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The Fourth Amendment and the Dangerous Fiction of "Implied Consent"

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THE FOURTH AMENDMENT AND THE DANGEROUS
FICTION OF “IMPLIED CONSENT”

CHRISTIAN TALLEY*

ABSTRACT

When the police obtain an individual’s consent, they may conduct searches or seizures that the Fourth Amendment would otherwise prohibit. Consent is thus a powerful exception to that Amendment’s guarantees of liberty and privacy. But consent is also fragile. Determining whether someone consented to a contested intrusion requires a sensitive review of that transaction’s particular facts—what the Supreme Court has termed “the totality of the circumstances.” An irreconcilable notion of consent, however, has long persisted in state statutes and has recently surfaced in two cases at the Supreme Court: so-called “implied consent.” Unlike real consent—a historical fact to be deduced by examining each specific case—“implied consent” is “consent” imputed by operation of law, irrespective of whether individuals actually consented during a particular transaction. By substituting a blanket rule for a case-specific inquiry, this legally imposed “consent” stands in tension with the Supreme Court’s traditional totality-of-the-circumstances test. It also undercuts individuals’ autonomy interests by denying them the right to withdraw consent, and it subverts the protections the Fourth Amendment was designed to provide.

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INTRODUCTION

[I]t's a fiction, isn't it? It's not consent, no matter how much you call it 'implied' or 'presumed.'

— Justice Ginsburg, criticizing the State's position at the oral argument for *Mitchell v. Wisconsin*¹

We often consider the Fourth Amendment the Constitution's premier guarantee of personal privacy. By its terms, it protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."² And it provides that "no [w]arrants shall issue, but upon probable cause."³ So neither of its central clauses *forbids* searches, seizures, or the issuance of warrants. But the clauses do require that certain conditions exist before a search, seizure, or warrant can be valid. Probable cause must back the warrant, and the search or seizure may not be "unreasonable." What, though, is a "reasonable" search? In what some scholars have forcefully argued is an inversion from original intent,⁴ warrants are now the gold standard in proving a search's reasonableness.⁵ Interposition by a neutral magistrate is said to check law enforcement's competitive tendency to "ferret[] out crime."⁶ But warrants take time to issue, and so in the centuries that have intervened since the amendment's framing, the Supreme Court has propounded other scenarios in which even a warrantless search may be reasonable. One, for instance, is exigency—where some emergency demands immediate action by officers, such as the "hot pursuit" of a fleeing felon.⁷ Another is "plain view," where officers happen to notice incriminating information from a vantage point they lawfully could occupy without a warrant.⁸ Yet another is consent to the search or seizure.⁹

1. Transcript of Oral Argument at 40, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (No. 18–6210) (Ginsburg, J.) (internal quotations added).

2. U.S. CONST. amend. IV.

3. *Id.*

4. See generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). For instance, at common law, officers' possession of a warrant was an affirmative defense to a trespass action, which was then the chief mechanism to deter and compensate for unreasonable searches. *Id.* at 774. Thus, the framers were suspicious of warrants, permitting them to issue only "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

5. See, e.g., *Thompson v. Louisiana*, 469 U.S. 17, 20–21 (1984) (labeling warrantless searches "*per se* unreasonable" unless falling "within one of the narrow and specifically delineated exceptions to the warrant requirement," and reiterating that "the warrant requirement . . . requires the interposition of a neutral and detached magistrate between the police and the persons, houses, papers, and effects of citizens.") (internal quotation marks omitted).

6. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

7. *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).

8. *Coolidge v. New Hampshire*, 403 U.S. 433, 465 (1971) ("It is well established that under certain circumstances the police may seize evidence in plain view without a warrant.")

9. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

Consent is, by far, the most commonly invoked of those exceptions to the Fourth Amendment.¹⁰ But consent is also the most doctrinally incoherent and the most prone to abuse. Though suspects are not obliged to consent to searches, officers are not obliged to advise them of that fact.¹¹ And many suspects, of course, have no idea that they may so refuse. Contrast this Fourth Amendment regime with that of the neighboring Fifth Amendment. As virtually everyone knows, police must read criminal suspects their "Miranda rights" upon a custodial arrest if the police intend to initiate questioning.¹² Indeed, "Miranda has become [so] embedded in routine police practice [that] . . . the warnings have become part of our national culture."¹³ But just moments *before* an arrest, when officers are requesting consent to a search that may ultimately cause it, they have no analogous obligation to give suspects a "Fourth Amendment warning."¹⁴

Likewise, the Supreme Court has struggled to explain what real-world phenomena constitute "consent" under the Fourth Amendment.¹⁵ The Supreme Court's leading restatement of the consent exception, *Schneekloth v. Bustamonte*, can be read to require a subjective analysis of the defendant's intelligence, education, and knowledge, and an inquiry into whether those factors show that she was vulnerable to offering a false consent.¹⁶ Such review is supposed to help courts determine whether the defendant consented "in fact" to the search—whether, under the circumstances of the particular encounter, she willingly permitted the intrusion—or whether any expressed consent was involuntary.¹⁷ But other cases can be read to support a contrasting view: that the inquiry is objective and based on officers' behavior, rather than on a defendant's subjective understanding of the

10. Michael J. Friedman, Comment, *Another Stab at Schneekloth: The Problem of Limited Consent Searches and Plain View Seizures*, 89 J. CRIM. L. & CRIMINOLOGY 313, 318-19, 319 n.40 (1998). One officer has suggested that perhaps 98% of warrantless searches in his city occur via consent. *Id.* at 319 n.40; see also Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 547 (2015) (noting that "the number of consent searches as an absolute number is high" since officers so often request consent to search).

11. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 219-21 (2001).

12. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

13. *Dickerson v. United States*, 530 U.S. 428, 430 (2000).

14. Strauss, *supra* note 11, at 219-20 (noting that the *Schneekloth* Court declined to require officers to warn suspects about their Fourth Amendment rights before requesting consent to search).

15. See 4 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 17-18 (5th ed. 2012).

16. See *id.* at 14-17; see also *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

17. *Schneekloth*, 412 U.S. at 233.

encounter.¹⁸ On that view, in which the Fourth Amendment becomes a mechanism to deter police misconduct, courts regard expressed consent as voluntary where no obvious police coercion procured it.¹⁹

In practice, and unsurprisingly, courts uphold most of the consent searches they confront.²⁰ The present consent test tends to be pro-government in both theory and practice. Theoretically, the lack of a “Fourth Amendment warning” and the shift to an objective analysis have displaced the inquiry into whether a defendant actually, subjectively consented.²¹ And practically, courts hesitate to declare police misconduct sufficiently coercive to render apparent consent involuntary.²² As a result, the consent exception is an attractive and commonly used tool for officers to conduct a search when they otherwise possess no lawful basis for those activities.

But whatever the deficiencies and contradictions in present doctrine, there has long been a thread of consensus woven through the Supreme Court’s consent cases: that courts must assess consent’s validity under the “totality of the circumstances.”²³ In other words, consent is a historical fact. The reviewing court’s task is to determine whether, “in fact,” the defendant genuinely consented during the contested transaction.²⁴ Though the subjective version of that inquiry is defendant-focused, and the objective version officer-focused, both require an analysis of the specific, real-world events during a particular search or seizure.²⁵ Only by assessing those “circumstances” can the reviewing court say that they, in their “totality,” either do or do not reflect valid consent.

By contrast, an idea creeping into Fourth Amendment consent doctrine threatens to displace even the present, pro-government totality-of-the-circumstances test: so-called “implied consent.”²⁶ Despite the term’s ubiquity, “implied consent” is a misnomer, and an unfortunate one. It has little to do with our typical understanding of consent.

18. LAFAVE, *supra* note 15, at 17; *see also* Florida v. Bostick, 501 U.S. 429, 436 (1991); United States v. Drayton, 536 U.S. 194, 206 (2002).

19. LAFAVE, *supra* note 15, at 20-21.

20. *See* Strauss, *supra* note 11, at 212; Ric Simmons, *Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 787 (2005).

21. Simmons, *supra* note 20, at 779.

22. *See* Strauss, *supra* note 11, at 226.

23. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973) (explaining that the Court assessed the “totality of the surrounding circumstances”); Florida v. Bostick, 501 U.S. 429, 437 (1991); United States v. Drayton, 536 U.S. 194, 207 (2002).

24. *Schneckloth*, 412 U.S. at 222, 223.

25. For instance, one scholar argues that *Bostick* and *Drayton* shifted the consent test to an objective inquiry. Simmons, *supra* note 20, at 781-82. But both cases set forth full-bore endorsements of the totality-of-the-circumstances approach. *Bostick* called it the “correct legal standard,” while *Drayton* said that it “must control.” 501 U.S. at 437; 536 U.S. at 207.

26. *See, e.g.*, Christopher M. Peterson, *Irrevocable Implied Consent: The “Roach Motel” in Consent Search Jurisprudence*, 51 AM. CRIM. L. REV. 773, 781-89 (2014) (criticizing the notion of “implied consent” and surveying several different aspects of Fourth Amendment jurisprudence into which it has spread).

Rather than treat consent as a historical fact that courts must assess under each case's circumstances, "implied consent" is often divorced from the particular circumstances of a contested transaction.²⁷ Thus, individuals are sometimes *deemed* to consent—ex ante and by operation of law—regardless of whether they *actually* consented as a matter of historical fact.²⁸ "Implied consent," therefore, coopts the terminology (and seeks to coopt the moral legitimacy) of actual consent, despite representing a distinct phenomenon.²⁹

That concept arises perhaps most often in the context of licensing schemes, and particularly with state driver's licenses. Several state laws purport that drivers imply their consent to various searches or seizures when they engage in the privilege of driving upon state roads.³⁰ And state courts have held that this statutorily implied "consent" creates a valid exception to the Fourth Amendment.³¹ But the notion of "implied consent" is not cabined to those domains.

More subtly, the concept has recently arisen in the context of police searches of suspects' "curtilage"—the area immediately surrounding a targeted home.³² The Supreme Court has explained that officers may not engage in unusual activities in that space without a warrant, such as deploying a drug-sniffing dog to inspect a front door's threshold for narcotic odors.³³ But the Court has also explained that there is a broad "implied license" for officers to validly conduct *other* police activities, like the so-called "knock and talk," in that same space.³⁴ In other words, because visitors and salesmen commonly knock on doors and speak to inhabitants, there is a "license"—albeit an "implied" one—for police officers to do the same.³⁵

This Article contends that neither of those concepts—the "implied license" and implied consent statutes—rests on entirely sound thinking. It makes that argument by examining two recent Supreme Court cases that dealt with those respective concepts: *Florida v. Jardines* and *Mitchell v. Wisconsin*. The former—*Jardines*—is akin to a Trojan horse. It invalidated the particular search at issue in that case, but only by declaring that the search happened to fall outside a broad and novel "implied license" to *other* police activity on private property.³⁶

27. *Id.* at 774, 783 (noting that "implied consent" may apply even "in situations where the suspect has not provided consent, does not have the opportunity to correct erroneously given 'consent,' and it is apparent that consent has never been given.").

28. M. Beth Valentine, *Constructive "Consent": A Problematic Fiction*, 37 L. & PHIL. 499, 502 (2018).

29. *Id.* at 499 (noting that though implied consent trades on the language of "consent," it "bears no normatively relevant resemblance to consent").

30. *See infra* Part III.

31. *Id.*

32. *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

33. *Id.* at 8-9.

34. *Id.* at 8, 10; *see also id.* at 21 (Alito, J., dissenting).

35. *Jardines*, 569 U.S. at 8.

36. *See id.* at 8-9.

Jardines purported to ground that “license” in precedent, history, and tradition.³⁷ But as this Article shows, *Jardines* reached an outcome with only dubious support in the relevant sources. In so doing, the Supreme Court imputed individuals’ “license” to various forms of police activity on their property, irrespective of whether those individuals *actually* sanctioned (or “licensed”) the intrusion.³⁸

Mitchell, for its part, declined to hold that state implied-consent statutes create valid consent under the Fourth Amendment.³⁹ But it also declined to *refute* that view, leaving the legitimacy of those statutes an open question.⁴⁰ And it avoided that central question (indeed, its original question presented) by issuing a narrow and fact-bound holding that has proven of limited utility to lower courts.⁴¹ Jurists remain in need of guidance about how to conceptualize the limits and legitimacy of “implied consent,”⁴² and the Supreme Court will inevitably have to render its verdict on that topic.

In criticizing *Mitchell* and *Jardines*, this Article’s underlying contention is that, at least for Fourth Amendment purposes, the law should rarely if ever treat “implied” consent as real consent. Consent is powerful, but it is also fragile. It can legitimize a search or seizure that would otherwise have no lawful basis.⁴³ Yet discerning whether someone actually consented to that intrusion is a sensitive inquiry dependent on the totality of the circumstances. That is because consent is a historical fact, rather than a legal fiction that courts or legislatures may simply impute by operation of law. When consent *is* so imputed, courts and legislatures undermine individuals’ right to refuse the intrusion. They wrongly coopt the vocabulary and moral legitimacy of actual consent and, in so doing, distort the protections the Fourth Amendment was designed to provide.

Part I proposes a working definition of “consent” that is informed by both legal and philosophical principles. This philosophical definition of “consent” may not perfectly align with how courts sometimes treat consent in search-and-seizure cases. (Indeed, the Supreme Court once explicitly disclaimed the usefulness of “epistemology” in

37. *Id.* at 8, 11.

38. Jamesa J. Drake, *Knock and Talk No More*, 67 ME. L. REV. 25, 40 (2014) (noting that the Justices simply postulated this empirical proposition “from the comfort of [their] armchair[s]”).

39. The majority opinion did not answer the question presented. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2551 (2019) (Gorsuch, J., dissenting) (“We took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute . . . But the Court today declines to answer the question presented. Instead, it upholds Wisconsin’s law on an entirely different ground—citing the exigent circumstances doctrine.”).

40. *Id.*

41. *See id.*

42. *See infra* Part III.

43. LAFAVE, *supra* note 15, at 4-5 (“If consent is given, evidence may thereby be uncovered in a situation where there was no other lawful basis for making the search.”).

understanding consent.)⁴⁴ But at the same time, establishing a baseline definition helps clarify how the totality-of-the-circumstances test can sometimes deviate from a rigorous and idealized understanding of consent. It also helps to show how significantly the notion of "implied" consent differs from both a philosophically "ideal" view of consent and from even the totality-of-the-circumstances test.

Part II explores the Court's divergence from these consent principles in *Jardines*. It argues that despite the majority opinion's historical façade, the notion of an "implied license" to police activity on private property is historically dubious. The founding-era practices and later case law that *Jardines* relied upon actually supported greater privacy protections than *Jardines* acknowledged.⁴⁵ Rather than flow from historical principles, *Jardines* seemingly arose from Justice Scalia's preference for rule-like jurisprudence and from his disdain for the fact-bound totality-of-the-circumstances test.⁴⁶ His majority opinion thus implied an apparently blanket license to police knock-and-talks, irrespective of whether individuals actually consent to such conduct.⁴⁷ Counterintuitively, the majority's move may have, in some ways, undercut privacy protections for the home and its curtilage.

Part III dissects the Court's recent treatment of implied-consent statutes in *Mitchell*. *Mitchell*'s question presented concerned whether Wisconsin's implied-consent statute "authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement."⁴⁸ Yet the Court avoided answering *that* question, instead analyzing the contested search under its "exigency" doctrine.⁴⁹ By declining to resolve the legitimacy of Wisconsin's statute, the Court left undisturbed analogous statutes across the nation. But when the Court ultimately *does* confront their legitimacy, this Article argues that the Court should invalidate those laws under the Fourth Amendment. Consent—a historical fact unique to a particular exchange—cannot be imputed to a generic class of conduct irrespective of each case's totality of the circumstances. Such an across-the-board limitation of constitutional rights is both legally and philosophically suspect.

44. *Schneekloth v. Bustamonte*, 412 U.S. 218, 224 (1973).

45. See *infra* Part II.

46. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-79 (1989).

47. Skyler K. Sikes, *Get Off My Porch: United States v. Carloss and the Escalating Dangers of "Knock and Talks,"* 70 OKLA. L. REV. 493, 506, 510 (2018) (noting that lower courts have struggled to discern whether and when the "implied license" may be revoked, and that the Tenth Circuit has even construed the "implied license" as a "de facto permanent easement" for law enforcement).

48. *Mitchell*, 139 S. Ct. at 2532.

49. *Id.* at 2537; *id.* at 2551 (Gorsuch, J., dissenting).

I. CONSENT: WHAT IT IS AND HOW TO FIND IT

Though almost everyone has a sufficiently “adequate mastery” of consent for “day-to-day use,”⁵⁰ memorializing some basic consent principles will help to frame this Article’s later analysis. Thus, Part I provides a baseline understanding of consent, which Parts II and III will later apply to specific cases. Consent, really, concerns two distinct but related concepts: “factual consent” and “prescriptive validity.”⁵¹ Each must exist simultaneously for legally valid consent to occur. Factual consent comprises three necessary, “real world” phenomena: subjective willingness, competence, and contemporaneity. And prescriptive validity, by contrast, comprises additional legal requirements that we sometimes impose before treating factual consent as legally effective.

Functioning properly, the Fourth Amendment consent exception should require both factual consent and prescriptive validity. In other words, someone who factually consents to a search and was legally entitled to give that permission obviates the need for other justifications for the search, like probable cause. But “implied consent,” as Part I reveals, is markedly different from these background concepts. It has little to do with our typical inquiries into factual consent, prescriptive validity, or the particular circumstances of any given case. Thus, it stands in deep tension with our ordinary understanding of consent and the Fourth Amendment’s consent exception.

A. *Factual Consent*

Factual consent is the phenomenon many people conjure when they think of “consent,” even if they do not do so in the reticulated manner set forth below. “Factual consent” concerns a confluence of mental attitudes (“subjective willingness”), mental capacity (“competence”), and time (“contemporaneity”). In other words, factual consent means that, at a minimum, the relevant agent mentally (or “subjectively”) assented to the event in question.⁵² That assent implies some level of both freedom and knowledge. A decision the agent would not have made but for some violent threat, for instance, is not really the product of her will.⁵³

50. PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* 3 (2004).

51. *Id.* at 139 (explaining that the factual circumstances alleged to constitute consent must amount to what “the jurisdiction deems sufficient” to qualify as legally valid consent).

52. See Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 403 (2016) (arguing that consent is a mental act); Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 165-66 (1996) (arguing that consent is “a subjective mental state”).

53. Kimberly Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L. J. 951, 968 (2018) (“Consent procured by gunpoint is ineffective.”); see also Heidi M. Hurd, *Was the Frog Prince Sexually Molested?: A Review of Peter Westen’s The Logic of Consent*, 103 MICH. L. REV. 1329, 1332 (2005) (“[C]oerced consent is no consent at all.”).

And a decision made without knowledge of some critical predicate fact may not have been willing either but rendered involuntary by mistake or fraud.⁵⁴

So mental willingness is a *necessary* condition of factual consent, but not an independently sufficient one. We also require the agent to have some baseline mental competency to conclude that she factually consented.⁵⁵ Conversely, someone who is unconscious, heavily intoxicated, or severely intellectually disabled may not possess the requisite capacity to make the sort of free choice involved in factual consent.⁵⁶ And even when the agent is competent and subjectively willing to permit an intrusion, we do not think of that permission as lasting forever. Rather, permission usually has a temporal scope, and it eventually goes stale at some point after it was issued.⁵⁷ In other words, the grant of permission must be sufficiently contemporaneous with the relevant act to find that some antecedent factual consent licensed that act.

If one accepts the basic premise that consent may go stale over time, it follows that courts must determine in all cases whether prospectively given consent remains valid in future applications. In some situations, consent and the relevant intrusion are undoubtedly sufficiently contemporaneous that the consent remains valid. But the further that consent drifts into the past, the more skeptical courts must become that its prospective application is warranted. This point extends even more forcefully with intrusions that implicate bodily autonomy, where "[i]t would seem that consent to any kind of bodily invasion has to be contemporaneous."⁵⁸

And where consent to some intrusion was given prospectively, it must also be revocable. Were it irrevocable, no guarantee would exist that a prior expression of consent *continued* to reflect consent, as the consentor would be incapable of retracting that prior expression. Indeed, *irrevocable* prospective consent has fallen into disrepute in "[b]oth morality and law."⁵⁹ Perhaps "[t]he most notorious historical example of irrevocable prospective consent" was the marital rape exemption, which held that wives consented to sex with their husbands

54. WESTEN, *supra* note 50, at 180.

55. *Id.* at 34.

56. *Id.*

57. See, e.g., Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 HARV. L. REV. 1220, 1285 (2019). Professor Prakash's article is a recent treatment of consent's limited temporal scope, albeit in the context of federal lawmaking authority.

58. LEO KATZ, WHY THE LAW IS SO PERVERSE 49 (2011). Conversely, the areas in which the law recognizes prospective consent's validity over long periods of time, such as "irrevocable prospective consent to the seizure of . . . property in a security agreement," do not implicate the supreme autonomy concerns of a bodily invasion. Jonathan Witmer-Rich, *It's Good to be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in the Criminal Law*, 5 CRIM. L. & PHILOS. 377, 384 (2011). Even in the context of contracts, courts remain unwilling to order remedies for breach that would significantly compromise bodily autonomy, as evidenced by "[t]he ban on specific performance of personal service contracts." KATZ, *supra* note 58, at 49.

59. Witmer-Rich, *supra* note 58, at 384.

at all times by dint of marriage. Yet that exemption has been “squarely rejected” by modern Anglo-American jurisdictions.⁶⁰ That is so, aside from the doctrine’s brutality, because of its incoherence. Irrevocable prospective consent is a legal fiction that sweeps aside concern for the continuing existence of factual consent.

B. Prescriptive Validity

We now turn to prescriptive validity. Though factual consent is *necessary* for valid consent, it is not independently sufficient. Rather, and for good reason, the law sometimes mandates the existence of *other* conditions before factual consent becomes legally (“prescriptively”) valid.⁶¹ A simple example is an age-of-consent statute.⁶² A jurisdiction may provide that someone cannot consent to sex until they are eighteen years old and that, concomitantly, a defendant may not assert consent as a defense to rape charges if the victim is a minor. Such a statute no doubt protects those minors too young to factually consent to sex. But it also sweeps in some minors who *are* capable of factual consent (for instance, someone who has sex the day before her eighteenth birthday), and who thus, somewhat arbitrarily, cannot render prescriptively valid consent. In those latter cases, the law imposes an additional qualifier—age—before it permits factual consent to become legally operative.

Translating these philosophical concepts into the language of the Fourth Amendment is relatively simple. As mentioned above and discussed below, *Schneckloth* appears to require analysis of subjective factors (essentially, the defendant’s mental state) in determining whether she genuinely consented to a search or seizure.⁶³ And several cases supply competence and contemporaneity requirements as well. The Supreme Court’s most recent analysis of the latter issue held that consent persists for a “reasonable” duration under the Fourth Amendment, after which it becomes stale.⁶⁴ Similarly, lower courts require individuals to possess a reasonable level of mental capacity before they will find those individuals capable of valid consent.⁶⁵

60. *Id.*

61. WESTEN, *supra* note 50, at 139.

62. Kenneth W. Simons, Review, *The Conceptual Structure of Consent and Criminal Law*, 9 BUFF. CRIM. L. REV. 577, 581 (2006) (“The concept of *prescriptive* consent identifies those instances of factual consent . . . that do constitute legally binding consent. For example, a fourteen-year-old girl who eagerly engages in sex with an adult gives both attitudinal consent and ‘expressive’ consent, but she doesn’t prescriptively consent, because states require additional conditions before factual consent is deemed legally valid, including the condition of being of sufficient age and maturity to be competent.”).

63. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 233 (1973).

64. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (explaining that the scope of Fourth Amendment consent is determined in accordance with what a “reasonable person [would] have understood by the exchange between the officer and the suspect”).

65. *United States v. Sims*, 428 F.3d 945, 953 (10th Cir. 2005); *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968) (noting that mere “acquiescence to a claim of lawful authority” is insufficient for actual consent).

As to prescriptive validity, an obvious Fourth Amendment analogue to age-of-consent is the notion of "authority." Under current precedent, an individual may validly consent to the search of some place only if she has the actual authority to permit officers' entry, or, barring actual authority, if it was reasonable under the circumstances to conclude that she had apparent authority to do so.⁶⁶ To understand how the "authority" concept maps onto consent, imagine a mentally competent individual who was contemporaneously and subjectively willing to permit a search of his neighbor's home. Though his consent might be *factual*—he was willing to permit the intrusion—it would not be prescriptively valid. He had no actual or apparent authority over that space, and thus his factual consent was not legally operative.⁶⁷

C. *The Totality-of-the-Circumstances Test*

If factual consent and prescriptive validity concern what consent *is*, the Supreme Court has long set forth the totality-of-the-circumstances test as the way to *find* both phenomena.⁶⁸ In other words, the test directs a reviewing court to survey all the relevant circumstances of a particular case and to determine whether, in their totality, the consent was valid. Ideally, courts would consider both subjective factors (a suspect's intelligence or education) and objective factors (law enforcement behavior) under "willingness"; the suspect's apparent mental capacity under "competence"; and the time that had transpired since the original consent under "contemporaneity." And as to prescriptive validity, courts might determine whether, based on those circumstances, the consenting agent had actual or apparent authority over the relevant space or thing.

Though our "philosophical" definition of consent and courts' understanding of consent in the Fourth Amendment context are thus quite similar, there may be some daylight between those concepts in practice. Specifically, some philosophers would not only start the consent inquiry by examining subjective mental attitudes, but they would end it there too.⁶⁹ By contrast, that approach is unworkable for courts. Virtually any time police discover contraband via consent, the suspect has a strong incentive to claim in a later suppression motion that officers unlawfully procured his expression of consent through coercion. But since those claims are obviously self-interested, courts then must default to "objective" factors to determine whether officers actually

66. See, e.g., *United States v. Cos*, 498 F.3d 1115, 1117 (10th Cir. 2007) (nineteen-year-old friend of renter had no actual or apparent authority to consent to a search of the apartment); *id.* at 1123-32 (discussing the actual or apparent authority doctrine for third-party consents).

67. *Id.*

68. See *Schneckloth*, 412 U.S. at 226-27; *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *United States v. Drayton*, 536 U.S. 194, 207 (2002).

69. See, e.g., Ferzan, *supra* note 52, at 405-06 (arguing that consent is a mental act); Alexander, *supra* note 52, at 165-66 (arguing that consent is "a subjective mental state").

exerted the claimed coercion.⁷⁰ And, therefore, they end up focusing on officers' tone of voice, deployment of weapons, proximity to the defendant, and so on, rather than on a purely subjective assessment of mental states.⁷¹ Those "objective" factors are presumably at least probative of that mental state—the lack of coercion makes it more likely that the defendant's consent was real—but clearly the objective factors are now courts' main focus.⁷²

Note, though, that those are differences of degree rather than of kind. The "philosophical" view of consent may overweight subjective factors, and the "practical" view may underweight them. But *both* views rely on a similar, totality-of-the-circumstances-type assessment. In other words, both philosophers and courts have long understood consent as a historical fact particular to a disputed transaction. And both view it as one that should be discerned through a review of the predicate facts surrounding the alleged consent.

D. "Implied" Consent

We now arrive at the notion of "implied consent." Implied consent in the context of phenomena like implied-consent statutes is an unfortunate misnomer. Properly understood, "implied consent" really refers to factual consent that the relevant agent conveys *indirectly*,⁷³ rather than expressly. So implication, in other words, refers to something the agent *actually* did or said—just in an indirect manner—to show her factual consent. For example, think of the Ohio woman who managed to summon police during a domestic violence situation by calling 911 and repeatedly asking for a "large pizza."⁷⁴ Though none of her *express* remarks on the phone revealed that a domestic-violence incident was unfolding, the dispatcher intuited, through the caller's tone of voice, her precise reason for calling—a reason implied through means other than direct verbal statements.⁷⁵ Implied consent, similarly, is real, factual consent, albeit consent conveyed by indirect expressions or behavior.

Statutorily "implied consent," by contrast, is fictional "consent" *imposed* upon individuals by a legal dictate. It is not contingent upon certain observed behaviors from which factual consent may be deduced

70. Simmons, *supra* note 20, at 779-85.

71. *Id.*; see also *United States v. Drayton*, 536 U.S. 194, 200 (2002) ("[T]he officers were dressed in plain clothes, did not brandish their badges in an authoritative manner, did not make a general announcement to the entire bus, and did not address anyone in a menacing tone of voice.").

72. LAFAVE, *supra* note 15, at 17; see also Simmons, *supra* note 20, at 779.

73. See *ImPLY*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (2d ed. 1970).

74. Elisha Fieldstadt, *Ohio Woman Who Called 911 For Pizza Was Really Reporting Domestic Violence Against Her Mom*, NBC NEWS (Nov. 22, 2019, 2:37 PM), <https://www.nbcnews.com/news/us-news/ohio-woman-who-called-911-pizza-was-really-reporting-domestic-n1089636> [<https://perma.cc/E98L-YFLS>].

75. *Id.*

but is instead contingent upon legal directives that exist irrespective of individuals' real-world behavior. So "implied consent" is not really "implied" in the sense that we just discussed. Nor, of course, is it really "consent." To the contrary, it is imposed *ex ante* by operation of law, rather than deduced *ex post* from the totality of a particular case's historical circumstances. Thus, it "merely treat[s] the agent *as if* she consented," irrespective of any inquiry into the historical reality of that conclusion.⁷⁶ And, therefore, it stands in deep tension with our aforementioned account of what consent is (a historical fact) and how to find it (by examining the totality of the circumstances).

With that dichotomy established, this Article now turns to two recent instances in which the Supreme Court strayed from that typical account of consent. In the first—*Jardines*—the Court endorsed a version of implied consent to justify police knock-and-talks.⁷⁷ And in the second—*Mitchell*—the Court declined to invalidate Wisconsin's implied-consent statute.⁷⁸ Each case, Parts II and III argue, represents an unfortunate divergence from the background consent principles detailed above.

II. THE ADVENT OF THE "IMPLIED LICENSE"

In 2006, Miami-Dade police "received an unverified tip that marijuana was being grown in the home" of Joelis Jardines.⁷⁹ Acting on that information, officers traveled to Jardines's home and surveilled it for about fifteen minutes.⁸⁰ Seeing no activity, they approached the home with a drug dog.⁸¹ When the dog arrived on the porch, it "apparently sensed" the odor of a narcotic, sniffing and pacing back and forth to determine its "strongest point source."⁸² The dog sat at Jardines's front door, suggesting his threshold was that source.⁸³ Based on the sniff, officers secured a warrant to search the home, leading to the discovery of marijuana.⁸⁴ Jardines successfully moved the lower courts to suppress the evidence as the fruit of a warrantless search.⁸⁵ The Supreme Court then granted Florida's petition for certiorari on the question whether the initial sniff should have required a warrant.⁸⁶

In his majority opinion holding for *Jardines*, Justice Scalia announced (or, in his view, revived) a test for Fourth Amendment searches distinct from the reasonable-expectation-of-privacy inquiry

76. Valentine, *supra* note 28, at 499-502.

77. See *infra* Part II.

78. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2551 (2019) (Gorsuch, J., dissenting).

79. *Florida v. Jardines*, 569 U.S. 1, 3 (2013).

80. *Id.*

81. *Id.* at 3-4.

82. *Id.* at 4.

83. *Id.*

84. *Id.*

85. *Id.* at 4-5.

86. *Id.* at 5.

long dominant under *Katz*.⁸⁷ Arguing that *Katz* had “add[ed]” to historical Fourth Amendment protections rather than having supplanted them, Justice Scalia concluded that police conduct a Fourth Amendment search when engaging in an unlicensed “physical intrusion of a constitutionally protected area” for the purpose of “gathering information.”⁸⁸ Justice Scalia argued that this “traditional,” property-based conception of Fourth Amendment protections “render[ed]” the case “a straightforward” victory for Jardines.⁸⁹

Justice Scalia was correct insofar as the police committed (1) a physical intrusion (2) of a constitutionally protected area (3) to gather information. The police entered Jardines’s property, and the Court’s precedents have long recognized that “the area ‘immediately surrounding and associated with the home’—the so-called “curtilage”—receives heightened Fourth Amendment scrutiny as an extension of the home itself.”⁹⁰ And the drug dog served no purpose other than learning whether narcotic odors were emanating into that space.⁹¹

The real fight between Justice Scalia and the dissenters, consequently, did not concern *those* elements of the trespass test, but whether the police intrusion was “unlicensed.”⁹² Justice Scalia contended that the police activity on Jardines’s property was unlicensed because it violated the “background social norms” of property ownership.⁹³ Under his theory of customary trespass, “visitor[s may] approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.”⁹⁴ Yet the introduction of the drug dog had been “something else”—a rupture of customary norms that exceeded the usual “implied license” for visitors to briefly approach a home.⁹⁵ This violation of the implied license was said to be a trespass, completing Justice Scalia’s syllogism in support of his argument that the police violated Jardines’s Fourth Amendment rights.⁹⁶

Justice Alito’s dissent, garnering four votes, criticized the majority’s characterization of the “implied license” as “a putative rule of trespass law . . . nowhere to be found in the annals of Anglo-American jurisprudence.”⁹⁷ Specifically, Justice Alito argued that no authority supported the proposition that a visitor bringing a dog on her sojourn at a home’s threshold constituted a trespass.⁹⁸ Despite dogs’ ancient

87. See *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

88. *Jardines*, 569 U.S. at 5.

89. *Id.* at 5, 11.

90. *Id.* at 6 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

91. *Id.* 9-10.

92. *Id.* at 7.

93. *Id.* at 9.

94. *Id.* at 8.

95. *Id.* at 9-10.

96. *Id.* at 11-12.

97. *Id.* at 16 (Alito, J., dissenting).

98. *Id.* at 16-17.

domestication, ubiquity in Britain and the early United States, and longstanding use by law enforcement, the majority was "unable to find a single case" holding their presence a trespass.⁹⁹ "[T]he Court's interpretation of the scope of [the] license," according to Justice Alito, was thus "unfounded."¹⁰⁰

Though Justice Alito seemingly glossed over the fact that *drug dogs* did not exist at common law, he was at least correct to question from where Justice Scalia derived his "implied license." Justice Scalia purported to ground that rule in "traditional" understandings of property law and the Court's own precedents.¹⁰¹ But closer scrutiny of those sources reveals only dubious support for a general "implied license"—a form of implied consent¹⁰²—to law enforcement activity on private property. Though history and precedent supported a rule more protective of privacy interests, Justice Scalia used the "implied license" as the key move to *downgrade* those historical protections. His constructively imposed license to knock-and-talks defeated their qualification as Fourth Amendment searches, thereby sanctioning an increasingly problematic law enforcement tactic.¹⁰³

A. History Refutes the "Implied License"

The implicit but crucial assumption throughout *Jardines*'s majority opinion is that longstanding historical practice somehow obviated the need for individualized consent analysis in knock-and-talk cases. In framing his conception of that historical "implied license," Justice Scalia drew from three sources of authority. First was the English common-law property rights tradition, as embodied in the case *Entick v. Carrington*.¹⁰⁴ Second and third were two of the Supreme Court's earlier decisions,¹⁰⁵ *McKee v. Gratz*¹⁰⁶ and *Breard v. Alexandria*.¹⁰⁷ Yet ironically, none of those sources supported his implied license theory. Indeed, they actually contradict it.

99. *Id.*

100. *Id.* at 18.

101. *Id.* at 11.

102. Indeed, *Jardines* is now being cited for the proposition that "sometimes consent to a search need not be express but may be fairly inferred from context." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) (citing *Florida v. Jardines*, 569 U.S. at 1, 7-10 (2013)).

103. Like their cousin consent searches, knock-and-talks are attractive to law enforcement because they require no individualized suspicion. See Craig M. Bradley, "Knock and Talk" and the Fourth Amendment, 84 IND. L.J. 1099, 1099 (2009) ("[T]here is a large swath of police activity that intrudes into dwellings that has been widely allowed by the courts and that often renders the search and arrest warrant requirements nugatory. This is the 'knock and talk' technique[, which] . . . has severely limited the Fourth Amendment protection afforded to homes").

104. 19 Howell's St Trials 1029 (CP 1765).

105. *Jardines*, 569 U.S. at 8.

106. 260 U.S. 127 (1922).

107. 341 U.S. 622 (1951).

The first significant case that Justice Scalia cited, in a nominal nod to privacy interests, was *Entick v. Carrington*,¹⁰⁸ a 1765 case decided in England's Court of Common Pleas.¹⁰⁹ *Entick* involved a trespass suit brought by the writer John Entick against four of the King's agents.¹¹⁰ The agents, "without [Entick's] consent and against his will," and "with force and arms," broke into his home and ransacked his drawers in search of "seditious" writings.¹¹¹ During their search, the agents "wrongfully discovered," "read over," and seized several hundred unrelated documents.¹¹² In so doing, they inflicted an alleged £2,000 in damages to Entick's home and possessions.¹¹³ The agents claimed that they were acting under a search warrant issued by the Secretary of State, Lord Halifax.¹¹⁴ Thus, they argued that they were immune from suit under the relevant statute that immunized state agents executing warrants from trespass actions.¹¹⁵ In a surprising turn, however, the court found their warrant improperly drafted and their search illegal.¹¹⁶

The Framers knew *Entick* not only for its rule-of-law holding but also for its ode to property rights and privacy against state intrusions.¹¹⁷ Protection of property was, according to the court, "[t]he great end, for which men entered into society," property being a "sacred and incommunicable [right] in all instances."¹¹⁸ To this end, it re-affirmed the English tradition of strict-liability trespass. "[E]very invasion of private property" without the owner's consent, even if the invasion caused no damage, still offended the owner's rights.¹¹⁹ The court noted, further, that "positive law" had circumscribed this "sacred" right in only a few circumstances: "[d]istresses" (foreclosures), "executions" (of court judgments), forfeitures, and taxation.¹²⁰ The agents' failure to

108. *Jardines*, 569 U.S. at 7.

109. *Entick*, 19 Howell's St Trials at 1029.

110. *Id.* at 1030.

111. *Id.* at 1030-31.

112. *Id.* at 1030.

113. *Id.*

114. *Id.* at 1031.

115. *Id.* at 1040.

116. *Id.* at 1063-64.

117. *See, e.g., Boyd v. United States*, 116 U.S. 616, 626 (1886) ("As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution."); *see also* Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 65, 69 (1996) (calling *Entick* one of the two "most famous colonial-era cases in all America" and noting that it involved an egregious intrusion "against persons, houses, and papers").

118. *Entick*, 19 Howell's St Trials at 1066.

119. *Id.* (emphasis added).

120. *Id.*

show that any of those doctrines abrogated *Entick's* property rights mandated denial of their immunity. Despite acting under color of law, the agents could not escape their violation of *Entick's* rights.

Though acknowledging that *Entick* was celebrated among the Framers,¹²¹ *Jardines* suggested that the principles for which it stood were due a modification. Because the officers in *Jardines*—unlike even the King's lawless agents in *Entick*—possessed no warrant when executing the sniff, it was apparently clear to Justice Scalia that the historical tradition he invoked could not support an "implied license" to police activity on private property. Indeed, after discussing *Entick*, he noted that "a license may be implied from the habits of the country, notwithstanding the strict rule of the English common law as to entry upon a close."¹²² Thus, he subtly acknowledged that his new rule would depart from the common-law conception of property rights, rather than affirm it. In the opinion's key move, Justice Scalia introduced the "implicit" or "implied license" as the central mechanism to weaken the trespass protections the historical tradition suggested.¹²³

The first case he offered in support of that mechanism was *McKee*, from which he took the language about implication of a license from "the habits of the country."¹²⁴ *McKee*, a 1922 decision written by Justice Holmes, concerned whether a private-property owner in Missouri could maintain a trespass action against a mussel forager.¹²⁵ Justice Holmes argued that the English common-law tradition would have supported a trespass action.¹²⁶ But, he said, that rule had to be modified in the American context, given the nation's "large expanses of unenclosed and uncultivated land."¹²⁷ Unlike in England, Americans found it "customary to wander, shoot[,] and fish at will until the owners[aw] fit to prohibit it."¹²⁸ Holmes argued that this "general understanding and practice" in Missouri—that mussels could be freely collected—militated against the foragers' liability for trespass.¹²⁹ A "license," in Justice Holmes's words, could be "implied from the habits of the country."¹³⁰ So because the property owner had not explicitly denied permission, foragers' customary rights trumped the right to exclude.

121. *Florida v. Jardines*, 569 U.S. 1, 7 (2013).

122. *Id.* at 8 (emphasis added) (internal quotation marks omitted) (citing *McKee v. Gratz*, 260 U.S. 127, 136 (1922)).

123. *Id.* at 8, 10.

124. *Id.* (citing *McKee v. Gratz*, 260 U.S. 127, 136 (1922)).

125. *McKee v. Gratz*, 260 U.S. 127, 134-35 (1922).

126. *Id.* at 136 (noting that "[t]he strict rule of the English common law as to entry upon a close" would have supported concluding "that those who took the mussels were trespassers").

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

On the surface, *McKee* might seem a natural precursor to *Jardines*. But there are two reasons to doubt that this is so. First, *McKee* understood the scope of a customary usage license to extend only to those engaged in the relevant use—in that specific case, to mussel foragers.¹³¹ Mussel foragers' license to temporarily break the close and gather mussels would not, in turn, provide a license to swimmers or barges to access the private waterway. So the foragers were not engaged in something “any private citizen might do,”¹³² but in a narrow, focused activity. The defined and limited nature of their license did not, then, grant a license to *all* potential trespassers.¹³³ To recast that principle in *Jardines*'s terms, Holmes's opinion in *McKee* would suggest that even if Girl Scouts' long-running custom of seasonal solicitation provides *them* a license to break the close, there is no reason to think the scope of that license *also* includes police investigative activities.

The second reason to doubt *McKee*'s support for *Jardines* is that Justice Holmes assumed that even if a license had developed, it was revocable. As he wrote, the “customary [license] to wander” would terminate when “the owner sees fit to prohibit it.”¹³⁴ The revocability of this license departs from *Jardines*'s knock-and-talk rule, which establishes that the police have a broad right to encroach private property, likely even if the owner has displayed “no trespassing” signs.¹³⁵ The “license” of *McKee*, then—circumscribed and revocable—does not look much like the “license” of *Jardines*.

Last, in perhaps his most dubious citation, Justice Scalia invoked the Court's 1951 decision in *Breard v. Alexandria* for the proposition that the Court had “recognized . . . the knocker on the front door . . . as an invitation or license” to “solicitors, hawkers and peddlers of all kinds.”¹³⁶ *Breard* concerned a constitutional challenge brought by

131. This understanding would track the background property principle that licenses only grant defined licensees privileges “for a narrow purpose.” JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW §32.13 (4th ed. 2012).

132. *Florida v. Jardines*, 569 U.S. 1, 2 (2013) (citing *Kentucky v. King*, 563 U.S. 452, 469 (2011)).

133. In *Jardines*, Justice Scalia actually noted that “[t]he scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.” *Id.* at 9. He relied on this principle to argue that while police officers, like Girl Scouts, may engage in knock-and-talks, they may not do so insofar as they bring drug dogs. *Id.* at 8-9. But the question remains why a presumptive license to break the close for the “specific purpose” of commercial solicitation should also extend to penetrations of the close for other purposes divorced from commercial activity.

134. *McKee*, 260 U.S. at 136.

135. See *United States v. Carlross*, 818 F.3d 988, 990 (10th Cir. 2016) (holding that a “[n]o [t]respassing” sign did not revoke the implied license to perform a knock-and-talk); *United States v. Jones*, No. 4:13cr0001113CR00011-003, 2013 WL 4678229, at *5 (W.D. Va. Aug. 30, 2013) (same); *City of Beatrice v. Meints*, 856 N.W.2d 410, 421 (Neb. 2014) (same). *But see Carlross*, 818 F.3d at 1005 (Gorsuch, J., dissenting) (rejecting the government's argument that a knock-and-talk license is irrevocable).

136. *Jardines*, 569 U.S. at 8 (internal quotation marks omitted) (citing *Breard v. Alexandria*, 341 U.S. 622, 626 (1951)).

traveling salesman Jack Breard to his arrest under a Louisiana ordinance that barred solicitation without homeowners' prior consent.¹³⁷ The ordinance, which treated solicitation as a misdemeanor nuisance, made it punishable by a fine or thirty days in jail.¹³⁸ Breard argued that the ordinance violated his putative due process "right to work," the dormant commerce clause, and the First Amendment.¹³⁹

The Court's 7-2 opinion upholding the ordinance easily swept aside those constitutional challenges and employed strong anti-solicitation rhetoric that underscored homeowners' privacy interests.¹⁴⁰ The Court noted as an initial matter that *tort law*, rather than the Court's own precedents, had "[treated] the knocker on the front door . . . as an invitation or license" for "solicitors, hawkers and peddlers" "to attempt an entry."¹⁴¹ Yet it labeled such solicitors "a recurring nuisance."¹⁴² Indeed, "[u]nwanted knocks on the door by day or night [were] a nuisance, or worse, to peace and quiet."¹⁴³ The Court also suggested that salesmen were "not really sporting to corner" homeowners and, through their "open door[,] put pressure on the prospect to purchase."¹⁴⁴ So it was only understandable that "responsible municipal officers ha[d] sought a way to curb the[se] annoyances" and preserve "the tranquility of the fireside."¹⁴⁵

The Court also noted that such anti-solicitation statutes were becoming increasingly common and, in several states, had survived legal challenges.¹⁴⁶ As early as 1931, Green River, Wyoming had adopted an anti-solicitation statute that survived review in the Wyoming Supreme Court and the Tenth Circuit.¹⁴⁷ Bolstered by this result, sixteen states in the intervening twenty years had adopted so-called "Green River ordinances" to curb annoyance from solicitation.¹⁴⁸ Far from the treasured institution of the Girl Scouts, then, the hawkers and solicitors of this era were apparently so annoying that courts nationwide had sanctioned their imprisonment.¹⁴⁹ And though eleven state courts had invalidated such laws on *Lochner*-inspired due process challenges,¹⁵⁰ *Breard* rejected that argument. The Court refused to "make a state or a city impotent to guard its citizens against the annoyances" of

137. *Breard*, 341 U.S. at 624-25.

138. *Id.* at 624-25.

139. *Id.* at 626, 633, 641.

140. *Id.* at 622-27, 632, 637-38.

141. *Id.* at 626, 626 n.1 (citing Restatement, Torts, § 167; Cooley on Torts (4th ed.) § 248.

142. *Id.* at 626.

143. *Id.* at 626-27.

144. *Id.* at 627.

145. *Id.*

146. *Id.* at 627-28; 628-29 n.6.

147. *Id.* at 627-28.

148. *Id.* at 628 n.6.

149. *Id.* at 625 (noting that Breard himself was sentenced to jailtime); *id.* at 628-29 n.6 (noting other states that had enacted similar ordinances).

150. *Id.*

solicitation just because economic interests were involved.¹⁵¹ Through strong rhetoric, it declined to constitutionally endorse this supposed “implied license” to solicit.

So despite the praise Justice Scalia received for his “originalist reasoning,”¹⁵² his “implied license” regime bears little relationship to the history marshaled in *Jardines*. Rather, the opinion bears several signs of “law office history”—use of the past as grist for advocacy rather than for dispassionate analysis.¹⁵³ And after the opinion’s release, these ironies in its craftsmanship were soon matched by ironies in its reception as a victory for privacy rights.¹⁵⁴ But one can only arrive at that conclusion by focusing on a tree—Joelis Jardines’s victory in the case itself—and missing the surrounding forest—*Jardines*’s novel defense of police knock-and-talks.

Put differently, *Jardines* sacrificed the core interests at stake to allow challenges of merely peripheral intrusions. Drug dogs, which exceed the scope of the “implied license,” are now constitutionally suspect. But *other* warrantless and suspicionless police activities *within* the “implied license” received an apparent blessing. Indeed, *Jardines* did not mince words about that implication of its holding: “[T]hus, a police officer not armed with a warrant may approach a home and knock, precisely because that is ‘no more than any private citizen might do’ under the ‘implied license.’”¹⁵⁵ Despite its originalist gloss, then, *Jardines*’s jaunt through the historical sources did not produce a historically grounded defense of privacy, but a historically untethered mechanism for reducing those protections.

Nor did the Court question if it is in fact true that citizens so universally consent to knock-and-talks that a license for their occurrence may be implied.¹⁵⁶ The relevant history, as mentioned, undercuts that conclusion.¹⁵⁷ Yet *Jardines* constructively imposed “consent” to those

151. *Id.* at 632.

152. Sophie J. Hart & Dennis M. Martin, Essay, *Judge Gorsuch and the Fourth Amendment*, 69 STAN. L. REV. ONLINE 132, 133 (2017).

153. See David T. Hardy, *Lawyers, Historians, and “Law-Office History,”* 46 CUMB. L. REV. 1, 1 (2016).

154. See, e.g., Jonathan Blanks, *Justice Scalia: Underappreciated Fourth Amendment Defender*, CATO INST.: BLOG (Feb. 15, 2016, 10:24 AM), <https://www.cato.org/blog/justice-scalia-underappreciated-fourth-amendment-defender> [<https://perma.cc/XKW7-BQTV>] (citing *Jardines* as a signature defense of the Fourth Amendment); Maura Levine, *Your Porch is Yours*, THE MICH. DAILY (Oct. 10, 2013), <https://www.michigandaily.com/opinion/10maura-levine-your-porch-yours10> [<https://perma.cc/6DV9-FYWU>] (same).

155. *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)).

156. Drake, *supra* note 38, at 40 (noting that the Justices simply postulated this empirical proposition “from the comfort of [their] armchair[s]”).

157. See *Johnson v. United States*, 333 U.S. 10, 13 (1948); Bradley, *supra* note 103, at 1099-1100 (arguing that courts should return to the *Johnson* rule to ameliorate abuses of police knock-and-talks).

intrusions through implication. And it strengthened the normative appeal of its rule by "borrow[ing] . . . legitimacy from" the language of "actual consent."¹⁵⁸

*B. The Incompatibility of "Rule-Like" Consent
Jurisprudence and Actual Consent*

Though commentators described *Jardines's* property-based rule as a rupture from normal Fourth Amendment analysis,¹⁵⁹ the opinion codified themes that Justice Scalia had long promoted. Justice Scalia's preference for rules over standards was no secret.¹⁶⁰ Indeed, he viewed rules—even bad rules—as serving important competing values like consistency, predictability, and uniformity.¹⁶¹ And if a rule facilitated those goals in most cases, it could be preferable to a malleable standard, even if the rule produced bad results in certain instances.¹⁶²

In Justice Scalia's view, the totality-of-the-circumstances approach in the Fourth Amendment context was a prime example of the mischief a standard could entail. He thought it had led the Court to adjudicate scores of fact-bound cases with no unifying principle other than ever-expanding judicial discretion.¹⁶³ In a 1989 essay, Justice Scalia cited as more appropriately rule-like *United States v. Dunn*,¹⁶⁴ in which the Court had issued the clean, clear holding that since barns were not part of the curtilage at common law, they received no heightened Fourth Amendment scrutiny.¹⁶⁵ Those themes presaged his search years later for a historically grounded, rule-like disposition to *Jardines*—one that would "keep[] easy cases easy."¹⁶⁶

But importing a rule into the consent context was a subtle mistake. Courts' interest in questions of fact—such as the reality of consent—is not in uniformity, but in accuracy. A rule of decision that consistently produces factually inaccurate results is indefensible. Unlike legal interpretations of an indeterminate text—which may have no ultimately "correct" answers but instead present a range of permissible ones¹⁶⁷—questions of fact are empirical claims about historical reality.¹⁶⁸ And

158. Valentine, *supra* note 28, at 499.

159. See, e.g., Hart & Martin, *supra* note 152, at 132-33.

160. See generally Scalia, *supra* note 46.

161. *Id.* at 1179-80.

162. *Id.* at 1178-79.

163. See *id.* at 1187.

164. 480 U.S. 294 (1987).

165. *Id.* at 296; Scalia, *supra* note 46, at 1184 (citing *United States v. Dunn*, 480 U.S. 294 (1987)).

166. *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

167. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 5-8 (2001) (applying a *Chevron* model to stare decisis and arguing that judicial decisions should be disturbed only if they stray "beyond the range of indeterminacy.").

168. Postmodern readers who would deny an actual, historical reality would have an ally in none other than Justice Scalia, who, despite his formalist leanings, entertained a "surprisingly post-modern" epistemology. See Lee Kovarsky, *Justice Scalia's Innocence*

consent is just such a situation—a question of fact.¹⁶⁹ For that reason, rule-like consent jurisprudence guarantees that mistakes of fact will occur with some frequency. A rule mandating that “if Y condition exists, X consents,” wrongly erases the set of cases in which Y condition exists (for instance, X owns a home) and yet X homeowner does not actually consent, for instance, to a knock-and-talk. Though a totality-of-the-circumstances test, in the run of cases, may produce some incorrect conclusions about consent, it does not do so *inherently*. Some other defect, like deceitful testimony or judicial misperception, derails the fact-finding process. By contrast, a rule governing a question of fact—mechanically producing results irrespective of factual nuance in the real world—suggests acceptance *ex ante* that the rule will produce inaccurate conclusions, given its under- or over-inclusiveness.

The choice of a rule to govern consent, then, is morally freighted. A rule entails the mandatory under-weighting of the times when persons do not consent to state action, such as knock-and-talks, yet have “consent” imposed upon them by operation of law. Such imposed consent not only drives a wedge between law and reality but also represents a deliberate choice to discount autonomy interests. Given that the intrusions sometimes involved in these cases may implicate the “most personal and deep-rooted expectations of privacy,”¹⁷⁰ it is unsurprising that these regimes attempt to coopt the rhetorical and moral legitimacy of actual consent.

III. CAN A STATUTE “IMPLY” CONSENT TO A BODILY INTRUSION?

A final comment on *Jardines* concerns a puzzle in the Court’s traditional hierarchy of the interests the Fourth Amendment protects—“persons, houses, papers, and effects.”¹⁷¹ Though the Amendment does not rank those interests, as a matter of doctrine and historical contingency, the Court often calls the home “first among equals.”¹⁷² Persons

Tetralogy, 101 MINN. L. REV. HEADNOTES 94, 100 (2016). In his criticism of freestanding actual innocence habeas petitions, Justice Scalia argued that there was no ultimately knowable past, but only more-accurate or less-accurate heuristics of it. *Id.* at 101. One such heuristic was state trial courts’ verdicts. *Id.* at 102. When such verdicts were procedurally valid, Justice Scalia considered them adequately accurate heuristics of past reality. *Id.* Thus, in his view, petitioners claiming their “actual innocence” were making epistemologically dubious claims about the ability to “prove” a different account of historical reality. *Id.* His position became untenable, though, after the rise of DNA evidence, which could show with virtual certainty that inmates on death row had not perpetrated the crimes for which they had been convicted. *Id.* at 102-06.

169. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

170. *Winston v. Lee*, 470 U.S. 753, 760 (1985).

171. U.S. CONST. amend. IV.

172. *See, e.g., Florida v. Jardines*, 569 U.S. 1, 6 (2013). Despite the Court’s recitation of this slogan in many cases, the Court appears to retreat from it when confronted with a sufficiently profound intrusion into the person. *See, e.g., Winston*, 470 U.S. at 760 (describing penetrations of the person as involving the “most personal and deep-rooted expectations of privacy”); *see also* Transcript of Oral Argument at 28, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (No. 18–6210) (“Intrusive as searching someone’s home is, invading someone’s body is a different level of intrusion.”).

may be seized, at least temporarily, on reasonable suspicion, and effects like automobiles may be searched and seized on probable cause alone.¹⁷³ Yet the Court has required (absent exigency or consent) a warrant issued by a neutral magistrate to sanction a search or seizure within a home.¹⁷⁴

The Court's rationale for according the home this "rarefied status" has been neither constant nor self-evident.¹⁷⁵ The framers' distaste for general warrants and writs of assistance intersected with British officials' searches of colonial homes.¹⁷⁶ Yet scholars have recently argued that the Fourth Amendment sought to protect a "broader sphere of private life, including expressive, political, and commercial conduct."¹⁷⁷ "The highest-profile controversies" of the day surrounding search and seizure—such as *Entick*—were often seditious libel cases.¹⁷⁸ Though they involved homes, their core concern was really the "proper limits of state searches . . . [of] papers"—citizens' "dearest property" that contained their "secret thoughts."¹⁷⁹ The other "core . . . intrusion" facilitated by writs of assistance was the search of colonists' *effects* "smuggled into the colonies without paying appropriate excise taxes."¹⁸⁰ Homes, in each case, constituted important means of protecting privacy of thought and private property, but they may have enjoyed no independently special significance.

Similarly, if modern persons were polled about what among the list they might regard as representing their most significant privacy interest, it seems likely many would pick their persons—not their homes.¹⁸¹ Those who might regularly enter their homes are legion—plumbers, electricians, party guests—while those who might see the most intimate details of their persons are confined, in most cases, to physicians and significant others. Counterintuitive, then, is not only courts' elevation of the home to "rarefied status," but their concomitant willingness to sanction revelation of intimate details about the person through invasive and warrantless searches.¹⁸²

173. U.S. CONST. amend. IV.

174. See *supra* text accompanying notes 2-8.

175. Anna Lvovsky, *Fourth Amendment Moralism*, 166 U. PA. L. REV. 1189, 1212 (2018).

176. *Id.* at 1212-13.

177. *Id.* at 1212.

178. *Id.*

179. *Id.* at 1212-13.

180. *Id.* at 1213.

181. See, e.g., *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2543 (2019) (Sotomayor, J., dissenting) (labeling blood draws "invasion[s] of bodily integrity" that "disturb[] an individual's most personal and deep-rooted expectations of privacy") (internal quotation marks omitted).

182. See, e.g., *Florence v. Bd. of Chosen Freeholders of Burlington*, 566 U.S. 318, 336-38 (2012) (permitting strip search upon arrest for any crime, including traffic offenses); Nina Totenberg, *Supreme Court OKs Strip Searches for Minor Offenses*, NPR (Apr. 2, 2012, 3:00 PM), <https://www.npr.org/2012/04/02/149866209/high-court-supports-strip-searches-for-minor-offenders> [<https://perma.cc/KQQ2-MB6V>]; Rhonda Cook, *Lawsuits Allege Routine Strip by Ga. Cops*, POLICE1 (June 21, 2012), <https://www.police1.com/legal/articles/lawsuits-allege-routine-strip-searches-by-ga-cops-r0NTBAA65nLg1Q1W/> [<https://perma.cc/GY9W->

One explanation for the Court's hierarchy concerns how it often conceptualizes "the person" in the Fourth Amendment context. For much of American history, observations of the person constituted the way a Fourth Amendment search implicating "the person" might occur.¹⁸³ It was not until around the latter half of the twentieth century, given advances in technology, that the Court began to adjudicate cases about evidence *inside* the person—such as blood that bore proof of drunk driving.¹⁸⁴ As for such warrantless blood draws, the Court first approved the practice by characterizing the intrusion as minor.¹⁸⁵

Yet the Court successively narrowed this initial declaration as it reconceptualized bodily penetrations' intrusiveness. It first held that the practice was permissible without a warrant only when the body's natural metabolism of alcohol would prevent timely preservation of evidence, leading to an exigent circumstance.¹⁸⁶ It then specified that metabolism of alcohol is not an exigency per se, but that whether circumstances reasonably would have precluded obtaining a warrant must be determined by the totality of each case's facts.¹⁸⁷ If police could have obtained a warrant, in other words, searching without one was unreasonable.¹⁸⁸

Most recently, the Court confronted a situation that could have obviated the exigency inquiry altogether—whether a state may, given a motorist's use of state roads, statutorily "imply" that motorist's consent to a warrantless blood draw.¹⁸⁹ Such was the question presented¹⁹⁰—though not the question answered¹⁹¹—in *Mitchell v. Wisconsin*. *Mitchell's* failure to decide that inquiry leaves open a major issue in Fourth Amendment consent doctrine: whether a statute may validly "imply consent" to a police search.¹⁹²

SNCH] (documenting Atlanta's denial that its officers routinely conduct roadside strip searches, despite city's agreement to pay out millions in settlements).

183. See, e.g., *United States v. Knotts*, 460 U.S. 276, 281 (1983) (declining to find reasonable expectation of privacy when a person is "in an automobile [in] public . . . mov[ing] from one place to another").

184. *Compare* *Rochin v. California*, 342 U.S. 165, 165 (1952) (holding unconstitutional an involuntary stomach pump that retrieved two morphine capsules suspect had swallowed), *with* *Breithaupt v. Abram*, 352 U.S. 432, 435-37 (1957) (upholding an involuntary blood draw used to determine blood-alcohol level in drunk-driving case).

185. *Breithaupt*, 352 U.S. at 435-37.

186. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966).

187. *Missouri v. McNeely*, 569 U.S. 141, 156 (2013).

188. *Id.* at 153-54.

189. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2532 (2019).

190. *Id.* (Gorsuch, J., dissenting).

191. *Id.* at 2551.

192. *Id.* (noting that the Court "declin[ed] to answer" whether implied-consent statutes are constitutionally sound).

A. *Mitchell v. Wisconsin*

In May 2013, Wisconsin police received reports that a seemingly intoxicated man had climbed into a van and driven off.¹⁹³ Thirty to forty-five minutes later,¹⁹⁴ officers found Gerald Mitchell "wandering near a lake," "[s]tumbling and slurring his words," and barely able to stand.¹⁹⁵ A preliminary breath test revealed that Mitchell's blood-alcohol level was three times the legal limit. Officers arrested Mitchell for driving under the influence and took him to the police station "for a more reliable breath test."¹⁹⁶ After a brief period there, however, Mitchell lost consciousness.¹⁹⁷ Officers decided to take him "to a nearby hospital for a blood test."¹⁹⁸ There, an officer read him "a notice, required by Wisconsin's so-called 'implied consent' law, [giving] him the opportunity to refuse" the blood draw.¹⁹⁹ Though Mitchell was entitled to refuse and, as a result, lose his driver's license, he predictably said nothing, since he was unconscious.²⁰⁰ Under the statute, because he was "not capable of withdrawing consent," he was presumed not to have done so.²⁰¹ On that basis, he was given a blood test, revealing a blood-alcohol level of 0.222%.²⁰² Mitchell then moved to suppress the results of the blood draw.²⁰³

After he lost in the lower courts, the Supreme Court granted his petition for certiorari to decide whether the implied-consent statute obviated the need to obtain a warrant before drawing his blood.²⁰⁴ That Mitchell had been unconscious during the blood draw seemed, at last, to implicate whether a statute may validly "imply" consent to a police search. Though implied-consent statutes have been litigated at the Court before,²⁰⁵ their function in earlier cases was something of a

193. *State v. Mitchell*, 914 N.W.2d 151, 154 (Wis. 2018), *rev'd on other grounds sub nom. Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

194. *Id.*

195. *Mitchell*, 139 S. Ct. at 2532.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 2542 (Sotomayor, J., dissenting).

200. *Id.* at 2531-32.

201. *Id.* at 2532.

202. *Id.*

203. *Id.*

204. *Id.*

205. The Court had broached implied-consent statutes as early as 1957 in *Breithaupt v. Abram*, where it noted that Kansas had passed an implied-consent statute that it praised as a "sensible and civilized system" not only to curtail drunk driving, but also, interestingly, to protect drivers falsely accused of drunk driving from "dubious lay testimony." 352 U.S. 432, 435 n.2 (1957). Though *Breithaupt*, which sanctioned a warrantless blood draw in factual circumstances nearly identical to *Mitchell*, has never been formally overruled, the modern Court has abandoned its rationale. *Breithaupt* characterized blood draws as trivially slight intrusions. *Id.* at 439. There is current consensus, however, that blood draws implicate significant privacy and bodily-integrity concerns. See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016) (noting that "[b]lood tests are significantly more intrusive" than breath

misnomer.²⁰⁶ Petitioners who had been *conscious* throughout their encounters with the police objected to the voluntariness of the consent they gave to blood draws, since nonconsent carried criminal penalties.²⁰⁷ Their argument was not that statutes could not imply consent, but that their affirmation of consent to the tests was coerced, given their statutory dilemma of submitting to the test and implicating themselves in drunk driving or committing a crime with similar penalties by refusing consent.²⁰⁸ Unlike those cases, however, Mitchell was unable to contemporaneously re-affirm or withdraw his supposed consent.²⁰⁹ His case thus forced the question whether the statute's implication of consent was constitutionally permissible.

In a move that some Justices did not anticipate,²¹⁰ Justice Alito's plurality opinion avoided that issue, analyzing *Mitchell* instead as an exigent-circumstances case.²¹¹ This avenue was startling given not only the question presented but also the course of the litigation. Whether Mitchell's situation constituted an exigency was not an argument the lower courts had addressed or the parties had even briefed.²¹² Justice Sotomayor, joined in her dissent by Justices Ginsburg and Kagan, pointed out that the state had "affirmatively waived"²¹³ any exigency argument: Wisconsin "conceded" that the exigency exception [did] not justify the warrantless blood draw in this case"; lower courts found *Mitchell* "not susceptible to resolution on the ground of exigent circumstances"; and officers "never once testified (or even implied) that there was no time to get a warrant."²¹⁴ The state's waiver of exigency, as Justice Sotomayor noted, was predictable—Mitchell's blood was not drawn until a full ninety minutes after his arrest.²¹⁵

But the plurality contended that unconsciousness "is *itself* a medical emergency," and transportation of unconscious persons a "pressing need[] or dut[y]" that would have made a warrant application impractical.²¹⁶ The plurality's rule looked suspiciously close to a declaration

tests); *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2543 (2019) (Sotomayor, J., dissenting) (labeling blood draws "invasion[s] of bodily integrity" that "disturb[] an individual's most personal and deep-rooted expectations of privacy") (internal quotation marks omitted); *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (same); *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 616 (1989) ("[A] compelled intrusio[n] into the body for blood . . . must be deemed a Fourth Amendment search.") (internal quotation marks omitted).

206. *Mitchell*, 139 S. Ct. at 2533 (plurality) (noting that prior implied-consent cases "have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize").

207. *See, e.g., Birchfield*, 136 S. Ct. at 2172 (this case consisted of three consolidated cases).

208. *Id.*

209. *Mitchell*, 139 S. Ct. at 2531-32.

210. *Id.* at 2545 (Sotomayor, J., dissenting); *id.* at 2551 (Gorsuch, J., dissenting).

211. *Id.* at 2531.

212. *Id.* at 2551 (Gorsuch, J., dissenting).

213. *Id.* at 2545 (Sotomayor, J., dissenting).

214. *Id.*

215. *Id.* at 2549.

216. *Id.* at 2537, 2539.

that unconsciousness constitutes exigency per se,²¹⁷ which would have limited the line of cases holding that exigency must be determined under the circumstances. "Presumably . . . to avoid overturning [those cases]," however, the plurality stopped short of saying that unconsciousness constitutes an exception per se to the warrant requirement.²¹⁸ Instead, it provided two caveats to its new rule. First, it left for lower courts the determination in each case whether "some other [pressing] factor" took "priority over a warrant application."²¹⁹ Second, it made the distinct but related point that in some cases, officers might pretextually trump up situations as emergencies with the motive of "seeking BAC information."²²⁰ The Court suggested that defendants remain free to challenge such pretextual searches.²²¹ And the Court remanded Mitchell's case so that he might make either of those showings.²²²

Mitchell, ultimately, represents an odd brand of judicial minimalism. The plurality avoided the question presented,²²³ which concerned the legal validity of implied consent, by cabining the case tightly to its facts, under which it created a new exigency exception. But despite its "fact-specific" analysis,²²⁴ the plurality dismissed the salient fact that Wisconsin had waived the exigency argument in the lower courts. Ignoring that waiver allowed the plurality to make an "overgeneralization" beyond Mitchell's case and about *all* unconscious drivers—hypothesizing that in *those* cases, some potential exigency might arise.²²⁵ Yet that "overgeneralization" was simultaneously under-inclusive. *Mitchell* did not resolve the legitimacy of implied-consent statutes writ large, and the case's focus on unconsciousness has not helped lower

217. Indeed, Justice Thomas would have held that the natural metabolism of alcohol in the body is an exigency per se in the context of a drunk-driving investigation. *See id.* at 2539 (Thomas, J., concurring in the judgment).

218. *Id.* at 2539-41 (Thomas, J., concurring in the judgment).

219. *Id.* at 2537.

220. *Id.* at 2539.

221. *Id.*

222. *Id.*

223. Justice Alito argued later in his plurality opinion that one of the questions presented in the lower court—"whether a warrantless blood draw from an unconscious person . . . violates the Fourth Amendment"—"easily encompass[ed] the rationale that we adopt today." *Id.* at 2534 n.2 (internal quotation marks omitted). Yet his own framing of the question presented to the Supreme Court, outlined just a few pages earlier, was "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement." *Id.* at 2532 (emphasis added) (internal quotation marks omitted). As mentioned, Justice Gorsuch's concise dissent noted that the Court "took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute"—a question "the Court . . . decline[d] to answer." *Id.* at 2551.

224. *Commonwealth v. Williams*, No. 2018-CA-000304-MR, 2019 WL 4559354, at *10 (Kt. Ct. App. September 20, 2019) (concurrence) (noting that "[u]nfortunately, the Supreme Court declined to address . . . whether a DUI suspect must be able to understand the implied consent warning in order for his consent to be considered voluntary for purposes of the Fourth Amendment" in its "fact-specific" opinion).

225. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2550 (2019).

courts resolve even similar nonexigency cases²²⁶ involving, for example, semi-consciousness. Predictably, courts thus far have found *Mitchell* of only limited utility in implied-consent cases.²²⁷

Perhaps the most interesting aspect of *Mitchell*, though, was its insinuation (but refusal to squarely hold) that the Court does not take seriously the claim that statutes may imply consent to searches. As Justice Alito wrote, the Court's recent decisions on implied-consent laws had "not rested on the idea that th[o]se laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize."²²⁸ Rather, the Court analyzed the "specific constitutional claims" at issue in each case, adjudicating whether specific petitioners' rights were violated.²²⁹ But those narrow holdings have left open the validity of implied-consent regimes nationwide.

Importantly, the Court's dismissive treatment of the notion of "implied consent" reveals the rift between itself and state courts on this issue. Several state courts have endorsed the proposition that statutes may imply consent to police searches. The Idaho Court of Appeals, for example, has held that a driver's unconsciousness "[did] not effectively operate as a withdrawal of her consent," and that her "statutorily implied consent was effective at the time of the warrantless blood draw[,] as it was justified by Idaho's implied consent statute."²³⁰ Idaho's Supreme Court also concluded that statutorily implied consent "may satisfy the consent exception to the warrant requirement," and, "[t]herefore, actual consent is not required."²³¹ Similarly, the Court of Appeals

226. As Justice Thomas's concurrence in the judgment pointed out, discerning which cases meet the threshold of exigency under the plurality's opinion will be difficult for lower courts, given the vagueness of the plurality's "pressing needs" test. *Id.* at 2539 (Thomas, J., concurring in the judgment).

227. See, e.g., *Williams*, 2019 WL 4559354, at *10-11, *14-15, *16. *Williams* features several opinions grappling with the meaning of *Mitchell*. See also *Commonwealth v. Bell*, 211 A.3d 761, 795 n.9 (Pa. 2019) (Wecht, J., dissenting) ("*Mitchell* . . . does not offer any clarity as to the important questions left open in *Birchfield* with regard to the contours of 'implied consent' or the validity of the consequences imposed under 'implied consent' statutes. . . [T]he High Court has again left these important questions unresolved.").

228. *Mitchell*, 139 S. Ct. at 2533. Justice Sotomayor labeled the plurality's decision not to ground its result in the implied-consent statute the "sliver of the plurality's reasoning" she agreed with. *Id.* at 2545 (Sotomayor, J., dissenting). At oral argument, Justice Ginsburg was also hostile to the notion that implied-consent statutes create actual consent. See Transcript of Oral Argument at 40, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (No. 18–6210) (Ginsburg, J.) ("[I]t's a fiction, isn't it? It's not consent, no matter how much you call it implied or presumed.").

229. *Mitchell*, 139 S. Ct. at 2533.

230. *Bobeck v. Idaho Transp. Dept.*, 363 P.3d 861, 867 (Idaho Ct. App. 2015).

231. *State v. Rios*, 371 P.3d 316, 320 (Idaho 2016). More precisely, the court held that while implied consent alone can sustain a blood draw, when a suspect affirmatively refuses the blood draw, his "refusal to give *actual* consent . . . withdr[aws]" his statutorily implied consent. *Id.* at 321 (emphasis added). The Idaho Supreme Court's division of implied and actual consent in this respect seems to diverge from Wisconsin's litigating position at the Supreme Court, where it maintained that implied-consent statutes themselves constitute "actual consent." Transcript of Oral Argument at 35, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (No. 18–6210).

of Georgia has reiterated that "everyone who operates a motor vehicle in Georgia implicitly consents to the chemical testing of their bodily fluids" upon arrest for DUI.²³² And the Supreme Court of Wisconsin, in case analogous to *Mitchell*, affirmed that "[the defendant] voluntarily, albeit impliedly, consented when he chose to drive on Wisconsin roads."²³³

Given the assertions made in these courts' opinions, the question presented in *Mitchell* remains a live, present source of disagreement across the nation. As the legitimacy of implied-consent statutes is still being actively litigated, this Article now turns to the reasons why statutorily "implied" consent fails to constitute the actual consent required to obviate the Fourth Amendment warrant requirement.

B. Applying the Part I Framework: Why Implied-Consent Statutes Cannot Create Actual Consent

The foundational deficiency of statutorily implied consent, which remains endemic to the broad class of cases outside the scope of *Mitchell*'s narrow exigency rule, is that such "consent" is almost guaranteed to fail the requirements of subjective willingness, competence, or contemporaneity.²³⁴ Wisconsin, for example, did not even furnish individuals with an admonishment during the licensing process that they impliedly consented to warrantless blood draws.²³⁵ Though the state's "knowledge test" apparently contained "questions relating to [its] implied consent laws," there was no "specific requirement" in that process that individuals acknowledge, much less assent to, the statute's imputation of consent.²³⁶ There seemed a strong case, at least for certain Justices, that most of Wisconsin's population probably failed to realize the implications attached to driving on its roads.²³⁷ That individuals were not even apprised of the possibility of a warrantless blood draw contradicted the state's assertion that they had, in fact, consented to one.²³⁸

The state's arguments about the validity of intoxicated arrestees' "re-affirmations" of consent upon being informed of the statute fare no better.²³⁹ Imagine a semi-conscious motorist—inebriated but not

232. *State v. Steward*, 649 S.E.2d 525, 526-27 (Ga. Ct. App. 2007).

233. *State v. Brar*, 898 N.W.2d 499, 509 (Wis. 2017).

234. See *supra* Part I.A.

235. Transcript of Oral Argument at 37, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (No. 18–6210).

236. *Id.*

237. *Id.* at 38-39.

238. *Id.*

239. See Brief of Respondent State of Wisconsin at 4, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (No. 18–6210). The State's brief explains that upon the arrest of intoxicated-but-conscious motorists, Wisconsin officers must read aloud an "Informing the Accused" pamphlet before seeking renewed consent to a warrantless blood draw. If the motorist then consents (or, in Wisconsin's view, affirms her statutorily implied consent), the officer may

exigently so—who voices her “consent” to a blood draw upon such an advisement. Is there any reason to believe the consent she voices in this semi-conscious state is *actual* consent? Assuming that actual consent requires competency, such “consent” seems dubious. Mere conscious knowledge of another’s conduct and mere physical compliance are insufficient for actual consent; individuals must also possess a capacity for “understanding and judgment” and exercise that capacity for their expression of consent to manifest actual consent.²⁴⁰ There is thus no serious argument that the “consent” offered by a semi-conscious person represents actual consent, for such cognitive impairment precludes a competent choice.²⁴¹

If heavily intoxicated individuals cannot consent to warrantless blood draws after their arrest, is their consent also invalid if it was offered in a *competent* state when they received their licenses? The Justices broached this point several times at *Mitchell’s* oral argument, asking whether there was “anything wrong” with a finding of consent if Mitchell had “signed something at the DMV” agreeing to a future blood draw.²⁴² Chief Justice Roberts asked—in a doubtful tone—whether it was really the case that if, for example, “he signed it two years ago, it doesn’t count anymore.”²⁴³ This advance-consent model is superficially attractive because it suggests that at some prior point, the individual manifested competent consent. Yet this is precisely its weakness: that is *all* advance consent reveals. That consent existed at some *prior* time does not mean that it *continues* to exist up until the time of the search. Probing this point, one Justice mentioned that individuals often consent in advance to certain healthcare treatments in documents called “advance directives.”²⁴⁴ Yet advance directives are notoriously susceptible to the precise criticism that because of the instability of human preferences over time, such documents should not

proceed with the blood draw. Thus, the Wisconsin statute implicitly contemplates treating an intoxicated person’s renewed “consent” upon arrest as legally valid. This scenario must occur with some frequency, since the Wisconsin Supreme Court has blessed the use of the “Informing the Accused” procedure unless the arrestee is completely unconscious and “incapable of responding to sensory stimuli.” *State v. Disch*, 385 N.W.2d 140, 144 (Wis. 1986).

240. *United States v. Sims*, 428 F.3d 945, 953 (10th Cir. 2005); *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968) (noting that mere “acquiescence to a claim of lawful authority” is insufficient for actual consent).

241. WESTEN, *supra* note 50, at 34-36.

242. Transcript of Oral Argument at 24, 37, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (No. 18-6210).

243. *Id.* at 25.

244. *Id.* at 6-7.

bind future selves.²⁴⁵ In that context, as with blood draws, there is hardly a guarantee that prospectively given consent meets the contemporaneity requirement of actual consent.

Another version of this argument is that written consent to a warrantless blood draw when receiving a license is like the formation of a contract.²⁴⁶ In consideration for the privilege of driving on state roads, persons consent to otherwise-unreasonable searches and must uphold their end of the bargain upon arrest. One basic issue with this analogy is that contract formation (unlike consent) does not even require the subjective mental assent of the parties.²⁴⁷ That point aside, though, some courts have invoked a contract model in their conception of implied-consent statutes.²⁴⁸ And contracts obviously can bind persons over long periods.

Yet no contract represents an unbreakable obligation. If a party's consent to a contract goes stale, that party may simply breach it. The question then is what constitutes the remedy—the price of nonperformance. That the state may take away a license for refusing a blood draw is uncontroversial; licenses are privileges.²⁴⁹ But bodily autonomy is a constitutional right.²⁵⁰ And basic contract principles dictate that it would be an inappropriate remedy to force an individual to physically perform against her will. Indeed, no court will order specific performance for a personal-services contract precisely because of the gross infringement it would entail upon personal autonomy.²⁵¹ Conversely, while contracts in the commercial context may bind parties over long periods, those agreements do not implicate the autonomy concerns of a bodily invasion.²⁵² When *those* intrusions are involved, the need for actual consent demands inquiry into whether the relevant

245. Angela Fagerlin & Carl E. Schneider, *Enough: The Failure of the Living Will*, *HASTINGS CTR. REP.* 30, 33-34 (2004) (labeling this criticism an "excellent reason[] to be skeptical of living wills on principle"). Additionally, while physicians are fiduciaries of their patients, police are in an adversarial relationship with suspects. Physicians must interpret ambiguities in advance consent documents in light of patients' best interests; officers have systemic incentives to interpret them in favor of additional evidence-gathering.

246. See, e.g., *State v. Ruiz*, 581 S.W.3d 782, 787-88 (Tex. Crim. App. 2019) (Keller, P.J., concurring in part).

247. JOSEPH M. PERILLO, *CONTRACTS* § 2.2 (7th ed. 2014) ("For more than a century the objective theory of contracts has been dominant. Under this theory the mental intentions of the parties are irrelevant.") (footnotes omitted).

248. See, e.g., *Ruiz*, 581 S.W.3d at 787-88 (Keller, P.J., concurring in part).

249. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2169 (2016); see also *Transcript of Oral Argument at 28, Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (No. 18-6210).

250. *Compare Rochin v. California*, 342 U.S. 165, 165 (1952) (holding unconstitutional involuntary stomach pump that retrieved two morphine capsules suspect had swallowed), with *Breithaupt v. Abram*, 352 U.S. 432, 435-37 (1957) (upholding involuntary blood draw to determine blood alcohol level in drunk driving case); U.S. CONST. amend. IV; see also *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person").

251. PERILLO, *supra* note 247, at § 16.5.

252. See *Witmer-Rich*, *supra* note 58, at 386.

agent's consent persists at the time of the intrusion.²⁵³ If that inquiry is unsatisfied or impossible—for instance, due to intoxication—then officers must do what the Fourth Amendment requires: get a warrant.

CONCLUSION

In his famous attack on lawyers' use of legal fictions, the philosopher Jeremy Bentham labeled fictions "a false assertion of the privileged kind."²⁵⁴ Though fictions were "acknowledged to be false," they were, "at the same time . . . acted upon as if true."²⁵⁵ In the process, fictions became fact, while the facts became fiction. Two centuries later, his writing aptly describes recent trends in Fourth Amendment consent jurisprudence. Despite consent's status as a historical fact—one to be deduced from the totality of the circumstances—courts and legislatures at times have shunned that inquiry to impose fictional "licenses" and to imply fictional "consent." That trend undercuts the promise of privacy and autonomy the Fourth Amendment was designed to secure.

253. KATZ, *supra* note 58, at 49.

254. C. K. OGDEN, BENTHAM'S THEORY OF FICTIONS cxvi (1932) (quoting Bentham).

255. *Id.*