NOTE

PERMISSION TO DESTROY: HOW A HISTORICAL UNDERSTANDING OF PROPERTY RIGHTS CAN REIN IN CONSENT SEARCHES

Eva Lilienfeld & Kimberly Veklerov***

Consent searches are by far the most common tool to circumvent the Fourth Amendment's warrant requirement. Though police officers have the property owner's permission, the searches they conduct are not always harmless. Without probable cause or reasonable suspicion, consent searches have justified officers' destruction of car parts, electronics, and shoes. Are officers allowed to damage property after receiving consent to search a person's belongings? In some jurisdictions, a consent search becomes unreasonable when officers destroy property, entitling the owner to money damages in civil litigation or the exclusion of evidence in criminal prosecutions. In other jurisdictions, an owner's consent means she has forfeited the right to have her property stay intact. This Note's first contribution is identifying and examining this consequential circuit split.

To resolve Fourth Amendment ambiguities, the Supreme Court has increasingly turned to the common law in place at the Founding. The mishandling and destruction of colonists' personal property by British soldiers acting pursuant to general warrants and writs of assistance helped to spur the Revolutionary War. This Note's second contribution applies Founding-era evidence to consent search doctrine. By drawing

* J.D., University of Virginia School of Law, 2022.

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This Note's Authors express no personal views on originalism as a method of interpretation. We recognize, however, its currency on the Supreme Court and aim to use the originalist lens as a means of persuading those who might otherwise be inclined to support expansive law enforcement powers. All errors are our own.

on colonial records, this Note offers an originalist argument for restraining consent searches.

INTRODUCTION

Just before daybreak on March 31, 2011, ten law enforcement officials arrived at the Chicago apartment where Jai Crutcher and Christopher Colbert, brothers by adoption, lived with their families.[1] The officers told Crutcher they were there to conduct a parole check, and Crutcher consented to the search.[2] As the police moved through the house, their search quickly turned destructive. In testimony that Judge David

[1] Colbert v. City of Chicago, 851 F.3d 649, 652 (7th Cir. 2017); id. at 661 (Hamilton, J., concurring in part and dissenting in part).

[2] Id. at 652 & n.1 (majority opinion) ("The terms of Crutcher's release required him to 'refrain from possessing a firearm or other dangerous weapon,' 'consent to a search of [his] person, property, or residence under [his] control,' and 'comply with any additional conditions the Prisoner Review Board has or may set as a condition of [his] parole or mandatory supervised release including, but not limited to: ELECTRONIC MONITORING FOR DURATION.'" (alterations in original)).

Hamilton of the U.S. Court of Appeals for the Seventh Circuit called "disturbing," the brothers described "the fright of their children as officers broke holes in the walls, cut open a couch, [and] tore doors off of cabinets."[3] In total, the officers damaged, dismantled, or destroyed: a weight bench, clothing, the basement door, the stairs, bedroom dressers, an electronic tablet, a stereo, a television, photographs of Crutcher's grandmother, wall insulation, a kitchen countertop, and shelf hinges.[4] The officers tracked dog feces through the house during their search.[5] One officer allegedly "unholstered his firearm and threatened to shoot Crutcher's six-week-old puppy before leaving the dog outside, where it was lost."[6] Crutcher and Colbert subsequently brought a § 1983 civil rights suit against the City of Chicago and four individual officers for violating their Fourth Amendment rights.[7] The district court dismissed the complaint, the Seventh Circuit affirmed, and the brothers were left to foot the bill.[8]

Whether, or how, property damage should affect the reasonableness of a consent search has divided the lower courts. In some jurisdictions, property damage has no effect on the legality of a consent search or potential remedies. In other jurisdictions, when police damage property, a search that began with the owner's permission becomes per se unreasonable. In still others, officers may damage property so long as they do not render it unusable. Drawing on Founding-era evidence and the common law, this Note argues that mishandling and destroying property during consent searches would have been anathema to the Constitution's Framers. This Note is the first to use the Fourth Amendment's history to answer whether consent searches are constitutional when they involve

[3] Id. at 661 (Hamilton, J., dissenting in part). Both the majority and dissenting opinions recounted the facts in the light most favorable to the plaintiffs because the case was on appeal from a grant of summary judgment for the defendants. Id. at 654 (majority opinion); id. at 661 (Hamilton, J., dissenting in part). Therefore, the account of property damage recited here came from the plaintiffs' perspective. In the officers' depositions, they "claimed they did not remember many of the events of March 31, 2011." Id. at 662.

[4] Id. at 661, n.1 (Hamilton, J., dissenting in part); id. at 652–53 (majority opinion).

[5] Id. at 652 (majority opinion).

[6] Id. at 661 (Hamilton, J., dissenting in part).

[7] Id. at 653–54, 656 (majority opinion).

[8] Id. at 654, 661. Most courts have held that harms like these do not violate the Takings Clause or related provisions of state constitutions, making this Note's proposal all the more important. See Lech v. Jackson, 791 Fed. App'x. 711, 719 (10th Cir. 2019); see also Maureen E. Brady, The Damagings Clauses, 104 Va. L. Rev. 341, 394–95 (2018) (describing several instances in which the government compensated property owners for police-inflicted damage).

property damage. Academics and advocates have frequently attacked the lax "voluntariness" requirement of consent searches, and they rightly note that many individuals agree to invasive searches without knowing they have the right to refuse.[9] But the *scope* of consent searches is just as important and is more likely to be taken up by the Supreme Court.[10]

Part I introduces consent searches, explaining their significance and situating them in Fourth Amendment doctrine. Part II describes how different circuits have addressed the question of property damage during consent searches and dissects their underlying reasoning. Part III uses Founding-era evidence to advocate limitations on consent searches. Part III also offers a workable test—one in accord with the primacy of property rights during the Founding—for identifying property damage that exceeds the scope of consent searches. Finally, Part IV anticipates and responds to objections.

I. A PRIMER ON CONSENT SEARCHES

To search property, officers do not need to harbor a reasonable suspicion or obtain a warrant from a magistrate judge if they have consent of the apparent property owner.[11] This Part discusses the prevalence of consent searches and their disparate racial impacts. It also provides a brief overview of remedies for unconstitutional searches.

[9] See, e.g., James C. McGlinchy, Note, "Was that a Yes or a No?" Reviewing Voluntariness in Consent Searches, 104 Va. L. Rev. 301, 303 (2018); Gerard E. Lynch, Why Not a *Miranda* for Searches?, 5 Ohio St. J. Crim. L. 233, 237, 245 (2007); Marcy Strauss, Reconstructing Consent, 92 J. Crim. L. & Criminology 211, 212 (2001); Oren Bar-Gill & Barry Friedman, Taking Warrants Seriously, 106 Nw. U. L. Rev. 1609, 1661–62 (2012).

[10] While the Supreme Court has explicitly rejected a requirement that consent be given knowingly or intelligently, the Court has said relatively little about the scope of consent searches. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). In addition, Justices on the Court today often find government overreach when private property is concerned. See, e.g., Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (holding that a California regulation giving union organizers access to farm workers constitutes a per se physical taking); Ala. Ass'n of Realtors v. Dep't of Health and Human Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (concluding that a federal eviction moratorium intruded on property owners' right to exclude).

[11] *Schneckcloth*, 412 U.S. at 227 (consent searches are constitutional when consent is given voluntarily). See generally Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 768 (1994) (situating consent searches in the context of the Fourth Amendment).

A. The Significance of Consent Searches

Consent searches, such as the encroachment on Colbert and Crutcher's Chicago home, are among the most widely used police procedures. Officers frequently resort to this investigative tool because they view consent searches as "the 'safest' course of action in terms of minimizing the risk of suppression" of evidence.[12] These searches are effective because people near-universally grant consent—even when they know the search will yield incriminating fruits.[13] As one scholar put it, "there are few areas of Fourth Amendment jurisprudence of greater practical significance than consent searches."[14]

Some officers admit to asking every stopped driver and passenger for permission to search their belongings, even in the absence of reasonable suspicion.[15] At one trial, an officer testified that in a nine-month period he had searched more than 3,000 bags using this tactic.[16] "Outside of a few narrow exceptions," asking for consent is the only way to conduct a search legally.[17] Even when officers do have probable cause, obtaining a

[12] 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 2–3 (5th ed. 2012).

[13] See, e.g., State v. Becerra, 366 P.3d 567, 568–69 (Ariz. Ct. App. 2016) (defendant permitted an officer to search her car, and he subsequently found methamphetamine); State v. Law, 847 S.W.2d 134, 135 (Mo. Ct. App. 1993) (defendant removed the keys from his ignition so a police officer could open his trunk, where he was hiding marijuana); State v. Johnson, 01C01-9502-CC-00040 , 1996 WL 125904, at *1 (Tenn. Ct. App. Mar. 22, 1996) (defendant consented to a search of his car, the officer found a paper bag containing cocaine under the driver's seat, and the defendant proceeded to run away while the officer continued the search).

[14] Joshua Dressler, Understanding Criminal Procedure 241 (2d ed. 1997); see also Erik G. Luna, Sovereignty and Suspicion, 48 Duke L.J. 787, 841 (1999) ("[T]he criminal justice system would be seriously impeded if consent became an insufficient predicate for a valid search.").

[15] See, e.g., Harris v. State, 994 S.W.2d 927, 932 n.1 (Tex. Ct. App. 1999) ("[The officer] testified that he asks for consent to search every vehicle that he stops . . . ."); State v. Retherford, 639 N.E.2d 498, 502 (Ohio Ct. App. 1994) ("[The officer] testified that, in 1992 alone, he asked for consent to search a vehicle incident to a traffic stop 'approximately 786 times . . . give or take a few.' ").

[16] State v. Kerwick, 512 So. 2d 347, 349 (Fla. Dist. Ct. App. 1987).

[17] See William Baude & James Y. Stern, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821, 1875–76 (2016); Sarah A. Seo, Policing the Open Road: How Cars Transformed American Freedom 117 (2019) ("When officers did not have warrants, they could, with varying degrees of coercion, get consent to search, especially when those who were policed were not likely to challenge authority or have the means to do so."). Officers can search without a warrant at the border or when in hot pursuit of a suspect, to name a few. Amar, supra note 11, at 768–69.

warrant can cause unnecessary inconvenience.[18] Accordingly, of the millions of searches conducted by police each year, consent justifies around nine in ten warrantless searches.[19]

Citizens rarely say no to police officers who ask to search their belongings or vehicles. Most people intercepted by police give consent "promptly and voluntarily on the street," without the need for custodial or extended police questioning.[20] When the Los Angeles Police Department was under a federal consent decree and mandated to keep detailed statistics on officer conduct, a six-month snapshot showed that 94.6% of drivers who were asked to submit to a consensual search granted the officer's request.[21] Of pedestrians, 96.5% said yes to police officers who asked to search them.[22] Over another six-month period, Los Angeles officers asked 16,228 drivers for permission to search their vehicles.[23] Only three of them said no.[24] Absent particularly unusual or deceptive

[18] Adrian J. Barrio, Note, Rethinking *Schneckloth v. Bustamonte*: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent, 1997 U. Ill. L. Rev. 215, 220–21 ("Consent searches also may be attractive as a logistical matter, especially when obtaining a warrant would be time-consuming or otherwise impractical."); see also Strauss, supra note 9, at 259. ("[E]ven if the police have probable cause to search, and even if procuring a warrant would not be onerous, an officer may elect to obtain consent because it increases the likelihood that the search would be deemed valid.").

[19] See Paul Sutton, The Fourth Amendment in Action: An Empirical View of the Search Warrant Process, 22 Crim. L. Bull. 405, 415 (1986) (officer estimated that consent justified 98% of warrantless searches); see also Ric Simmons, Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine, 80 Ind. L.J. 773, 773 (2005) ("Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment."); Dressler, supra note 14, at 241 ("As one police officer explained: '[T]here are a lot of warrants that are not sought because of the hassle. You just figure it's not worth the hassle . . . . I don't think you can forego a case because of the hassle of a search warrant, but you can . . . work some other method. If I can get consent, I'm gonna do it.'" (quoting Richard Van Duizend, L. Paul Sutton, & Charlotte A. Carter, The Search Warrant Process: Preconceptions, Perceptions, and Practices 21 (National Center for State Courts 1984)).

[20] Phillip A. Hubbart, Making Sense of Search and Seizure Law: A Fourth Amendment Handbook 288–89 (2d ed. 2015).

[21] L.A. Police Dep't, Arrest, Discipline, Use of Force, Field Data Capture and Audit Statistics 4 (2007), https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/2021/12/Jan-Jun-2007.pdf. [https://perma.cc/F3MB-BHX6]. Race may play a role in whether a driver is comfortable declining a search request. While 96.4% of Black drivers and 95.3% of Hispanic drivers consented to a search, 88.3% of white drivers said yes. Id. Among pedestrians, however, those figures converged: 96.8%, 96.6%, and 95.2%, respectively. Id. at 6.

[22] Id. at 6.

[23] Bar-Gill & Friedman, supra note 9, at 1662.

[24] Id.

police tactics, such as a false assertion that officers have obtained a warrant, courts routinely uphold consent as voluntary and admit the fruits of such searches.[25]

B. Defining Consent Searches

The Supreme Court recognizes consent searches as an exception to the Constitution's warrant requirement.[26] The Fourth Amendment guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[27] The Amendment goes on to state that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[28] To contextualize consent searches and the Fourth Amendment, this Section proceeds by reviewing the elements of a consent search. It then discusses the Supreme Court's lone case about the scope of consent searches.

The consent exception permits police officers to conduct an otherwise-unreasonable search so long as they first receive permission from the item's owner.[29] The consent doctrine has two requirements. First, the person granting consent must have either actual or apparent authority over the property.[30] For example, when a defendant's daughter permitted officers to search their shared motel room, the Tenth Circuit determined that the daughter had apparent authority and that the search was therefore constitutional.[31] Second, the consent must be freely given when considered in light of the "totality of all the circumstances."[32] The Fifth Circuit, for instance, upheld a consent search that occurred after police officers boarded a bus and asked the defendant if he "wouldn't mind standing up and letting [the officer] pat him down."[33] The court

[25] Hubbart, supra note 20, at 288.
[26] Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).
[27] U.S. Const. amend. IV.
[28] Id.
[29] See, e.g., *Schneckcloth*, 412 U.S. at 227.
[30] Apparent authority exists when a reasonable police officer would believe that the third party had actual authority to consent to the search. See, e.g., Illinois v. Rodriguez, 497 U.S. 177, 179 (1990) (defendant's ex-girlfriend gave officers the impression she lived at defendant's house and granted officers permission to search).
[31] See United States v. Gutierrez-Hermosillo, 142 F.3d 1225, 1229–31 (10th Cir. 1998).
[32] *Schneckcloth*, 412 U.S. at 227.
[33] United States v. Cooper, 43 F.3d 140, 143 (5th Cir. 1995).

determined that a reasonable person would have felt free to decline the request.[34]

Though police rely on the consent exception every day, the Supreme Court has offered minimal guidance in determining the boundaries of such searches. The exception is *Florida v. Jimeno*.[35] At a traffic stop, officers asked Enio Jimeno for permission to search his car, which he granted.[36] During their inspection, officers found a paper bag containing cocaine on the vehicle's floorboard.[37] The Court sketched out an objective test: the scope of consent is what a reasonable person would understand it to be.[38] Rejecting Jimeno's argument that each "closed container" should require an additional request for consent, Chief Justice Rehnquist noted that the "community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime."[39]

Fourth Amendment violations may entitle the harmed party to two different remedies: the exclusionary rule in criminal trials or financial recovery in civil litigation.[40] The former allows criminal defendants to exclude from trial certain evidence uncovered during unconstitutional searches.[41] The exclusionary rule protects defendants because, while their constitutional rights may have been violated, the fruits of the violation cannot be used against them.[42] And if police are motivated to secure

[34] Id. at 146–47.

[35] 500 U.S. 248 (1991).

[36] Id. at 249–50.

[37] Id. at 250.

[38] Id. at 250–52.

[39] Id. at 252. Notably, in *Jimeno*, the government argued in an amicus brief that "General Consent To Search A Car For Narcotics Authorizes The Search Of All Containers Inside The Car That Might Contain Narcotics And *Can Be Opened Without Causing Property Damage*." Brief for the United States as Amici Curiae Supporting Petitioner at III, *Jimeno*, 500 U.S. 248 (No. 90-622) (emphasis added). In the intervening years, however, the government has changed its litigation position. See, e.g., Gonzalez-Badillo v. United States, 693 F. App'x 312, 316 (5th Cir. 2017); Respondents' Brief on the Merits at 6, *Jimeno*, 500 U.S. 248 (No. 90-622).

[40] See Akhil Reed Amar, supra note 11, at 785–801 (discussing the pitfalls of the exclusionary rule before ultimately introducing a proposal for an alternative solution for remedying Fourth Amendment violations).

[41] See Weeks v. United States, 232 U.S. 383 (1914) (applying the exclusionary rule against actions by federal officers); Mapp v. Ohio, 367 U.S. 643 (1961) (applying the exclusionary rule against actions by state officers).

[42] See generally Saul Levmore & William J. Stuntz, Remedies and Incentives in Private and Public Law: A Comparative Essay, 1990 Wis. L. Rev. 483, 490–92 (discussing the benefits of the exclusionary rule as a remedy). But see Amar, supra note 11, at 785–91 (critiquing the

convictions of criminals, then they are theoretically incentivized not to violate their Fourth Amendment rights so that evidence will stick at trial.[43] Victims of Fourth Amendment violations can also bring civil rights lawsuits for damages under 42 U.S.C. § 1983. But police officers are ordinarily shielded by qualified immunity, and winning these suits is often an uphill battle.[44]

C. Racial Bias and Consent Searches

Almost every area of Fourth Amendment law intersects with race, and consent searches are no exception.[45] Black people bear the brunt of these searches because (1) cops are more likely to stop them, and (2) Black people are more likely to provide consent to protect themselves from a potentially violent encounter. The interaction of these factors led one professor to term consent searches the "handmaiden of racial profiling."[46]

Empirical evidence shows that police surveil Black and Hispanic people more often than white individuals. In a class action lawsuit challenging New York City's stop-and-frisk policy, police officers acknowledged that they conducted 4.4 million stops between January 2004 and June 2012.[47] Of those, 52% were of Black people, 31% were of Hispanic people, and only 10% were of white people. New York City's population in 2010 was approximately 23% Black, 29% Hispanic, and 33% white.[48] Purported differences in criminal activity cannot explain the statistics because police recovered contraband in 1.8% and 1.7% of the

historical support for the exclusionary rule and explaining that modern justifications for the rule do not align with policy concerns surrounding the Fourth Amendment).

[43] Levmore & Stuntz, supra note 42, at 491, 494.

[44] Plaintiffs must prove that a reasonable officer would have known that his actions violated a clearly established constitutional right. Often, this requires finding a precedential case with similar facts. See, e.g., John C. Jeffries Jr., What's Wrong with Qualified Immunity?, 62 Fla. L. Rev. 851, 852–53 (2010).

[45] See, e.g., Tracey Maclin, "Black and Blue Encounters" – Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?, 26 Val. U. L. Rev. 243, 250 (1991) (discussing race and seizures); Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (discussing race and searches incident to arrests); Sheri Lynn Johnson, Race and the Decision to Detain a Suspect, 93 Yale L.J. 214, 226–27 (1983) (discussing race and pretextual stops).

[46] George C. Thomas III, Terrorism, Race and a New Approach to Consent Searches, 73 Miss. L.J. 525, 542 (2003).

[47] Floyd v. City of New York, 959 F. Supp. 2d 530, 573 (S.D.N.Y. 2013).

[48] Id. at 574.

stops of Black and Hispanic people, respectively, while they seized it in 2.3% of the stops of white people.[49]

Data collected from the opposite side of the country tells the same story. Of the 31,528 traffic stops Oakland police officers made in 2017, 61% of drivers were Black and only 9% were white; according to 2020 census data, Black people made up 23.8% of Oakland, while 35.5% of the city was white.[50] In 2002, the Department of Justice found that of nearly 17 million traffic stops, both Black and Hispanic drivers were more than twice as likely to be searched or have their vehicles searched than white drivers. [51]

Research has found that searches of white drivers more often yield evidence than those of Black drivers, which suggests that police tend to search white people's cars when they have a higher suspicion of finding illegal contraband.[52] By comparing traffic stops of Black and white drivers before and after dark, researchers have found that being Black does not correlate with any indicators of wrongdoing.[53] Instead, increased policing of Black drivers happens only during the daytime, meaning that police officers pull over more Black drivers when the race of the driver is visible.[54]

People of color are also more likely to consent to searches.[55] Most people of all races would feel uncomfortable telling an officer to "get

[49] Id.

[50] Rachel Swan, To Curb Racial Bias, Oakland Police Are Pulling Fewer People Over. Will it Work?, S.F. Chron. (Nov. 16, 2019 5:12 PM), https://www.sfchronicle.com/bayarea/article/To-curb-racial-bias-Oakland-police-are-pulling-14839567.php [https://perma.cc/E4WL-N643]; Quick Facts: Oakland City, California, U.S. Census Bureau (July 1, 2021), https://www.census.gov/quickfacts/oaklandcitycalifornia (last visited Mar. 31, 2022).

[51] Erica L. Smith & Matthew R. Durose, U.S. Dept. of Just., Characteristics of Drivers Stopped by Police 1, 1 (2002).

[52] See Press Release, New Data Shows Racial Bias in Police Consent Searches, ACLU of Ill. (July 13, 2011), https://www.aclu-il.org/en/press-releases/new-data-shows-racial-bias-police-consent-searches [https://perma.cc/H2T3-U2AC] ("Hispanic motorists were 3.38 times more likely than Caucasian motorists to be asked for a consent search. African American motorists were nearly 3 times (2.96) more likely. And, as in the past, contraband was more frequently found in searches of white motorists.").

[53] See Emma Pierson et al., A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States, 4 Nature Hum. Behav. 736, 736 (2020) ("[B]lack drivers were less likely to be stopped after sunset, when a 'veil of darkness' masks one's race, suggesting bias in stop decisions.").

[54] See id. at 737–39.

[55] Maclin, supra note 45, at 250.

lost."[56] "[P]ractically every constitutional scholar who has considered the issue has agreed that the average, reasonable person will not feel free to leave a law enforcement official who has approached and addressed questions to them."[57] The power dynamics between Black people and police officers, however, are even more coercive.[58] Parents raising Black children give them "'the-talk'—instructing [the kids] never to run down the street; always keep [their] hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them."[59] Whether through "the talk" or the media's documentation of excessive force against Black men, the message is clear: when interacting with police officers, be compliant and accommodating.[60]

II. A CHORUS OF DIVERGENT VIEWS

In the course of a consent search, officers may accidentally or intentionally damage property. Though there is no data on the prevalence of property damage, the issue regularly arises in suppression motions. As a baseline matter, property damage is common enough—and sufficiently

[56] Id.; accord Barrio, supra note 18, at 233 (drawing on psychological theories to show that "man's innate tendency to obey authority can impair his decision making and, ultimately, dull the understanding with which he exercises his constitutional rights"); Caleb Foote, The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?, 51 J. Crim. L. & Criminology 402, 403 (1960) ("[W]hat on their face are merely words of request take on color from the officer's uniform, badge, gun and demeanor."); H. Richard Uviller, Tempered Zeal 81 (1988) (Requesting for permission to search "however gently phrased, is likely to be taken by even the toughest citizen as a command"); Richard Van Duizend, L. Paul Sutton & Charlotte A. Carter, The Search Warrant Process: Preconceptions, Perceptions, Practices 69 (1985) (quoting one judge who stated that "[t]he very fact that you've got three 250-pound guys standing there with badges and guns on [means] the person isn't going to say no").

[57] Maclin, supra note 45, at 250.

[58] Id. ("I submit that the dynamics surrounding an encounter between a police officer and a [B]lack male are quite different from those that surround an encounter between an officer and the so-called average, reasonable person.").

[59] Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting). Perhaps the most famous example of "the talk" is in Ta-Nehisi Coates's *Between the World and Me*. Coates addresses his son, warning him of future interactions with the police. Ta'Nehisi Coates, Between the World and Me 103 (2015) ("It is not necessary that you believe that the officer who choked Eric Garner set out that day to destroy a body. All you need to understand is that the officer carries with him the power of the American state and the weight of an American legacy, and they necessitate that of the bodies destroyed every year, some wild and disproportionate number of them will be [B]lack.").

[60] E.g., Max Ehrenfreund, The Risks of Walking While Black in Ferguson, Wash. Post (Mar. 4, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/04/95-percent-of-people-arrested-for-jaywalking-in-ferguson-were-black/. [https://perma.cc/N8ZL-WGVC].

consequential to convictions—that nearly every circuit has weighed in. The question whether property damage makes a consent search unreasonable has elicited varying responses and rules from these courts. The fractured landscape can roughly be sorted into three categories. Some circuits exclude evidence obtained in the course of a destructive search unless the government can point to an alternative justification, such as probable cause. Others say that property damage alone does not make a search unreasonable. And still other circuits fall somewhere in between. Section A of this Part explains the approach of the Sixth, Seventh, and Eleventh Circuits, which deem consent searches unreasonable when an officer damages property in any capacity. Section II.B then surveys the three circuits—the Second, Third, and Fifth—which permit unrestricted property damage in consent searches. Section II.C then describes what this Note calls a "Goldilocks approach," adopted by the Tenth and D.C. Circuits, in which some property damage is permitted but not so much as would render the object unusable.

A. Per Se Prohibitions on Property Damage

The most defendant-friendly circuits have reasoned that a person's consent to a search does not encompass an officer's destruction of her property. But because officers have other exceptions to the warrant requirement at their disposal, the contraband seized often can be admitted into evidence notwithstanding the court's conclusion on consent. Namely, under the automobile exception, police may search a vehicle without either permission or a warrant if they have probable cause.[61] For instance, if an officer gets permission to search a driver's car but has no probable cause, the officer cannot tear open the upholstery as part of the consent search. Courts in this category would exclude from evidence any contraband found beneath the upholstery. But if, instead, the officer notices a bulging seat cushion while searching the car and smells marijuana emanating from it, he then has probable cause to rip it apart. Even if the officer had no probable cause when he first pulled the driver over, a valid consent search can reveal information that gives the officer probable cause to search outside the bounds of the owner's consent; in some circumstances, that includes property damage.

The Seventh and Eleventh Circuits have confronted similar scenarios. In *United States v. Garcia*, state troopers pulled over the defendant,

[61] See, e.g., Collins v. Virginia, 138 S. Ct. 1663, 1669–70 (2018).

Carlos Garcia, for speeding.[62] A trooper asked for permission to search the car, and Garcia agreed.[63] The officers grew suspicious of Garcia when they saw the car was missing window cranks, and the door handles and inside panels were mismatched with poorly fitting screws.[64] One trooper saw what looked like packages when peering through the window opening.[65] The troopers then took apart the door paneling and found ten packages of marijuana wrapped in duct tape.[66] On appeal, the Seventh Circuit held that the property destruction was not justified by the initial consent.[67] The court noted that destroying property under those circumstances "is inherently invasive, and extends beyond the [scope of] consent."[68] The court held, however, that dismantling the door was justified by probable cause.[69]

The Eleventh Circuit followed suit in a similar case, *United States v. Strickland*.[70] Instead of an odd-looking car door, though, it was a suspicious spare tire. At a traffic stop, Walter Strickland had given officers permission to search his entire car.[71] Officers found in the trunk a spare with a bent rim that did not match the car's other tires.[72] When the officers picked it up, it felt too heavy and something inside it made a "flopping sound."[73] Those factors—not Strickland's consent—allowed

[62] 897 F.2d 1413, 1415 (7th Cir. 1990).

[63] Id. at 1416.

[64] Id.

[65] Id. at 1420.

[66] Id. at 1416.

[67] Id. at 1419–20. The court, however, ultimately held that the search was constitutional because officers had probable cause to inspect the vehicle. Id. at 1420.

[68] Id. at 1420.

[69] Id.; see also United States v. Calvo-Saucedo, 409 F. App'x 21, 24 (7th Cir. 2011) ("[Unqualified consent] permits law enforcement to search inside compartments and containers within the car, so long as the compartment or container can be opened without causing damage."); United States v. Smith, No. 94-3488, 1995 WL 568345, at *3 (7th Cir. Sept. 20, 1995) ("It is well-settled that 'permission to search does not include permission to inflict intentional damage to the places or things to be searched.'"); United States v. Torres, 32 F.3d 225, 231–32 (7th Cir. 1994) (citing United States v. Martinez, 949 F.2d 1117, 1119 (11th Cir. 1992)) (same).

[70] 902 F.2d 937, 941–42 (11th Cir. 1990).

[71] Id. at 941.

[72] Id. at 943 ("The incongruity of a worn, oddly sized tire from a different manufacturer than the other tires of a late model sedan provided the officer with suspicion as to the circumstances of the tire. The tire's bent rim, extreme weight, and flopping sound, provided the officer with at least probable cause to believe that something had been secreted in the tire. The officer's knowledge of drug smuggling techniques and the anomalous presence of items in a spare tire firmly established the probable cause to believe that the items in the tire were contraband.").

[73] Id.

police to cut open the tire without violating his Fourth Amendment rights, according to the Eleventh Circuit. The court held that the gun and cocaine subsequently discovered inside the tire were properly admitted into evidence based on probable cause, given the tire's strange characteristics.[74] Still, the court recognized that "a police officer could not reasonably interpret a general statement of consent to search an individual's vehicle to include the intentional infliction of damage to the vehicle or property contained within it."[75]

The Sixth Circuit adopted this approach in *United States v. Garrido-Santana*, which also involved a consent search following a traffic stop.[76] The court noted that "[a] reasonable person likely would have understood his consent to exclude a search that would damage his property."[77] But because the officers' search caused no damage to the vehicle or gas tank, in which they found cocaine, the court affirmed the decision to admit the evidence.[78]

Dicta from the Eighth Circuit suggests its agreement with this side of the circuit split. As in *Strickland*,[79] officers in *United States v. Alvarez* requested permission to search the defendant's car and then examined a spare tire.[80] The officers cut the tire open and found drugs.[81] The court held that the officers had probable cause to justify the property damage because the tire made "several thudding noises" when moved.[82] But the court noted that "the cutting of the spare tire likely exceeded the scope of the consensual search and may well have required suppression of the evidence had the officers not had probable cause to expand the search."[83]

Even according to this understanding of consent searches—the most defendant-friendly view—not every intrusion into a person's possessions counts as property destruction. For instance, the Eleventh Circuit held that officers did not damage a vehicle when they pried open a trunk and moved a panel separating the trunk from the passenger seats.[84] Those actions did

[74] Id.
[75] Id. at 941–42.
[76] 360 F.3d 565, 576 (6th Cir. 2004).
[77] Id.
[78] Id. at 576–77.
[79] 902 F.2d at 941–42.
[80] 235 F.3d 1086, 1088 (8th Cir. 2000).
[81] Id.
[82] Id. at 1088–89.
[83] Id. at 1089.
[84] United States v. Martinez, 949 F.2d 1117, 1120–21 (11th Cir. 1992).

not rise to the level of "mutilation" of the tire in *Strickland*.[85] Nonetheless, the court affirmed that "general permission to search does not include permission to inflict intentional damage to the places or things to be searched."[86]

While these circuit courts have found that probable cause justified otherwise-unreasonable destructive searches, their holdings concerning property damage have made a difference at the district court level. A Tennessee district court, for instance, granted a defendant's motion to suppress evidence of methamphetamine found inside picture frames after police officers destroyed the frames, which exceeded the scope of the owner's consent.[87] Police were required to obtain his consent specifically to destroy the frames, the court held; general permission to search the bag in which the frames were found did not suffice.[88] Similarly, a Pennsylvania court suppressed evidence of drugs that officers only found after tearing up the carpeting in a vehicle.[89] The damage exceeded the scope of any purported consent.[90]

A per se prohibition on property damage is the best of the three current circuit views. It not only protects defendants' rights but also accords with an original understanding of the Fourth Amendment.[91] Still, while the Sixth, Seventh, and Eleventh Circuits properly cabin the scope of consent searches, they do not directly address an important definitional or line-drawing question: What actually constitutes property damage? Evidently, ripping open a tire falls on the destructive side of the ledger, but prying open a trunk is on the other. What accounts for the distinction? What about ripping open a bag of chips? Tearing apart a child's stuffed animal? In Part III *infra*, this Note offers a workable standard to supplement the per se bar on property damage during consent searches.

[85] Id. at 1121.

[86] Id. at 1119.

[87] United States v. Leon-Santoyo, No. 3:14-00103, 2015 WL 632066, at *11–12 (M.D. Tenn. Feb. 13, 2015).

[88] Id. at *8, *12.

[89] United States v. Jimenez, No. 17-019-1, 2018 WL 488037, at *4 (E.D. Pa. Jan. 19, 2018).

[90] Id.; see also United States v. Washington, 739 F. Supp. 546, 550–51 (D. Or. 1990) (removing seats of vehicle, even if they could be replaced, is not within scope of consent to search trunk).

[91] See infra Part III.

B. The Unrestricted View of Consent

Some circuit courts have taken the opposite approach and ruled that property damage, no matter how destructive, never exceeds the scope of consent.[92] In *United States v. Kim*, officers boarded a train to confront Yong Hyon Kim, a passenger they suspected of smuggling narcotics.[93] The officers requested Kim's permission to search his bag, which he granted, and found inside it a sealed canister.[94] Though the can of "vegetable protein" bore no signs of tampering, the officers opened it and discovered methamphetamine, prompting them to arrest Kim for possession.[95] The Third Circuit understood consent as an extremely expansive device: Kim's assent to a search for narcotics gave officers the authority to open any closed container that might possibly conceal drugs.[96] Though the Supreme Court stated that consent to search does not extend to locked containers, the Third Circuit explained that sealed containers did not require possession of a key or knowledge of a lock combination.[97] Under this view, the fact that the officers destroyed Kim's property over the course of the search and rendered the can useless for its original purpose was irrelevant to the Fourth Amendment analysis.[98]

The Second Circuit has also understood consent broadly. In *United States v. Mire*, officers approached the defendant at a bus station and obtained permission to search his bag.[99] In it, officers found a pair of new sneakers, one with a thicker sole than the other.[100] The Second Circuit reversed the district court's holding, finding that consent to search the bag was "broad enough to include the finding of drugs in the oversized sole of the sneakers."[101] The court implied that officers who have consent to search may reasonably destroy property in the course of the search without violating the defendant's Fourth Amendment rights.[102]

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[92] See, e.g., United States v. Kim, 27 F.3d 947, 956–57 (3d Cir. 1994).
[93] Id. at 949–50.
[94] Id. at 950.
[95] Id. at 956; id. at 968 (Becker, J., dissenting).
[96] Id. at 956–57 (majority opinion).
[97] Id. at 957 (quoting United States v. Springs, 936 F.2d 1330, 1334–35 (D.C. Cir. 1991)).
[98] See id.
[99] 51 F.3d 349, 350–51 (2d Cir. 1995).
[100] Id. at 351.
[101] Id. at 352.
[102] Id. at 352–53.

In a case closely mirroring *Mire*, the Fifth Circuit joined the Second and Third Circuits in sanctioning property damage by police.[103] The defendant in *United States v. Gonzalez-Badillo* was boarding a bus when an officer asked him for permission to search his bag.[104] After getting his assent, the officer discovered a pair of shoes in the bag, one of which had a tattered and "lumpy" sole.[105] The officer pried off the shoe's sole and found that it contained a small bag of drugs.[106] When the Fifth Circuit reviewed the lower court's decision to exclude the evidence, the court determined that the destruction of the shoe was not akin to breaking open a locked container, which the Supreme Court deemed unconstitutional.[107] The court justified its approach by noting that the officer inflicted only "minimal damage on the boot."[108]

These courts' unrestricted view of consent is illogical on its face: no reasonable person would think that allowing an officer to search her belongings means that she has given the police permission to destroy them. The Supreme Court's precedent on the postal service provides a useful analogy. In *Ex Parte Jackson*, the Court held that sealed mail entrusted to the government for transmission is "fully guarded from examination and inspection, except as to their outward form and weight."[109] This principle—that someone can convey their belongings to the state, but such a voluntary conveyance does not justify their destruction—cannot be squared with the Third, Second, and Fifth Circuits' views. Finally, as a historical matter, these courts fail to consider the importance of property rights at the Founding.

[103] United States v. Gonzalez-Badillo, 693 F. App'x 312, 316 (5th Cir. 2017).

[104] Id. at 313.

[105] Id.

[106] Id.

[107] Compare id. at 316, with Florida v. Jimeno, 500 U.S. 248, 251–52 (1991) (using different analyses to determine the reasonableness of consent searches).

[108] *Gonzalez-Badillo*, 693 F. App'x at 316. As discussed *infra* Part III, Judge Elrod protested the court's use of the value of the shoe in determining whether the officer violated Gonzalez-Badillo's constitutional rights. See id. at 318 (Elrod, J., dissenting) ("[I]t makes no difference that this case involves work boots that can be glued back together, rather than high-end Christian Louboutin pumps: Fourth Amendment protections do not wax and wane based on the monetary value of a citizen's property.").

[109] 96 U.S. 727, 733 (1878).

C. Two Circuits Adopt a "Goldilocks Approach"

Still other courts permit officers to damage property during a consent search without violating the Fourth Amendment so long as the property remains usable.[110] In *United States v. Battista*, drug enforcement officers approached Donato Battista on a train stopped in Washington D.C.'s Union Station on its way to Florida.[111] The officers asked him for permission to search his room for narcotics.[112] Battista consented, and the officers soon uncovered a locked suitcase under the bed.[113] Though Battista only gave express authorization to search the room, he unlocked the suitcase for the officers.[114] In the suitcase, the officers found a plastic bag containing two small packages.[115] Using a pocketknife, one of the officers cut open the package and found cocaine.[116] Battista argued that the fruits of the search should be suppressed, in part, because the officers' search of a bag within the suitcase exceeded the scope of his consent to search the room.[117] The D.C. Circuit, however, determined that because the officers asked Battista for permission to search the room for narcotics, Battista's consent included everything therein that could hold drugs, including the bag in the suitcase.[118] The court held that destroying a package with a pocketknife fell within the scope of consent.[119]

The D.C. Circuit expanded on this reasoning in *United States v. Springs*.[120] In that case, several narcotics detectives approached Melissa Springs and got permission to search her belongings.[121] In one of her tote bags, they found a baby powder container covered in what an officer

[110] E.g., United States v. Battista, 876 F.2d 201 (D.C. Cir. 1989).

[111] Id. at 202–03. Battista raised suspicion because he (1) paid cash (2) for a one-way ticket (3) just before the train departed (4) to a city known for supplying drugs. And when the officers tried to call Battista's number, it was out of service. Id. The Supreme Court had recognized six years prior that travel to Florida can serve as basis for reasonable suspicion. See Illinois v. Gates, 462 U.S. 213, 243 (1983) ("In addition to being a popular vacation site, Florida is well known as a source of narcotics and other illegal drugs.").

[112] *Battista,* 876 F.2d at 203.

[113] Id.

[114] Id.

[115] Id.

[116] Id.

[117] See id. at 207–08.

[118] Id. ("In effect, Battista would turn the search of this bag into a game of 'Mother-may-I,' in which [the officer] would have to ask for new permission to remove each article from the suitcase to see what lay underneath.").

[119] Id. at 208.

[120] 936 F.2d 1330 (D.C. Cir. 1991).

[121] Id. at 1332.

described as "pry marks."[122] The officers opened the container and found a substance later identified as twenty-eight percent pure cocaine base.[123] The D.C. Circuit determined that, much like in *Florida v. Jimeno*, the Fourth Amendment permits officers to search any container that a reasonable person would think might contain the object of the search, in this case drugs.[124] The court then specifically reiterated the dicta in *Jimeno*: "It is very likely unreasonable to think that a suspect, by consenting to the search of his truck, has agreed to the breaking open of a locked briefcase within the trunk."[125] Because prying open the baby powder container did not require a key or combination and did not destroy the usefulness of the container, the Court reasoned, it fell within the purview of the search.[126] Put simply, police officers do not exceed the scope of the consent so long as they do not break open a lock or destroy property to the point of uselessness.[127]

The Tenth Circuit put the D.C. Circuit's dicta to the test in *United States v. Osage*, in which the Court held that opening a sealed can exceeded the scope of consent.[128] David Osage was traveling from Los Angeles to Chicago by train when two officers boarded and asked for his ticket and permission to search his bags.[129] Osage agreed, identified his bags, and produced a key to open one of them.[130] Inside, an officer found plastic grocery bags containing several sealed cans of "tamales in gravy."[131] The officer noticed that the label had been tampered with, and, when he shook the can, the weight shifted like a solid, not like tamales in gravy should.[132] The officer then used a tool from his belt to break open the container and found inside a plastic bag of methamphetamine.[133]

[122] Id.
[123] Id.
[124] See id. at 1334; see also Florida v. Jimeno, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents. But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization.").
[125] *Springs*, 936 F.2d at 1334 (quoting *Jimeno*, 500 U.S. at 251–52).
[126] Id. at 1334–35.
[127] See id.
[128] 235 F.3d 518, 522 (10th Cir. 2000).
[129] Id. at 519.
[130] Id.
[131] Id.
[132] Id.
[133] Id.

The court drew a line at "whether the can was destroyed or rendered useless after being opened."[134] Because unsealing the can left it unable to serve its designated function, breaking it exceeded the scope of the consent search, so the Tenth Circuit reversed and remanded back to the district court.[135] More recently, the Tenth Circuit held that opening a nailed-down cover[136] or a baby powder bottle[137] both fell within the scope of consent searches because the objects remained intact.

The Goldilocks approach has the benefit of attempting to answer the question, "What constitutes property damage?" It also aims to balance property rights with law enforcement interests. The problem with this view, first, is that not all possessions have a "use" that can be measured or tested. Second, an object's usability is a poor standard for determining whether a person's constitutional rights have been violated. Finally, as explained more *infra* Part III, property rights extend far beyond protecting the mere usefulness of possessions. Even small interferences with one's belongings could be actionable at common law.

III. CONSENT SEARCHES, PROPERTY DAMAGE, AND THE FOUNDING

Constitutional scholars tend to emphasize one of two themes in discussing the original meaning of the Fourth Amendment. By one account, the Fourth Amendment did not establish any new right; it simply reduced extant common law protections—specifically, against trespass—to text.[138] For centuries, after all, invasions of a person's land or things

[134] Id. at 521.

[135] See id. at 522 ("We therefore hold that, before an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed.").

[136] See United States v. Marquez, 337 F.3d 1203, 1209 (10th Cir. 2003) ("If damage to the compartment did occur, it was de minimis in nature, and well short of the type of 'complete and utter destruction or incapacitation' that was the focus of our concern in *Osage*." (quoting United States v. Osage, 235 F.3d 518, 522 n.2 (10th Cir. 2000))).

[137] See United States v. Jackson, 381 F.3d 984, 989 (10th Cir. 2004) ("The container was neither destroyed nor rendered useless by [the officer's] search, as it remained capable of 'performing its designated function.' . . . Thus, [the officer's] opening of the baby powder container and manipulation of its contents with his Leatherman blade while on the train did not exceed the scope of Jackson's consent.").

[138] E.g., Bradford P. Wilson, Enforcing the Fourth Amendment – A Jurisprudential History 15–16 (1986) ("The language of the amendment does not purport to create the right to be secure against unreasonable searches and seizures, but rather recognizes it as already existing.").

were considered intolerable and met with writs of trespass.[139] By another account, American revolutionary leaders included the Fourth Amendment in the Bill of Rights in direct response to the abuses they suffered at the hands of the Crown's henchmen.[140] According to this view, the Amendment fashioned affirmative rights, separate and apart from the common law, and protections against trespass. This Part explains how both theories support this Note's claim. First, it discusses why this history matters and the Supreme Court's increasing use of originalism to resolve Fourth Amendment questions. This Part then recounts common law principles against trespass and early violations of colonists' privacy—evidence that supports limits on consent searches from a property-rights perspective. This Part ends by advancing a functional test for identifying unconstitutional property damage.

A. The Rise of Originalism

Starting with Justice Scalia's tenure, the Supreme Court has increasingly looked to the common law of the Founding period to inform modern interpretations of the Fourth Amendment.[141] The Supreme Court has continued to use originalist methodology to understand the contours of constitutional rights in the wake of Justice Scalia's death.[142] Since his appointment to the Supreme Court, Justice Gorsuch has rejected modern interpretations of the Fourth Amendment and has embraced a return to the property-based understanding.[143] Justice Barrett explained during her confirmation hearings that she "interpret[s] the Constitution as a law . . . [that has] the meaning that it had at the time people ratified it."[144]

[139] See, e.g., Bernard H. Siegan, Property Rights: From Magna Carta to the Fourteenth Amendment 114–15 (2001) ("[U]nder the common law almost any physical deprivation of property was in violation of the owner's right of quiet enjoyment and likely constituted either a trespass or a nuisance, for which the perpetrator thereof was subject to liability.").

[140] Hubbart, supra note 20, at 36 (noting that the Crown's persistent use of writs of assistance to enforce payment of duties "grew steadily worse with each succeeding year" in the 1770s).

[141] Virginia. v. Moore, 553 U.S. 164, 168 (2008) (Scalia, J.); see also United States v. Jones, 565 U.S. 400, 406 (2012) (citing Kyllo v. United States, 533 U.S. 27, 34 (2001)) ("At bottom, [the Court] must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.' ").

[142] See, e.g., TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021).

[143] Carpenter v. United States, 138 S. Ct. 2206, 2264–65, 2267–68 (2018) (Gorsuch, J., dissenting).

[144] Nomination of the Honorable Amy Coney Barrett to be an Associate Justice of the Supreme Court of the United States (Day 2), Committee on the Judiciary, at 00:21:41 (Oct. 13, 2020, 9:00 AM), https://www.judiciary.senate.gov/meetings/nomination-of-the-

Since Justice Gorsuch's and Justice Barrett's appointments, the Court has continued to rely on Founding-era common law to delineate the Fourth Amendment.

The Court's recent Fourth Amendment decisions illustrate this perspective. In *Torres v. Madrid* last Term, the Court considered whether officers unconstitutionally seized a defendant when they fired weapons into her vehicle while attempting to execute an arrest warrant.[145] To answer the question, the Court turned to Founding-era dictionary definitions and examined whether arrests at common law were seizures.[146] The Court has taken the same approach in dissecting the meaning of Fourth Amendment searches. In *Lange v. California*, also last Term, the petitioner asked the Court to consider whether probable cause of a misdemeanor offense justifies an officer's warrantless entry into a suspect's garage. The Court again looked to the common law at the time of the Founding. Writing for a seven-Justice majority, Justice Kagan explained that "the Framers' view provides a baseline for our own day: The [Fourth] Amendment 'must provide *at a minimum* the degree of protection it afforded when it was adopted.'"[147]

The Court's recent departure from original public meaning, *Carpenter v. United States*, is the exception that proves the rule. In *Carpenter*, the police accessed cell-site location information without a warrant to gather data about a person's movements.[148] In a 5-4 decision, Chief Justice Roberts explained that "the unique nature of cell phone location records" accounted for the Court's departure from the common law and precedent.[149] The *Carpenter* logic is unlikely to extend to consent searches, which are nontechnical and long-standing. Further, Chief Justice Roberts wrote *Carpenter* when Justice Ginsburg provided a fourth vote for the liberal wing of the Court. Now that an avowed originalist

honorable-amy-coney-barrett-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-2 [https://perma.cc/68DT-C7WL]; see, e.g., Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (looking to the original public meaning of the Second Amendment as applied to non-violent felons).

[145] 141 S. Ct. 989, 993–94 (2021).

[146] Id. at 996.

[147] Lange v. California, 141 S. Ct. 2011, 2022 (2021). Off the Court, scholars have also advocated for a departure from *Katz*'s reasonable expectations of privacy test. See, e.g., Baude & Stern, supra note 17, at 1872, 1888 (describing the current approach as "dubious" and "urg[ing] a greater recognition of the principle at the core of the Fourth Amendment").

[148] 138 S. Ct. 2206, 2212 (2018).

[149] Id. at 2217.

occupies her seat, the Court is even more likely to consult the Founding-era common law to decide Fourth Amendment cases.

B. The Trespass View and Its Durability

For most of American history, courts understood the Fourth Amendment as embodying the right to be free from trespasses to "persons, houses, papers, and effects."[150] The landmark Fourth Amendment case in 1967, *Katz v. United States*, expanded Fourth Amendment protections to include areas where people have a "reasonable expectation of privacy."[151] In the last decade, though, the Supreme Court has shifted back toward a trespassory understanding of the Fourth Amendment—one informed by the common law in place at the Constitution's Founding.[152] Today, the "principal criterion" for finding a Fourth Amendment violation is "'whether a particular governmental action . . . was regarded as an unlawful search or seizure under the common law when the Amendment was framed.'"[153] This Section argues that the Framers and general public would have considered property damage during a search to be unreasonable at the time of the Founding.

By the eighteenth century, in both England and the American colonies, it was well-established that the centuries-old writ of trespass provided expansive protections for the quiet enjoyment of one's property.[154] Damaging someone's belongings would have been sufficient, though certainly not necessary, to establish the tort of trespass to chattels. Merely taking away someone's personal property for a substantial period of time would have constituted a trespass, even if the wrongdoer returned the item in the same condition.[155] Trespass to real property demanded even less: stepping foot on a man's land or in his home without his permission was

[150] See Laurent Sacharoff, Constitutional Trespass, 81 Tenn. L. Rev. 877, 928 (2014).

[151] 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[152] The Court has said the two standards co-exist. United States v. Jones, 565 U.S. 400, 409 (2012) ("[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").

[153] David A. Slansky, The Fourth Amendment and Common Law, *in* Searches and Seizures: Its Constitutional History and the Contemporary Debate 56, 57 (Cynthia Lee ed., 2011) (quoting Wyoming v. Houghton, 526 U.S. 295, 299 (1999)).

[154] See, e.g., Siegan, supra note 139, at 115 (discussing property protections in centuries leading up to Founding).

[155] See, e.g., Amar, supra note 11, at 774 ("[A]ny official who searched or seized could be sued by the citizen target in an ordinary trespass suit.").

actionable at common law, even if the intrusion was brief and caused no damage.[156]

Out of this history came the Fourth Amendment. Some scholars say the Amendment did no more than codify common law prohibitions on trespass, while others contend it created new, affirmative rights.[157] Citizens suing to vindicate their Fourth Amendment rights would not have cited the Amendment in their pleadings ordinarily, at least in the Founding generation.[158] Rather, plaintiffs would bring trespass actions and seek damages.[159] The writ of trespass, after all, was the primary tool in remedying Fourth Amendment intrusions prior to the existence of the exclusionary rule in criminal trials or Section 1983 in civil litigation. The Drafters, of course, did not need to state this principle in the text of the Amendment; they intended the Constitution "to be implemented in accordance with the remedial institutions of the common law."[160]

And though government officials frequently intruded into homes and interfered with property, they were not wholly immune from suit at common law, before or after the Founding. In the famous English case, *Entick v. Carrington*, which had a profound effect on the Revolution's leaders, Lord Camden discussed in detail how property rights served as an important limitation on government searches and seizures.[161] "The great end, for which men entered into society, was to secure their property," and even minute invasions of real and personal property were considered trespasses.[162] Similarly, in the famous case of *Wilkes v. Wood*, Chief Justice Pratt upheld a large damage award for a victim of a trespass by the King's officers—an outcome the American colonies cheered. In the early years of the Republic, too, warrantless intrusions by government agents were not exempt from judicial review.[163] "[A]ny official who searched or seized could be sued by the citizen target in an ordinary

[156] Id. at 786 ("Typically, if one's person or house or papers or effects are unreasonably trespassed upon, one can bring a civil action against the trespasser.").

[157] See, e.g., Wilson, supra note 138, at 33; David A. Slansky, The Fourth Amendment and Common Law, 100 Colum. L. Rev. 1739, 1765 (2000) ("[T]he Fourth Amendment and its state constitutional analogs were 'nothing more than an affirmance of the common law.'" (quoting Wakey v. Hart, 6 Binn. 316, 319 (Pa. 1814)).

[158] Wilson, supra note 138, at 33.

[159] See, e.g., id.

[160] Id. at 15, 33 (citation omitted).

[161] Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation 105 (3d ed. 2017) (citing Entick v. Carrington (1765) 95 Eng. Rep. 807 (K.B.)).

[162] Id. at 105–06.

[163] Wilson, supra note 138, at 18.

trespass suit" and could be liable for significant damages.[164] A trespass action therefore provided "redress, punishment, deterrence, and morality."[165]

Viewing the Fourth Amendment in this light unambiguously supports the proposition that property damage during a search would have constituted a trespass to chattels at common law—inherently unreasonable. Unless a property owner specifically consented to an officer's destruction or mishandling of her belongings, she would have had an actionable tort. The Fourth Amendment's drafting and the Founders' perspectives on property rights, which the next Section discusses in further detail, provide additional evidence for this conclusion.

C. The Fourth Amendment's Genesis

The Fourth Amendment incorporated common law property rights but was also a direct response to regular government intrusions in colonial America. The general public in both England and the American colonies widely shared a belief that a person's home was his sanctuary—a refuge from trespasses by both government and private actors.[166] Yet, as Professor Robert Bloom noted, "Despite this deeply rooted view, the Parliament made it possible through the authorization of general warrants and writs of assistance to search a home without much justification or specificity."[167] A writ of assistance was a court order to members of the public to assist customs officers in the performance of their duties, which included their searches for smuggled imports in homes and other places.[168] The writ's cousin, the general warrant, did not require probable cause and did not specify places to be searched or items to be seized. In the decades leading up to the American Revolutionary War, colonists and British subjects grew increasingly hostile to the Crown's use of these investigative tools.

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[164] Amar, supra note 11, at 774.

[165] Wilson, supra note 138, at 19.

[166] Robert M. Bloom, Searches, Seizures, and Warrants: A Reference Guide to the United States Constitution 4–5 (Jack Stark ed., 2003).

[167] Id. at 5.

[168] O.M. Dickerson, Writs of Assistance as a Cause of the Revolution, *in* The Era of the American Revolution: Studies Inscribed to Evarts Boutell Greene 40, 45 (Richard B. Morris ed., 1939).

As historians and judges have repeatedly remarked, intrusion into the home was the paradigmatic source of outcry.[169] But the attendant harms to such searches, including property damage, had long played an important role in moving public sentiment. William Cuddihy traced the history of these "[l]urid accounts of the sufferings that . . . searches and seizures had caused."[170] Cuddihy recounts, for instance, the writings of a sixteenth-century Catholic priest who complained that the Crown's foot soldiers "breake wals, untile howses, unseale chambers, pluck up bordes, to the owner's great losse and trouble."[171] These incidents spawned popular opposition to general searches in Britain, which carried over to the American colonies and accelerated in the decade and a half preceding the American Revolution.[172] Ordinary colonists thought that not only their homes but also their ships and persons should be sanctuaries against government intrusion.[173]

The Crown's intrusive searches, often meant to enforce trade duties, were a major motivating factor for independence and the Revolutionary War.[174] A group of Boston merchants challenged the continuation of writs of assistance in a famous 1761 case, *Paxton v. Gray*. While unsuccessful, their lawyer, James Otis, delivered a speech calling for the end of writs of assistance, which the Supreme Court has repeatedly cited in modern Fourth Amendment cases.[175] In his speech, Otis decried customs officers who "break locks, bars and every thing in their way" when searching homes.[176] Colonists opposed such intrusions not only because of privacy concerns but also because of basic rights to possess property without interference or damage.[177] In attendance at Otis's speech were leaders of

[169] E.g., Lange v. California, 141 S. Ct. 2011, 2022 (2021).

[170] William J. Cuddihy, Fourth Amendment: Origins & Original Meaning, 602–1791, at 27 (1990) (Ph.D. dissertation, Claremont Graduate School) (ProQuest).

[171] Id. (quoting Letter from Robert Southwell to Richard Verstegan (Dec. 1, 1591), *in* The Letters and Despatches of Richard Verstegan, 1, 8 (Anthony G. Petti ed., 1959).

[172] See generally id. (documenting colonial history leading up to the Founding).

[173] Id. at 363.

[174] See, e.g., Hubbart, supra note 20, at 36.

[175] Clancy, supra note 161, at 71 & n.60.

[176] See Thomas K. Clancy, The Framers' Intent: John Adams, His Era, and the Fourth Amendment, 86 Ind. L.J. 979, 1000 (2011).

[177] Maureen E. Brady, The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection, 125 Yale L.J. 946, 994 (2016) ("When the government rifled, rummaged, examined, and seized personal property, it threatened individuals' livelihood, safety, privacy, and dignity. And if the law of interferences with chattels is any clue, the harms might be especially pronounced when the item itself, or inferences from its environment, created strong sensibilities about third parties tampering with the object.").

the revolutionary cause, including John Adams, who came to view Otis as a personal hero and who later remarked, "Then and there, the child of independence was born."[178]

In 1772, Bostonians formed a twenty-one-person Committee of Correspondence, the first of its kind in the colonies, to articulate their rights and promulgate their writings to the towns of Massachusetts.[179] In a statement authored by Samuel Adams and Joseph Warren, among others, they proclaimed: "[O]ur houses and even our bed chambers, are exposed to be ransacked, our boxes chests & trunks broke open ravaged and plundered by wretches . . . . Flagrant instances of the wanton exercise of this power have frequently happened in this and other sea port Towns."[180] They went on to complain of soldiers who "ransack men's houses, destroy their securities, [and] carry off their property."[181] The general public wanted both their homes and their movable property to be protected against government interference.[182]

After winning independence, the Founders who set out to write a new Constitution agreed that protection of property was a core governmental function. "[T]he primary objects of civil society," said James Madison, "are the security of property and public safety."[183] Alexander Hamilton said that one of government's great objectives was "personal protection and the security of [p]roperty."[184] The actual text of the Fourth Amendment was modeled after state bill of rights provisions—and that of Massachusetts in particular.[185] Between 1776 and 1790, the majority of state constitutions contained restrictions on searches and seizures.[186] The Revolution's leaders were "of one mind" in adopting the Fourth Amendment.[187] While security in the home was a chief right they meant

[178] Bloom, supra note 166, at 6.
[179] See Hubbart, supra note 20, at 37.
[180] Id. at 37–38.
[181] Id.
[182] Bloom, supra note 166, at 6–7.
[183] James L. Huffman, Private Property and the Constitution 109 (2013) (quoting 1 The Records of the Federal Convention of 1787, at 147 (Max Farrand ed., 1911)).
[184] Id. (quoting 1 The Records of the Federal Convention of 1787, at 302 (Max Farrand ed., 1911)).
[185] Bloom, supra note 166, at 7, 9.
[186] Peter J. Galie, Christopher Bopst & Bethany Kirschner, Bills of Rights Before the Bill of Rights: Early State Constitutions and the American Tradition of Rights, 1776–1790, at 84 (2020) (noting that Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia constitutionally restricted searches and seizures in this time period).
[187] Hubbart, supra note 20, at 91.

to protect, it was intertwined with the right to possess one's property peaceably. As Professor Molly Brady explains, one reason the Framers included "effects" in the text of the Fourth Amendment was "the risk of mishandling or damage generally associated with interferences with personal property."[188] Today, "effects" broadly include vehicles, bags and containers, clothing, weapons, and even the fruits of crime.[189]

Against this historical backdrop, there is no reason to think that colonists or newly independent Americans would have acquiesced to officers' destroying their personal property. Of course, evidence from America's Founding cannot resolve all Fourth Amendment debates, nor should it. Many facets of modern life have no historical analogs, including modern policing. But this much is clear: the Founders believed that a central purpose of government was to protect private property—not to grant officers the authority to destroy it. They understood their right to control property as so central to their liberty that it took precedence over the general welfare. As Blackstone wrote: "So great moreover is the regard of the law for private property, that it will not authorize the least violation of it . . . not even for the general good of the whole community."[190] Given the importance of property rights at the Founding, we should not view consent searches of the modern era that lead to property damage as reasonable.

D. What Actually Constitutes Property Damage?

To the courts that sanctioned property damage during a consent search, the property itself may have appeared insignificant: a can of food, a sneaker, or a container of baby powder. Should the destruction of cheap, replaceable, everyday objects cause a consent search to become unreasonable per se? This Section addresses a line-drawing question that our thesis raises: What property ought to be protected and what kinds of damage should be deemed unreasonable?

A person's wealth or the value of her possessions should have no bearing on her Fourth Amendment rights. This is true for both normative and historical reasons. In a speech attributed to William Pitt, Earl of Chatham, he decried the short-lived Cider Act of 1763, which authorized

[188] Brady, supra note 177, at 987.
[189] Dressler, supra note 14, at 63.
[190] 2 William Blackstone, Commentaries *139.

home invasions to enforce the tax on the production of cider.[191] Even "[t]he poorest man" had the right to be secure "in his cottage," Pitt said. "It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."[192] The speech was well-known to the American colonial leaders and cited in opposition to general writs of assistance.[193] It has since become a canonical citation for courts and scholars in understanding the origins of the Fourth Amendment.[194]

Although Pitt, along with his contemporaries, emphasized the right to be secure in one's home, his description of destitution is notable. Even rags strung up together to form a canopy or a rickety shack can constitute someone's home and is thus owed the same legal protections as another person's castle would be. A businessman carrying a gold-plated briefcase and a homeless person with a tattered backpack have the same Fourth Amendment right to be secure in their bags' contents. By the same token, common law and constitutional protections "do not wax and wane based on the monetary value" of property.[195]

Normatively, this equality proposition is particularly important given the class and race divides that characterize criminal punishment: the negative repercussions of intrusive searches are more likely to fall on poor and non-white individuals. Consider the incentives for an officer to exercise restraint and not destroy an object he wants to search. If an officer is dissuaded from damaging belongings only out of concern for his personal financial liability, then he will exercise more restraint as the cost of the property rises. He might even be willing to run the risk and destroy cheap property, given the potential benefits of uncovering contraband.

That said, if an officer has consent to search a person's lunchbox, then peering inside an opened yogurt container should not constitute property damage. A functional, fact-based standard would help to draw the line

[191] Miller v. United States, 357 U.S. 301, 307 (1958).

[192] Id. (quoting The Oxford Dictionary of Quotations 379 (2d ed. 1953)).

[193] Hubbart, supra note 20, at 51.

[194] See, e.g., *Miller*, 357 U.S. at 307; Georgia v. Randolph, 547 U.S. 103, 115 (2006) (citing Miller v. United States); Daniel J. Solove, Conceptualizing Privacy, 90 Calif. L. Rev. 1087, 1138 n.298 (2002); Laura K. Donohue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1238 (2016).

[195] United States v. Gonzalez-Badillo, 693 F. App'x 312, 318 (5th Cir. 2017) (Elrod, J., dissenting).

between unconstitutional property damage and reasonable searching. This is the approach Judge Elrod took in her *United States v. Gonzalez-Badillo* dissent. After recounting the Fourth Amendment's history, Judge Elrod rejected any kind of blanket rule.[196] She wrote that, in keeping with the Founders' intentions and broader Fourth Amendment doctrine, a reasonable person would not think that ripping off the sole of a person's boot would be included within the scope of consent to search one's bag containing the boot. "[E]ven if destruction and uselessness were the appropriate rule to apply to a box or other container," she wrote, "a broader rule should apply to an article of clothing (such as a boot), which is different in kind: its intended use is not storage, nor is it designed to be opened and closed like a container."[197] Prying open the boot from its sole exceeded the scope of Gonzalez-Badillo's consent. Importantly, the value of the damaged item is irrelevant to Fourth Amendment protections. Just because Gonzalez-Badillo wore inexpensive work boots that could be glued back together, "rather than high-end Christian Louboutin pumps," did not mean his property rights were diminished.[198]

This proposal would expand defendants' rights from the tests used by the Tenth and D.C. Circuits—the "Goldilocks approach." Under that view, items that have been only torn or can easily be mended may not be rendered entirely useless. Imagine officers receive a parent's permission to examine his child's teddy bear and proceed to rip open the seam and pull out the stuffing. Under the Goldilocks approach, the fact that the bear can be sewn up renders the search reasonable. A more functional test, however, recognizes that the teddy bear is not merely a container but also a children's toy. Because consent to inspect a child's plaything cannot be understood as permission to tear it open and grope its stuffing, a functional test would find this search unreasonable.

Looking to an object's purpose, use, and function better protects property rights than an amorphous usability standard. As another illustration, say officers have permission to search a person's kitchen. The scope of consent would reasonably encompass actions such as opening a cabinet and looking behind a cereal box. By using this functional test, officers would not be allowed to cut a hole through the pantry to see what is on the other side, absent a warrant or some other exception. That is because a cabinet's function is to open, close, and hold kitchenware.

[196] Id. at 317–18.
[197] Id. at 321.
[198] Id. at 318.

Cabinets are not meant to be burrowed through. Under the functional test this Note envisions, drilling through the cabinet would be beyond the scope of consent because it is a misuse of property. Rather than ask how extensive the damage was, whether it can be repaired, or if it remains useable—which is the current approach of most courts—the functional test looks to the actual interference with one's property, not just the resulting physical state of the object.

The functionalist approach also better accords with foundational Fourth Amendment principles. The Court has explicitly stated that the test for determining if consent is freely given "presupposes an *innocent* person."[199] This presumption generally hurts defendants by making it difficult to prove coercion, given that an innocent person would not usually feel compelled to consent. But this principle also justifies greater protections for their property. If an officer assumes that a suspect is innocent when conducting the search, then the search should be limited by an innocent person's use of the object. In other words, an innocent owner has no use for a dissected teddy bear that can hide contraband. By looking to an object's function, and not whether it is merely intact, this test is consistent with consent search precedent.

While this Note's focus is consent searches, given the unsettled questions of law, this understanding of property damage could and should apply to other Fourth Amendment doctrine. For instance, if police obtain a warrant to search a person's home, ripping a couch to shreds—without specific probable cause for doing so—should be understood as beyond the scope of the warrant. The importance of property protection at the Founding can be applied to more than just consent searches.

IV. ANTICIPATING RESPONSES

Founding-era evidence supports protecting property during consent searches. Given the discordant views among the lower courts, however, this Part aims to anticipate objections to our thesis and respond to them.

A. Focus on Property

One valid critique of this Note is its focus on property damage by the state, rather than bodily harm. When so many police encounters turn

[199] Florida v. Bostick, 501 U.S. 429, 438 (1991).

deadly,[200] legal arguments against unlawful seizures, excessive force, and other violent Fourth Amendment events may have life-or-death consequences.[201] This Note's argument is not mutually exclusive with efforts to constrain state violence. This Note advocates a theory that protects defendants' rights.

Additionally, this issue is ripe for the Court's review. These cases have percolated through lower courts for several decades, giving most circuits an opportunity to weigh in. The Court has signaled an appetite to reject *Katz v. United States* and recast Fourth Amendment jurisprudence through a traditional, property-rights lens.[202] Given the possibility of the Court reverting to a pre-*Katz* understanding of the Fourth Amendment, it is all the more important to develop pro-defendant arguments that accord with that theory.

B. Community Safety

The Supreme Court has previously been unwilling to limit consent searches because doing so would eliminate a valuable police tool that has helped secure countless convictions. The Court has remarked that the community has a "real interest" in consent searches, "for the resulting search may yield necessary evidence for the solution and prosecution of crime."[203] It follows that any suggestion that limits consent searches must explain how doing so would not undermine a valuable police tool.

Even if criminals hid evidence beyond the scope of consent searches as imagined by this Note—such as inside a container that can only be

[200] See, e.g., David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, Why Many Police Traffic Stops Turn Deadly, N.Y. Times (Oct. 31, 2021), https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html [https://perma.cc/5FHR-SWKE].

[201] See Rachel A. Harmon, Promoting Civil Rights Through Proactive Policing Reform, 62 Stan. L. Rev. 1, 8–10 (2009); William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45, 83 (2018); Devon W. Carbado, From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence, 105 Calif. L. Rev. 125, 129 (2017) ("[T]he Court's legalization of racial profiling exposes African Americans not only to the violence of ongoing police surveillance and contact but also to the violence of serious bodily injury and death.").

[202] See Carpenter v. United States, 138 S. Ct. 2206, 2213–14 (2018) and accompanying dissents.

[203] Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973); see also United States v. Drayton, 536 U.S. 194, 207 (2002) ("In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding.").

opened by destroying it—that fact of reality should not alter constitutional protections. The Supreme Court has explained that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."[204] Justice Scalia, the leading proponent of originalism, agreed that "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."[205] The Court has echoed this sentiment in expanding the reach of the Fourth Amendment and has recognized that "[t]he occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of preserving overriding constitutional values."[206]

C. Incentives for Criminal Behavior

Similarly, proposals to expand the exclusionary rule sometimes spur criticisms about incentivizing criminal behavior. The argument goes that excluding evidence at criminal trials—because an officer destroyed property during the search or otherwise—would incentivize criminals to better hide evidence of their wrongdoing. Yet the same argument could be applied to almost any Fourth Amendment doctrine. Often, officers are allowed to peer inside run-of-the-mill containers, but a locked safe or glove compartment indicates a greater expectation of privacy and cannot ordinarily be broken open. The potential incentive for criminals to move contraband behind combination locks has no bearing on that black-letter Fourth Amendment rule. Consider, too, *Lange v. California* from this last Term. The Court acknowledged that a fleeing suspect accused of a misdemeanor, if he reaches his home before being caught, would be protected from warrantless entry by police. The fact that this may encourage misdemeanants to hurry home to avoid police encounters does not diminish the Fourth Amendment's protections.

The same principle applies to property damage and consent searches. The Fourth Amendment's protection for "effects" includes pocketbooks, backpacks, jackets, suitcases, and other items capable of holding contraband. This proposal does not prevent police from ever reaching evidence of a crime. If some observation during a consent search gives

[204] Bailey v. United States, 568 U.S. 186, 199 (2013) (quoting Mincey v. Arizona, 437 U.S. 385, 393 (1978)).
[205] Arizona v. Hicks, 480 U.S. 321, 329 (1987).
[206] James v. Illinois, 493 U.S. 307, 311 (1990).

them probable cause to break open a container, for instance, officers can use other Fourth Amendment exceptions or get a warrant. This Note simply argues that officers cannot use the owner's consent as their sole justification for a destructive search.

D. Revoking Consent

Federal courts have repeatedly recognized that a defendant may revoke consent at any time, triggering the exclusionary rule for evidence uncovered thereafter.[207] Accordingly, some may believe that it would be more effective to expect defendants to object *before* an officer damages anything.[208] But expecting defendants to withdraw consent both misunderstands the available data on consent searches and distorts the Fourth Amendment's legal framework. As a practical matter, too, many individuals stopped by police would not predict that consenting to a search would entail property damage.

Evidence suggests that social norms, not constitutional standards, determine whether a subject consents or revokes his consent to a search. Since the Supreme Court recognized voluntariness as an essential factor in consent searches,[209] legal scholars have struggled to understand what makes a search voluntary. Many theorize that warning subjects that they have a right to refuse these searches would protect them from incriminating themselves,[210] but psychological research shows that the solution is imperfect. When Ohio passed a law requiring police officers to warn drivers of their right to leave, one researcher compared the rate of

[207] See, e.g., United States v. Ho, 94 F.3d 932, 945 (5th Cir. 1996) (defendant grabbed a portfolio back from an officer, ending the search); United States v. Flores, 48 F.3d 467, 468 (10th Cir. 1995) (defendant withdrew consent and ended the search by slamming the trunk door shut).

[208] See Florida v. Jimeno, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents. But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization."); see also United States v. McWeeney, 454 F.3d 1030, 1035 (9th Cir. 2006) ("[The suspects] had a constitutional right to modify or withdraw their general consent at anytime . . . .").

[209] See Schneckloth v. Bustamonte, 412 U.S. 218, 246–47 (1973).

[210] See, e.g., Devon W. Carbado, (E)racing the Fourth Amendment, 100 Mich. L. Rev. 946, 1030 (2002) ("[R]equiring police officers to inform every suspect of her right to refuse consent would help to equalize people's vulnerability to consent searches."); Lynch, supra note 9, at 245 ("It is not a bad thing, and it is not a small thing, that the first words a person about to be subjected to interrogation hears are, 'You have a right . . . .' I believe it would be an equally good thing if similar words accompanied police requests for consent to search.").

assent before and after the reform.[211] The data showed no statistically significant difference in the rates of consent before and after the law's passage.[212]

Simulated studies in controlled environments confirm the real-world results. In one experiment, researchers simulated consent searches by comparing two sets of participants. In the first set, researchers asked subjects to surrender their unlocked phones because the researchers were studying the contents of phones. Of 103 participants, 97.1% unlocked their phones.[213] In the second set, researchers first informed participants of their right to refuse to hand over their phones, and 83% still complied.[214]

In light of this widespread willingness to hand over personal and potentially incriminating information, it is difficult to believe that subjects of destructive searches would interrupt a police officer's search to revoke consent. Moreover, giving the public *Miranda*-style warnings, as some jurisdictions have done, would be compatible with this Note's thesis.[215] A person can be informed of her right to refuse a search request and still be protected against property destruction that occurs if she does not exercise her right of refusal.

CONCLUSION

Consent searches are ubiquitous. Nearly everyone, whether driving, walking, or resting at home, says yes to officers who ask for permission to search their property. Many scholars and defendants-rights advocates have challenged consent searches from this angle and reasoned that informed consent should be necessary for a consent search to be lawful. This Note argues for restrictions on consent searches from a different, though not mutually exclusive, standpoint and demonstrates why the line should be drawn at property damage. This Note advances a functional test that could resolve disagreement among the lower courts—one that both

[211] Illya Lichtenberg, *Miranda* in Ohio: The Effects of *Robinette* on the "Voluntary" Waiver of Fourth Amendment Rights, 44 How. L.J. 349, 366–74 (2001).

[212] Id.

[213] Roseanna Sommers & Vanessa K. Bohns, The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance, 128 Yale L.J. 1962, 1984–85 (2019).

[214] Id. at 1994.

[215] E.g., Joseph Boven, Colorado's New Informed-Consent Bill Celebrated as Tool to Fight Racial Profiling, Colo. Indep. (May 4, 2010), https://www.coloradoindependent.com/2010/05/04/colorados-new-informed-consent-bill-celebrated-as-tool-to-fight-racial-profiling/. [https://perma.cc/2K8K-G6YS].

adequately protects defendants' property and aligns with the common law at the time of the Founding.