

The Language of Consent in Police Encounters

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In this chapter, we examine the nature of conversations in citizen-police encounters in which police seek to conduct a search based on the citizen's consent. We argue that when police officers ask a person if they can search, citizens often feel enormous pressure to say yes. But judges routinely ignore these pressures, choosing instead to spotlight the politeness and restraint of the officers' language and demeanor. Courts often analyze the language of police encounters as if the conversation has an obvious, context-free meaning. The pragmatic features of language influence behavior, but courts routinely ignore or deny this fact. Instead, current Fourth Amendment jurisprudence assumes that the authority of armed police officers simply vanishes when they pose their desire to search as a question. We discuss empirical evidence suggesting that people are afraid to decline police officer requests to search, and conclude by discussing the social and psychological cost of the widespread use of consent searches.

*"A police officer who is certain to get his way has no need to shout."*¹

1. Introduction

In this chapter, we focus on public encounters between citizens and police officers in the United States. More specifically, we examine encounters in which police question and search citizens without probable cause or even reasonable suspicion of criminal activity. These encounters are legally permitted because courts deem them "consensual." Legal consent depends on whether a reasonable person, when confronted by the police, would feel free to end the conversation, which itself turns in part on the nature of the conversation and its context. It is these conversations, embedded in their social and physical contexts, which we explore in this chapter.

We argue that when police officers seek permission to conduct a search, citizens often feel enormous pressure to say yes. But in most criminal cases, judges do not acknowledge these pressures, generally choosing instead to spotlight the politeness and

restraint of the officers' language and demeanor. By ignoring the pragmatic features of the police-citizen encounter, judges are engaging in a systematic denial of the reality of the social meaning underlying these encounters, and are thereby constructing a collective legal myth designed to support current police practices in the "war on drugs." Because consent searches are very common, and because the vast majority of people subjected to consent searches are innocent,² the practice of conducting frequent consent searches comes with social and political costs. It is possible that these costs are worthwhile, at least in some cases, depending on the threat at hand. But the U.S. Supreme Court has declined to engage in any serious analysis of this question. We begin with the practical importance of consent searches as a crime investigation tool.

2. The Role of Consent Searches in Criminal Investigation

Law enforcement practices in the United States today frequently include on-the-fly searches to detect evidence of crime. These searches are not a result of an ongoing investigation, but rather the result of police acting on their instincts and training regarding a person's appearance or behavior or even presence in a particular place. For example, in locations where intercity (e.g., Greyhound) buses make stopovers, local police sometimes make a practice of boarding every bus as it arrives and requesting consent from passengers to search their bags and/or their persons. In airports, law enforcement officers use "drug courier profiles," consisting of a list of behaviors and characteristics, to decide which passengers to approach, question, and perhaps request consent to search for drugs.

Consent searches often follow on the heels of a routine traffic stop. Police pull over drivers for burned out tail-lights, unsignaled lane changes, and speeding. Police

incentives to attend to such administrative violations often rest not on the risk posed by the violations themselves, but rather on the opportunity such stops provide for investigating “suspicious” citizens. Which citizens appear suspicious is, of course, in the eye of the beholder. Unfortunately, recently uncovered evidence demonstrates that the race and ethnicity of the driver sometimes influence police judgments about which cars to stop (Ayres 2008; Garcia & Long 2008).

The incentives to engage in this type of “drug interdiction” are now quite powerful, with the advent of federal programs that pay large sums of money to local police departments to fund the war on drugs (Bascuas 2007). As part of this federal program, some small towns located near an interstate highway have generated millions of dollars in revenue from seized cars and cash after local police succeeded in stopping drivers transporting illegal drugs (Bascuas 2007). As a result, violations of minor traffic violations are routinely parlayed into consent searches. Thus, the real purpose of many traffic stops is drug interdiction, and minor traffic violations will suffice to justify such stops,³ even though minor violations are committed by virtually every driver on virtually every trip.

In the absence of probable cause that a crime is being committed, officers rely on the driver’s consent to find out what is in the car. In some localities, consent searches have become routine, and are accomplished not only through traffic stops, but also by boarding intercity buses and searching bags. As a tool for ferreting out possession offenses, consent searches are extremely effective. First, consent searches permit police to search when they otherwise would be prohibited from doing so. By some estimates, over 90% of all searches are consent searches (Simmons 2005). Second, once police

decide to request consent to search, they are remarkably successful in obtaining consent - one study found that over 95% of people asked to consent to a search did so.⁴ Third, consent searches are low cost -- no investigation, wiretaps, warrants are needed. And consent searches are effective in much the same way junk mail or spam email is effective. If police stop and search enough people, it is just a matter of time until they find evidence of crime. In the next section, we discuss the circumstances under which it is legally permissible for the police to conduct a consent search.

3. Legal Standards for Consent Searches: The “Free to Terminate” Test

Government searches and seizures are governed by the Fourth Amendment to the United States Constitution, which guarantees the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.” A search is likely to be considered reasonable if there is probable cause to believe that a crime is being or has been committed. But in practice, police often search without probable cause if the citizen has consented to the search.

To be valid, consent must be given voluntarily. If the citizen merely accedes to the authority of the officer, then consent is not valid and the search is unreasonable. Anything obtained during an unlawful search is excluded from evidence. Additionally, if the police unlawfully seize someone, and then obtain consent to search, anything obtained following the unlawful seizure is excluded. As a practical matter, excluding contraband from evidence results in the dismissal of a charge of possessing that contraband.

The two key issues, then, are: 1) whether a consent search lacks sufficient voluntariness, and 2) whether a person who consented to search had been unlawfully seized. The first issue focuses on the extent to which a citizen's consent to search was voluntary or was the product of duress. The analysis requires the judge to decide, under the totality of the circumstances, whether a reasonable person would have felt free to refuse consent. To decide this question, courts examine, among other things, the manner in which the police requested consent. If consent is requested in a manner that indicates "to a reasonable person that he or she was free to refuse,"⁵ courts consider this to be strong evidence the search was consensual. Courts point to factors such as the police speaking in a polite manner, and asking for permission to search, as indications that the person voluntarily consented. We will return to these factors later.

The second issue, regarding unlawful seizure, is analyzed in a similar manner. The judge's task is to decide whether a reasonable person in that situation would believe that she is free to leave, or to terminate the encounter. Note that both of these tests require courts to interpret the social meaning of behavior – to ascertain what is implicit in a social interaction. For example, a police officer who orders a car to pull over acts with an implicit claim of right, and so a driver or even a passenger in the car would not feel free to leave once the car has been pulled over.⁶ We understand this implicitly only because we have internalized certain norms of social behavior; a visitor from another culture might not understand this. Similarly, when a police officer says, "May I please see your license and registration?" we understand this utterance to be not a request, but a command. This understanding is gleaned from our social and cultural understanding of what a police officer means and intends when he utters those words in that context. In the

next section, we examine more closely the ways in which contextual implicatures are understood in ordinary conversation between people, and specifically in encounters between police and citizens.

4. Language

Language is usually the first point of contact between police and citizen. These encounters are dense with meaning, and fraught with the potential for deception. In the hands of a seasoned communicator, clever use of language can gain anyone an advantage over peers. And when that person has a badge, uniform, gun, and the power to change the course of your days, language becomes his or her soft restraint. To appreciate the controlling power of language, we will cover general pragmatics first; then we will turn to its application to police encounters.

4.1. Pragmatics Basics

Language is far more than a tool for communicating descriptive facts. Language pleases and cajoles, it scolds and questions. And when it is embedded in a cultural setting, it can intimidate, control, or liberate. But this won't be obvious if we only look at the superficial structure of language. Fifty years of work in the philosophy of language has delivered an elaborate roadmap of the origins of meaning in communication, from posture and gesture to types of meaning, like conventional and speaker meaning. Leaving aside phonetics and phonology, linguistics is usually carved up into three main areas: syntax (the rules of linguistic well-formedness), semantics (the theory of meaning) and pragmatics (the contribution of context to meaning).

In philosophy, the chief preoccupation has been with what philosophers call “truth functional semantics,” or the conditions that have to be met in order for descriptive claims (normally, declarative, factual sentences) to be deemed true or false. Accordingly, the meaning of a sentence is given by the conditions that would make it true. The sentence “The earth has magnetic poles” is true if and only if the earth has magnetic poles. For these kinds of statements, it doesn’t matter who says them, or how they are said. Their meaning is entirely a function of what states of affairs would make them true.

By contrast, pragmatics takes into account the potential impact of social norms and subtle cues that are typically expressed in language, and is informed not only by linguistics and philosophy, but also psychology and anthropology.

Many linguistic expressions, such as commands, promises, or questions, have meaning but not truth conditions. “Would you leave her alone?” is a question (and interestingly, can also be a command of sorts), and has no truth conditions. In the case of some linguistic expressions, like questions, the same person can imply different meanings by uttering the same sentences with stress on different words. There is nothing at all surprising or exotic about this fact. We see it in exchanges in every walk of life. In order to see that the very same expression can provoke very different reactions, consider that classic question: “Why did Sutton rob the bank?” Now place the accent on the capitalized word, and note the answer, ratified by convention and common sense:

WHY did Sutton rob the bank? (He needed the money.)

Why did SUTTON rob the bank? (He was the one who needed the money.)

Why did Sutton ROB the bank? (He asked for the money nicely, but they wouldn’t give it to him.)

Why did Sutton rob the BANK? (That’s where the money was.)

If the appropriate answer is different for each of the questions, the implicatures of emphasis go well beyond descriptive meaning. In addition, one has to be steeped in a culture to know the permissible interpretations of this question as a function of stress.

The philosopher of language Paul Grice identified and characterized the phenomenon of implicature. His theory explained and predicted what he called the “conversational implicatures” that arise in ordinary conversations. Grice (1975) postulated a general “Cooperative Principle,” which posits that conversational partners cooperate with each other and will contribute what is required by the accepted purpose of the conversation. People expect that communication will, in general, conform to this principle, so violations can be powerfully manipulative. Any individual prepared to deviate from this norm can exploit the listener’s unwitting expectation of cooperation.

Grice also postulated four “maxims” specifying how to be cooperative in communication. These maxims (quantity, quality, relevance, and manner) all document the way that subtle mechanisms of language – often together with the broader context – can imply meanings that go beyond the sober, descriptive use of language (Grice 1975). Using a vintage example: Imagine a friend telling you “A man came to my office” only for you later to find that the man was her fiancé, whom you know. You assume that your friend is being cooperative and adhering to the maxim of quantity, which specifies that a speaker should provide enough information for purposes of a conversational exchange. If your friend had been cooperative, she would have specified that her fiancé came by the office. Therefore, the use of the indefinite article with a noun, “a man” creates an implicature that the person who came to the office is not known to you (or possibly that he is but would not be of interest to you.)

Notice what the friend has done here. She has controlled the meaning of the expression by saying something that is strictly true, but she has also manipulated you by correctly predicting your reaction to her violation of selected rules of cooperative communication. In these cases, there is little honor in merely telling the truth, because it is not the whole truth, anything less than the whole truth will mislead, and the speaker designed the statement with the intent to mislead. The violation of these conversational maxims would seem a powerful tool for manipulation.

4.2. Pragmatics of Police Encounters

These pragmatic features of language play an important role in citizen-police encounters, including vehicle stops, bus sweeps, airport stops, and street stops. In these encounters, the police officer's main purpose is to get information about what the person is doing, and get permission to do something else, like search their person, house, car, bags, etc.

With the idea of pragmatic implicature now in hand, we can examine the way in which police language can be used to deprive citizens of their sense of control. If the police officer says or does something to diminish the citizen's sense of control, the citizen will not feel that consent could be refused. First, consider the contrast between declarative statements and other kinds of utterances. Much communication is achieved through simple declarative sentences, like "It is raining" or "Electrons have a spin of plus or minus one half." The meaning of declarative statements, like "The cat is on the mat" is given by its truth-conditions. But questions don't have truth conditions. As we mentioned earlier, a substantial portion of communication does not invoke declarative sentences. Indeed, what would it mean to say that a question is true? Instead, questions

(“May I look in your bag?”), commands (“Hand over your valuables”), promises (“I promise to repay the debt”), recommendations (“Always pay your taxes”), etc., have what linguists and philosophers call “felicity conditions” (Austin 1962; Alston 2000).⁷ But once you concede that the meaning of such utterances is not a simple function of their truth conditions, you must examine all of the relevant contextual factors that contribute to their meaning in order to fix their interpretation. In addition, because contextual factors can affect meaning in limitless, even if systematic, ways, there is no sense to be made – either scientific or folk -- of claims about the “literal meaning” of some linguistic sequence. Its meaning can change with identity of speaker, tone and accent, location of the utterance (church, courthouse), and a host of other indexes.

4.3. Pragmatics and Police Authority

During traffic stops, bus sweeps, and the like, the conversation between the police officer and the citizen tends to be dominated by the kinds of utterances whose meaning varies widely with context (Solan & Tiersma 2005). Yet, courts often analyze police encounters as if the conversation that took place has a fixed meaning, which can be readily gleaned without reference to the context.

One way to debunk the contention that there is some obvious, literal or uncontested interpretation of a police officer’s request is by the following example. Consider a backpack owner’s reaction to the same linguistic utterance, constituted by sound alone, when delivered by a shabbily-dressed passerby. Suppose such a person stops and says, “Would you mind if I look in your backpack?” Most people would feel freer to refuse the shabbily dressed passerby than the person who has identified himself as a

police officer. But if the same acoustic sequence engenders two different responses depending upon the speaker, which is the “literal interpretation”? Another way to debunk the contention is to imagine how the backpack owner might respond to other sorts of communication from a police officer. Suppose a police officer says “Drop the backpack and raise your hands in the air.” The owner obeys. Now suppose the shabbily dressed passerby issues the same command. The owner laughs it off.

It may be rational to comply with a police officer’s command (like “put your hands in the air”), but that doesn’t make it voluntary. We assume that the command is backed by force. Similarly, when police use request-language, we hear this as a command and similarly assume this is backed by force. Because people perceive discourse originating from an authority to be coercive regardless of assertive linguistic cues, authority figures need not use highly face-threatening language--part of that burden is carried by the badge and gun.

People in positions of authority can control the message conveyed by linguistic expressions in a number of ways. The cues of threat go well beyond speaker intentions. Posture, mode of dress, physical proximity, location, identity, and authority of the speaker all contribute to meaning. The same question may carry different force, or imply different meanings, when uttered by different people. Suppose you are sitting on a bus, with an empty seat next to you. Suppose further that someone approaches you and says: “Would you like to move over?” Consider your reaction when the question is asked by each of the following people:

1. a child
2. an adult passenger

3. the bus driver

4. a police officer

We could explore the different implications in each case, but for the moment it is enough to observe the difference in your reactions, and that we are quite used to sentences having different meanings when asserted by people in different stations in life.

The meaning of social exchanges also depends on whether the speakers were invited or unsolicited by chief parties to the exchange. When a citizen summons the police, police presence is a welcome relief. But when officers approach uninvited, it is seldom a happy event for the citizen. Without a clear idea of where this encounter is going and how it will turn out, a citizen would feel irresponsible to treat this exchange like any other. People know that they should be courteous to police, that police carry guns and handcuffs, that they make mistakes that can cause you harm, and that additional police are just a radio call away. They know that the police can handcuff you and take you to the station for processing, and that it can take hours or days to sort out a misunderstanding. So, if a police officer asks to check my backpack or luggage – even if they inform me that I have the right to refuse – I would naturally worry that a refusal would be viewed as grounds for suspicion.

4.4. Judicial Misunderstandings of Pragmatic Implicature in Police Encounters

Courts routinely conclude that searches that ensue during police-citizen encounters are voluntary (Nadler 2003). To justify this conclusion, judges highlight the language of the exchange and minimize important contextual features, like the fact that the speaker is armed. For example, the U.S. Supreme Court has stated that when an armed police officer

approaches and asks to search, “[t]he presence of a holstered firearm ... is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.”⁸

Judges often note that, in requesting consent, the officers made a request rather than a demand. They also note that the officers used a polite tone of voice. Judges routinely conclude that these aspects of language give rise to the inference that the citizen was free to decline to talk to the officers or to decline the request to search. As the Supreme Court put it, a police-civilian encounter is consensual so long as the police do not convey a message that compliance with their request is required.⁹ Indeed, the Supreme Court has lionized the kind of exchange that takes place between police and citizens in consent searches:

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.¹⁰

But is the Court correct that consent searches are typically characterized by the notion of a voluntary agreement between the citizen and the officer (akin, perhaps, to two corporate executives negotiating a licensing agreement)? Do citizens really “advise police of [their] wishes” when they agree to searches that are devoid of probable cause? In short, is it plausible to conclude, as the Court does, that the language of the exchange itself dispels inferences of coercion? Contrary to the Court’s conclusion, our discussion in the previous section suggests that this kind of police-citizen exchange heightens, rather than dispels, inferences about coercion.

Fortunately, not all judges advance the implausible position that consent searches arise from a dignified understanding between citizens and police. In an early landmark case, the police stopped a car in the middle of the night. The police asked permission to search the car, and when they were through, the officer asked, “Does the trunk open?” The defendant opened the trunk, and police found stolen checks. The federal court of appeals judge was concerned that the defendant might not have realized that he had the option of refusing the officer’s implied request to open the trunk. The judge acknowledged that, “[u]nder many circumstances a reasonable person might read an officer’s ‘May I’ as the courteous expression of a demand backed by force of law.”¹¹

In bus sweep cases, too, some courts have acknowledged that passengers approached by officers requesting permission to search might not feel free to leave or to terminate the encounter. In one case, the Florida Supreme Court found that sheriff’s officers who boarded the bus wearing raid jackets, blocking the aisles, and questioning passengers about their destinations had unlawfully seized the passengers, rendering invalid the passengers’ subsequent consent to search.¹² And in other Florida bus sweep cases, considered by federal appellate courts, judges found that reasonable passengers would not have felt free to refuse the consent to search, because they had no indication that consent could be refused.¹³

Remarkably, in each of the cases just described where the judge has recognized the coerciveness of the police request to search, the U.S. Supreme Court has reversed the lower court’s decision and held that there was no unlawful seizure and that consent was freely given. The Supreme Court has made it very clear that considerations about pragmatic implicature are to be ignored in consent search cases, no matter how

compelling those considerations might be. Instead, it has signaled to lower courts that an utterance phrased in the form of a question, and spoken in a polite tone, is to be considered a request that can be freely refused, regardless of whether the context of the conversation strongly suggests otherwise.¹⁴

Consider the following example. In the last bus sweep case mentioned above, *U.S. v. Drayton*, three police officers boarded a Greyhound bus during a scheduled stopover in Tallahassee, Florida. The driver had collected all of the passenger's tickets and taken them into the terminal to complete paperwork. One police officer knelt backwards in the driver's seat; one police officer stood at the back of the bus; and one officer began questioning passengers. As he asked questions, the officer stood over the seated passenger and leaned toward them, placing his face 12-18 inches from theirs. He held up his badge and explained that he was conducting drug interdiction, and said that he would like their cooperation. He then asked permission to search their bags.

During oral argument in the case, Justice Scalia made clear his opinion that the police officer's utterance was merely a request, and that the words uttered would "counteract" contextual cues suggesting compulsion, such as the placement of one of the officers in the driver's seat of the bus. Specifically, Justice Scalia asked, "Why ... is it that the most immediate expression of the police officers does not counteract whatever other indications of compulsion might exist under the circumstances? ... There's a policeman in the front of the bus. Who cares? He . . . has made it very clear that he's asking for your permission."¹⁵ To answer Justice Scalia's facetious question, the bus passengers are the ones who care, because they could not help notice the following: the driver and tickets were absent, one police officer was now in the driver's seat, the police had effectively

commandeered the bus, and the bus was apparently going nowhere until the police got what they wanted. But Justice Scalia and the rest of the majority in *Drayton* appear to see things differently. Pragmatic implicature falls to the wayside, and instead an officer's asking of permission "counteract[s] ... other indications of compulsion." According to this view, the authority of armed police officers simply fades away when they express their desire to search in the form of a question.

Ever since *Drayton*, lower courts have had no choice but to follow the lead of the U.S. Supreme Court. In doing so, those courts routinely and mechanically point to the police officer's polite tone of voice as a key basis for finding that the defendant voluntarily consented to being searched.¹⁶ *Drayton* portrayed the questioning police officer as courteous and courtly: "He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.... There was ... no threat, and no command, not even an authoritative tone of voice."¹⁷

Indeed, lower courts now seem hesitant to ever find that the defendant's grant of consent to search was coerced, unearthing voluntariness even when the officer issues a direct command. In one recent case, the police pulled over a car and arrested the driver for driving without a license. The officer then asked the passenger if he had any drugs, and asked, "Well, do you mind if I check?" The passenger did not answer and did not gesture. The officer ordered the passenger out of the car. The passenger complied, placing his hands in the air. The police officer then searched the passenger and found drugs. Unbelievably, the court held that the passenger had consented voluntarily to the search by raising his hands in the air.¹⁸ Apparently, when the officer uttered the magic

words, “Well, do you mind if I check?” this rendered the remainder of the encounter voluntary.

Although lower courts applying the Fourth Amendment have little choice but to routinely find consent searches voluntary under the tightly constrained precedent that the U.S. Supreme court has constructed, each state has its own constitution with its own version of the Fourth Amendment. A few states interpret their own constitutions to be more restrictive than the U.S. Constitution on matters relating to government searches and seizures.

New Jersey courts, for example, have interpreted their state constitution to require a higher level of scrutiny for consent searches.¹⁹ Under this standard, the prosecution must prove that the person consenting knew that she had a choice in the matter. Further, a police officer making a traffic stop is prohibited from requesting consent to search unless he or she has a “reasonable and articulable suspicion” to believe that a crime is occurring.²⁰ The New Jersey Supreme Court acknowledged that “many persons, perhaps most, would view the request of a police officer to make a search as having the force of law.”²¹ Several other states follow a similar rule for traffic stops.²² The Supreme Court of Hawaii has gone further and applies a similar “reasonable suspicion” rule for requesting consent during any police encounter, not just traffic stops.²³ The highest courts of these states have each acknowledged that when a police officer says, “Do you mind if I search?” the pragmatic implicature is often that cooperation is not just requested but required.

5. Empirical Evidence Regarding the Language of Consent in Police Encounters

Given the nature of police authority and the context of the citizen-police encounter, it is highly likely that police requests to search are often interpreted as commands to permit the search to take place. But the extent to which citizens feel compelled to accede to a police request is an empirical question (Nadler 2003). Not much empirical evidence is available to help answer that question. But there is some, which we will review next.

First, consider an illustration used by courts as the paradigmatic example of when no seizure takes place: a police officer approaches a citizen on a sidewalk and asks a question. Recall that if a police officer unlawfully seizes someone, then any subsequent search is deemed invalid. The U.S. Supreme Court has characterized this kind of sidewalk encounter as a “perfect example of police conduct that supports no colorable claim of seizure.”²⁴ That is to say, the Court assumes the citizen in that situation clearly feels free to terminate the encounter or to leave.

But do people in fact feel free to terminate that type of sidewalk encounter? Kessler (2009) conducted a survey to find out, and it turns out the answer is mostly, no. Respondents read a scenario in which they are walking on the sidewalk when a police officer approaches and says, “I have a few questions to ask you.” Respondents indicated how free they would feel to walk away or decline to talk with the officer. About half of the respondents indicated that they would not feel free to leave in this situation.²⁵ Remarkably, only about 20% of respondents indicated that they felt free to leave or decline.²⁶ Thus, most people do not in fact feel free to terminate the very type of police encounter that the Supreme Court considers the clearest example of a completely consensual conversation. It is clear that the Court’s conception of the level of coercion

present in ordinary citizen-police encounters is greatly at odds with the conception of ordinary people when they think hypothetically about interacting with police.

Moving from the hypothetical to the actual, consider next Lichtenberg's (1999) survey of Ohio motorists who had been stopped recently by police for traffic violations and asked for their consent to search. Of the 54 drivers interviewed, 49 reported that they had agreed to the request to search. Of these 49, all but two said they consented because they were afraid of what would happen if they said no. Their fears included having their trip unduly delayed, being searched anyway, incurring property damage to their car if they refused, being arrested, being beaten, or being killed. Some of these concerns were apparently well founded: of the five motorists who declined to consent to the search, two reported being searched despite their explicit refusal to consent. Another motorist who refused to consent was not searched but was threatened with future retaliation, which left him so shaken that he avoids driving on the road near his home where he was stopped.

The fact that such a large percentage of this sample reported feeling afraid to decline the officer's request to search suggests a possible solution: require police who request consent to search to advise citizens of their right to refuse (Solan & Tiersma 2005).²⁷ Although on its face this requirement might seem promising, it is not a panacea. There is no reason to believe that giving a warning would dispel the coercion inherent in police encounters. In fact, there is empirical evidence suggesting that such warnings have no effect on people's willingness to refuse consent. Lichtenberg (2001) examined all Ohio highway stops between 1995 and 1997. For part of the period studied, police were not required to advise motorists of their right to refuse consent, and for part of the period, police were required to do so.²⁸ Remarkably, the same percentage of motorists consented

with the warnings as without the warnings. Apparently, people are unaffected by the warnings because they do not believe them -- they feel that they will be searched regardless of whether or not they consent, as illustrated by the interviews just discussed.

6. Conclusion: Hollow Politeness and Its Consequences for Innocent Citizens

No one knows precisely how many innocent people are subjected to consent searches each year, but there is little doubt that the number is staggering. One officer conducting bus sweeps testified that he had searched 3000 bags in the previous nine months.²⁹ In some localities, police officers ask every motorist they stop for consent to search.³⁰ One officer in Ohio made, in one year, 786 requests for consent to search motorists pulled over for routine traffic violations.³¹

But consent searches are not costless. People are shaken by them and don't forget them quickly. The vast majority of people subjected to consent searches are innocent. This is a fact that is easily forgotten because consent searches often come to our attention via published exclusionary rule cases, in which the defendant was factually guilty. How do consent searches affect the lives of innocent people -- that is, people who possess no illegal drugs or guns, are not engaged in illegal activity, yet find themselves submitting to a search?

The Supreme Court paints a wholesome picture of a citizen and a police officer engaging in polite conversation, in which the officer and the citizen amicably agree that the officer is free to search her person or possessions, after which the citizen bids the officer good day and goes on her way. But in the real world, people subjected to searches

do not live happily ever after. The Lichtenberg (1999) survey reveals that a large majority (76%) of citizens whose consent was requested from the Ohio Highway Patrol felt negatively about the experience. Here are some examples:

I don't know if you ever had your house broken into or ripped off ... [it's] an empty feeling, like you're nothing (Lichtenberg 1999:285, subject #11091).

It was embarrassing. It pissed me off... they just treat you like a criminal and you ain't done nothing I think about it every time I see a cop (Lichtenberg 1999:283, subject #14735.)

I feel really violated. I felt like my rights had been infringed upon. I feel really bitter about the whole thing (Lichtenberg 1999:285, subject #15494).

I don't trust [the police] anymore. I've lost all trust in them (Lichtenberg 1999:288, subject #12731).

When police question citizens or rummage through their possessions and find nothing, they leave in their wake a flood of shaken people. Those feelings of contingency or personal insecurity frustrate well-being. At best, subjecting citizens to suspicionless searches amounts to a loss of liberty. At worst, it threatens the legitimacy of the police and the legal system more broadly (Nadler 2003; 2005). People who feel that the legal system is worthy of respect are more likely to comply with legal rules regulating their everyday experiences (Tyler 1991; Nadler 2005).

We have demonstrated in this chapter that the power of language and context to intimidate is well established. By choosing to ignore the intimidating power of language in a commanding context, the courts have adopted an interpretation of police exchanges with citizens that favors expedience over justice, and the interests of an unsustainable war

on drugs – politically motivated and historically datable -- over the rights of citizens,
inalienable and eternal.

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¹ Drayton, 536 U.S. 194 (2002)(Souter, J., dissenting).

² Because of the absence of systematic record keeping, it is difficult to calculate the proportion of consent searches in which the target is innocent of any crime. There are, however, scattered statistics for individual localities. For example, the sheriff in one Florida county arrested only 55 of the 507 motorists subjected to consent searches over a three-year period (Brazil & Berry 1992). An analysis of over 1,900 consent searches of motorists concluded that illegal drugs are discovered in about one of every eight searches. (Lichtenberg 2001).

³ That the real reason for the stop in the first place was the officer's mere hunch that he might find something illegal does not invalidate the enterprise – so long as the police can hang their hat on a provable violation of traffic regulations. *Whren v. United States*, 517 U.S. 806 (1996).

⁴ *State v. Carty*, 170 N.J. 632 (2002).

⁵ Drayton, 536 U.S. at 197.

⁶ *Brendlin v. California*, 551 U.S. 249 (2007).

⁷ This is Austin's (1962) original terminology.

⁸ Drayton 536 U.S. at 204.

⁹ *Florida v. Bostick*, 501 U.S. 429, 435 (1991).

¹⁰ Drayton, 536 U.S. at 207.

¹¹ *Bustamonte v. Schneckloth*, 448 F.2d 699 (1971).

¹² *Bostick v. State*, 554 So. 2d 1153 (1990).

¹³ *United States v. Drayton*, 231 F.3d 787 (11th Cir. 2000); *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998).

¹⁴ Note that the U.S. Supreme Court's consent search decisions have not been unanimous, and some judges on the Court do recognize the coercive effects of powerful contextual factors. For example, Justice Souter, in his dissent in *U.S. v. Drayton*, argued that the fact that the police asked politely and said "Do you mind" is irrelevant, concluding that "a police officer who is certain to get his way has no need to shout." *Drayton*, 536 U.S. at 212.

¹⁵ Official Transcript of Oral Argument, *U.S. v. Drayton*, 2002 U.S. Trans. LEXIS 37 at 46.

¹⁶ *United States v. Awoussi*, 2009 U.S. Dist. LEXIS 45680 (consent to search apartment was voluntary in part because officers were polite); *State v. Rathjen*, 16 Neb. App. 799 (2008) (consent to search locked toolbox in pickup truck was voluntary in part because officer was "cordial and polite" when he requested consent); *United States v. Johnson*, 2005 U.S. Dist. LEXIS 712 (2005) (consent to search car was voluntary in part because officers were polite); *People v. Palomares*, 2008 Cal. App. Unpub. LEXIS 1452 ("[t]he tone of the encounter was conversational, not accusatory").

¹⁷ *United States v. Drayton*, 536 U.S. at 204.

¹⁸ *People v. Tupper*, 2009 Cal. App. Unpub. LEXIS 4908.

¹⁹ *State v. Carty*, 170 N.J. 632, 639 (2002).

²⁰ *State v. Carty*, 170 N.J. at 647.

²¹ *State v. Carty*, 170 N.J. at 644.

²² These states include Indiana (*State v. Washington*, 875 N.E.2d 278 (Ind. App. 2007)); Minnesota (*State v. Fort*, 660 N.W.2d 415 (Minn. 2003)); and North Carolina (*State v. McClendon*, 350 N.C. 630, 517 S.E.2d 128 (N.C. 1999)).

²³ *State v. Quino*, 840 P.2d 358 (1992).

²⁴ *Drayton*, 536 U.S. at 209 (Souter, J. dissenting)

²⁵ The response scale ranged from 1 to 5, where 1 was labeled “Not free to leave or say no,” 3 was labeled “Somewhat free to leave or say no,” and 5 was labeled “Completely free to leave or say no.” For each scenario (sidewalk and bus), about 50% of respondents chose 1 or 2. Kessler repeated this with a scenario in which the respondent is on a bus when the officer approaches, and the results were the same.

²⁶ That is, only about 20% of respondents selected 4 or 5.

²⁷ The U.S. Supreme Court has already considered and rejected the notion that police are required to advise citizens that they have the right to say no to requests for consent. *U.S. v. Drayton*, 536 U.S. 194 (2002).

²⁸ During that time period, the Ohio Supreme Court ruled that police who stop motorists for traffic violations must advise them that they are free to leave prior to asking for consent to search the vehicle. *Ohio v. Robinette*, 653 NE2d 695 (Ohio 1995).

Subsequently, the U.S. Supreme Court reversed and held that no such warning was necessary. *Ohio v. Robinette*, 519 U.S. 33 (1996).

²⁹ *State v. Kerwick*, 512 So. 2d 347 (1987).

³⁰ See *Harris v State*, 994 SW2d 927, 932 n 1 (Tex Crim App 1999).

³¹ *State v Retherford*, 93 Ohio App 3d 586, 591-92 (1994).