603, 612 (Ill. 2008) (holding that the end of a traffic stop is canonized by an officer’s return to the defendant of his license, registration, and other paperwork).

81. See cases cited *supra* note 78 (discussing the proper time period and level of inquiry during a routine traffic stop).

82. *Robinette*, 519 U.S. at 38.

83. *Id.* at 38. The Court held that consent was appropriately gained, but only analyzed whether the officer was mandated to tell Robinette he was “free to go,” not whether the timing of consent was appropriate. *Id.*

84. See *Wong Sun v. United States*, 371 U.S. 471, 492 (1963) (holding that an initial illegal search taints subsequent related searches). However, not all events after the initial search are tainted; Certain subsequent consented-to events can “become so attenuated as to dissipate the taint.” See *id.* at 491 (holding illegal search tainted testimony against defendant could not bar defendant’s subsequent and voluntary confession). See also *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975) (citing *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (holding that the factors considered to determine whether confession was validly obtained after an illegal arrest include: “[1] the temporal proximity of the arrest and the confession, [2] the presence of intervening circumstances, and, particularly, [3] the purpose and flagrancy of official misconduct”).

85. See *Melendez-Garcia*, 28 F. 3d at 1054; *Robinette*, 519 U.S. at 38; *Cosby*, 898 N.E.2d at 612 (all discussing requests for consent to search before and after the stop has ended).

86. See *Kats*, 967 N.E.2d at 346 (Schmidt J., concurring) (arguing that if

Indeed, once the encounter has ended, how can any subsequently obtained consent be anything but an unrelated new encounter?⁸⁷ And, even if police concede such a technical and minor intrusion⁸⁸ did take place, it may not be subject to exclusion at all.⁸⁹

Alternatively, other courts argue that if the detention violated *Terry*, it is a near *per se* indication that the consent was obtained illegally.⁹⁰ Indeed, if *Terry*'s second prong is relegated only to timing infractions by *Caballes*, timing violations should not be ignored. Moreover, *Terry* focused on a seemingly "minor" infraction and refused to define a "seizure" as anything less than "restraint on an individual to walk away."⁹¹ Justice Stevens has even argued that a principal problem with both views is they presuppose that, just because a stop has a clear beginning, it also has a clear ending.⁹²

police effectively end the seizure, consent may be legally obtained afterwards, despite a later finding that the initial seizure itself was illegal).

87. *Id.*

88. As Professor LaFave notes, "it typically takes little time to obtain consent." LaFave, *supra* note 75, at 1892. For example, it would only take 3-4 seconds to ask the defendant, "May I search your vehicle for drugs, weapons, or other contraband?"

89. See *Hudson v. Michigan*, 547 U.S. 586, 597-98, 602 (2006) (holding that even an concededly illegal intrusion may be so de minimis as to escape exclusion under the Fourth Amendment; although, it may still succumb to a §1983 suit); *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977) (*per curiam*) (holding that the government's interest in officer safety outweighs the "de minimis" intrusion of ordering a passenger out of a motor vehicle "once [it] has been lawfully detained for a traffic violation").

90. See *United States v. Everett*, 601 F.3d 484, 491 (6th Cir. 2010) (collecting cases). See also Reid M. Bolton, Comment, *The Legality of Prolonged Traffic Stops After Herring: Brief Delays As Isolated Negligence*, 76 U. CHI. L. REV. 1781, 1795-97 (2009) (advocating for a bright line, "no prolongation" rule where consent may not be obtained after the stop has ended); LaFave, *supra* note 75, at 1892 (arguing that "any consent obtained will not be valid if the request came after the traffic stop had or should have run its course").

However, even Professor LaFave quickly cautions that despite the technical infraction, "courts are inclined to validate consent requests that immediately follow completion of all other traffic-stop activities." LaFave, *supra* note 75, at 1982.

91. See *Terry*, 392 U.S. at 16-18 (reasoning that even minimally intrusive acts no matter how brief can still amount to a "seizure," and rejecting the notion that the Fourth Amendment only applies to "technical arrest[s]" which "eventuate in a trip to the station house"). See also *Robinette*, 519 U.S. at 47 (Stevens, J., *dissenting*) (reasoning that a request for consent to search restrains an individual's freedom to walk away because "[t]he question itself sought an answer 'before you get gone'") (emphasis in original).

92. See *Robinette*, 519 U.S. at 46-50 (Stevens, J., *dissenting*) (examining the totality of the circumstances rather than applying a bright-line rule or litmus-paper test).

In the end, courts split the difference: a request for consent which violates *Terry* is presumptively tainted, unless police can show they clearly ended the stop.⁹³ A request for consent after the stop has clearly ended, without more, does not taint a search merely because it was temporarily close to a *Terry* violation.⁹⁴ Yet, consent obtained within an amount of time deemed unreasonable under the second prong of *Terry* will be fruit of the poisonous tree causally connected to the *Terry* violation.⁹⁵

2. *The Nature of the Consent Colloquially & Resulting Scope*

Assuming Officer McFadden's consent request was made within an appropriate time frame, what does an appropriate exchange of valid consent look like?

In the simplest example, Officer McFadden may request your consent by saying, "May I have permission to search your vehicle?" However, when you respond in the affirmative, it is unlikely that you have given an all-encompassing general consent rather than a more limited one.⁹⁶ If McFadden wants a broader consent, he must ask for your consent to search the vehicle *for* something.⁹⁷ And, if the search involves an obscure

93. See *Everett*, 601 F.3d at 492 (rejecting a bright-line "no-prolongation" rule and surveying related cases).

94. See *id.* (arguing that such a construction, although logical, is *too* précising and ignores the overarching principle of reasonableness mandated in the text of the amendment).

95. At the very least, violating *Terry* can be used as an indication that consent was obtained in an objectively unreasonable fashion, when the time taken becomes a "show of authority." See *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (arguing that a "show of authority" by the officer can invalidate seemingly voluntary consent because such consent is "instinct with coercion" and actually involuntary); *People v. Cosby*, 898 N.E.2d 603, 613 (2008) (citing *People v. Brownlee*, 713 N.E.2d 556 (Ill. 1999)) (noting officers "flanking" a car can create an unreasonable seizure while asking for consent because a reasonable person would not feel free to leave).

96. See *Jimeno*, 500 U.S. at 251 (holding that the "scope of a search is generally defined by its expressed object").

97. *Id.* Indeed, proving the scope of consent is the burden of the government at trial. *United States v. Melendez*, 301 F.3d 27, 32 (1st Cir. 2002). Thus, without stating exactly what they are looking for, the government may not be able to justify opening compartments whose contents are not "routinely opened or accessed." See *State v. Arroyo-Sotelo*, 884 P.2d 901, 905 (Or. App. Ct. 1994) (arguing that a defendant's silence or general consent does not extend to a search behind a door panel unless the police specifically identified, as the object of their search, an item which would fit in such a place). *But see Melendez*, 301 F.3d at 33 (arguing that police may not open sealed containers when the consent is merely to "look around" but can dismantle a stereo speaker by unscrewing the sub-woofer so long as there was

area of a vehicle (such as behind a door panel), the object named must be small enough to be at least capable of fitting there.⁹⁸

But even assuming McFadden timely asserts this verbal boilerplate,⁹⁹ how can a search of the bowels of your vehicle be within your consent when all that occurs is the following colloquy:

McFadden: May I have your permission to search your vehicle for drugs, weapons, or other contraband?

You: Yes.¹⁰⁰

a. Majority Argument

A majority say that so long as the suspect consented to a search “for contraband,” peeling off paneling is acceptable as a corollary of the Supreme Court’s jurisprudence on searching containers in automobiles.¹⁰¹ That jurisprudence states that “[w]hen a legitimate search is under way . . . nice distinctions . . . between glove compartments, upholstered seats, trunks, and wrapped packages . . . must give way to the interest in the prompt and efficient completion of the task at hand.”¹⁰²

no damage and the speaker was put back into good working order).

98. This is the primary command of *Jimeno*’s objective reasonableness test as a limiting principle, and the one place of agreement among both sides of the debate. *Compare Garcia*, 897 F.2d at 1419-20 (holding that scope of consent did not extend to areas within a vehicle’s door panel, even though stated object was capable of being located there), *with Zapata*, 180 F.3d at 1243 (holding that scope of consent did extend to areas within a vehicle’s door panel because the stated object was capable of being located there).

Both sides also agree that, at a minimum, damage to the property being searched is a floor to the defendant’s consent. *See Arroyo-Sotelo*, 884 P.2d at 905 (rejecting the state’s argument that damage to property is *the only* limitation on his prior consent).

99. Indeed, some courts discussed the application of contract principles to resolve the exchange. *See Arroyo-Sotelo*, 884 at 906 n.2 (Haselton, J., concurring) (arguing that police should not be able to escape obtaining actual consent by “cast[ing] requests for consent in the broadest and most ambiguous of terms,” but should instead be forced to specifically identify where they want to search and noting that the risk of ambiguity rests with the draftsman in the civil context).

100. Indeed, that such exchanges can relinquish consent to search behind a door panel has been called an “unacceptable burden-shifting gambit.” *Id.* at 906 (Haselton, J., concurring). *See also* *State v. Swanson*, 838 P.2d 1340, 1345 (Ariz. Ct. App. 1992) (emphasizing defendant’s refusal to sign a consent form and finding statements such as “go ahead” and “I can’t stop you” did not encompass “tearing a car apart” using a special tool to pry open a defendant’s door panel).

101. *See Kats*, 967 N.E.2d at 344 (discussing the split).

102. *Ross*, 456 U.S. at 821. *See also* *Carroll v. United States*, 267 U.S. 132, 162 (1925) (authorizing police to tear up upholstery to conduct a warrantless search for contraband, under the automobile exception).

In *United States v. Ross*,¹⁰³ police searched a suspect's trunk.¹⁰⁴ Upon finding a brown paper bag, police opened it, and found drugs later admitted into evidence at Ross' trial.¹⁰⁵ The Court held the search was valid (based on probable cause), but made two distinct efforts to extend *Ross* beyond its facts.¹⁰⁶ First, the Court said its reasoning would not have changed given the type of container: both a footlocker and a brown paper bag were of equal status under the Fourth Amendment.¹⁰⁷ Second, the Court posited that "[a]rguably, the entire vehicle itself (including its upholstery) could be searched without a warrant."¹⁰⁸ *Ross* reinforces the majority's proposition that the scope of a legitimate search is quite broad and police need not draw lines between consoles, glove boxes, or indeed door paneling.

In addition to *Ross*, a majority of lower courts argue that the defendant, who is free to place restrictions on his consent and has knowledge of the contraband secreted, has created his own dilemma by his failure to tailor his consent.¹⁰⁹ These courts urge that the "defendant, as the individual 'knowing the contents of the vehicle,' has the 'responsibility to limit the scope of the consent.'"¹¹⁰ Finally, the majority contends that we need not be committed to an overly detailed form of legal realism; although the Fourth Amendment grants defendant's a "right to be let alone," it does not guarantee the most effective use of that right.¹¹¹

103. *United States v. Ross*, 456 U.S. 798 (1982).

104. *Id.* at 801.

105. *Id.*

106. *Id.* at 816-22.

107. *Id.* at 821 n.28. The Court held that the scope of the search must extend to sealed containers within cars because any smaller a scope would actually breed intrusion, rather than diminish it. *Id.* Police would be forced to detain passengers while sorting through "worthy" containers. *Id.*

108. *Id.*

109. See *United States v. Flores*, 63 F.3d 1342, 1362 (5th Cir. 1995) (arguing that a "failure to object to breadth of search indicates that search was within scope of consent" where officers unscrewed the face of air vents and interior panels to find hidden money); *United States v. Cannon*, 29 F.3d 472, 477 (9th Cir. 1994) (holding that a failure to protest when officers used a key to unlock defendant's trunk indicated the search was within the scope of his consent).

110. See *United States v. McSween*, 53 F.3d 684, 688 (5th Cir. 1995) (citing *United States v. Rich*, 992 F.2d 502, 507 (5th Cir. 1993)) (holding that even an officer's failure to delineate the "express object" of his search is not dispositive where defendant failed to affirmatively delineate limitations on the search and police subsequently searched under the hood of the vehicle).

111. In *Schneckloth*, the Court stated:

the Fourth Amendment is not an adjunct to the ascertainment of truth.

The guarantees of the Fourth Amendment stand as a protection of quite

Indeed, such realism would inadvertently take into account the defendant's guilt, lowering *Jimeno's* reasonable *innocent* person test to accommodate the defendant's subjective apprehensions and guilt.¹¹² In sum, the majority argues that the combination of the Ross' scope and the defendant's willing compliance end Fourth Amendment protections.

b. Minority Argument

Despite the abject premise of arguing against a search the defendant himself expressly approved, the minority also give compelling arguments. In cases very similar to the one that recently confronted Illinois,¹¹³ courts have held that if reasonableness is a limiting principle at all, it must exclude those areas not "routinely accessible."¹¹⁴

In *State v. Arroyo-Sotelo*,¹¹⁵ Officer Anderson pulled over Arroyo for a traffic violation.¹¹⁶ After Anderson issued a warning and ended the encounter, telling Arroyo that he was free to go, he asked Arroyo if there were any drugs, weapons, or cash in the car.¹¹⁷ Arroyo said no, and freely volunteered his consent to a search.¹¹⁸ Based upon his experience, Anderson knew narcotics traffickers hid drugs in paneling, so he removed two screws on the passenger door, pried open the paneling, and discovered large amounts of cash and stacks of cocaine.¹¹⁹ The entire stop took 15-20

different constitutional values — values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect (internal citations omitted).

412 U.S. at 242. In this respect, the guarantees of the Fourth Amendment are very different from *Miranda* Warnings or the Right to Council. *Id.*

112. See cases cited *supra* note 62 (explaining that the "reasonable person" test presupposes an innocent person). *But see* California v. Hodari D., 499 U.S. 621, 623 n.1 (1991) (accommodating reality by noting that it is only "[t]he wicked [who] flee" when being pursued).

113. Compare *Arroyo-Sotelo*, 884 P.2d at 905 (holding that consent does not extend to behind door paneling), with *Kats*, 967 N.E.2d at 345 (holding that consent does extend to behind door paneling).

114. See *Arroyo-Sotelo*, 884 P.2d at 905 (stating that "[a]bsent specific facts to suggest otherwise, a general consent to search a car does not authorize an officer to search areas of a car that are not designed to be routinely opened or accessed").

115. *State v. Arroyo-Sotelo*, 884 P.2d 901 (Or. App. Ct. 1994).

116. *Id.* at 902.

117. *Id.*

118. *Id.*

119. *Id.*

Indeed, officers often cite the commonplace nature of secreting drugs within door paneling as the premier justification for special procedures and

minutes.¹²⁰

The court found for Arroyo.¹²¹ They reasoned that whether the items expressed as the object of the search (such as drugs or weapons) *might* fit within the door panel is irrelevant.¹²² *Jimeno's* “objective reasonableness” test requires more than the place be *capable* of housing contraband. Instead, the court reasoned, the area must be “routinely accessible,”¹²³ or likely to house contraband.¹²⁴

Others in the minority reject the majority’s idea that cases like *Ross* and *Carroll* endorse an all-encompassing consent, arguing that each of those cases were based on probable cause rather than consent.¹²⁵ Instead, they argue that *Jimeno*, unlike *Ross*, does in fact distinguish between “worthy” and “unworthy” containers.¹²⁶

tools used to remove door paneling quickly, without damage. *See Swanson*, 838 P.2d at 1343, 1345-48 nn.6-7 (stating that the use of a “slim jim,” a specialized tool used to dismantle door panels, was appropriate because “it was common knowledge in law enforcement that drugs are often secreted behind car door panels” and “the standard operating procedure of the officers [to] pop all door panels when permission to search is obtained”)

120. *Arroyo-Sotelo*, 884 P.2d at 902.

121. *Id.* at 905.

122. *See id.* (rejecting the argument that an officer may search an area merely because it is physically capable of housing the express object of an officer’s search). In *Arroyo-Sotelo*, the court reasoned that:

the scope of the consent [does not include] *any* area where a specified item might be found. For example, if a suspect has narcotics hidden inside a spare tire, *that* spare tire becomes an area where narcotics “might” be found. However, a reasonable person would not understand the suspect’s general consent to search the car as authorizing an officer to slash the spare tire and investigate its contents. (internal citations omitted) (emphasis in original)

Id. at 905 n.3

123. Whether an area was “routinely accessible” turns upon how hard the officer had to work to get into the compartment. *See id.* (holding that because the officer had to “remove two screws and pry a panel away from the sidewall” the area searched was not “routinely accessible”).

124. *Id.* at 905. In fact, the *Arroyo* Court argued that any other area would require additional consent. *Id.*

125. *See Ross*, 456 U.S. at 825 (holding that *probable cause* justified the search of “every part of [a] vehicle and its contents that may conceal the object of the search”); *Carroll*, 267 U.S. at 155 (holding that *probable cause* justified cutting open defendants upholstery).

126. *See Jimeno*, 500 U.S. at 251-52 (stating that it “is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk,” but probably has consented to the search of “a closed paper bag” in his trunk).

B. Thorough Breakdown of *Kats*

Illinois recently had an opportunity to address each of the issues above – timing, nature, and scope of consent – in *Kats*. In *Kats*, police pulled over *Kats* for a failure to properly merge.¹²⁷ Over the course of the stop, the officer, Officer Thulen, who had nearly 20 years of experience, became suspicious of *Kats*.¹²⁸ Both men went back to the squad car to issue a ticket, and run a “routine” background check, which revealed that *Kats* had a criminal record.¹²⁹ Nine minutes into the stop, Thulen issued *Kats* a ticket, returned his paperwork, and told him that he was “free to go,” before asking if *Kats* “had anything illegal in the car” and requesting consent to search “for contraband,” to which *Kats* replied “yes.”¹³⁰ After Thulen’s initial search proved unfruitful, he returned to the squad car, grabbed a screwdriver and an upholstery tool in front of *Kats*,¹³¹ returned to the car and pried open a partially loose flap of the door panel.¹³² Peering into the door panel Thulen uncovered several plastic wrapped bundles containing over seven pounds of marijuana.¹³³

127. *Kats*, 967 N.E.2d at 338.

128. *Id.* The officer who pulled over *Kats*, Officer Thulen, had 19 years on the job, 10 of which were spent with a canine unit. *Id.* He testified that “his training, [experience,] and the observations made from the beginning of the traffic stop led him to believe that criminal activity was afoot.” *Id.* at 339. Thulen’s observations included *Kats*’ California driver’s license, and the fact that *Kats* was driving a rental car, a Toyota Sequoia SUV, with a mattress in the back. *Id.*

129. *Id.* at 338. Thulen’s check revealed that *Kats* had an FBI number. *Id.* An FBI number is a number assigned to suspected criminals in a national data bank maintained by the National Crime Information Center (NCIC). *National Crime Information Center*, FED. BUREAU OF INVESTIGATION <http://www.fbi.gov/about-us/cjis/ncic> (last visited Oct. 26, 2012).

130. *Kats*, 967 N.E.2d at 338-39. After *Kats* exited the squad car and began back towards his vehicle, “Thulen said ‘Sir?’ [and *Kats*] turned around started walking back toward Thulen.” *Id.* Thulen told him that “the traffic stop was over and that he was free to go [but] asked if he could ask a few questions.” *Id.*

131. The trial court’s holding was silent on the fact that *Kats* remained in Thulen’s squad car for the duration of the search, a fact that cuts both ways. On the one hand, *Kats* could have argued that because he could not see what Thulen was doing, he was restrained from limiting the scope of his consent. *See Arroyo-Sotelo*, 884 P.2d at 905 (arguing that defendant could not properly limit his consent where he was not in the line of sight of the officer’s search). On the other, *Kats* was in perfect position to see Thulen recover the tools after the initial search proved unfruitful. *Kats*, 967 N.E.2d at 339.

132. *Kats*, 967 N.E.2d at 339.

133. *Id.* *Kats* argued that use of the tools violated his consent, but the trial court disagreed. *Id.* at 340. The trial court held that the search was proper because “remov[ing] dashboard and door panels that could be easily put back into place is ‘routinely done.’” *Id.* The court “couldn’t imagine that the courts

The Appellate Court upheld Thulen's search.¹³⁴ First, the court held that requesting consent after a lawful seizure did not unreasonably prolong the stop or itself constitute a seizure because Officer Thulen made it clear that the stop had ended.¹³⁵ The court went on to hold that the nature of the consent request was well within the bounds of *Jimeno*.¹³⁶ The scope of the search did not violate the scope of Kats' consent because Thulen properly identified that he was looking for drugs (an object small enough to fit where Thulen looked) and all items removed were easily replaced.¹³⁷ The use of tools was not dispositive where Thulen only used them to peer into a crevasse created by a prying motion.¹³⁸ In sum, *Kats* holds that a careful and well trained officer can unilaterally create a nearly unlimited search, with careful timing and choice of words, so long as the party searched consents. For the reasons that follow, *Kats* was rightly decided.

Certainly *Kats* itself opens the door to the dangers of discriminatory pretextual traffic stops.¹³⁹ However, that "danger" is little more than the ordinary risk associated with presuming the legitimacy of police investigations, which is patently acceptable under *Schneckloth*,¹⁴⁰ the Supreme Court's bedrock consent case, and undeniably affirmed by *Whren*.¹⁴¹ Moreover,

would hamstring police officers" into only searching areas revealed to the naked eye because "it would just be a green light to anyone who wants to traffic." *Id.*

134. *Id.* at 345.

135. *Id.* at 342.

136. *Id.* at 344. Officer Thulen's line of questioning was sufficiently similar to the hypothetical colloquy above to relate to the reasonable observer that he would be searching behind paneling for small illicit items. *Id.* The court held that Thulen's mention of illegal items and request to search for contraband identified an appropriate object to search within paneling by "revealing a suspicion of specific criminal activity." *Id.* at 343.

137. *Id.* at 344. The Court rejected the "routinely accessed" principle asserted by other courts, and instead opted for an "easily replaced principle." Compare *Arroyo-Sotelo*, 884 P.2d at 905 (holding that consent did not extend to a search behind a vehicle's door panel because that area could not be "routinely accessed"), with *Melendez*, 301 F.3d at 33 (holding that police can dismantle a stereo speaker by unscrewing the sub-woofer so long as there was no damage and the speaker could be easily put back into good working order).

138. See *Kats*, 967 N.E.2d at 344 (stating that Officer Thulen only used the tools to peer into a part of the door panel which was "already slightly ajar").

139. The defendant in *Kats* was pulled over for failure to properly merge. *Kats*, 967 N.E.2d at 338.

140. See *supra* notes 63 and 67 (explaining that *Schneckloth* primarily authorizes consent stops because they are a useful tool of law enforcement and essential to the efficient administration of justice).

141. See *supra* note 47 and accompanying text (emphasizing that the

the line between pretextual police work and good police work becomes a very fine one.¹⁴² Police officers often have significant experience allowing them to notice the finest details in a matter of moments.¹⁴³

But, pretext or not, the defendant maintains significant protections after the stop has occurred; specifically those concerning the timing of the request. As *Kats* correctly held, where a stop violates *Terry*'s brevity prong, any consent obtained is invalid, absent a clear indication from the officer that the stop had ended.¹⁴⁴ *Kats* demonstrates the perfect balance struck by the current regime between the efficiency and legitimacy of police investigations on the one hand, and the defendant's Fourth Amendment rights on the other. Under the existing edifice, once a stop violates *Terry*'s brevity prong an officer is encouraged [1] to clearly end the stop by handing back the defendant's license and telling him he is free to go¹⁴⁵ and [2] to establish the scope of the search by itemizing either the places he intends to go or objects he seeks to find.¹⁴⁶ Thus, between timing and scope, defendants already have two very powerful protections: notice of the search and an autonomous opportunity to reject the officer's request.

Nevertheless, minority courts like *Arroyo* argue that the scope of a consensual search should be narrowed to places "likely to house contraband."¹⁴⁷ For two reasons this misses the point and fundamentally

subjective motives of police are irrelevant to traffic stops).

142. What may seem strange to you and I but not necessarily sinister, can be a red flag to a well-trained officer. See *Garcia*, 897 F.2d at 1419 (citing mismatched door handles as suspicious).

143. See *supra* notes 119 and 128 (citing cases illustrating officers who relied on their experience to find drugs in obscure areas in vehicles).

144. *Kats*, 967 N.E.2d at 342.

145. *Id.* The court in *Katz* emphatically held that the stop, which lasted only nine minutes of the seventeen minute encounter, was not "unreasonably long." *Id.* at 338-39, 343. But even if it was, the court foreclosed any poisonous tree argument because "the traffic stop ended when Thulen gave the defendant the ticket, and Thulen's subsequent search of the defendant's vehicle was not part of the traffic stop." *Id.* at 342 (emphasis added). Even if the stop in *Kats* had violated *Terry*'s brevity prong, *Kats*' argument failed because Thulen's positive affirmation that "the stop had ended" and that *Kats* was "free to go" by handing him his license back, purged any taint resulting from the unreasonable seizure. *Id.* See also *id.* at 346 (Schmidt J., concurring) (calling the length of the stop prior to obtaining consent completely "irrelevant" and without "any bearing" on whether subsequent consent was lawfully obtained unless police conduct after the stop constituted a second seizure).

146. See *supra* Part II.B.3.b. (discussing *Jimeno*'s command that the police identify the object of their search).

147. *Arroyo-Sotelo*, 884 P.2d at 905.

misunderstands the relationship between probable cause and consent. First, *Ross* extends to consent searches. If anything, a consensual search should be broader in scope than one based on probable cause because a frank and express request from police serves the interest of justice more than an undisclosed motive guised as probable cause, easily concealed in hindsight.¹⁴⁸ The former is preferable to the latter and should be encouraged.¹⁴⁹

Second, even if the scope of a consensual search is narrower than *Ross*, what is “routinely accessible” goes too far the other direction. In *Arroyo*, the court defined “routinely accessible” as those areas likely to house contraband.¹⁵⁰ However, what is “likely” expresses a level of suspicion reserved for probable cause, expressly rejected in consent analysis.¹⁵¹ The main virtue of consent analysis is the absence of any suspicion requirement.¹⁵² Without a principled basis, using what is “routinely accessible” as a limitation overcompensates by protecting a defendant from being inconvenienced at the expense of legitimate police work.

IV. PROPOSAL

The opinion in *Kats*, addressing timing, nature, and scope of the consent stop, is correct both legally and ethically. The regularity in which drug trafficking on our nation’s highways takes place makes consent

148. See *Schneekloth*, 412 U.S. at 227-28 (arguing that consensual cooperation with the police from the community serves both the interests of justice and the efficacy of law enforcement, as citizens have an interests in the effective enforcement of laws)

149. *Id.* at 228.

150. *Arroyo-Sotelo*, 884 P.2d at 905.

151. See *Illinois v. Rodriguez*, 497 U.S. 177, 183-84 (1990) (explaining that consent searches are always “reasonable” searches, which by definition cannot be governed by the Fourth Amendment so there is no basis of authority for the Court to require anything more from police, once consent is established).

Although no modicum of suspicion is required, resource constraints already ensure that officers are likely have *some* suspicion before searching obscure areas in a vehicle. Departments are not likely funded well enough to be routinely dismantling every vehicle stopped for a traffic violation. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1673 (2012) (explaining that numerous indiscriminate consent searches would be nearly impossible “from a human resources perspective,” because there are more than fifty million traffic stops in the United States per year and, as a routine part of each stop, officers perform a multitude of tasks including calling headquarters, running license and registrations, as well as warrant and criminal record checks).

152. *Rodriguez*, 497 U.S. at 183-84.

searches a necessary weapon in law enforcement's arsenal.¹⁵³ Yet, a proper consent search contains daunting logistical permutations, happens in a matter of minutes, and occurs with such frequency, that exacting guidelines are required to keep in line with the Court's current jurisprudence while searching the obscure areas of a defendant's vehicle.

This section proposes a short but effective checklist based upon the above review of case law. Where the object is a peek inside a defendant's clever roadside hiding place, a simple checklist can help navigate officers through the minefield created by *Jimeno* and its progeny, and guide them safely to an admissible search. The list that follows will reduce *Kats'* legal effect to a short set of commands toward officers in the field, on how best to effectuate a consent stop while remaining within the bounds of current jurisprudence.

A. *Using the Latitude Given By The Supreme Court:
Exacting Guidelines For Police In The Field To
Effectuate Legitimate Consent Searches*

To effectuate an appropriate stop, officers need to [1] be prepared, [2] ask properly, [3] look closely, and [4] use tactics to hedge their bets. Prosecutors and departments need to ensure those efforts do not go unrewarded, by safeguarding admissibility.

1. *Be prepared: use a written consent form to gain consent and bring tools for a potential search*

Police can ensure they maximize the likelihood of a fruitful, legitimate, and admissible search, before even leaving the station. First, although not required¹⁵⁴ police should be equipped with written consent waivers. Such waivers would serve to avoid confusion, ensure the object of the search is clearly expressed, and frustrate any subsequent voluntariness challenges.¹⁵⁵

153. See *supra* notes 1-13 and accompanying text (discussing the regularity of drug trafficking on our nation's highways).

154. See *supra* notes 55-63 and accompanying text (stating that consent need only be voluntary, which is determined from the totality of the circumstances). See also Kevin Corr, *A Law Enforcement Primer on Vehicle Searches*, 30 LOY. U. CHI. L.J. 1, 4 (1998) (stating that almost no courts require written consent, but it is helpful as evidentiary corroboration in a subsequent voluntariness review).

155. Compare *Swanson*, 838 P.2d at 1344 (using a colloquy between police and suspect, which was reduced to writing, to establish whether the police used the correct language to identify the object of their search), with *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2261 (2010) (holding that a writing is not required in a voluntariness review, but neither is defendant's refusal to sign

Second, police should keep tools nearby to pry or peer into obscure areas. Illinois expressly rejected the argument in *Kats* that the use of tools, without more, went beyond the scope of the defendant's consent.¹⁵⁶

Tools need not be used in every stop¹⁵⁷ and police should be extremely careful not to damage a defendant's property.¹⁵⁸ However, on those limited occasions where tools are needed, their use is not sufficient to show the scope of defendant's consent was violated.¹⁵⁹ In Illinois, the proposition is expressly rejected.¹⁶⁰

2. Ask properly: the timing & phraseology of a proper consent exchange

Once a stop has occurred, even the most inexperienced officer knows that he is up against the clock.¹⁶¹ One of the relatively few ways to abate that clock is a request for consent.¹⁶² Thus, police should ask for consent as early on in the stop as possible. If they question whether the stop has gone too long,¹⁶³ they should make certain to clearly convey to the driver that the stop has ended, before requesting consent.¹⁶⁴ In the

dispositive).

156. See *supra* notes 131-34 and accompanying text (discussing the *Kats* Court's rejection of *Kats*' argument that the use of a tool violated the scope of his consent).

157. See *Garcia*, 897 F.2d at 1420 (explaining that police were able to peer down a gaping hole in the defendant's door panel to find drugs because defendants did such a poor job putting the door panel back together).

158. See *Swanson*, 838 P.2d at 1345 (holding that police needed additional consent any time they affected the "structural integrity of a vehicle" using tools, so an officer's use of a "slim jim" to pry open the defendant's door panel violated the scope of his consent).

159. *Jimeno*'s test is one of "objective reasonableness" of the exchange between the officer and the defendant at the time consent was given. *Jimeno*, 500 U.S. at 251. A suspect-motorist is free to watch the officer as he searches and has every opportunity to place subsequent limitations on the search after giving consent. *Id.* at 250-52.

160. *Kats*, 967 N.E.2d at 344.

161. See *Arizona v. Johnson*, 555 U.S. at 333 (setting the time limit required to issue a warning, citation, or ticket after *Caballes*); *Caballes*, 543 U.S. at 408 (modifying *Terry* to only regulate the time of traffic stops); *Berkemer*, 468 U.S. at 439 (applying *Terry* to traffic stops); *Terry*, 392 U.S. at 26 (limiting the scope of stops, detentions, and seizures).

162. See *supra* note 86 and accompanying text (arguing that granting consent acts as a temporal break in *Terry* analysis because it provides independent authority for the duration of the stop).

163. Which is certainly not a clear question by any means. See *Sharpe*, 470 U.S. at 685 (stating that no "talismanic" period of time defines the appropriate length of a legal stop).

164. See Part III.A.1, *supra* notes 78-95 and accompanying text (discussing when to ask for consent and asserting that the only invalid time is [1] after an

latter case, the driver's paperwork should be returned, and they should be told that they are "free to go."¹⁶⁵

Beyond timing, the vernacular of the request is also important. Remember that, under the *Jimeno* standard, the stated object of the search delineates its scope and the areas the officer is free to examine.¹⁶⁶ Although the language need not match the clarity of an "oxford don,"¹⁶⁷ it should reasonably indicate the object of the search.¹⁶⁸ The request most likely to yield the broadest scope is one for "drugs, weapons, or other contraband."¹⁶⁹

3. *Look closely: where to search once consent is obtained*

The scope of the resultant search, once consent is obtained, is any place where the stated object can be found.¹⁷⁰ This is relatively limitless compared to other

unreasonable amount of time under *Terry* but [2] before the officer has ended the stop).

165. See *Robinette*, 519 U.S. at 39 (holding that handing back a suspect's license and registration completely ended a police stop and that telling a suspect he was "free to go," although not constitutionally required, would be helpful).

166. See *Swanson*, 838 P.2d 1340, 1345 (holding that consent did not extend to beyond a door panel where the officer only asked if he could "take a look" in the vehicle, rather than stating an object of the search capable of being in the defendant's door panel).

In *Swanson*, the officer's question was even preceded by language that did express the object of his search. See *id.* (stating that the officer asked if there were "guns, large sums of money, or drugs" in the vehicle before asking to "take a look"); but see *Jimeno*, 500 U.S. at 251-52 (rejecting a rigid and formalistic analysis of whether magic words were linguistically couched in the same phrase as the request to search and instead requiring a culmination of all the facts to determine objective reasonableness).

167. *Davis v. United States*, 512 U.S. 452, 476 (1994) (Souter, J., concurring) (stating that an invocation of the Fifth Amendment right should not "requir[e] criminal suspects to speak with the discrimination of an Oxford don").

168. For instance, in *Arroyo-Sotelo*, officers did not ask "[suspect], may I search your vehicle for weapons or contraband." *Arroyo-Sotelo*, 884 P.2d at 902. Instead, they asked [d]oes your vehicle contain weapons? . . . drugs? . . . large amounts cash? . . . ; may I search your vehicle. *Id.* In fact, Arroyo actually offered the officers the opportunity to search before the officer could ask. *Id.*

Cf. id. at 906 (Haselton, J., concurring) (arguing that contract principles should be used to avoid a "burden shifting gambit" where police can simply employ magic words to gain access to a defendants entire vehicle). See also *North Carolina v. Butler*, 441 U.S. 369, 379 (1979) (Brennan, J., dissenting) (arguing that the default voluntariness test should require a writing because police should bear the risk of ambiguity when they stray).

169. Corr, *supra* note 154, at 9.

170. *Jimeno*, 500 U.S. at 251.

Fourth Amendment searches,¹⁷¹ with the clear exception of property damage.¹⁷² For several reasons, the “routinely accessible” scope shaped by a minority of state courts must fail. Often the compartments are rigged and retrofitted, makeshift compartments for quick and easy removal.¹⁷³ Moreover, that argument validates the original reason that the defendant cleverly hid drugs in an obscure area in the first place: because he thought that no one would look there. This is a principal policy reason for allowing such searches, not for frustrating them.¹⁷⁴ Indeed, as a policy decision, we should not legitimize any defendant’s interest in secreting illegal contraband by constitutionally protecting the area, especially after the defendant himself waived such a protection.

4. Hedge your bets during the search: additional consent, line of sight, and reasonable suspicion and probable cause

The most crucial time to begin using the circumstances to bolster an argument that consent was

171. See Corr, *supra* note 154, at 22-25 tbls. 1-4 (comparing the relative scope of various types of Fourth Amendment searches, including searches based on consent, reasonable suspicion, probable cause, full-custody arrest, or a written policy to inventory a contents after impound).

172. See *supra* note 98 (discussing property damage as clearly violating the scope of consent under *Jimeno*).

173. See *Garcia*, 897 F.2d at 1419-20 (1990) (explaining that defendants hid marijuana behind paneling but left door handles and screws off as a crude engineering design to allow for easy and routine access). See also WBNS, *supra* note 13 (explaining that “secret compartments” are routinely professionally installed in vehicles and intentionally made routinely accessible).

174. It is well-established that there is no legitimate expectation of privacy in secreting contraband. See *Place*, 462 U.S. at 705 (holding that there is no constitutionally protected interest in the scent of drugs picked up by a canine unit); *Jacobsen*, 466 U.S. at 123 (holding that a cocaine field test which can only reveal contraband and “no other arguably ‘private’ fact,” does not implicate any constitutionally recognized privacy interest); *Bostick*, 501 U.S. at 438 (holding that the “reasonable person” test which defines whether a search occurred always presumes an innocent, reasonable person); *United States v. Scott*, 975 F.2d 927, 930 (1st Cir. 1992) (holding that there is no privacy interest worth protecting in a defendant’s bank statements, even though he took painstaking efforts to keep the item private by shredding them so the IRS had to later put them back together like a jigsaw puzzle, because an intent to keep contraband hidden is not a policy interest worthy of constitutional protection); *But see* Transcript of Oral Argument at 3, *Florida v. Jardines*,—U.S.—(2013), (No. 11-564) (protesting the proposition that there is no constitutionally protected interest in contraband because it “just can’t be a proposition that we can accept [because] it’s just a circular argument” unless it is coupled with the plain view doctrine and simply means that police have no duty to avert their eyes when faced with a “smoking gun”).

properly obtained is during the search itself. Although none of the following are required, officers should, if possible: [1] request additional consent to search obscure areas; [2] stay in the suspect's line of sight while searching; and [3] gather enough particularized suspicion to support a search based on probable cause or reasonable suspicion.

Additional consent reinforces the proposition that the search of the obscure area, even one outside *Jimeno's* scope, was subsequently made the explicit subject of the search and brought into the reasonable contemplation of the parties.

For the same reason, officers should remain in the suspect's line of sight while conducting the search.¹⁷⁵ A primary rationale for *Jimeno's* relatively broad scope is that defendants are always free to affirmatively dictate the scope of their consent by articulating itemized limitations.¹⁷⁶ That rationale might fail, unless the officer is within the suspect's line of sight while conducting the search.¹⁷⁷

Admittedly, the drawback of such tactics is that they increase the likelihood that defendant will put a limitation on his consent. In the event that consent is revoked or narrowed, police have three alternatives. First, where consent is specifically narrowed by the defendant, police can still peer down any open crevasse.¹⁷⁸ If this "peering" reveals objects, probable cause can provide the basis for a search with equal or

175. Indeed, even the most restrictive minority cases agree that further admonishments, after consent is initially obtained, are not required because a failure to put any limitation on a search *while it is being conducted* is nearly always dispositive that the suspect's consent extended to the area searched. *Arroyo-Sotelo*, 884 P.2d at 905. That is, a defendant's silence during a search behind his door panel shows that his consent did in fact extend to the area behind the door panel. *Id.* However, the same does not hold true where the defendant was not in line of sight and thus could not see the area being searched. *Id.*

176. *Jimeno*, 500 U.S. at 251.

177. *Arroyo-Sotelo*, 884 P.2d at 905. For instance, suspects are unlikely to affirmatively limit the scope of the search upfront where the area to be excluded is an obscure area, such as behind a door panel. *Id.* It would simply defy reason: "sure officer, you can search everywhere in my car except behind the door panel of the driver's side door." Although legally a defendant is free to place such restrictions under *Bostick* and *Jimeno*, common sense dictates otherwise.

178. *Compare Garcia*, 897 F.2d at 1419 (holding that consent to search a vehicle justified flashing a light down a crevice between the window and the door panel, exposing gray packages, and providing probable cause to remove the panel); *with Swanson*, 838 P.2d at 1343 (holding that search was not justified by consent where officers pried open door panel without citing any particular reason for doing so).

greater scope than the initial consent.¹⁷⁹ Second, where consent is revoked, police can convey an intent to summon a canine unit to sniff the defendant's vehicle while a ticket is being issued.¹⁸⁰ If the suspect appears anxious, a canine unit may indeed be worthwhile. If not, a further search may prove fruitless, saving time and resources.

Finally, police may be able to ignore a request for further consent where reasonable suspicion or probable cause crops up during the course of a consent search.¹⁸¹ Certainly, reasonable suspicion is not required.¹⁸² The primary virtue of the consent analysis is that it has *never* required any modicum of suspicion.¹⁸³ However, reasonable suspicion or probable cause can provide auxiliary authority to search the vehicle if consent is revoked or a court later finds that the defendant's consent did not include the area searched.¹⁸⁴ As they

179. See *supra* note 37 (establishing that the scope of a search based on facts giving rise to probable cause is at least as broad as a search based on a warrant founded on those same facts).

180. See *Moran v. Burbine*, 475 U.S. 412, 424 (1986) (holding that police deception, without more, doesn't in itself amount to a cognizable constitutional violation); *Corr*, *supra* note 154, at 8 (asserting that officers should request a canine unit where consent is refused or revoked); *but see Florida v. Harris*, 132 S.Ct. 1796 (2012) (granting certiorari on whether a roadside sniff of a vehicle by a canine unit constitutes a "search").

181. See *Corr*, *supra* note 154, at 12 (explaining that, in using a "consent search, other search exceptions may come into play during the course of the stop," such as probable cause).

182. Indeed, the contrary position – that a search of the inner most bowels of a defendant's vehicle cannot be supported by consent, but requires some degree of suspicion – is the proposition asserted by a minority of courts. See *Arroyo-Sotelo*, 884 P.2d at 905 (“[a]bsent specific facts to suggest otherwise, a general consent to search a car does not authorize an officer to search [obscure] areas of a car”). Yet, this argument utterly fails to explain why an item seen within an obscure area *without removing any component of the vehicle* is within the scope of the defendant's consent. See *Garcia*, 897 F.2d at 1419 (holding that mismatched door handles yielded sufficient suspicion to peer down the crack of a door panel without touching it, and visual inspection of packages inside the panel yielded more suspicion, sufficient to remove the panel).

Rather, an object in plain view, seen without moving, adjusting, or touching anything within the vehicle, is *always* within the scope of a search, and does not require any suspicion whatsoever. See *Katz*, 389 U.S. at 361 (Harlan J., concurring) (explaining that “objects [exposed] to the ‘plain view’ of outsiders are not protected” by the Fourth Amendment). And, if not excluded from the Fourth Amendment by the “plain view” doctrine, *Jimeno's* objective reasonableness test must, if anything, go far enough to exclude such objects.

183. See sources cited *supra* note 151 (discussing the chief advantage of consent searches are that they do not require either reasonable suspicion or probable cause).

184. See *Garcia*, 897 F.2d at 1420 (holding that peering into the panel without touching it provided probable cause to search the panel, although

are lawfully searching, police should become alert to facts such as loose screws,¹⁸⁵ open flaps,¹⁸⁶ or mismatched handles, knobs, or locks.¹⁸⁷

5. Ensure Admissibility: in the courthouse and at the police station

Finally, the proper consent search does not end at the roadside. Police departments should create procedures to provide for inter-departmental punishment when and where the above procedures are not followed. Such procedures may serve to avoid exclusion of evidence obtained during the search when the abuse is a minor - though a technical - violation of the Fourth Amendment.¹⁸⁸ Moreover, prosecutors must take advantage of the “lockstep doctrine,” thrusting it on Illinois Courts, not as just a rationale for following the United States Supreme Court in certain instances, but as a command of the Illinois Supreme Court in all instances.¹⁸⁹

V. CONCLUSION

The Framers of the Constitution would not have shrugged their shoulders at the difference between

prying open a door panel was not within the scope of the defendants consent); *Strickland*, 902 F.2d at 942 (holding that although consent to search did not include slashing open defendants tire, information gathered during the legal portions of the search did provide probable cause for slashing open the tires). *See also Carroll*, 267 U.S. at 155 (holding that probable cause to search defendant’s vehicle allowed police to cut into the upholstery); *Ross*, 456 U.S. at 825 (holding that probable cause to search a vehicle extends to every part of that vehicle). *But see State v. Murray*, 376 A.2d 1255, 1260 (N.J. 1977) (noting in dictum that any search which “interferes with the structural integrity of the vehicle itself is fatally excessive in its scope” where officers noticed drugs on the dashboard and subsequently searched the car by removing the front seat); *State v. Acosta*, 801 P.2d 489, 493 (1990) (holding that no amount of reasonable suspicion could ever justify a search as intrusive as removing a screwed in panel in a vehicle).

185. *Garcia*, 897 F.2d at 1420.

186. *Kats*, 967 N.E.2d at 339.

187. *Garcia*, 897 F.2d at 1420.

188. *See Hudson*, 547 U.S. at 598 (2006) (arguing that violation of knock and announce does not warrant exclusion because, using the *Leon* cost-benefit analysis, inter-departmental reprimand is sufficient to deter such de minimis violations). *But see Whren* 517 U.S. at 816, (rejecting the proposition that the Fourth Amendment inquiry could ever turn on whether an inter-departmental regulation was followed).

189. *Compare O’Neill*, *supra* note 17, at 757 (requiring that the elaborate edifice Illinois constructed on the permissible scope of a Terry Stop in *Caballes* be torn down in favor of the Supreme Court’s timing rule in *Caballes II*), *with Arroyo-Sotelo*, 884 P.2d at 903 (relying on the Oregon Constitution but construing Federal Fourth Amendment law).

banning certain “unreasonable” searches, and allowing those same searches at the voluntary election of an autonomous individual – neither should we. No matter how broad the scope of a consent search is, it only exists under several strata of other protections.¹⁹⁰ After all the protections already afforded, if the defendant doesn’t have the wherewithal to say “no,” he should not be able to turn to the Constitution for solace. Given this great authority, law enforcement has a duty to use it ethically, responsibly, economically, and without abuse; but above all, they must take special care to use it effectively, to avoid unnecessary exclusion.

190. Indeed, authority figures are relegated to “requests” to conduct searches because a great multitude of other relatively harmless procedures are prophylactically outlawed. *See* *Bond v. United States*, 529 U.S. 334, 337-39 (2000) (holding that merely feeling the outside of a passenger’s luggage, as other passengers or baggage handlers would, constituted a “search” under the Fourth Amendment); *Kyllo v. United States*, 533 U.S. 27, 36 (2001) (holding that a thermal imaging device which could only detect heat surrounding a home rather than within the home, constituted a “search” under the Fourth Amendment); *Jones*, 132 S. Ct. at 952 (holding that GPS tracking of a vehicle which was unknown to the owner for over a month and did not affect the vehicle’s appearance or functionality constituted a search (or seizure) under the Fourth Amendment).

