

*Spring 2007*

## Reining in "Knock and Talk" Investigations: Using *Missouri v. Seibert* To Curtail an End-Run Around the Fourth Amendment

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### Recommended Citation

Marc L. Waite, *Reining in "Knock and Talk" Investigations: Using Missouri v. Seibert To Curtail an End-Run Around the Fourth Amendment*, 41 Val. U. L. Rev. 1335 (2007).

Available at: <https://scholar.valpo.edu/vulr/vol41/iss3/11>

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## REINING IN "KNOCK AND TALK" INVESTIGATIONS: USING *MISSOURI v.* *SEIBERT* TO CURTAIL AN END-RUN AROUND THE FOURTH AMENDMENT

*"The quality of a nation's civilization can be largely measured  
by the methods it uses in the enforcement of its criminal  
law."*<sup>1</sup>

### I. INTRODUCTION

Imagine that you are a single mother of three children.<sup>2</sup> You are at home cleaning up from dinner when there is a knock at the door. Answering the knock reveals two police officers, each wearing shirts with "Indiana Drug Enforcement" plainly visible. They ask to come in and discuss a situation regarding your oldest son, age fourteen. Once inside the home, the officers tell you that they have received information that drugs are being sold out of your home, and they would like to look around. You begin to sweat, unsure of what to do.<sup>3</sup> So you nervously ask what they are looking for, and the officers reply that they want to look for drugs, drug paraphernalia, or other indications that drugs are being sold. You decline their request for consent to search.

At this point the officers have a curious look on their faces. They ask you why you would not agree to let them search for these items. Surely you do not want your son selling drugs, and would want to correct any missteps he takes right away. Alternatively, the officers hypothesize, maybe you have something to hide. Is that it? Already nervous, you are now in a state of near hysteria. Two police officers, with the power to

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<sup>1</sup> Chief Justice Warren made this statement in the majority opinion of *Miranda v. Arizona*, 384 U.S. 436, 480 (1966) (quoting Walter V. Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956)).

<sup>2</sup> This situation, while completely hypothetical, is a conglomeration of many different fact patterns experienced during a summer spent clerking for the Honorable Dean A. Colvin, Judge, Marshall County (Indiana) Superior Court #2. He is, without doubt, one of the best legal mentors a law student could ask for. No inferences should be made that this particular fact pattern actually happened, or regarding how Judge Colvin would rule should this issue arise in the future.

<sup>3</sup> Before this is casually dismissed as a dilemma facing someone with something to hide, see Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 249-50 (2002). Strauss, a *criminal procedure professor* who knew what her rights were, felt intimidated, nervous, and embarrassed when police came to her home to investigate her son's party. *Id.* (emphasis added). She revealed that the police showed no force, yet, initially, she was unsure how she should proceed. *Id.*

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arrest you and remove your children, have accused you of hiding something. You are unable to answer, so you just stare at them.

In response to your silence, the officers tell you that unless you agree to let them search, they will remove all three of your children from your home and take them to Child Protective Services. So you agree to let them search; they produce a consent form and you sign it.

The police in this hypothetical have engaged in what is known as a “knock and talk,” a procedure that is quickly becoming a popular investigatory tool in the police arsenal.<sup>4</sup> The police in this hypothetical would not have been able to get a search warrant to search the home, yet were able to exploit the situation in the home to get around the warrant requirement by obtaining the consent of the homeowner.<sup>5</sup>

This Note will argue that when the “knock and talk” is used in this manner, any fruits, or evidence obtained from the resulting search should be excluded as coming from the “poisonous tree,” or illegal search.<sup>6</sup> First, in Part II, this Note discusses the development of the

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<sup>4</sup> The “knock and talk” is a tool used in police investigations where the police approach a dwelling, without a search warrant, knock on the door, identify themselves as police officers, ask to enter the home to “discuss” some police issue, and conduct a search of the home after gaining the homeowner’s consent. Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. CIV. RTS. L.J. 297, 311-12 (2005). These techniques were designed by police to conduct searches without warrants and to generally avoid the protections offered by the Fourth Amendment. *Id.* See *infra* note 14 for the appropriate text of the Fourth Amendment. The “knock and talk” technique (no warrant present) is to be distinguished from “knock and announce,” which refers to situations where the police *already have* a search warrant and are serving that warrant on the homeowner. See generally *Richards v. Wisconsin*, 520 U.S. 385 (1997) (law enforcement does not even have to “knock” or “announce” in this circumstance if the officer has reasonable suspicion, based on articulable facts, that knocking and announcing would be dangerous or futile or lead to the destruction of evidence).

<sup>5</sup> Consent is not the only way a search can be conducted without a waiver. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* §§ 11.01-17.01, at 183-275 (3rd ed. 2002). There are currently six exceptions (including consent) to the warrant requirement, and to be valid, a warrantless search must meet all criteria of one of the exceptions. *Id.* Besides consent, the other exceptions are: (1) search incident to a lawful arrest, (2) probable cause to believe an automobile contains contraband or evidence of a crime, (3) evidence in plain view, (4) a “stop and frisk” search, and (5) hot pursuit, evanescent evidence, or other emergency. *Id.* These exceptions are beyond the scope of this Note, and as such, detailed explanations are foregone. However, for an excellent explanation of warrant exceptions, see 4 WAYNE R. LAFAVE, *SEARCH & SEIZURE: A TREATISE ON THE 4TH AMENDMENT* (West 4th ed. 2004) (1978).

<sup>6</sup> Generally, evidence that law enforcement obtains illegally is inadmissible at criminal trial. Further, all evidence obtained or derived by exploiting the illegally obtained evidence is inadmissible as well. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). In

"knock and talk" and the historical roots of consent searches.<sup>7</sup> Then, because the evolution of consent law relies on confession law, Part II traces the development of the *Miranda* decision and its progeny.<sup>8</sup> Part II concludes with a discussion of the *Missouri v. Seibert* decision, which forms one basis for the analysis portion of this Note.<sup>9</sup> Then, Part III presents an analysis of the "knock and talk" using the information presented in Part II, while Part IV proposes a workable solution to constitutional issues discussed in Part III.<sup>10</sup>

## II. THE DEVELOPMENT OF CONSENT LAW – DOES NO REALLY MEAN NO?

Prior to 1991, no appellate case had ever used the phrase "knock and talk" in connection with the consensual search of a home.<sup>11</sup> But since 1991, the increased use of the phrase has corresponded to the increased use of the technique, because police find that getting consent is far easier than obtaining a search warrant.<sup>12</sup> Indeed, excluding searches subsequent to arrest, over ninety percent of searches conducted by police without a warrant are conducted under the auspices of consent.<sup>13</sup>

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the proceeding, the illegally obtained evidence is the "poisonous tree," and the evidence obtained by exploiting that evidence is the "fruit." *Id.*

<sup>7</sup> See *infra* notes 18-95 and accompanying text.

<sup>8</sup> See *infra* notes 96-133 and accompanying text.

<sup>9</sup> See *infra* notes 134-67 and accompanying text.

<sup>10</sup> See *infra* notes 168-266 and accompanying text.

<sup>11</sup> H. Morley Swingle & Kevin M. Zoellner, "Knock and Talk" Consent Searches: If Called by a Panther, Don't Anther, 55 J. MO. B. 25 (1999). Swingle and Zoellner found that the first appellate case to mention the phrase was *State v. Land*, 806 P.2d 1156, 1156 n.4 (Or. App. 1991). Further, the police are able to approach the home because that area is outside of the curtilage of the home in an area called the open field. See generally *Hester v. United States*, 265 U.S. 57 (1924) (the evaluation of this policy is outside the scope of this Note, and the propriety of such will be left to other Notewriters).

<sup>12</sup> See DRESSLER, *supra* note 5, § 17.01, at 275 (citing RICHARD VAN DUIZEND, L. PAUL SUTTON, & CHARLOTTE A. CARTER, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* 21 (Nat'l Center for State Courts 1984)) (quoting a police officer frustrated by delays in getting a search warrant: "you say to yourself, 'my God, you know, if I'm putting you [the magistrate] out, you know, I'll run back to the house and try bargaining for consent, you know, 'cause I can get that done.'") (emphasis added).

<sup>13</sup> See Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773 (2005); Rebecca Strauss, Note, *We Can Do this the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868, 871 (2002); see also *State v. Kerwick*, 512 So. 2d 347, 349 (Fla. Dist. Ct. App. 1987) (reporting testimony of officer patrolling the Amtrak station that they would routinely search over 3,000 passenger bags per year after receiving consent); *Harris v. State*, 994 S.W.2d 927, 932 n.1 (Tex. Crim. App. 1999) (noting the police officer in the case asked for consent to search every car he stopped, regardless of suspicion). Searches after arrests are beyond the scope of this Note.

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However, an unreasonable search of a home is the chief problem the Fourth Amendment seeks to eradicate.<sup>14</sup>

This part will begin by discussing the development of the subcategory of consent searches known as “knock and talk.”<sup>15</sup> Second, the legal history and development of consent searches is discussed, ending with a discussion of the seminal case *Schneekloth v. Bustamonte*.<sup>16</sup> Third, because the *Bustamonte* Court leaned on the development of voluntary confession law, Part III delves into the history of voluntary confession cases, concluding with a discussion of the 2004 Supreme Court decision in *Missouri v. Seibert*.<sup>17</sup>

A. *Knock and Talk Investigations*

The typical “knock and talk” practice consists of officers knocking on a resident’s door, identifying themselves, and requesting entry.<sup>18</sup>

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<sup>14</sup> The text of the Fourth Amendment reads:

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

U.S. CONST. amend. IV; *see, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 191 (1990) (Marshall, J., dissenting). Justice Marshall recognized that “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *Rodriguez*, 497 U.S. at 191 (quoting *United States v. U.S. Dist. Court, East. Dist. Mich.*, 407 U.S. 297, 313 (1972)); *see also Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting same); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948) (holding the right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals); *Hadl v. State*, 47 S.W.3d 897, 902 (Ark. App. 2001) (“Indeed, physical intrusion into the privacy of a person’s residence absent a warrant is the primary evil that the Fourth Amendment seeks to eradicate.”); Leonetti, *supra* note 4, at 297 (“The sanctity of the home and its immediate surroundings enjoys special solicitude in Fourth Amendment jurisprudence.”).

<sup>15</sup> *See infra* notes 18-39 and accompanying text.

<sup>16</sup> 412 U.S. 218 (1973); *see infra* notes 40-95 and accompanying text.

<sup>17</sup> 124 S. Ct. 2601 (2004); *see infra* notes 96-167 and accompanying text.

<sup>18</sup> *See Leonetti, supra* note 4, at 311. This action alone is constitutional as a result of the combination of the curtilage and open fields doctrines. The curtilage of the home is the area immediately surrounding the home, the boundaries of which are usually clearly marked, in which the homeowner maintains an expectation of privacy. *See Oliver v. United States*, 466 U.S. 170, 182 (1984). Open fields, on the other hand, are the unoccupied and undeveloped area outside of the curtilage. *Id.* at 178. Generally, the Court looks at four factors when analyzing whether an area is in the curtilage or in an open field. *See United States v. Dunn*, 480 U.S. 294, 301 (1987). Those four factors are: (1) the proximity of the area to the home; (2) whether the area was within an enclosure surrounding the home; (3) the nature of the uses to which the area was put; and (4) the steps taken to protect the area from observation by passers-by. *Id. But cf. Wolf v. Colorado*, 338 U.S. 25, 27 (1949) (discussing the knock at the door, either during the day or at night, as a prelude to a search

Usually, the officers are responding to an informant's tip that there may be drug activity at the house.<sup>19</sup> Once inside, the officers inform the resident that they are investigating suspected drug activity at the house and ask for permission to search the home.<sup>20</sup> If permission is granted, the officers search the home and can seize potential evidence found under the plain view doctrine; officers are authorized to take incriminating evidence in their plain view.<sup>21</sup>

At the federal level, the "knock and talk" technique has been generally recognized as a legitimate police method to obtain consent to search a residence.<sup>22</sup> However, some federal courts have asked whether the police conduct has resulted in a "seizure" for Fourth Amendment purposes.<sup>23</sup> They focus on whether the occupant of the home would feel free to leave the home or otherwise end the encounter.<sup>24</sup> These courts, generally disapproving of the technique, focus on the inherent

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simply on the authority of the police as being inconsistent with "the basic constitutional documents of English-speaking peoples").

<sup>19</sup> See Leonetti, *supra* note 4, at 312 ("The knock-and-talk has become extremely popular with law enforcement agencies around the country, particularly in areas of high drug activity."). However, nothing prevents the police from engaging in this activity on a whim, something that has been held a violation of the Fourth Amendment. See *Wolf*, 338 U.S. at 27 ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.").

<sup>20</sup> See Swingle & Zoellner, *supra* note 11, at 25. This Note focuses on the events surrounding this request. Actual experience indicates that evidence obtained as a result of the consent search often is admissible at trial as courts tend to side with law enforcement. See LAFAVE, *supra* note 5, at 51.

<sup>21</sup> See Swingle & Zoellner, *supra* note 11, at 312. The plain view doctrine is explained merely by stating that an officer, legally present at the scene, may seize incriminating evidence if it is in the officer's plain view, including items not stated in the request for consent. See LAFAVE, *supra* note 5, at 35.

<sup>22</sup> See *United States v. Jones*, 239 F.3d 716 (5th Cir. 2001); *United States v. Johnson*, 170 F.3d 708 (7th Cir. 1999); *United States v. Powell*, 929 F. Supp. 231, 232 (S.D. W. Va. 1996) (noting while the potential for abuse is apparent, courts and commentators appear to concur the practice can be lawful); *United States v. Cruz*, 838 F. Supp. 535, 543 (D. Utah 1993) (stating the "knock and talk" approach has been favorably recognized as a manner of consent search).

<sup>23</sup> Leonetti, *supra* note 4, at 313; see, e.g., *Johnson*, 170 F.3d at 720 (holding that a "knock and talk" is unconstitutional because the officers detained the suspect without the reasonable suspicion necessary to justify an investigative stop); *United States v. Jerez*, 108 F.3d 684, 690 (7th Cir. 1997) (stating that the officers' conduct amounted to a seizure based on the *Bostick* standard).

<sup>24</sup> This is known as the "free to leave" test. *Florida v. Bostick*, 501 U.S. 429 (1991). The test holds that when a person is confronted by the police in a confined place, with restricted freedom of movement, the appropriate inquiry for determining whether the encounter constitutes a "seizure" is whether a reasonable person would feel free to decline the request or otherwise end the encounter. *Id.* at 436. See *infra* notes 80-95 for a discussion of the *Bostick* case.

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intimidation involved when multiple police officers approach a residence late at night seeking a consent search.<sup>25</sup> These circumstances invariably convey the message to the homeowner that if consent is not given, the police officers will simply get a warrant and return.<sup>26</sup>

By contrast, in state courts, “knock and talk” jurisprudence has generally developed under one of two theories.<sup>27</sup> The majority of states place no further encumbrances on the technique, choosing to strictly analyze the consent granted after police have entered the home.<sup>28</sup> The courts reason that the validity of “knock and talk” ultimately turns on the validity of the consent granted to the searching police officer.<sup>29</sup>

Alternatively, some states have analyzed the procedure under Fourth Amendment seizure law.<sup>30</sup> This analysis has also led to the technique being upheld.<sup>31</sup> The courts reason that the resident is free to end the encounter at any time, and therefore no “seizure” has taken place. These courts analogize the “knock and talk” to the “free to leave test.”<sup>32</sup>

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<sup>25</sup> Leonetti, *supra* note 4, at 314.

<sup>26</sup> See, e.g., Griffin v. State, 67 S.W.3d 582 (Ark. 2002) (Brown, J., concurring). For federal cases and the circumstances disallowing the “knock and talk,” see *Johnson*, 170 F.3d at 720 (declaring the “knock and talk” unconstitutional when officers detained the suspect without the reasonable suspicion necessary to justify an investigatory stop); *United States v. Conner*, 127 F.3d 663 (8th Cir. 1997) (holding consent was not voluntary when it was given in response to a “knock and talk” procedure in which four police officers knocked on defendant’s motel room door, identified themselves as police, and ordered defendant to “Open up”); and *Jerez*, 108 F.3d at 690 (stating that the officers’ conduct in engaging in a late night “knock and talk” amounted to a seizure under the *Bostick* standard).

<sup>27</sup> See generally *Swingle & Zoellner*, *supra* note 11, at 28.

<sup>28</sup> See *Hadl v. State*, 47 S.W.3d 897, 898 (Ark. App. 2001) (ruling the “knock and talk” procedure meets the requirements of the Arkansas Constitution); *State v. Green*, 598 So. 2d 624 (La. App. 3rd Cir. 1992) (declaring the “knock and talk” search is not unlawful); *People v. Frohriep*, 637 N.W.2d 562, 569 (Mich. Ct. App. 1992) (analyzing the search resulting from a “knock and talk” under consent’s totality of the circumstances).

<sup>29</sup> *State v. Land*, 806 P.2d 1156 (Or. App. 1991) (upholding a “knock and talk” search based on consent jurisprudence).

<sup>30</sup> See *Frohriep*, 637 N.W.2d at 567 (noting that for any “knock and talk” to have constitutional ramifications a search or seizure must have taken place).

<sup>31</sup> See *State v. Smith*, 488 S.E.2d 210, 214 (N.C. 1997) (holding that the “knock and talk” procedure does not taint the consent or render the procedure a per se violation of the Fourth Amendment).

<sup>32</sup> The “free to leave test” comes from a Fourth Amendment seizure case, *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), which declared that a person is seized under the Fourth Amendment only if, in view of all the circumstances, “a reasonable person would have believed that he was not free to leave.”

Conversely, other states have chosen to place additional burdens on the police by requiring them to inform the consentor of his right to refuse consent.<sup>33</sup> These states override *Bustamonte*, which ruled that police are not required to give notice of the occupant's right to refuse the search on state constitutional grounds.<sup>34</sup> Courts in these states have placed additional burdens on police attempting to search homes, reasoning that the home is to be afforded additional protections from search and seizure by police under their state constitutions due to the sanctity of the home.<sup>35</sup>

A case that illustrates this principle is *Washington v. Ferrier*.<sup>36</sup> In *Ferrier*, the Washington Supreme Court held that before a signed consent form will be upheld, the police engaging in a "knock and talk" must notify a resident of her right to refuse to consent to the search.<sup>37</sup> The fact that the search took place in the home was central to the court's analysis of the consent granted in this case, and led the court to determine that the "knock and talk" is inherently coercive to some degree.<sup>38</sup> Therefore,

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<sup>33</sup> See *Graves v. State*, 708 So. 2d 858 (Miss. 1997) (stating consent gained through the use of a "knock and talk" requires informed waiver); *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975) (ruling that the New Jersey Constitution required the police to inform the resident of the right to refuse a search before consent was a valid exception to the warrant requirement). See *infra* notes 36-39 for a discussion of *State v. Ferrier*.

<sup>34</sup> See *State v. Ferrier*, 960 P.2d 927, 932-33 (Wash. 1998) ("we conclude that the knock and talk, as carried out here, violated Ferrier's state constitutional right to privacy in her home"). See *infra* notes 68-79 for the discussion of *Bustamonte*.

<sup>35</sup> See *Ferrier*, 960 P.2d at 933 (stating the fact that the "knock and talk" took place in the home was central to their analysis). Two examples from *Ferrier* and *Johnson* can be given. The pertinent text of Washington's Constitution reads: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. 1 § 7. The pertinent text of the New Jersey Constitution reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." N.J. CONST. art. I, para. 7.

<sup>36</sup> *Ferrier*, 960 P.2d at 927. In *Ferrier*, police went to search Mrs. Ferrier's house after they received a tip from her son that she was growing marijuana in the home. *Id.* at 928. A total of four officers of the Bremerton police force went to the home to engage in a "knock and talk" because they did not believe they could get a search warrant. *Id.* The officers went to Mrs. Ferrier's home and asked to enter to discuss a problem with her son. *Id.* After the officers were in the home they asked for consent to search. *Id.* At this point the testimony of the officers differed significantly from the testimony of Mrs. Ferrier. *Id.* The officers testified they went over a consent to search form and that Mrs. Ferrier signed it willingly. *Id.* at 929. They did note, however, that she appeared nervous. *Id.* Mrs. Ferrier, on the other hand, testified that the officers threatened to take her grandchildren to protective services and that she only signed the consent form to prevent this from happening. *Id.* Mrs. Ferrier testified that not only was she nervous, she was afraid as well. *Id.*

<sup>37</sup> *Id.* at 938. The court went on to state that where police have ample opportunity to obtain a warrant they would not look kindly on a failure to do so. *Id.* at 932.

<sup>38</sup> *Id.* at 933. The court stated that in its opinion, the majority of people would not question the lack of warrant because they either: (1) do not know one is required, (2) would



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the closer officers come to intruding a dwelling, the greater the constitutional protection the Washington Constitution offers.<sup>39</sup>

B. *The Consent Search – “Bargained” for or Freely Given?*

The United States Supreme Court has often maintained that warrantless searches are *per se* unreasonable.<sup>40</sup> However, a significant exception to the warrant requirement is the consent search.<sup>41</sup> In fact, there are few areas of Fourth Amendment jurisprudence that have greater practical significance than consent searches.<sup>42</sup> One particularly troublesome aspect of consent law is how far the Supreme Court has been willing to bend to allow police to conduct warrantless activity.<sup>43</sup> This penchant is particularly bothersome when it comes to searches of a residence, because the police tend to violate the sanctity of the home that the Fourth Amendment ostensibly protects.<sup>44</sup>

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feel inhibited from requesting, or (3) would be too stunned by the circumstances to make a reasoned decision on whether to grant consent. *Id.*

<sup>39</sup> *Id.* at 931. The court stated that in no area is a citizen more entitled to privacy than in the home. *Id.*

<sup>40</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967) (stating, “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions”).

<sup>41</sup> See DRESSLER, *supra* note 5, § 17.01, at 275. As one officer explained, “there 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 [to search], I’m gonna do it.” VAN DUIZEND, SUTTON, & CARTER, *supra* note 12, at 21 (quoting DRESSLER, *supra* note 5, § 17.01, at 275).

<sup>42</sup> See DRESSLER, *supra* note 5, § 17.06, at 276 (stating a potentially troubling aspect of the development of consent law is how far the Court is willing to bend to allow warrantless consent searches); see also LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 47-48 (2005) (describing the apparent double standard courts employ when analyzing consent in the search context—positing pragmatic information indicating consent is credited while pragmatic information indicating coercion is discounted).

<sup>43</sup> DRESSLER, *supra* note 5, § 17.06, at 276. A particularly pragmatic issue is how often people grant consent even though they are well aware that incriminating evidence is within the area to be searched. Strauss, *supra* note 3, at 212. Most reasonable people, it would seem, would not consent to such a search. *Id.* Indeed, the District of Columbia Circuit even had a rule—the no sane man rule—that stated that no sane man who denies his guilt would actually be willing to allow policemen to search his room and discover contraband. *Higgins v. United States*, 209 F.2d 819, 820 (D.C. Cir. 1954) (holding that mere acquiescence to a police search, absent some verbal indication to consent, does not constitute consent when the resident is denying guilt).

<sup>44</sup> See *United States v. Matlock*, 415 U.S. 164, 184 (1974) (Marshall, J., dissenting) (“The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from

Despite the sanctity issue, the Court has maintained that the consent search may be the only tool that police have when probable cause is not present, and even when probable cause is present, the consent search may be to the benefit of the person granting consent.<sup>45</sup> Further, it may be more convenient for the police to conduct a consent search if the suspect is willing to give up her constitutional protections.<sup>46</sup> However, when the police have probable cause, some members of the Court have stated that the Constitution prefers the input of a detached and neutral magistrate.<sup>47</sup> In these cases, the methods the courts use to analyze consent become

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surveillance."); *Miller v. United States*, 357 U.S. 301, 307 (1958) (stating that for Fourth Amendment purposes a man's home is his castle); *State v. Ferrier*, 960 P.2d 927, 931 (Wash. 1998) ("In no area is a citizen more entitled to his privacy than in his or her home." (quoting *State v. Young*, 867 P.2d 593, 599 (Wash. 1994) (citation omitted))); *Hadl v. State*, 47 S.W.3d 897, 902 (Ark. App. 2001) ("individuals have a high expectation of privacy in their homes"). Indeed, when the search is of the home, and occurs at night, it can be particularly problematic. See *Leonetti*, *supra* note 4, at note 60 (citing cases that note the consistent recognition of nighttime searches of one's home as "uniquely intrusive" and people being awakened at night by police as "uniquely vulnerable to coercion"). For this reason, the Federal Government, and many states, require more than probable cause to justify serving a search warrant on a dwelling at nighttime. *Id.* (citing *Gooding v. United States*, 416 U.S. 430, 437 (1974), for the proposition that the Federal Rules of Criminal Procedure require positive certainty that the property is on the person or in the place to be searched before a nighttime search will be authorized, with the exception of a search for controlled substances).

<sup>45</sup> The Court's attitude toward consent searches was explained by Justice Stewart in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. . . . And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent . . . is a constitutionally permissible and wholly legitimate aspect of effective police activity.

*Id.* at 227-28.

<sup>46</sup> *DRESSLER*, *supra* note 5, § 17.02, at 278. Dressler, however, also delivers a cautionary rhetorical question regarding this justification: is police convenience, or police efficiency, really important enough that we are willing to cast aside constitutional protections to afford it? *Id.*

<sup>47</sup> See *Matlock*, 415 U.S. at 180-81 (Marshall, J., dissenting) ("The intervention of a judicial officer gives the Amendment vitality by restraining unnecessary and unjustified searches and invasions of privacy before they occur."); *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[T]he Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . .'" (quoting *Wong Sun v. United States*, 371 U.S. 471, 481 (1963))).

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very important.<sup>48</sup> Traditionally, the Court has used two options: either the consent represents waiver of a constitutional right or the consent search is a reasonable search.

1. Constitutional Waiver or Reasonable Search?

Early consent cases indicated that the Supreme Court justified consent searches on waiver grounds.<sup>49</sup> That is, there was no exception to the Fourth Amendment, but rather, a consenting person gives up the right to be free from unreasonable searches.<sup>50</sup> In this way, a person is really giving up the claim that her rights were violated when she consents to a search.<sup>51</sup>

The Court soon moved away from justifying consent searches on waiver grounds. The reasoning behind the waiver grounds soon conflicted with the facts surrounding other, Court approved, consent cases.<sup>52</sup> For example, the waiver of a constitutional right involves the “intentional relinquishment of a known right or privilege.”<sup>53</sup> However, the Court specifically stated in *Schneekloth v. Bustamonte*, discussed in detail below, that a consent search can be upheld even if the consenter

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<sup>48</sup> 415 U.S. at 180-81. Much more bothersome are the cases where police do not have consent. *Id.* When the police know they could not obtain a search warrant even if they tried, they resort to “bargaining” for consent. See VAN DUIZEND, SUTTON & CARTER, *supra* note 12, at 21. This seems to run afoul of the very purpose of the Fourth Amendment itself, for “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.” *Arizona v. Hicks*, 480 U.S. 321, 329 (1987).

<sup>49</sup> See DRESSLER, *supra* note 5, § 17.02, at 277. For a discussion of the *Bustamonte* Court’s handling of the waiver issue, see *infra* note 75 and accompanying text.

<sup>50</sup> *Stoner v. California*, 376 U.S. 483, 489 (1964) (reasoning that the right to be free of a warrantless search “was a right, . . . which only the petitioner could waive by word or deed . . .”); *Johnson v. United States*, 333 U.S. 10, 13 (1948) (holding consent to be invalid if it is “granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right”).

<sup>51</sup> See DRESSLER, *supra* note 5, § 17.02, at 277.

<sup>52</sup> *Id.* See *infra* notes 62-65 and accompanying text for a discussion on third party consent.

<sup>53</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Johnson had been imprisoned for possessing and passing counterfeit money. *Id.* at 460. He sought a writ of habeas corpus to review his claim that he was denied the assistance of counsel at his trial, violating his Sixth Amendment rights. *Id.* The District Court Judge denied the writ finding that the lack of assistance of counsel did not make the trial void. *Id.* The Supreme Court remanded the case for determination whether Johnson intelligently and intentionally waived his constitutional right to counsel. *Id.* at 469. The Court further stated that if Johnson did not knowingly and intelligently waive his right to counsel the writ must be granted. *Id.*

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did not know that she could refuse the police's request.<sup>54</sup> This conflict is further shown in both the cases of third-party consent and the "apparent authority" cases.<sup>55</sup> Each of these cases involves one party granting consent to the police to search the property of someone else, and absent some agency relationship, person A cannot waive the constitutional rights of person B.<sup>56</sup>

*Illinois v. Rodriguez* states the current justification for consent searches.<sup>57</sup> In *Rodriguez*, the Court explained that the consent obtained by police made the search reasonable, and therefore no violation of the Fourth Amendment occurred.<sup>58</sup> As a result, consent is not really a

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<sup>54</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The Court reasoned that consent searches are a part of standard investigatory techniques, and there was no reason to require police to tell the resident they have the right to refuse the request to search. *Id.* at 231-32. Knowledge of that right by the resident is one of the conditions to be evaluated as a part of the "totality of all the circumstances." *Id.* at 227; *see also* *Ohio v. Robinette*, 519 U.S. 33 (1996) (holding that the Fourth Amendment does not require that a lawfully seized person be advised that she is free to go before her consent to a car search will be recognized as voluntary, and following the *Bustamonte* approach in refusing to establish bright line rule). This line of reasoning has been followed in the state courts as well. *See* *State v. Woolfolk*, 3 S.W.3d 823 (Mo. Ct. App. 1999) (ruling state constitution did not require a pre-consent warning); *State v. Forrester*, 541 S.E.2d 837 (S.C. 2001) (holding that the state constitution did not require police to issue a warning before the suspect granted consent).

<sup>55</sup> *See* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987); Peter Goldberger, *Consent, Expectations of Privacy, and the Meaning of "Searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319 (1984).

<sup>56</sup> *See* *Stoner v. California*, 376 U.S. 483, 489 (1964) ("It is important to bear in mind that it was [Stoner's] constitutional right which was at stake here . . . . It was a right, therefore, which only [Stoner] could waive by word or deed, either directly or through an agent.").

<sup>57</sup> 497 U.S. 177 (1990). *Rodriguez* was arrested for possession of illegal drugs after police found cocaine on the coffee table. *Id.* at 180. The police had been summoned to Dorothy Jackson's house to investigate an assault claim by Gail Fischer, Ms. Jackson's daughter and *Rodriguez's* girlfriend. *Id.* at 179. Ms. Fischer claimed *Rodriguez* assaulted her at their apartment and that he was at the apartment sleeping. *Id.* at 180. She agreed to take the police there and let them in to arrest him. *Id.* She repeatedly referred to the apartment as "our" apartment, and stated that she lived there with *Rodriguez* and had furniture and clothes at the apartment. *Id.* Upon arriving at the apartment, Ms. Fischer unlocked the door and let the police officers enter. *Id.* The officers then found the cocaine. *Id.* Subsequently, it was determined that Ms. Fischer did not appear on the lease and did not pay rent for the apartment. *Id.* The Court ruled that while Ms. Fischer had no actual authority to consent to the search, it could have been reasonable, under the circumstances, for the police to assume Ms. Fischer's authority, and therefore the search itself was reasonable and did not violate the Fourth Amendment. *Id.* at 189. The case was remanded for consideration of the reasonableness of the police's presumptions. *Id.* The Court stated that the important question was not whether a Fourth Amendment right had been waived, but rather, had the right to be free from unreasonable searches been violated. *Id.* at 187.

<sup>58</sup> *Id.* at 183-84. Some members of the Court in *Rodriguez* wanted to justify consent searches with the logic that once a person has consented to a search, she has given up all

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warrant exception; if a search is reasonable, it comports with the Fourth Amendment by definition.<sup>59</sup>

2. Police Deception

Another consideration in consent searches is the use of deception to gain consent.<sup>60</sup> In *Bumper v. North Carolina*, the Supreme Court held that a consent search cannot be upheld if the police claim that they already have a warrant when, in fact, they do not.<sup>61</sup> During the trial the prosecutor reported to the judge that there was no warrant, but that consent was given to search the home.<sup>62</sup> The Court held that the search was impermissible, reasoning that mere acquiescence to a claim of

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expectations of privacy in the property in question. See DRESSLER, *supra* note 5, § 17.02[B], at 277. Under this view, a consent search is really not a search at all. *Id.* The dissent claimed, “a person may voluntarily limit his expectation of privacy by allowing others to exercise authority over his possessions.” *Rodriguez*, 497 U.S. at 190 (Marshall, J., with whom Brennan and Stevens, JJ., joined, dissenting). Justice Scalia refuted this statement however, by saying: “To describe a consented search as a noninvasion of privacy and thus a non-search is strange in the extreme.” *Id.* at 186 n.\*.

<sup>59</sup> DRESSLER, *supra* note 5, § 17.02, at 278; see also *Rodriguez*, 497 U.S. at 189. For a further discussion on consent searches, see LAFAVE, *supra* note 5, § 8. In addition, not only is a consent search a “reasonable search,” police only need “reasonable” belief that consent has been given. See *United States v. Mendoza-Cepeda*, 250 F.3d 626, 629 (8th Cir. 2001) (upholding district court’s conclusion that “the Fourth Amendment ‘requires only that the police reasonably believe the search to be consensual’”); *People v. Henderson*, 210 N.E.2d 483 (Ill. 1965) (reasoning that officers, as reasonable men, could conclude that defendant’s consent was given). However, there are police actions that typically lead courts to a finding of involuntariness—threats to a suspect or his family, deprivation of necessities until suspect consents, asserting an absolute right to search, and an unusual or extreme show of force. Strauss, *supra* note 3, at 225; see, e.g., *United States v. Ivy*, 165 F.3d 397, 402 (6th Cir. 1998) (stating that the police threat to remove suspect’s child from the home amounted to coercion); *United States v. Tibbs*, 49 F. Supp. 2d 47, 48-49 (D. Mass. 1999) (ruling that the removal of suspect’s children was a force rendering suspect’s consent coerced).

<sup>60</sup> See LAFAVE, *supra* note 5, § 8.2, at 55; see also *Ivy*, 165 F.3d at 402 (ruling that the threat to arrest suspect’s girlfriend and remove suspect’s children created coercive environment); *Tibbs*, 49 F. Supp. 2d at 53 (holding that when police threatened to take away the suspect’s children they coerced the consent given).

<sup>61</sup> 391 U.S. 543, 548 (1968). Bumper, an African-American man, was charged with raping a white woman. *Id.* at 544. Rape was a capital offense in North Carolina at that time. *Id.* During the search of the home Bumper shared with his grandmother, a .22 caliber rifle was found that allegedly was used in the rape. *Id.* Bumper was found guilty and sentenced to death. *Id.*

<sup>62</sup> *Id.* The State attempted to argue that the search was justified based on the fact that it turned up the rifle allegedly used. *Id.* at 548. The Court ruled that this issue had been settled long ago; a search that violates the constitution is not cured by what it brings to light. *Id.*

authority does not represent consent.<sup>63</sup> Further, when an officer claims to have authority to search a home under a warrant, he is in effect making a claim that the occupant has no right to refuse the search.<sup>64</sup> This represents coercion on the part of the police, and "where there is coercion, there cannot be consent."<sup>65</sup> Additionally, the Court stated that consent must be given freely and voluntarily, and placed the burden of proving free and voluntary consent on the State.<sup>66</sup>

### 3. Voluntariness of Consent

Yet another consideration courts must give to consent searches is the voluntariness of the consent granted.<sup>67</sup> *Schneckloth v. Bustamonte* is the seminal case in determining whether the consent was granted voluntarily.<sup>68</sup> In *Bustamonte*, the Supreme Court reversed the Ninth

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<sup>63</sup> *Id.* Bumper lived with his grandmother in a house at the end of an isolated dirt road. *Id.* at 546. A sheriff, two deputies, and a state investigator went to his house in an attempt to search for evidence. *Id.* When the police arrived, they informed Hattie Leath, Bumper's grandmother, that they had a search warrant, and asked to search the home. *Id.* She replied "Go ahead." *Id.* Mrs. Leath testified that she believed the officer that they had a warrant, and if the law had a warrant they could search the house. *Id.* at 547. The Court stated that consent must be given freely and voluntarily, and that the State had the burden of proving consent was indeed given freely and voluntarily. *Id.*

<sup>64</sup> *Id.* at 550. The Court's observance of the occupant's right to refuse the search will reappear in later cases. See *infra* notes 88-95 and accompanying text for a refining of this test in the *Bostick* and *Drayton* cases. See also SOLAN & TIERSMA, *supra* note 42, at 38-46 (describing how linguistically police requests can be, and often are, interpreted as commands which the accused has no right to refuse).

<sup>65</sup> *Bumper*, 391 U.S. at 550. In this case, the Court found that the consent given was merely "acquiescence to a claim of lawful authority," and this was not enough to meet the burden imposed on the State to show the consent was given freely and voluntarily. *Id.* at 549.

<sup>66</sup> *Id.* at 547. There is question as to whether that burden remains on the prosecution, or whether the judiciary has inadvertently shifted that burden to the accused via over-reliance on police testimony. See *infra* notes 95-102.

<sup>67</sup> See LAFAVE, *supra* note 5, § 8.2, at 51. LaFave argues that the voluntariness test is not useful. *Id.* He argues that one reason the *Miranda* decision was made was in response to the ineffectiveness of the voluntariness test in the coerced confession arena. *Id.* Actual experience evidence often is allowed in at trial. *Id.* Also, courts tend to side with law enforcement on questions of voluntariness. *Id.*; see also *infra* note 83 and accompanying text.

<sup>68</sup> 412 U.S. 218 (1973). *Bustamonte* was a passenger in a vehicle that had been stopped for having a headlight out. *Id.* at 220. He was sitting on the passenger side of the front seat with another man, Alcalá. *Id.* The driver could not provide the police officer with identification, and Alcalá told the officer the car belonged to his brother. *Id.* When the police officer asked Alcalá if he could search the car Alcalá responded, "Sure, go ahead." *Id.* No person was threatened with arrest. *Id.* The officer found three checks that had been stolen from a local car wash under the front seat of the vehicle. *Id.* *Bustamonte* was then charged with possessing a check with intent to defraud. *Id.* at 218. At the trial court, *Bustamonte's* motion to suppress the checks was denied and he was convicted. *Id.* at 220.

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Circuit's finding that consent was a waiver of a constitutional right and that the consent granted must be freely and voluntarily given.<sup>69</sup> Engaging in a review of coerced confession cases to establish the meaning of voluntariness, the Court noted that the voluntariness of confessions was measured by the confessor's will being overborne, which was indicated by a totality of the circumstances.<sup>70</sup> Likewise, then, consent to search should be a question of fact to be determined by the "totality of all the circumstances."<sup>71</sup> Therefore, a person's awareness, or lack of awareness, of her constitutional rights becomes only a factor to be considered as a part of the totality of the circumstances surrounding the consent given.<sup>72</sup> However, in every case involving a consent search, the

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He then sought a habeas corpus review in federal district court, and this was denied. *Id.* at 221.

<sup>69</sup> *Id.* The Court cited *Bumper*. See *supra* notes 60-66 and accompanying text for a discussion of the issues surrounding the *Bumper* case.

<sup>70</sup> *Bustamonte*, 412 U.S. at 223, 226. The most extensive exposition of the meaning of voluntariness has been in cases of confession. The Court stated that the need for police questioning as a tool for effective enforcement of criminal laws is at one end of a spectrum with the belief that unfair and brutal police tactics pose a real and serious threat to civilized notions of justice at the other. *Id.* at 225. The Court also noted that "the Constitution requires the sacrifice of neither security nor liberty." *Id.* This test for confessions was obviously supplemented by the *Miranda* case and its progeny. See *infra* Part II.C for a discussion of the development of confession jurisprudence.

<sup>71</sup> *Bustamonte*, 412 U.S. at 227. Many commentators have criticized this holding by the Court. DRESSLER, *supra* note 5, § 17.03, at 282; see also Strauss, *supra* note 3, at 872. These critics contend, as did Justice Marshall in dissent, that the Court misstated the issue. DRESSLER, *supra* note 5, § 17.03, at 282-83. Their contention is that the issue in *Bustamonte* was whether the accused had waived his constitutional right to be free from unreasonable searches. *Id.* § 17.03, at 283. Justice Stewart discounted the contention by saying that the waiver approach is inconsistent with the Court's holding in third party consent cases. *Bustamonte*, 412 U.S. at 245. Those cases hold that any person who possesses common authority over premises may consent to a search of the property. See DRESSLER, *supra* note 5, § 17.03, at 283. The *Bustamonte* Court stated however that "it is inconceivable that the Constitution could countenance the waiver of a defendant's [constitutional] right . . . by a third party." *Bustamonte*, 412 U.S. at 245.

<sup>72</sup> *Bustamonte*, 412 U.S. at 226. This decision has been criticized for leading to confusion at best and inadequate Fourth Amendment protections at worst. See Strauss, *supra* note 3, at 235. The decision has been poorly understood and courts often ignore the factors emphasized in *Bustamonte*. *Id.* It has been posited that people will inevitably feel coerced simply by dealing with the police because of their authoritativeness. *Id.* Studies have shown that people are significantly more apt to comply with orders they perceive coming from an authority figure. *Id.* at 238. A person wearing a guard's uniforms achieved 82% compliance for simple commands such as, move away from a specified area or pick up that piece of trash, while a "milkman" achieved 64% compliance, and a civilian achieved 36%. *Id.* Indeed, some testimony in criminal trials indicates that defendants do not feel they can refuse a police request. *Melton v. State*, 705 N.E.2d 564, 567 (Ind. Ct. App. 1999). Additionally, judges have begun to recognize that citizens might view the request to search as a demand if it comes from an authority figure. *Bustamonte*, 412 U.S. at 289 (Marshall, J., dissenting); *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975).

prosecution has the burden of demonstrating that the consent, in fact, was freely and voluntarily given.<sup>73</sup>

The Court reviewed factors generally considered in the totality of all the circumstances surrounding confession cases.<sup>74</sup> Among the factors noted were the age of the accused, intelligence and education level of the accused, lack of advisement as to constitutional rights, length of detention, use of physical force, repeated and prolonged nature of the questioning, and location of the questioning.<sup>75</sup> In fact, the majority indicated that no single factor would be outcome-determinative, but taken together, these factors would be indicative of the totality of all the circumstances surrounding the consent.<sup>76</sup>

The Court also noted that generally the person giving consent would be in the home when granting consent and that the familiar surroundings would also play a role in the totality.<sup>77</sup> Indeed, the Court distinguished *Miranda* based on this point, stating that *Miranda* ruled that the stationhouse interview is inherently coercive, while the familiar surroundings of the home prevented the consent scenario from being inherently coercive.<sup>78</sup> However, the Court failed to discuss any

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<sup>73</sup> *Bustamonte*, 412 U.S. at 222. The Court stated this was a question of fact to be determined by looking at the totality of circumstances. *Id.* at 227.

<sup>74</sup> *Id.* at 226. See *infra* notes 80-87 and accompanying text for a review of the Court's treatment of these factors after *Bustamonte*.

<sup>75</sup> *Bustamonte*, 412 U.S. at 226. Again, the factors were settled upon by the Court after the review of coerced confession cases with the Court noting these particular factors most often were relied upon. *Id.*

<sup>76</sup> *Id.* "The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances." *Id.*

<sup>77</sup> *Id.* at 247. However, this contradicts previous statements describing the sanctity of the home being protected by the Fourth Amendment. Justice Frankfurter summarized the view of the sanctity of the home when he stated:

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. . . . The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

*Wolf v. Colorado*, 338 U.S. 25, 27-28 (1948); see also *supra* note 14 and accompanying text.

<sup>78</sup> *Wolf*, 338 U.S. at 27-28. Interestingly, the Court did not discuss other cases referencing the reverence with which the home is treated. See *supra* note 14. The Court has also invoked the issue of privacy in the home in other contexts as well. *Frisby v. Schultz*, 487 U.S. 474 (1988). Justice O'Connor's opinion described the targets of picketing as being



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Congressional or regulatory determinations on this point. For example, the Court never mentioned a Federal Trade Commission regulation that specifically deals with coercive sales tactics inside the home.<sup>79</sup>

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literally and figuratively trapped inside their homes. *Id.* at 487. She went on to say that even one picketer could “invade residential privacy.”

<sup>79</sup> See 16 C.F.R. § 429.1 (2005). The pertinent text reads as follows:

In connection with any door-to-door sale, it constitutes an unfair and deceptive act or practice for any seller to:

(a) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, e.g., Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

“You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.”

The seller may select the method of providing the buyer with the duplicate notice of cancellation form set forth in paragraph (b) of this section, *provided however*, that in the event of cancellation the buyer must be able to retain a complete copy of the contract or receipt. Furthermore, if both forms are not attached to the contract or receipt, the seller is required to alter the last sentence in the statement above to conform to the actual location of the forms.

(b) Fail to furnish each buyer, at the time the buyer signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned either “NOTICE OF RIGHT TO CANCEL” or “NOTICE OF CANCELLATION,” which shall (where applicable) contain in ten point bold face type the following information and statements in the same language, e.g., Spanish, as that used in the contract.

*Id.*

4. Voluntariness after *Bustamonte*

The Court expanded *Bustamonte* in *Florida v. Bostick*.<sup>80</sup> The Florida Supreme Court held that the police coerced consents to search luggage by conducting bus sweeps for drugs, therefore violating the Fourth Amendment.<sup>81</sup> But the Supreme Court reversed and stated that no per se violation of the Fourth Amendment had occurred.<sup>82</sup> The Court declared that the appropriate test is whether the bus passenger would feel free to decline the officers' requests given the totality of all the circumstances.<sup>83</sup>

Since *Bostick*, the Court has stuck with the "free to end the encounter" test, as demonstrated in *United States v. Drayton*.<sup>84</sup> In

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<sup>80</sup> 501 U.S. 429 (1991). In *Bostick*, a bus en route from Miami to Atlanta had a stopover in Ft. Lauderdale. *Id.* at 431. While the bus was stopped, two officers with badges, insignia, and one holding a zipper pouch containing a pistol, boarded the bus in an attempt to curb the illegal transportation of drugs. *Id.* The two officers admitted to picking out Bostick for no articulable reason. *Id.* The officers asked Bostick for his identification and ticket, and immediately returned them after determining they were appropriate. *Id.* The officers continued the interrogation, identifying themselves as drug officers and requested permission to search Bostick's belongings. *Id.* at 432. It was the point of contention whether this consent took place, and whether this action by the police amounted to a seizure for Fourth Amendment purposes. *Id.*

<sup>81</sup> *Id.* at 433. The Florida Supreme Court reasoned that Bostick would have been seized for Fourth Amendment purposes due to the fact a reasonable person would not have felt free to leave the bus to avoid the questioning. *State v. Bostick*, 554 So. 2d 1153, 1154 (Fla. 1989) (stating an impermissible seizure results when police engage in drug searches during scheduled stops by questioning passengers without an articulable reason for doing so for the purpose of gaining consent to search the luggage).

<sup>82</sup> *Bostick*, 501 U.S. at 440. The Court was persuaded by several factors. *Id.* at 434-40. First, the Court noted that police merely asking questions does not constitute a seizure. *Id.* at 434. Second, the Court reasoned that if this encounter had taken place after the bus had arrived in Atlanta or before it left Miami, there would be no doubt about the legitimacy of the encounter. *Id.* Third, the Court stated the fact that Bostick would not have felt free to leave the bus was due to his own decision to take the bus, an independent factor from any coercive police behavior. *Id.* at 436. As a result of these factors, as well as the trial court's finding that the police had instructed Bostick that he had the right to refuse the search, the Court overruled the Florida Supreme Court. *Id.* at 440. However, the Court intentionally did not rule whether a seizure had taken place or not. *Id.* at 437.

<sup>83</sup> *Id.* (stating that the case is remanded so that the Florida courts may evaluate the seizure question under the correct legal standard).

<sup>84</sup> 536 U.S. 194 (2002). In *Drayton*, a bus was en route from Ft. Lauderdale to Detroit when it made a scheduled stop for gas in Tallahassee. *Id.* at 197. At that time, three police officers boarded the bus as part of drug interdiction program. *Id.* One officer observed from the driver's seat, one officer stayed at the rear of the bus, and one officer went up the aisle and randomly asked passengers if he could search their bags and/or person. *Id.* at 198. When the officer got to Drayton and his traveling partner, they both indicated that the officer could search their bags in the overhead bin. *Id.* After that search, they each consented to the officer patting down their persons, where the officer found bags of cocaine taped to their thighs. *Id.* at 199. The Court of Appeals ruled the search and seizure

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*Drayton*, another bus search case, the Court stated that when a reasonable person would feel free to end the encounter, no seizure has taken place, and that the consent is given voluntarily.<sup>85</sup> The majority paid particular attention to the actions of the police, and never discussed the *Bustamonte* factors surrounding the person granting consent.<sup>86</sup> In fact, the Court seemed to say that police conduct is more decisive in the voluntariness question than subjective factors surrounding the person granting consent.<sup>87</sup>

However, a general problem that occurs with consent searches, and is especially pertinent when considering the “knock and talk,” is that the litigation of consent brings the integrity of judicial reviewer into the equation.<sup>88</sup> Often, the suspect’s version of events will differ dramatically from the police officer’s version.<sup>89</sup> In these instances, judges tend to side with the police; they are uncomfortable accusing the police of lying unless the evidence against the officer is overwhelming.<sup>90</sup> This deference occurs despite the fact that the need to convict, and the need to avoid reprimand, creates incentives for the officer to misrepresent the circumstances surrounding consent.<sup>91</sup> These incentives manifest themselves in two potential ways, with the first being outright perjury

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unconstitutional, saying passengers on a bus would not feel free to disregard the search request. *Id.* However, the Court reversed and remanded the decision. *Id.*

<sup>85</sup> *Id.* at 203-04. Further, the Court stated that this test presupposes an innocent reasonable person. *Id.* at 202. This is also affirmation of the *Bostick* decision utilizing the reasonable innocent person. *Bostick*, 501 U.S. at 437-38.

<sup>86</sup> See *Simmons*, *supra* note 13, at 779 (stating that in practice the Court will only look at police conduct in determining voluntariness); see also *Strauss*, *supra* note 3, at 222 (positing that the subjectivity requirement of *Bustamonte* is dead).

<sup>87</sup> A nuanced reading of *Bustamonte* also supports this contention. See *Simmons*, *supra* note 13, at 779. The Court attempted to make clear that the purpose of the voluntariness requirement is to prevent police misconduct, not to ensure the defendant is making a subjectively free choice. *Id.* Further, it could be argued that the subjectively free choice is irrelevant because the lynchpin of traditional Fourth Amendment jurisprudence is reasonableness, or, in other words, an objective inquiry into the appropriateness of police action. *Id.* at 774.

<sup>88</sup> See *Strauss*, *supra* note 3, at 244; see also *Simmons*, *supra* note 13, at 775 (“[T]he nearly unanimous condemnation of the Court’s rulings on consensual searches is creating a problem of legitimacy which threatens to undermine the integrity of judicial review of police behavior.”).

<sup>89</sup> *Strauss*, *supra* note 3, at 245 (calling these differences “conflicting tales”). Indeed, the author cites as an example “several” students in her Criminal Procedure class report they refused consent only to have the officer say “thank you for agreeing,” and then proceed to search. *Id.* at 246 n.130.

<sup>90</sup> See David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941, 947 (1997). Further, many recognize the accused’s incentive to lie to maintain his freedom. *Id.*

<sup>91</sup> See *Strauss*, *supra* note 3, at 245.

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by the officer.<sup>92</sup> Some believe that judges knowingly accept this perjury and purposefully ignore the law to keep evidence from being suppressed.<sup>93</sup> The second manifestation is selective perception, or "misremembering."<sup>94</sup> Either one of these manifestations impacts the integrity of the judicial system and the public's belief in its ability to render fair and objective justice.<sup>95</sup>

C. *Confessions: Can Police "Bargain" for Confessions?*

Because consent search law, as developed by *Bustamonte*, relied so heavily on coerced confession jurisprudence, a review of confession case

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<sup>92</sup> *Id.* at 245-49; see also Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 82-83 (1992) (reporting a study of prosecuting attorneys, judges, and police officers revealed "pervasive police perjury intended to avoid the requirements of the Fourth Amendment"). One former Police Chief admitted his belief that perjury (called "testilying") is common at suppression hearings with respect to consent searches. Strauss, *supra* note 3, at 246 (referring to Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1356-57 (1996)); Joseph McNamara, *Has the Drug War Created an Officer's Liars Club?*, L.A. TIMES, Feb. 11, 1996, at M1.

[H]undreds of thousands of police officers swear under oath . . . that the defendant gave consent to a search. This may happen occasionally but it defies belief that so many drug users are . . . so dumb as to give cops consent to search . . . when they possess drugs.

McNamara, *supra*, at M1; see also Maurice Possley & Gary Marx, *Drug Busts Only as Good as Cop's Word*, CHI. TRIB., Feb. 4, 1997, § 1, at 1 (describing study by a member of the Minnesota House of Representatives interviewing judges, prosecutors, police officers, public defenders working in the Cook County Criminal Courts and found 64% of judges and 84% of public defenders interviewed believed officers shade the facts as much as needed to obtain probable cause when there may not have been probable cause); *United States v. Heath*, 58 F.3d 1271, 1276 (8th Cir. 1995) (McMillian, J., concurring) ("The police officers' saccharine account of the events . . . leaves a bitter aftertaste . . . . The 'fact' that [defendant] would so willingly consent to the search of . . . the shoe box, which he knew contained drugs . . . is surprising, to say the least.").

<sup>93</sup> See Orfield, *supra* note 92, at 83. The reasons for these actions by judges are that the judge may feel that it is unjust to suppress the evidence under the circumstances of the case, fear of adverse publicity, or worry that a suppression will hurt the chance for re-election. *Id.* Orfield also noted that serious cases in Chicago are diverted to judges who have the reputation of being more likely to convict the defendant. *Id.*

<sup>94</sup> See Strauss, *supra* note 3, at 250. Selective perception occurs when the suspect grants conditional consent, but the officer hears an unqualified yes. *Id.* at 249. As time goes by, the words used by the suspect become even more convincingly clear in the officer's head; so much so that, by the time of trial, the officer can honestly take the stand and testify that the suspect clearly and without qualification consented. *Id.*

<sup>95</sup> *Id.* at 252. This is analogous to the testimony regarding the question of whether the suspect received and understood his *Miranda* rights. See *infra* note 128. However, there are reasons to believe testimony in the *Miranda* realm is more reliable—first, the rights are often given and received in the more formal setting of the stationhouse, and, second, those interrogations are often videotaped. *Id.*

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law is necessary as it also impacts the “knock and talk” analysis. A privilege against compelled self-incrimination in United States jurisprudence has existed since the Supreme Court’s decision in *Bram v. United States*.<sup>96</sup> This decision held that the Fifth Amendment privilege was applicable to federal criminal trials as a matter of constitutional law.<sup>97</sup> However, because the Court did not find that this right was fundamental, it was not applicable to state criminal trials.<sup>98</sup>

Because the Fifth Amendment was not available to keep coerced confessions out of state criminal trials, the Court often resorted to the Due Process Clause of the Fourteenth Amendment.<sup>99</sup> This clause was the instrument of choice for the Supreme Court until *Malloy v. Hogan*.<sup>100</sup> In *Hogan*, the Court held that the Fifth Amendment was now applicable to the states through the Fourteenth Amendment, thus ensuring that suspects in state criminal trials could assert the Fifth Amendment privilege as a basis for excluding a coerced confession.<sup>101</sup>

During the period that *Hogan* was decided, the Court became concerned with the interrogation techniques used by law enforcement officials.<sup>102</sup> The use of the Due Process Clause caused police to move from physical force during interrogations to psychological pressures to elicit confessions.<sup>103</sup> The Court wanted to even the playing field in the interrogation room, believing that the police had an unfair advantage over suspects.<sup>104</sup> This belief, in part, led the Court in *Escobedo v. Illinois* to

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<sup>96</sup> 168 U.S. 532 (1897) (holding that a confession can never be received into evidence when it has been brought about by threats or violence).

<sup>97</sup> *Id.* at 542. The pertinent text of the Fifth Amendment: “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V.

<sup>98</sup> See DRESSLER, *supra* note 5, § 23.01[B][1], at 436.

<sup>99</sup> Michael J. Zydney Mannheim, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57 (2002). The pertinent text of the Fourteenth Amendment provides: “nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” U.S. CONST. amend XIV, § 1.

<sup>100</sup> 378 U.S. 1 (1964). *Malloy* was arrested during a gambling raid. *Id.* at 3. The Court held that the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but rather was the confession “free and voluntary.” *Id.* at 7.

<sup>101</sup> *Id.* at 3.

<sup>102</sup> See DRESSLER, *supra* note 5, § 24.02, at 457. A majority of the Supreme Court viewed confessions “darkly as the product of police coercion.” *Id.* (quoting Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1425 (1985)).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* Coerced confession jurisprudence developed in response to the use of physical and psychological coercion to extract statements from criminal suspects. See Caplan, *supra* note 102, at 1425. The first case in this line of jurisprudence was *Brown v. Mississippi*, 297 U.S. 278 (1936). In *Brown*, three African-American suspects were indicted for murder based on confessions obtained by torturing the suspects until they agreed to confess. *Id.* at 281.

declare that the Sixth Amendment extended the right to counsel to the interrogation room.<sup>105</sup>

To combat the confusion that *Escobedo* created, the Court chose four appeals cases, now treated collectively as *Miranda*, to announce a clarification of suspects' rights in the interrogation room.<sup>106</sup> In *Miranda*, the Court announced a prophylactic rule establishing a conclusive presumption that coercion was present if certain warnings were not given or a waiver of these rights was not obtained.<sup>107</sup> The Court viewed the *Miranda* warnings as a solution to the problem caused by various tests being used to determine the "voluntariness" of a suspect's confession.<sup>108</sup>

However, the mere issuance of *Miranda* warnings does not end the coercion analysis.<sup>109</sup> A court must still go through the coercion analysis even if *Miranda* is followed.<sup>110</sup> That being said, coercive police conduct is now required if a post warning confession is to be found involuntary.<sup>111</sup>

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<sup>105</sup> 378 U.S. 478 (1964). In *Escobedo*, the Court held that the Sixth Amendment right to counsel is violated when a suspect is the focus of an investigation and has requested and is denied an opportunity to consult with his lawyer. *Id.* at 490-91. *Escobedo* had been held during a murder investigation and was not allowed to confer with his hired counsel while police were questioning him. *Id.* at 481. The police told *Escobedo's* attorney he could not see *Escobedo* until they were done with the investigation. *Id.* The interrogation lasted overnight, and eventually *Escobedo* made incriminating statements to the police before he was allowed to confer with his attorney. *Id.* at 482. The Court ruled that when *Escobedo* requested the presence of his attorney, the interrogation ceased to be a general inquiry, that *Escobedo* had become the accused, and the purpose of the interrogation was to get him to confess his guilt despite the constitutional right not to do so. *Id.* at 485. The Court declared the statement inadmissible and overturned the conviction. *Id.* at 484.

<sup>106</sup> See DRESSLER, *supra* note 5, § 24.04, at 460.

<sup>107</sup> See Mannheim, *supra* note 99, at 62. In this setting, the term "prophylactic rule" refers to a rule devised by the Court for the purpose of preventing a violation of a constitutional right. DRESSLER, *supra* note 5, § 4.05, at 73-74. In this context, the rule means that the *Miranda* warnings must be given to ensure any confession a suspect makes is not coerced by law enforcement. *Id.*

<sup>108</sup> See Mannheim, *supra* note 99, at 70. The test for coercion had been whether the suspect's will was overborne or whether the confession was the product of a rational intellect and a free will. *Id.* The standard became whether the confession was voluntary under all the circumstances, taking into account the police conduct and the character of the confessor. *Id.*

<sup>109</sup> *Id.* at 72.

<sup>110</sup> *Id.* This provides a prohibition of coercive police tactics even where *Miranda* has been given. *Id.* In other words, just giving the *Miranda* warning does not give the police the authority to physically or psychologically coerce a confession out of the suspect. *Id.* The confession must be the result of the suspect's free will. *Id.*

<sup>111</sup> *Id.* at 75; see also *Colorado v. Connelly*, 479 U.S. 157, 163-64, 167 (1986) ("[T]he crucial element of police [is] overreaching. . . . Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a

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Given these facts, confusion about the applicability of the *Miranda* warnings was rampant.<sup>112</sup> Questions arose regarding the constitutionality of the warnings and if a *Miranda* violation represented a constitutional violation.<sup>113</sup> Further, if a violation of *Miranda* was a constitutional violation, many wondered if a “fruits” analysis was needed for subsequent statements or evidence obtained as a result of the unwarned statement.<sup>114</sup>

The Court attempted to answer these questions in later cases, although scholars are somewhat skeptical of the logic utilized by the holdings.<sup>115</sup> First, the Court addressed the constitutional issue in *Michigan v. Tucker*,<sup>116</sup> stating that the violation of *Miranda* rules was a violation only of prophylactic rules developed to protect the Fifth Amendment right.<sup>117</sup>

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criminal defendant of due process of law.”). However, the prosecution bears the burden of proving, by a preponderance of the evidence, that a waiver exists and that it was voluntarily obtained. *Id.* at 169.

<sup>112</sup> See Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 449 (2002). For example, Clymer argues that police decisions not to use *Miranda* warnings are not, in and of themselves, constitutional violations. *Id.* at 450. Rather, the police only violate *Miranda* if statements are used in court that otherwise should have been inadmissible. *Id.* Clymer posits that *Miranda* warnings only affect the admissibility of a suspect’s statement. *Id.*

<sup>113</sup> Compare *id.* at 449-50 (“*Miranda* is best understood as a constitutional rule of admissibility.”), with *supra* note 99 and accompanying text.

<sup>114</sup> The “fruits” analysis comes from a Fourth Amendment case. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); see *supra* note 6 and accompanying text (explaining “fruit of the poisonous tree”). In *Wong Sun*, evidence otherwise admissible but obtained as a result of an earlier Fourth Amendment violation, the “fruit of the poisonous tree,” is excluded as tainted to keep from encouraging future violations. 371 U.S. at 484.

<sup>115</sup> Peter Bowman Rutledge & Nicole L. Angarella, *An End of Term Exam: October Term 2003 at the Supreme Court of the United States*, 54 CATH. U. L. REV. 151, 179 (2004) (characterizing these decisions as “splintered”); see also *The Supreme Court: 2003 Term Leading Cases*, 118 HARV. L. REV. 306, 311 (2004) (describing decisions as “doctrinally incoherent” and “compromise” decisions).

<sup>116</sup> 417 U.S. 433 (1974). In *Tucker*, the suspect in a rape investigation was not given his complete *Miranda* warnings. *Id.* at 435. During the interrogation the suspect gave a statement mentioning the name of someone else who might have been involved in the crime. *Id.* The prosecution in *Tucker* used this person as a witness against the suspect, and the issue involved in the case was whether the fruit—the name of the witness divulged in a *Miranda*-less interview—was admissible. *Id.* at 436-38.

<sup>117</sup> *Id.* at 444. Justice Rehnquist stated:

A comparison of the facts in this case with the historical circumstances underlying the privilege against compulsory self-incrimination strongly indicates that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as

But the *Tucker* decision did little to abate the confusion in the legal community.<sup>118</sup> For instance, if *Miranda* was not a constitutional rule, then the power of the Court to enforce the rule in state proceedings was questionable.<sup>119</sup> The Court had the chance to clarify the constitutional position of *Miranda* in two cases, *Oregon v. Elstad*<sup>120</sup> and *Dickerson v. United States*.<sup>121</sup> In *Elstad*, the Court held that a second *Mirandized* statement could be admitted into evidence under certain circumstances and was not to be excluded.<sup>122</sup> The Court reasoned that if the police make errors in administering a prophylactic *Miranda* procedure, it should not be equated with a violation of the Fifth Amendment itself.<sup>123</sup> As a result, this holding followed *Tucker's* logic that the *Miranda* decision

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such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*.

*Id.*

<sup>118</sup> *Id.* at 475-76. This ruling seemed to say that a *Miranda* violation was not a constitutional violation; therefore, there was no "poisonous tree," or unconstitutional action, from which to get fruit. See DRESSLER, *supra* note 5, § 24.06, at 475.

<sup>119</sup> DRESSLER, *supra* note 5, § 24.06, at 475 (citing *Smith v. Phillips*, 455 U.S. 209, 221 (1982) for the proposition that the Supreme Court lacks general supervisory authority over state judicial proceedings).

<sup>120</sup> 470 U.S. 298 (1985). In *Elstad*, the suspect was arrested in his parents' home. *Id.* at 300-01. While one of the officers was informing his mother of the circumstances of his arrest, the other officer asked the suspect about a burglary next door. *Id.* The suspect responded that he was there, and then confessed again during questioning at the station house. *Id.* The Court ruled that the confession at the station house was voluntary, and came after a *Miranda* warning. *Id.* at 315. Therefore, it was properly admitted into evidence. *Id.* at 318. The Court discounted the psychological effects of the suspect's prior confession, instead focusing on the voluntariness of each confession, the time interval between them, and the change in scenery and interrogators. *Id.* at 312-16. The Court characterized the failure to issue a *Miranda* warning in the suspect's house as an "oversight." *Id.* at 316.

<sup>121</sup> 530 U.S. 428 (2000). In *Dickerson*, Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm to commit an act of violence, all violations of Title 18 of the United States Code. *Id.* at 432. Before trial, Dickerson moved to exclude a statement he had made to the local branch office of the FBI on grounds that he did not receive his *Miranda* warnings prior to the interrogation. *Id.* The District Court agreed and granted his motion. *Id.* However, the Court of Appeals for the Fourth Circuit, while agreeing that the *Miranda* warnings were not given, reversed the District Court. *Id.* The Court of Appeals ruled that *Miranda* was not a constitutional decision and therefore Congress could overrule the decision. *Id.* The Court of Appeals went on to hold that the voluntariness provisions of § 3501 were met, and therefore, the statement by Dickerson should be allowed. *Id.* Congress had responded to the *Miranda* decision by passing legislation stating the voluntariness issue was determinative in the federal context when evaluating confessions. 18 U.S.C. § 3501 (2000). This piece of legislation was declared unconstitutional in this decision. *Dickerson*, 530 U.S. at 439.

<sup>122</sup> *Elstad*, 470 U.S. at 312 ("When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.").

<sup>123</sup> *Id.* at 306 ("The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.").



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was not a constitutional rule.<sup>124</sup> However, in direct contrast, *Dickerson* held that *Miranda* was a “constitutional decision” and had a “constitutional origin.”<sup>125</sup> Chief Justice Rehnquist stated in the majority opinion that “we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.”<sup>126</sup> As a result, the states were bound to enforce *Miranda*.<sup>127</sup>

The *Dickerson* ruling has been largely described as a decision attempting to get to the middle ground of the interrogation debate.<sup>128</sup> The holding has been widely criticized as illogical and Chief Justice Rehnquist has been criticized as not adequately distinguishing either *Elstad* or *Tucker*.<sup>129</sup> Even so, it seems clear from these rulings that the police do not violate the Constitution by merely refusing to give the *Miranda* warnings or failing to get a waiver of those rights.<sup>130</sup> Rather, the Fifth Amendment is violated only when the coerced statements are used

<sup>124</sup> *Id.* at 308 (noting that, as in *Tucker*, “the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule”).

<sup>125</sup> *Dickerson*, 530 U.S. at 439 (concluding that *Miranda* presented constitutional guidelines for law enforcement to follow, and the statements obtained from the suspect did not meet constitutional standards).

<sup>126</sup> *Id.* at 444.

<sup>127</sup> *Id.* The legislation at issue in *Dickerson* was 18 U.S.C. § 3501, an attempt by Congress to overrule *Dickerson* by reinstating the voluntariness test in evaluating confessions. *Id.* at 435-46.

<sup>128</sup> See generally Yale Kamisar, *A Look Back on a Half-Century of Teaching, Writing and Speaking About Criminal Law and Criminal Procedure*, 2 OHIO ST. J. CRIM. L. 69 (2004); Rutledge & Angarella, *supra* note 115, at 179 (describing the *Dickerson* decision as a “détente”).

<sup>129</sup> See *Dickerson*, 530 U.S. at 453 (Scalia, J., dissenting) (noting that in light of the decisions in *Elstad* and *Tucker* that it is simply no longer possible for the Court to conclude that a violation of *Miranda*’s rules is also a constitutional violation); see also William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53 (describing the *Dickerson* decision as the end of stare decisis); Joelle Anne Moreno, *Faith Based Miranda?: Why the New Missouri v. Seibert Police “Bad Faith” Test Is a Terrible Idea*, 47 ARIZ. L. REV. 395, 396-97 (2005) (calling the belief that “*Dickerson*’s constitutional imprimatur” on *Miranda*’s rules would enhance law enforcement compliance “naive”); *The Supreme Court, supra* note 115, at 311 (describing the *Dickerson* opinion as “doctrinally incoherent but carefully crafted to protect culturally entrenched *Miranda* warnings from congressional attack, all the while purporting to preserve *Elstad* and the other fruits cases”).

<sup>130</sup> See *Chavez v. Martinez*, 538 U.S. 760 (2003). In *Chavez*, a struggle broke out when police attempted to interview suspect Martinez regarding narcotics activity. *Id.* at 763. During the scuffle, the suspect took the gun out of one officer’s holster. *Id.* at 764. Upon seeing this, the other officer shot Martinez several times and placed him under arrest. *Id.* Officer Chavez, a patrol supervisor, proceeded to interview Martinez while he was getting medical treatment at the hospital. *Id.* At no time were the *Miranda* warnings given to Martinez. *Id.* The Court held that because no charges were ever filed against Martinez, there was no Fifth Amendment violation. *Id.* at 772.

against the accused during a trial.<sup>131</sup> Police violation of the *Miranda* rules will only affect the subsequent statement's admissibility.<sup>132</sup> It is equally clear that a suspect's issuance of an unwarned statement should not be a complete bar to the admissibility of a subsequent statement that the suspect might make during a future interrogation after the *Miranda* warnings have been issued.<sup>133</sup>

#### D. *The Seibert Decision*

Taking the next logical step, the Court hoped to answer the question of admissibility of statements in a "question-first" context, defined as interrogating the suspect first and then issuing the *Miranda* warnings, in the case of *Missouri v. Seibert*.<sup>134</sup> In a plurality opinion, the Court affirmed the Supreme Court of Missouri's decision, and held that both the pre-warning and post-warning statements by the suspect should have been excluded.<sup>135</sup> Justice Souter, announcing the decision of the

<sup>131</sup> *Id.* "All the Fifth Amendment forbids is the introduction of coerced statements at trial." *Id.* (quoting *New York v. Quarles*, 467 U.S. 649, 686 (1984)); see also Clymer, *supra* note 112, at 450 (noting that police decisions not to use *Miranda* are not a constitutional violation and that the constitutional violation only occurs when the statement is used at trial).

<sup>132</sup> See Clymer, *supra* note 112, at 450 (stating the only effect of a violation of *Miranda* is on the statement's admissibility).

<sup>133</sup> *Oregon v. Elstad*, 470 U.S. 298, 309 (1985).

It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

*Id.*

<sup>134</sup> 124 S. Ct. 2601, 2607 (2004). Patrice Seibert's 12 year-old son had cerebral palsy. *Id.* at 2605. When he died in his sleep, she feared that she would be charged with neglect because of bedsores on his body. *Id.* Her two teenage sons and two of their friends devised a plan to conceal the facts surrounding the boy's death by incinerating his body during the course of burning the family's mobile home. *Id.* To avoid the appearance that they had left the child unattended, they planned to leave Donald Rector, a mentally ill teenager living with the family, in the mobile home while it burned. *Id.* This plan was hatched in the presence of Patrice Seibert; her son, Darian, and a friend set fire to the home, and Donald died. *Id.* at 2606. Five days later the police arrested Seibert. *Id.* "Question first" refers to the police technique of interviewing the suspect, getting a confession, then giving her the *Miranda* warning, and repeating the pre-warning questions. See *infra* note 144 for a description of the use of this technique in *Seibert*.

<sup>135</sup> *Seibert*, 124 S. Ct. at 2605. Officer Kevin Clinton followed instructions from Officer Richard Hanrahan that he refrain from giving *Miranda* warnings. *Id.* Seibert was transported to a police station and left in an interrogation room for 15-20 minutes before Hanrahan questioned her without giving her *Miranda* warnings. *Id.* at 2606. During the initial interview, Hanrahan questioned Seibert for 30 to 40 minutes and at one point was squeezing her arm and repeating "Donald was also to die in his sleep." *Id.* Seibert finally

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Court,<sup>136</sup> first observed that the goals of *Miranda* and the question-first technique conflict.<sup>137</sup> The goal of *Miranda* is to ensure that interrogation practices do not “overbear the will” of the accused and to ensure that the accused is aware of the choices the Constitution guarantees.<sup>138</sup> Question-first techniques, on the other hand, are intended to render the *Miranda* warnings ineffective by issuing them right after a suspect has confessed and may psychologically feel like she has already waived those rights.<sup>139</sup> The Court concluded that the appropriate inquiry is whether the warnings issued reasonably conveyed to the suspect the rights the Constitution guarantees.<sup>140</sup> In other words, given the circumstances of the interrogation, the determining factor would be whether the warnings acted as effectively as *Miranda* required.<sup>141</sup>

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admitted she knew Donald was meant to die in the fire. *Id.* At this point she was given a twenty-minute coffee and cigarette break. *Id.* After this break, Hanrahan gave Seibert the *Miranda* warnings and turned on a tape recorder. *Id.* He then resumed the questioning and frequently referred to her pre-warning statements. *Id.* The pertinent language used by Officer Hanrahan was “Ok, ‘Trice, we’ve been talking for a little while about what happened on Wednesday the twelfth, haven’t we?” *Id.* Also, “Trice, didn’t you tell me that he [Donald] was supposed to die . . . ?” *Id.* During the post-*Miranda* interview Seibert confessed again to knowing that Donald was supposed to die in the fire. *Id.* Seibert was charged with first-degree murder for her role in Donald’s death. *Id.* At trial Seibert sought to exclude both her pre-warning and post warning statements. *Id.* Officer Hanrahan admitted that he made a “conscious decision” to withhold *Miranda* warnings stating that he was using an interrogation technique he had been taught: question first, give the warnings, and then repeat the question “until I get the answer that she’s already provided once.” *Id.*

<sup>136</sup> *Id.* Justices Stevens, Ginsburg, and Breyer joined this opinion, with Justice Breyer filing his own concurring opinion. *Id.* at 2613. Justice Kennedy filed his own concurring opinion. *Id.* at 2614. Justice O’Connor dissented, and was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. *Id.* at 2616.

<sup>137</sup> *Id.* at 2609 (“attention must be paid to the conflicting objects of *Miranda* and question-first”).

<sup>138</sup> *Id.* These practices by police departments are hardly limited to Missouri. See Clymer, *supra* note 112, at 451 (characterizing intentional violations of *Miranda* by police as “advantageous,” “sensible,” and “constitutional”); see also Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121, 1123-25 (2001) (describing various California police training instructions for questioning “outside *Miranda*”).

<sup>139</sup> *Seibert*, 124 S. Ct. at 2609. “The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.” *Id.* at 2610.

<sup>140</sup> *Id.* “The inquiry is simply whether the warnings reasonably ‘conve[y] to [a suspect] his rights as required by *Miranda*.” *Id.* (quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)).

<sup>141</sup> *Id.* “In a sequential confession case, clarity is served if the later confession is approached by asking whether in the circumstances the *Miranda* warnings given could reasonably be found effective.” *Id.* at 2610 n.4.

Seibert argued that the warned confession should be kept out because it was "fruit of the poisonous tree."<sup>142</sup> She claimed this evidence was otherwise admissible but discovered as the result of an earlier constitutional violation and should be excluded so that the law does not encourage future violations.<sup>143</sup> But the Court rejected this argument based on the holding in *Elstad*.<sup>144</sup> The Court took the position that clarity is best served by approaching the second confession from the position that if it was possible for the *Miranda* warnings to be effective, then the voluntariness of the confession and waiver could be upheld.<sup>145</sup> If not, then the confession would be inadmissible for lack of adequate *Miranda* warnings.<sup>146</sup>

The factors identified by the *Seibert* plurality distinguished the interrogations involved in *Seibert* from the interrogation involved in *Elstad*.<sup>147</sup> In *Elstad*, the Court noted that the questioning at the station house was a marked difference from the limited questioning that had taken place at the suspect's house.<sup>148</sup> Not only was the setting markedly different, but new interrogators were used as well.<sup>149</sup> Also, the statements made at the suspect's house were never referred to by the

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* Seibert based her argument on the *Wong Sun* Fourth Amendment context. *Id.* See *supra* note 6 and accompanying text for a discussion of *Wong Sun* and "fruits of the poisonous tree."

<sup>144</sup> *Id.* In *Elstad*, the Court held that any *Miranda* violation did not so taint the proceedings that law enforcement could never gain a valid waiver of the rights. *Oregon v. Elstad*, 470 U.S. 298, 300 (1985). Rather, the admissibility of any subsequent statement was to turn solely on whether it is knowingly and voluntarily made. *Id.*

<sup>145</sup> *Seibert*, 124 S. Ct. at 2610. The Court identified five factors it used to analyze the question-first interrogation. *Id.* at 2612. These factors constitute the approach Justice Breyer feels will act, in practice, as a "fruits" approach. *Id.* at 2613. First, the Court looked at the completeness and detail of the questions and answers involved in the pre-warning interrogation. *Id.* at 2612. Second, it was critical that the content of the pre-warning and post-warning interrogations were similar. *Id.* Third, the Court noted the timing and setting of the first and second confessions, and fourth the continuity of police personnel involved in the interrogations. *Id.* Finally, the Court considered the degree to which the interrogator's questions treated the second round of questioning as continuous with the first. *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* The plurality argues that a "reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." *Id.*

<sup>148</sup> *Elstad*, 470 U.S. at 315 (noting that the officers stopped in the living room to notify the mother of the reasons for the arrest and not to interrogate her son).

<sup>149</sup> *Id.* at 301. The settings were the suspect's home and the stationhouse while the interrogators were the arresting officer and a police detective. *Id.*

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interrogator at the station house.<sup>150</sup> The Court found that these differences would have enabled the suspect to make an informed choice about his rights at the station house, rendering the *Miranda* warnings effective in that situation.<sup>151</sup>

The *Seibert* case presented a far different scenario.<sup>152</sup> The plurality noted that the same interrogator was involved in both interrogations and that they took place in the same room at the station house.<sup>153</sup> Additionally, the interrogator also referred back to Seibert's unwarned statements repeatedly during the second interview.<sup>154</sup> Further, while not proscribing a set length of time between statements for *Miranda* to be effective, the plurality stated that twenty minutes was not long enough.<sup>155</sup> These factors combined to vitiate the effectiveness of the *Miranda* warnings before the second confession.<sup>156</sup> Specifically, the plurality stated that the second confession was a mere continuation of the unwarned statement and as such was to be excluded.<sup>157</sup>

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<sup>150</sup> *Id.* at 301-02.

<sup>151</sup> *Seibert*, 124 S. Ct. at 2607, 2612.

<sup>152</sup> *Id.* The Court referred to the *Seibert* scenario as "the opposite extreme." *Id.*

<sup>153</sup> *Id.* The Court was influenced by the fact that Officer Hanrahan "said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details" of the unwarned statement. *Id.* In other words, the police never told her that her prior statement could not be used. *Id.*

<sup>154</sup> *Id.* The Court noted that "any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying 'we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?'" *Id.* at 2613.

<sup>155</sup> *Id.* The length of time, comparatively, in *Elstad* was over one hour. *Elstad*, 470 U.S. at 301.

<sup>156</sup> *Seibert*, 124 S. Ct. at 2613.

<sup>157</sup> *Id.* Justice Breyer, in his concurrence, stated that he believed the analysis followed by the plurality would act as a "fruits" based analysis, similar to the fruits analysis in other Fourth Amendment cases. *Id.* (Breyer, J., concurring). He felt this way despite the express rejection of this type of analysis in *Elstad*, and the plurality in this case. *Id.* Justice Breyer argued for a "fruits" analysis because prosecutors and judges understand how to apply the approach. *Id.* He also believed that effective *Miranda* warnings would only occur when certain circumstances, such as the plurality's five factors, intervene to break the connection between the two statements. *Id.* at 2614; *see, e.g.*, *Taylor v. Alabama*, 457 U.S. 687, 690 (1982) (holding that evidence obtained subsequent to a constitutional violation must be suppressed as "fruit of the poisonous tree" unless "intervening events break the causal connection"). He therefore believed that unless the failure to warn was a good faith failure, the "fruits" of the unwarned statement should be excluded. *Seibert*, 124 S. Ct. at 2613 (Breyer, J., concurring). Justice O'Connor took issue with the "fruits" analysis and agreed with the plurality's refusal to apply it. *Id.* at 2617 (O'Connor, J., dissenting). She stated that the analysis may involve the same facts and circumstances as a "fruits" analysis would consider, but it does so for entirely different reasons. *Id.* The "fruits" analysis seeks to balance the probative value of the evidence with the deterrence value of exclusion, while

Justice Kennedy filed a concurring opinion, supported by somewhat different reasoning.<sup>158</sup> He argued that the Court must first determine whether the failure to warn was deliberate or unintentional,<sup>159</sup> and stated that the *Elstad* decision should continue to be applied unless the failure to warn was deliberate.<sup>160</sup> The second prong of Justice Kennedy's argument was that in intentional failure to warn cases, curative measures should be allowed.<sup>161</sup> The curative measures he would allow are very similar to the factors that the plurality considered.<sup>162</sup> In the alternative, Justice Kennedy reasoned, a statement by the interrogator to the suspect that the previous interview would most likely be inadmissible could also serve as a curative measure and make the subsequent statement admissible.<sup>163</sup>

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the plurality uses those factors to determine the psychological affect they had on the suspect. *Id.*

<sup>158</sup> *Seibert*, 124 S. Ct. at 2613 (Kennedy, J., concurrence). His concurrence has been criticized as being the "unfortunate byproduct" of the Court's concern over law enforcement's deliberate withholding of *Miranda*. Moreno, *supra* note 129, at 396.

<sup>159</sup> Moreno, *supra* note 129, at 396. However, this is clearly inconsistent with *Moran v. Burbine*, 475 U.S. 412 (1986), which held that thoughts kept inside a police officer's head cannot affect the suspect's experience. This would seem to dispel the need for a dichotomy between intentional and unintentional violation of *Miranda* because the suspect would have experienced the interrogation in the same manner. *Seibert*, 124 S. Ct. at 2618 (O'Connor, J., dissenting). This test would also seem to shift an "impossible and inappropriate" burden onto the defendant to prove an officer acted in bad faith. Moreno, *supra* note 129, at 397-98.

<sup>160</sup> *Seibert*, 124 S. Ct. at 2616 (O'Connor, J., dissenting). See *infra* note 171 for Justice O'Connor's criticism of this contention.

<sup>161</sup> *Seibert*, 124 S. Ct. at 2616 (O'Connor, J., dissenting). In this matter Justice O'Connor agreed with the plurality and disagreed with Justice Kennedy. *Id.* at 2618. She reasoned that the Court had previously held that the thoughts occurring in the interviewer's head are irrelevant when it comes to the voluntariness of the suspect's statement. See *infra* note 172 and accompanying text. In *Burbine*, the police were interrogating a suspect while an attorney the suspect's sister had hired for him (without his knowledge) was waiting in the lobby. 475 U.S. at 417-18. The Court held, in an opinion by Justice O'Connor, that the police's failure to inform the suspect about the attorney his sister had hired did not deprive him of his right to counsel or vitiate the waiver of *Miranda* rights. *Id.* at 422-23. The Court reasoned that the police activity had "no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422. Therefore, according to Justice O'Connor dissent in *Seibert*, Officer Hanrahan's intent could not impact Seibert's capacity to comprehend and knowingly relinquish her rights. *Seibert*, 124 S. Ct. at 2618 (O'Connor, J., dissenting). Additionally, Justice O'Connor noted that it would be frequently difficult, if not impossible, to tell what states of mind different interviewers had, and the likelihood of error would be high. *Id.*

<sup>162</sup> *Seibert*, 124 S. Ct. at 2618. Justice Kennedy's curative measures are a substantial break in time or a statement that the pre-warning statement is inadmissible. *Id.*

<sup>163</sup> *Id.* Justice O'Connor noted that Justice Kennedy's stated reason for concurring with the plurality was that no curative measures were taken in this instance. *Id.*

Justice O'Connor, in her dissent, would have kept to the "knowingly and voluntarily made" test employed in *Elstad*.<sup>164</sup> She reasoned that if the first statement was shown to be involuntary, then a court must examine whether the taint was dissipated through the passage of time or change in scenery.<sup>165</sup> The important issue for Justice O'Connor was the voluntariness of the second confession.<sup>166</sup> Consequently, Justice O'Connor would have remanded the case for the Missouri courts to consider the voluntariness of Seibert's second confession.<sup>167</sup>

The next step is to analyze the "knock and talk" utilizing the legal tests put forth by the Court. Specifically, Part III takes the judicial tests set forth and applies them to the "knock and talk" context.

### III. IS THE "KNOCK AND TALK" A TOLERABLE INVESTIGATORY TOOL?

Police engage in constitutional activity when they go to the door of a residence and knock on it.<sup>168</sup> This proposition has been stated in the curtilage and open fields doctrines, pertaining to the area outside of a home generally accessible to the public, and is not questioned in this Note. The analysis must begin, therefore, at the point where the constitutional activity begins to blur—that is, when the "knock and talk" is used to evade the warrant requirement.<sup>169</sup> The "knock and talk" technique falls under the purview of consent searches. However, as demonstrated above, the development of consent case law was based on the development of coerced confession cases.<sup>170</sup> Therefore, Part III.A will analyze the "knock and talk" using the development of coerced confession cases, principally *Missouri v. Seibert*, because this

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<sup>164</sup> "The relevant inquiry is whether, in fact, the second statement was also voluntarily made." *Oregon v. Elstad*, 470 U.S. 298, 318 (1985). Justice O'Connor opined that it is a rare instance when a police officer is so forthcoming regarding his true intentions in withholding the *Miranda* warnings. *Seibert*, 124 S. Ct. at 2618 (O'Connor, J., dissenting). In the future, she imagined, it would be difficult, if not impossible, to discern the true intention of the officer. *Id.*

<sup>165</sup> "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Elstad*, 470 U.S. at 310. These are also similar to Justice Kennedy's curative measures. *See supra* note 161.

<sup>166</sup> *Seibert*, 124 S. Ct. at 2619 (O'Connor, J., dissenting).

<sup>167</sup> *Id.* at 2620.

<sup>168</sup> The area outside of the home, open to the public, from the street to the front door is covered under the curtilage and open field doctrines. *See supra* note 13 for an explanation of these doctrines.

<sup>169</sup> *See supra* note 4 (describing the "knock and talk" as being a method of avoiding the requirements of the Fourth Amendment).

<sup>170</sup> *See supra* notes 96-133 and accompanying text.

development was examined in *Bustamonte*.<sup>171</sup> Following that analysis, Part III.B will analyze the "knock and talk" using the "totality of all the circumstances" test from *Bustamonte* itself.<sup>172</sup> Both analyses will demonstrate the questionable constitutionality of the "knock and talk" technique that will be addressed in Part IV of this Note.<sup>173</sup>

#### A. *Coerced Confession Analysis*

The application of coerced confession case analysis has its roots in Supreme Court precedent.<sup>174</sup> Coerced confession case history shows that the Court is concerned with the psychological advantage that the police have over suspects when engaged in interrogation.<sup>175</sup> In fact, the Court went so far as to say that coercion was a conclusive presumption if *Miranda* warnings were not given.<sup>176</sup> However, *Bustamonte* currently governs this point in the search context because the Court explicitly ruled that a warning is not required.<sup>177</sup>

On the other hand, these differing results seem illogical. The Fourth Amendment is mostly concerned with intrusions into the home.<sup>178</sup> If so, searching a residence without a warrant and without properly obtained consent would represent a constitutional violation invoking the "fruit of the poisonous tree" doctrine.<sup>179</sup> Conversely, the Court has already ruled that a *Miranda* violation does not in and of itself represent a constitutional violation, but can lead to the exclusion of the results of an interrogation.<sup>180</sup> It then becomes difficult to justify a consent search

<sup>171</sup> See *infra* notes 174-225 and accompanying text.

<sup>172</sup> See *infra* notes 226-51 and accompanying text.

<sup>173</sup> See *infra* notes 252-66 and accompanying text.

<sup>174</sup> See *supra* note 70 and accompanying text (reporting that the *Bustamonte* Court looked to coerced confession cases for definitions of "voluntariness"). This comparison makes sense on many different levels. See *Simmons*, *supra* note 13, at 795. In both contexts, the police are asking the defendant to voluntarily take actions that go against her interests. *Id.* Additionally, both contexts produce especially compelling evidence against the defendant. *Id.* Also, these cases frequently occur in cases where law enforcement officers have a unique opportunity to use significant amounts of compulsion against the defendant. *Id.*

<sup>175</sup> See *supra* notes 106-08 and accompanying text.

<sup>176</sup> *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). This presumption is present no matter where the interrogation is taking place. Therefore, the fact that the interrogation might take place in a stationhouse, while the "knock and talk" takes place at a residence should not be determinative.

<sup>177</sup> See *supra* note 70 and accompanying text.

<sup>178</sup> See *supra* note 4 and accompanying text.

<sup>179</sup> See *supra* note 6 (describing the *Wong Sun* "fruit of the poisonous tree" doctrine).

<sup>180</sup> It only represents a constitutional violation when the actual statement is used in court against the accused. *Elstad*, 470 U.S. at 306. Therefore, police are free to violate *Miranda* if they do not mind the statement's admissibility being taken away. *Clymer*, *supra* note 112,



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without a warning on the one hand, and disallow the results of police interrogation on the other, where a warning was not given to the suspect.<sup>181</sup> Rather than remove *Miranda* protections, it would seem more prudent to enhance the search protection afforded the subject in his residence.<sup>182</sup>

Proponents of the “knock and talk” could argue that the *Bostick* and *Drayton* decisions seem to place the “knock and talk” technique within the realm of constitutional police actions. At first glance, the requests in each case, on a bus in the middle of the passenger’s journey, being ruled reasonable, would seem to indicate that any request in a person’s home should be reasonable as well.<sup>183</sup> However, if one looks deeper into the *Bostick* and *Drayton* decisions, it becomes apparent that they compel no such interpretation. First, while both *Seibert* and the “knock and talk” involve police procedures specifically formulated to avoid constitutional constraints, *Bostick* does not.<sup>184</sup> As a result of this difference, police intentionally avoiding the warrant requirement bring their actions into

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at 450. In fact, it can be argued that this stance encourages the violation of *Miranda* where a confession will make a plea bargain possible when it would not have been absent the confession. *Id.* at 451 (calling the disregard for *Miranda* constitutional and sensible).

<sup>181</sup> Both confessions and consent searches involve a suspect agreeing to forego rights guaranteed by the Bill of Rights, and both involve the competing concerns of the legitimate need for confessions and consent searches in law enforcement and the equally important need to eliminate police misconduct. Simmons, *supra* note 13, at 795.

<sup>182</sup> This also follows the philosophy regarding the sanctity of the home already recognized by the Court. Justice Jackson summed up this philosophy in *Brinegar v. United States* when he stated that Fourth Amendment freedoms

are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear. Courts can protect the innocent against such invasions indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.

338 U.S. 160, 180-81 (1949). See *supra* note 13 for further discussion.

<sup>183</sup> This, of course, assumes identical police conduct. It also assumes that the request will be interpreted by the resident as a request and not a command, which is questionable. See SOLAN & TIERSMA, *supra* note 42, at 39-46.

<sup>184</sup> The use of subjective factors in *Bustamonte* is misleading; the focus of Fourth Amendment analysis is on police action and not the state of mind of the accused. See Simmons, *supra* note 13, at 774, 779.

question in the *Seibert* and "knock and talk" contexts.<sup>185</sup> This difference also confers a preference for the *Seibert* analysis of the "knock and talk" being utilized, since both *Seibert* and the "knock and talk" involve law enforcement's attempt to work around constitutional protections.<sup>186</sup> Second, both *Bostick* and *Drayton* have been criticized as being void of practical considerations.<sup>187</sup> As a result, it could be the time to overrule them.

Further, in keeping with the tenants of the *Bustamonte* Court, the "knock and talk" procedure must also be evaluated under coerced confession precedent, and the precedent set forth in the *Bustamonte* ruling itself.<sup>188</sup> As a result, Part III.A.1 discusses the Court's analysis in *Seibert*.<sup>189</sup>

### 1. The *Seibert* Plurality

The plurality in *Seibert* held that the goal of *Miranda* was to ensure police tactics do not overbear the will of the accused.<sup>190</sup> The Court then noted that the goal of the question-first tactic employed by the police was to render *Miranda* warnings ineffective.<sup>191</sup> This aspect of the question-first tactic is identical to the "knock and talk." The goal in using the "knock and talk" is to gain consent to search, and thereby alleviate the need for a search warrant.<sup>192</sup> But this legal shortcut has the

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<sup>185</sup> Officers admitted in the *Ferrier* decision that they conducted the "knock and talk" to avoid getting a warrant. *State v. Ferrier*, 960 P.2d 927, 932 (Wash. 1998). Indeed, that is the principle advantage to the "knock and talk"—the avoidance of the hassle of getting a warrant. See *supra* LAFAVE, *supra* note 5, at 4 (stating police attempt consent searches because they believe the warrant requirement to be overly technical and time consuming); see also *Melton v. State*, 705 N.E.2d 564, 568 (Ind. 1999) (Robb., J., concurring) (noting the conduct of the police was troubling when conducting a "knock and talk").

<sup>186</sup> See *infra* notes 190-211 and accompanying text.

<sup>187</sup> See *Simmons*, *supra* note 13, at 773 (noting that the Court's rulings do not comport with real life confrontations occurring on the street); Erica Flores, Note, "People, Not Places": The Fiction of Consent, The Force of Public Interest, and the Fallacy of Objectivity in Police Encounters with Passengers During Traffic Stops, 7 U. PA. J. CONST. L. 1071, 1081 (2005) ("By relying on the illusion that passengers can simply ignore the presence of the police, courts approve of the sort of fishing expeditions the Fourth Amendment was designed to prevent.").

<sup>188</sup> See *supra* notes 68-82 and accompanying text.

<sup>189</sup> See *supra* notes 134-67 and accompanying text.

<sup>190</sup> *Missouri v. Seibert*, 124 S. Ct. 2601, 2609 (2004).

<sup>191</sup> *Id.*

<sup>192</sup> See *supra* note 185 for examples of police using the "knock and talk" to avoid the warrant requirement.

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effect of rendering the protection of the Fourth Amendment ineffective.<sup>193</sup>

The plurality went on to describe five factors pertinent to the evaluation of the voluntariness of the post-warning statement, and these are useful in the “knock and talk” analysis.<sup>194</sup> The first two factors noted by the *Seibert* Court were the completeness and detail of the first pre-warning set of questions, and the similar content of the two sets of questions.<sup>195</sup> The more detailed and complete those questions were, the more it seemed that coercion was present.<sup>196</sup> Further, if the content was similar, the chance that the suspect would no longer believe he could remain silent was increased. This technique tipped the psychological scale too far in the police’s favor. The Court defined the inappropriate behavior by the police as conducting an interrogation without a *Miranda* warning, getting incriminating evidence, and then issuing the warning when it will be least effective.<sup>197</sup> By corollary, in the context of consent searches, the behavior by police should be deemed inappropriate if they do *not* give out information, or if they provide incomplete or deceptive information in pursuit of consent.<sup>198</sup>

Within the realm of “knock and talk” consent searches, it is often the case that the police do not give any explanation for the search, or the explanation given is devious.<sup>199</sup> By analogy, this deception or lack of information relates to the facts of *Bumper*, when the Court held that misrepresentations by the police represented coercion.<sup>200</sup> Following the

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<sup>193</sup> “[P]hysical intrusion into the privacy of a person’s residence absent a warrant is the primary evil that the Fourth Amendment seeks to eradicate.” *Hadl v. State*, 47 S.W.3d 897, 902 (Ark. App. 2001) (Griffen, J., concurring). The effectiveness of Fourth Amendment protection is lessened to a degree if all the police have to do to avoid it is to “bargain” for consent.

<sup>194</sup> See *Seibert*, 124 S. Ct. at 2612.

<sup>195</sup> *Id.*

<sup>196</sup> See *supra* note 145.

<sup>197</sup> “The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the subject has already confessed.” *Seibert*, 124 S. Ct. at 2610.

<sup>198</sup> This is a primary reason some states have ruled that the “knock and talk” requires informed consent; that is, the occupant must be informed of the right to refuse consent. See *supra* notes 33-35 and accompanying text.

<sup>199</sup> See *supra* notes 11-13 and accompanying text.

<sup>200</sup> See *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968). This is especially true when one considers the evidence that people often do not feel they can refuse a police request. See *supra* note 3 (relating the uncertainty a professor of criminal procedure felt when police came to her home to investigate a complaint); *supra* note 43 (describing the “no sane man rule” and questioning why suspects continually grant consent to search with full

*Bumper* Court, the presence of coercion precludes the presence of consent.<sup>201</sup> At a minimum, the validity of the consent given will be called into question in court.<sup>202</sup>

Another factor that the *Seibert* Court found important was the location of each set of questioning.<sup>203</sup> The Court was persuaded by the fact that both sets of questions took place at the station house, as that would further indicate to the suspect that she was unable to retract her previous statement.<sup>204</sup> In this particular context, comparison to the "knock and talk" is more difficult; it would be rare that a "knock and talk" was conducted at one residence only to have the search take place at a second residence.<sup>205</sup>

In this regard, the Court has held many times that police questioning in the home, absent intimidation, is not coercive, as the suspect will feel more at ease in the home setting than in the station house.<sup>206</sup> While this assertion is most likely true, it runs directly counter to the explicit language in the Fourth Amendment regarding protection of the home.<sup>207</sup> On the other hand, the language of the Fourth Amendment provides for only protection against unreasonable searches, and that the Court has stated consent searches are reasonable.

However, as a Federal Trade Commission regulation and other Court rulings indicate, the mere act of asking for consent *inside* the home is unreasonable.<sup>208</sup> Indeed, the Federal Trade Commission has explicitly

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knowledge incriminating evidence will be found); *supra* note 72 (discussing anecdotal evidence that people comply with the uniform, not the request).

<sup>201</sup> See *Bumper*, 391 U.S. at 550.

<sup>202</sup> See, e.g., *Simmons*, *supra* note 13, at 774 (stating that no outsider viewing interaction would conclude that one would voluntarily consent to search when surrounded by police in close quarters).

<sup>203</sup> See *Missouri v. Seibert*, 124 S. Ct. 2613, 2607 (2004).

<sup>204</sup> See *supra* notes 153-54 and accompanying text.

<sup>205</sup> On the other hand, it is not totally out of the realm of possibility in the case of a neighbor being present when police enter the home. This, however, is not within the scope of this Note.

<sup>206</sup> See *supra* note 78 and accompanying text.

<sup>207</sup> Physical intrusion into the privacy of the home without a warrant is the chief evil the Fourth Amendment seeks to eradicate. *Hadl v. State*, 47 S.W.3d 897, 902 (Ark. App. 2001) (Griffen, J., concurring).

<sup>208</sup> See *supra* note 79 and accompanying text. If the home is truly a sacred place for constitutional purposes, it should be protected from police intervention when they do not have enough suspicion to get a search warrant. Otherwise, why would the police ever bother to ask for a warrant if they can get consent? This renders the warrant requirement toothless—over 90% of searches are already conducted under the auspices of consent. See *supra* note 13 and accompanying text.

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stated, through regulation, that outsiders inside the home are coercive.<sup>209</sup> Similarly, the Court has found the home setting to be worthy of a greater level of protection in free speech jurisprudence.<sup>210</sup> As both the Federal Trade Commission and the Court have found the home worthy of increased privacy protection, it becomes logical to extend that privilege to the home search setting.

The last factor that the plurality in *Seibert* examined was the time interval between the pre-warning and post-warning questioning.<sup>211</sup> A twenty-minute interval, the plurality ruled, did not provide enough of a cooling-off period, and in fact, was merely a continuation of the unwarned statement.<sup>212</sup> Seen in the context of the “knock and talk,” this tactic becomes even more intrusive. There are no warnings given. The police come in, most of the time at night, under the guise of merely “discussing” a situation. This “discussion” quickly turns into a request for consent, often before the homeowner has time to completely digest what has happened. If twenty minutes in a station house is not enough time for a suspect to gather her senses, then it follows that an instantaneous question in the home would not allow this either.

When the factors used by the *Seibert* plurality are applied to the “knock and talk,” it becomes apparent that the “knock and talk” should be categorized with the question-first/*Mirandize* later interrogation tactic. Both techniques are utilized by law enforcement to evade constitutional requirements put in place to secure our freedom.

## 2. The *Seibert* Concurrences

Both Justice Breyer and Justice Kennedy focused on the police intent when writing their concurrences in *Seibert*.<sup>213</sup> Even though their positions have been criticized, they nonetheless deserve analysis in the

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<sup>209</sup> See *supra* note 80 and accompanying text. If door-to-door salesmen are so coercive as to require a three day cooling-off period, why is the presence of law enforcement not considered coercive? One dresses in plain clothes only armed with his product and vocabulary. The other comes armed with a gun and the ability to take away your freedom and liberty. The finding of coerciveness on the part of salesmen and not on the part of police is illogical in this setting.

<sup>210</sup> See *supra* note 78. Surely, if residential privacy is to be protected from even one picketer, then it should be protected from police activity having even the appearance of coerciveness.

<sup>211</sup> *Missouri v. Seibert*, 124 S. Ct. 2601, 2612 (2004).

<sup>212</sup> *Id.* at 2613.

<sup>213</sup> See *supra* note 158 and accompanying text.

"knock and talk" context.<sup>214</sup> The position of each concurring Justice comports with the potential finding that the "knock and talk" is presumptively coercive.

Justice Breyer would have allowed the question-first/*Mirandize* later technique only when the failure to warn was a good faith failure and was unintentional, whereas Justice Kennedy took this analysis one step further, even allowing the intentional question-first/*Mirandize* later when "curative measures" were employed during the interval between the pre-warning and post-warning statements.<sup>215</sup>

Both of these analyses are appropriate for the "knock and talk." It is undisputed that the "knock and talk" is utilized for the direct purpose of gaining consent, and therefore avoiding the requirements of the warrant requirement.<sup>216</sup> It has been argued that requiring a warning, similar to *Miranda*, in the "knock and talk" context would be a curative measure.<sup>217</sup> However, the taint of coerciveness would still surround the written warning if other precautions were not in place.<sup>218</sup> For one, the *Seibert* Court found the *Miranda* warnings insufficient in that particular context.<sup>219</sup> There is no assurance that police will not find a way to creatively insert the warning in the search context.<sup>220</sup> Because the "knock and talk" is an intentional attempt to avoid the warrant requirement, and curative measures would not absolve the "taint," the analysis from the concurrences in *Seibert* results, again, in the "knock and talk" appearing to be a coercive police tactic used to gain consent.

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<sup>214</sup> See Moreno, *supra* note 129, at 398 (describing the bad faith test, or intentional disregard of *Miranda*, as shifting an impossible and inappropriate burden onto the defendant, yet also describing federal courts already using the test).

<sup>215</sup> See *supra* notes 157, 163 and accompanying text.

<sup>216</sup> Indeed, in most instances, not only do the police seek to avoid the warrant requirement, they could not get a warrant even if they wanted one because they lack probable cause. See *supra* note 4.

<sup>217</sup> See *State v. Ferrier*, 960 P.2d 927, 933 (Wash. 1998); see also SOLAN & TIERSMA, *supra* note 42, at 51.

<sup>218</sup> For example, did the police use coercive tactics to get the warning signed? Or, alternatively, was the warning signed before the search or after the search in an attempt by the accused of mitigating any incriminating evidence found during the search?

<sup>219</sup> *Missouri v. Seibert*, 124 S. Ct. 2601, 2613 (2004) ("These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.").

<sup>220</sup> As an example, how effective would the warnings be in the case of our hypothetical, when the officer is exploiting the suspect's family situation to gain consent? What mother would reasonably feel free to decline the request, if she feels her custody over her children is threatened?

3. The *Seibert* Dissent

Justice O'Connor's dissent did not take issue with the factors used by the plurality, but rather with the result of the plurality opinion.<sup>221</sup> Specifically, Justice O'Connor would have remanded the case for a determination of whether Seibert's second confession was voluntarily given.<sup>222</sup> She saved the majority of her disagreement for the concurrences, and the discussion of police intent in their analyses.<sup>223</sup>

According to Justice O'Connor, the intent of the police has no effect on how the accused perceives the questioning.<sup>224</sup> By extension, the same logic would be used in the "knock and talk" analysis. The reason that police choose to use the technique should have no impact on the finding of coerciveness. Assuming, for the sake of argument this is true, it nonetheless could leave the presumption of coerciveness. The technique still takes place in the home, still mostly occurs at night, and still involves unsupervised police action.<sup>225</sup> Because Justice O'Connor agreed with the factors utilized by the plurality, the same analysis used in that section applies to the "knock and talk." Thus, Justice O'Connor's analysis also comports with the potential finding of presumptive coerciveness.

Utilizing the factors employed in the *Seibert* ruling, it has been shown that the "knock and talk" technique has a dubious constitutional basis. The logic behind all three groupings of Justices—the plurality, the concurrences, and the dissent—has been used to show the troubling nature of the "knock and talk." However, the "knock and talk" also needs to be analyzed under the *Bustamonte* reasoning and using the "totality of the circumstances" surrounding the use of the technique.

B. *Totality of the Circumstances Analysis*

The language used by the Court in the *Bustamonte* decision indicated that the totality of the circumstances has to be evaluated on a case-by-case basis.<sup>226</sup> The Court explicitly stated that no one characteristic would

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<sup>221</sup> See *supra* note 164 and accompanying text.

<sup>222</sup> *Seibert*, 124 S. Ct. at 2620.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> The actions of police in the field are ultimately supervised by judges; a group admittedly loathe to find that the police lied. See *supra* note 100. If that is true, the taint of coerciveness is still present whether the police intend to use the tactic or not. This argument is thus beside the point.

<sup>226</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

be outcome-determinative in regards to the coercion question.<sup>227</sup> It thus becomes somewhat more difficult to analyze a general proposition, such as the coerciveness of the "knock and talk," using case specific characteristics. It can be done, however, using the reasoning in the Court's analysis that was based on the characteristics.

The *Bustamonte* Court stated that the totality of the circumstances would show the voluntariness of the consent.<sup>228</sup> In order to be voluntary, the police tactics used to gain the consent must not have "overborne the will" of the suspect.<sup>229</sup> To apply these principals in a general setting entails much of the *Seibert* argument made above.<sup>230</sup> Police intend to overcome the will of the accused by the very nature of the "knock and talk." When a police officer negotiates for the consent from the accused, he is essentially admitting that the accused would not consent under normal circumstances.<sup>231</sup> In other words, if the accused was going to consent by a free will, no negotiation on the officer's part would be necessary. Many, including one Supreme Court Justice, recognize the inherent difficulty society imposes on individuals if they are expected to decline an officer's request.<sup>232</sup> Furthermore, some civilians would believe that if they refused the request, it would only arouse the officer's suspicions and intensify the investigation; in fact, officers have admitted that investigations are often intensified after a refusal.<sup>233</sup> This real world result runs counter to the *Bostick* Court's assumption in their findings of voluntariness.<sup>234</sup>

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<sup>227</sup> *Id.* at 226.

<sup>228</sup> *Id.* at 227.

<sup>229</sup> *Id.* at 226.

<sup>230</sup> See *supra* notes 190-225 and accompanying text.

<sup>231</sup> See *supra* note 12 (officer describing the warrant process as being tedious and explaining that it is easier to obtain consent because he knows he can get that done).

<sup>232</sup> See *Florida v. Bostick*, 501 U.S. 429, 444-45 (1991) (Marshall, J., dissenting) (stating he could not understand how the majority could possibly suggest that a bus passenger would ever feel free to decline the officer's search request); see also *Simmons*, *supra* note 13, at 800-01 (noting the most frequent criticism of consent search cases is that the Court is unaware of the realities on the street, where anytime an officer requests something, no matter how innocently and politely she asks, the civilian feels a large amount of compulsion to comply).

<sup>233</sup> See *Bostick*, 501 U.S. at 447 (Marshall, J., dissenting) (declaring that intimidating shows of authority on the part of police results in defendants reasonably believing that refusing requests will arouse the officer's suspicions, and noting that officers have admitted this is the result of a refusal).

<sup>234</sup> In the *Bostick* opinion, the Court noted that an individual may decline an officer's request without fear of prosecution. *Id.* at 437 (majority opinion). Further, the Court has consistently ruled that a refusal to cooperate, without more, does not furnish the minimal level of justification needed for a seizure. *Id.*



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Additionally, as stated above, the Federal Trade Commission requires a three day cooling off period when salesmen invade the home to conduct business.<sup>235</sup> The regulation specifically calls the cooling off period a right of the purchaser.<sup>236</sup> It is illogical to require a three day cooling off period when a door-to-door salesman negotiates a sale, but hold a negotiated consent valid when it occurs in a matter of minutes.<sup>237</sup>

Moreover, the *Bustamonte* Court ruled that the prosecution bore the burden of proof regarding the voluntariness issue.<sup>238</sup> It seems that, in practice, current courts are not holding the prosecution to this burden. When the voluntariness of consent comes down to a “shouting match,” it is the tendency of courts to favor the law enforcement testimony.<sup>239</sup> This outcome is often due to the commonly held belief that the accused has a large incentive to lie on the stand in an attempt to preserve his liberty.<sup>240</sup> However, law enforcement has an equally great incentive to lie on the stand.<sup>241</sup> Specifically, the officer has three goals when testifying: he wants to justify his search, preserve the evidence found, especially if that evidence is critical to conviction, and maintain his reputation. As a result, the effect of favoring law enforcement is a shift of the burden of proof to the accused to prove consent was involuntary—a difficult, if not often impossible proposition.<sup>242</sup> If the only evidence that the prosecution

<sup>235</sup> See *supra* note 86 for a description of the regulation granting the cooling off period.

<sup>236</sup> 16 C.F.R. § 429.1 (2005) (regulation requiring salesperson to notify the occupant of the three day cooling off period when sales occur in the home).

<sup>237</sup> Herbert Gaylord, Note, *What Good Is the Fourth Amendment? “Knock and Talk” & People v. Frohiep*, 19 T.M. COOLEY L. REV. 229, 239 (2002).

<sup>238</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).

<sup>239</sup> The phrase “shouting match” comes from the Strauss article. See *supra* note 91 and accompanying text. Courts, many times, defer to police determinations. Flores, *supra* note 201, at 1096. By granting this deference, courts have removed all objectivity from their review. *Id.* at 1094; see, e.g., *United States v. Arizona*, 534 U.S. 266, 273 (2002) (holding that the reasonable suspicion standard would allow officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might elude an untrained person); *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (stating that courts “should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing”); *United States v. McRae*, 81 F.3d 1528, 1534 (10th Cir. 1996) (“We defer to ‘the ability of a trained law enforcement officer to distinguish between innocent and suspicious actions.’” (quoting *United States v. Figueroa*, 44 F.3d 908, 912 (10th Cir. 1993), *cert. denied*, 514 U.S. 1029 (1995))).

<sup>240</sup> See Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Drug Interdiction Program*, 29 OHIO N.U. L. REV. 1, 27 (2001).

<sup>241</sup> See *supra* note 98 and accompanying text (descriptions of law enforcement officials “testilying”).

<sup>242</sup> This is similar, again, to the confession context requiring the accused prove law enforcement acted in bad faith. Moreno, *supra* note 129, at 398 (calling this requirement difficult, if not impossible). Further, only obvious and egregious police misconduct will

has regarding consent is the officer's word, and his word is contested by a coherent witness whose testimony is believable, it does not seem that anything has been proven regarding consent. There is merely the "shouting match," and by accepting the officer's word over that of the other witness, the court is displaying a preference for police testimony. However, if the testimony is looked at objectively, that search should be ruled a violation of the Fourth Amendment because the prosecution has not met its burden of proof due to each party having an incentive to lie.

Related to this burden of proof argument is a public policy argument based on confidence in the judicial system. In cases where police officers are allowed to get away with selective memory or lying on the stand, it has the effect of ratification of error by the court.<sup>243</sup> Specifically, the court is endorsing the unconstitutional behavior of the police, which has the derivative effect of eroding society's confidence in the judicial system.<sup>244</sup> Also, it could have the residual effect of the suspect's will being overborne during the "negotiation" phase. If a suspect does not believe he has a chance of proving coercion in court, he most likely will not even attempt to say no. This could go a long way in explaining why so many people willingly grant consent when incriminating evidence is highly likely to be found.<sup>245</sup> That is, of course, assuming that they were willing in the first place.

Finally, the development of *Miranda* case law shows a high likelihood that the totality analysis will not function as a deterrent to police to abstain from unconstitutional behavior.<sup>246</sup> Indeed, the *Miranda* warnings were put into effect because the Court felt the totality analysis

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lead to a finding of involuntariness. Strauss, *supra* note 3, at 225. Professor Strauss read every published consent case over a three-year period and concluded that a suspect's consent is almost always found to be voluntary; only in extreme cases of misconduct is the consent found involuntary. *Id.* The conduct found to lead to a finding of involuntariness generally was one of four instances: (1) threats to the subject or his family; (2) deprivation of necessities; (3) a false assertion that the police had a right to search; or (4) an "unusual or extreme show of force." *Id.* at 223.

<sup>243</sup> See *supra* notes 92-100 and accompanying text (discussing "testilying" and selective memory); see also Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 KAN L. REV. 947, 979 (1998) (discussing this ratification of error in the preservation of errors for appellate review context).

<sup>244</sup> See Simmons, *supra* note 13, at 775 (noting that the amount of condemnation of the Court's consensual search rulings threatens to undermine the integrity of judicial review of police action); Strauss, *supra* note 3, at 252 (arguing for the abolition of consent searches since "the determination of voluntariness is currently confused, misapplied, and based on a fiction" which "raises significant concerns about the integrity of the judicial system").

<sup>245</sup> See *supra* note 35 and accompanying text.

<sup>246</sup> See *supra* notes 96-133 and accompanying text.

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was not doing enough to prevent coercive police tactics.<sup>247</sup> Further, the totality test caused a myriad of problems in the confession arena, and the Court viewed *Miranda* as a solution to these problems.<sup>248</sup> What is not clear is why these same issues should not be expected when the totality test is used in the search context. It could be argued that because the search takes place in the home, there is a decreased chance for coercive behavior due to the fact the accused is in a familiar setting.<sup>249</sup> However, there is often a *greater* chance for coercive behavior on the part of police in the home.<sup>250</sup> Children being present, the lack of videotape evidence, and embarrassment from the police presence all serve the officer in creating an atmosphere conducive to obtaining consent. Additionally, children in the home give the officer leverage to negotiate for consent. Further, audiotape can be turned on and off at the officer's whim, and curious neighbors may prompt many homeowners to grant consent just to get the police out of public view. This loophole should not be tolerated by a Constitution that explicitly prohibits unreasonable searches of the home without a warrant supported by probable cause.<sup>251</sup>

## IV. A CURE FOR THE "KNOCK AND TALK"

The previous analysis shows significant problems with the "knock and talk" technique as currently employed. However, it is conceded that consent searches and interviews in the home are necessary techniques for law enforcement's use. As a result, these two concurrent situations require a nuanced rule recognizing the police necessity on the one hand, and Fourth Amendment protections on the other.<sup>252</sup> It is not desirable to completely eliminate an effective and commonly used law enforcement tool. However, it is extremely desirable to eliminate those instances

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<sup>247</sup> See *supra* note 106 and accompanying text. Additionally, the Court in *Seibert* recognized that the *Miranda* warnings themselves were not a sufficient deterrent to police misconduct. *Moreno, supra* note 129, at 399.

<sup>248</sup> See *supra* note 108 and accompanying text.

<sup>249</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 247 (1973) (holding the home is not an inherently coercive setting).

<sup>250</sup> [T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

*Id.* at 228 (citing *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

<sup>251</sup> See *supra* note 16; see also *United States v. Lewis*, 728 F. Supp. 784, 789 (D.D.C. 1990) ("In this 'anything goes' war on drugs, random knocks on the doors of our citizens' homes seeking 'consent' to search for drugs cannot be far away. This is not America."). As has been shown, we are already there.

<sup>252</sup> *Simmons, supra* note 13, at 788.

where the officer could develop probable cause and obtain a search warrant but merely *chooses* not to.<sup>253</sup>

In other words, society has an interest in eliminating police misconduct. This desire can be met in a relatively easy fashion with the following proposed revised judicial test for consent searches in the home resulting from "knock and talks." The revised judicial test should contain a presumption of coerciveness on the part of police when they engage in a "knock and talk." This will ensure that the burden of proof remains on the prosecution, will protect residents against coercive police behavior, and relieve the pressure on the judiciary to prefer police testimony over the suspect's.

Additionally, this presumption should not present too great a burden on the prosecution. Similar to the preference for videotaping in the *Miranda* context, there should be a preference for videotaping the consent search when it results from the "knock and talk." The main benefit is that videotaping will allow the reviewing judge to observe the totality of the circumstances. The circumstances surrounding the search can be viewed directly by the judge instead of relying on testimony to determine the totality of the circumstances. Further, the videotape protects the police themselves from spurious accusations of coercion.

#### A. *Presumption of Coerciveness*

The first element of the proposed solution is a new judicial test. The sanctity of the home in Fourth Amendment jurisprudence dictates that these "knock and talk" searches should carry a presumption of coerciveness. This presumption would provide three important benefits. First, the presumption will recognize the importance society places on the privacy of the home. Second, the presumption will ensure that the burden of proof remains on the prosecution to prove voluntariness, or reasonable police action. Third, the presumption will, in part, increase the public's confidence in the judicial system.

Currently, the Supreme Court, in various contexts, recognizes that a warrantless search inside the home is the chief evil the Fourth Amendment was designed to protect.<sup>254</sup> This solicitude comes from the language of the Fourth Amendment itself which specifically guards the "right of the people to be secure in their . . . houses . . . against

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<sup>253</sup> Strauss, *supra* note 3, at 264-65.

<sup>254</sup> See *supra* notes 14, 43 and accompanying text.

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unreasonable searches and seizures.”<sup>255</sup> Alternatively, the Court has also stated that the home provides familiar surroundings enabling the accused to feel free to end the police encounter.<sup>256</sup> These differing positions require reconciliation that the presumption of coercion can provide. The point of the presumption is not that civilians can end the encounter; it is that on some level they should not have to. The fact that the search takes place in the home should receive heightened scrutiny if, indeed, the privacy of the home deserves special Fourth Amendment treatment. Additionally, the presumption of coerciveness will refocus courts onto the protection of privacy the home deserves.

Moreover, the presumption of coerciveness will ensure that the burden of proof remains on the prosecution.<sup>257</sup> Courts must require more than a police officer’s testimony that consent was obtained reasonably. If the officer’s testimony is not contradicted by the accused, then the presumption has been overcome. However, if believable testimony has been offered by the accused opposing the officer’s testimony, then the presumption has not been overcome. The prosecution must provide additional evidence to support the contention that the search was consented to, which, in turn, ensures that the burden remains on the prosecution.

Another identified issue that the presumption of coerciveness will address is the tendency of courts to grant too much deference to the testimony of a law enforcement officer.<sup>258</sup> The presumption will decrease the incentive for “testilying” by requiring the prosecution to provide additional proof, and not merely relying on the officer’s testimony.<sup>259</sup> Furthermore, the presumption will decrease the effect selective memory plays in the courtroom. This benefit will, in turn, increase society’s confidence in the criminal justice system by leveling the playing field inside of the courtroom. Civilian testimony being treated equally with law enforcement testimony will engender a sense of equality that increases trustworthiness and confidence in the result of criminal trials.

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<sup>255</sup> U.S. CONST. amend. IV; Leonetti, *supra* note 4, at 297.

<sup>256</sup> This statement is a combination of statements the Court has made in the *Bustamonte*, *Bostick*, and *Drayton* cases. See *supra* notes 67-95 and accompanying text.

<sup>257</sup> See *supra* notes 67-79 and accompanying text for the discussion of the burden of proof for consent.

<sup>258</sup> See *supra* notes 88-95 and accompanying text.

<sup>259</sup> See *supra* notes 92-93 and accompanying text.

Additionally, the presumption of coerciveness will give more bite to the "free to end the encounter" test put forth in *Bostick and Drayton*.<sup>260</sup> The feeling of being treated equally in the courtroom and the resulting confidence gain in the criminal justice system that the presumption engenders will also allow civilians to feel more comfortable declining police requests for consent to search. In this way, people will actually feel free to end the encounter because they will have confidence that they have a chance to compete equally in the courtroom, the ultimate review of police behavior. This change will address the most frequent criticism of consent cases: the Court's interpretation of reality does not comport with the reality on the streets.<sup>261</sup>

*B. Meeting the Presumption: Videotaping the Encounter*

While the presumption of coerciveness provides many corrections to the problems encountered by the use of the "knock and talk" technique, the prosecution needs reasonable means to overcome the presumption. Therefore, to overcome the presumption of coerciveness, the police should videotape the "knock and talk" encounter.

The main benefit of videotape evidence is that it eliminates the "shouting match" in the courtroom.<sup>262</sup> The judge, or jury, has the evidence on display right in front of them, and can decide how coercive the police action was using the best available information. While the presumption itself can reduce the incentive for law enforcement to lie on the stand, videotape evidence would eliminate it completely. Therefore, instead of trying to decide who is more believable between the officer and the accused, the judge can focus on what actually prompted the consent to search. The best method to ensure the consent was granted voluntarily, without police coercion, and in a reasonable manner, is for the encounter to be videotaped by the police.<sup>263</sup> This, of course, requires that the video camera be turned on before entering the home and be kept on during the search itself.<sup>264</sup>

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<sup>260</sup> See *supra* notes 84-87 and accompanying text for the explanation and discussion of the "free to end the encounter" test.

<sup>261</sup> See *supra* note 250 and accompanying text.

<sup>262</sup> See *supra* note 92 and accompanying text.

<sup>263</sup> See Moreno, *supra* note 129, at 399 (arguing that videotaping is the best method to ensure custodial interrogations include *Miranda* warnings, and are free from coercion).

<sup>264</sup> Otherwise, *Miranda* type problems could ensue. See *supra* notes 134-67 and accompanying text for a description of the *Seibert* situation, one type of *Miranda* problem. Also, if the video camera is turned on and off intermittently throughout the search the

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Furthermore, one reason *Miranda* warnings have gained a greater level of societal confidence is that they are often videotaped.<sup>265</sup> The videotape allows the presiding judge to view body language, subtle innuendos, facial expressions, and tone of voice in reviewing the totality of the circumstances surrounding a confession. This review has the effect of increasing confidence in judicial decisions, and by derivative, increasing confidence in the criminal justice system itself. The effect would be similar on the “knock and talk” technique if videotape evidence was offered. The videotape would help reduce police misconduct, improve the process of the “knock and talk,” and enhance the judicial decision-making process. Shouting matches, as well as “testilying” and misremembering by the police, would be eliminated by the representative nature of the videotape evidence.

Lastly, the videotape would protect officers themselves from spurious claims of police misconduct. The videotape would exonerate the honest officer who has been wrongly accused of coercive behavior. Again, the actions are recorded for posterity and show just what the officer did and did not do. Similar to placing video cameras in squad cars to videotape the actions of people pulled over for traffic violations, the videotape will show the actions of the civilians inside of the home and not allow a claim of misconduct where there was none.

However, in certain instances, the fact that the police are videotaping could actually increase the coerciveness of the situation if the resident feels apprehension at being subjected to a recording device. This feeling in some residents would seem to argue against videotaping; however, on balance, the benefits outweigh this limited detraction. First, the video camera that this Note proposes is a button camera that would not be visible to the occupant.<sup>266</sup> Second, the protection to Fourth Amendment rights afforded by the use of videotape is a greater benefit to society than the limited increase in coercion some may feel when they see the video camera, if one is seen at all.

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value of the videotape evidence is lost because the judge is then dependant on testimony only for descriptions of what occurred while the camera was off.

<sup>265</sup> See *supra* note 95 and accompanying text. Also, one could foresee another argument against videotaping—the cost of acquiring the equipment. The response to that argument is that many times the equipment is already in squad cars for the protection of officers. Another answer is that the cost is not significant. For less than \$300, a button-hole video camera could be installed on officers attempting the “knock and talk.” See <http://www.cornerstonesecurityservices.com/st163.htm> (last visited Jan. 8, 2007) (Web site selling covert video cameras).

<sup>266</sup> See *supra* note 265 for the description of this camera.

In summary, the presumption of coerciveness coupled with videotape evidence will allow a valued and efficient police procedure to continue and flourish. Confidence in the criminal justice system will be increased, which should result in improved relations and cooperation between law enforcement and civilians. Also, police conduct will be preserved for judicial review which will protect police departments from spurious misconduct claims.

#### V. CONCLUSION

As the "knock and talk" is currently interpreted by most states, our hypothetical mother in the introduction will most likely have to live with her consent to the search. The police will be allowed to get away with conduct generally prohibited by the courts when they "bargained" for the consent granted. Even if the mother protests the methods used by police, the officers could very well testify that she gave consent willingly and produce the signed consent form as proof. Most judges would be persuaded by this evidence that the consent was voluntary and the search reasonable.

As analyzed in this Note, however, the "knock and talk" has features that render it unconstitutional as currently employed by the police. The "knock and talk" erodes the sanctity of the home by allowing the police admittance to the home using deception, and use the coerciveness of their presence in the home to gain consent. Additionally, and too frequently, the courts subtly shift the burden of proof to the accused to show coerciveness on the officer's part rather than hold the prosecution to their duty of showing the consent was properly obtained. This is principally, and most often, an unintentional result of judges being loathe to finding that a police officer has lied on the stand when recounting the circumstances surrounding the search. The resulting "shouting matches" in the courtroom almost always result in victory for the police.

Further, this Note has shown that the tactics employed by law enforcement in the "knock and talk" are *not* reasonable, and need reining in. The privacy and sanctity of the home must be protected, and the presumption of coercion and videotaping of home consent searches will accomplish this goal. The "knock and talk" is a tool the police use to fight the war on drugs; however, this war should not support the violation of the Constitution. The Court has said, "[i]f that war is to be



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fought, those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime."<sup>267</sup>

**Marc L. Waite\***

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<sup>267</sup> Florida v. Bostick, 501 U.S. 429, 439 (1991) (referring to the war on drugs not justifying every governmental action merely because the action is effective).

\* J.D. Candidate 2007, Valparaiso University School of Law; M.Ed., 2003; B.S., Accounting, 1992, Valparaiso University. There are many people the author needs to thank. First, to my family, thank you for all your support and encouragement throughout this process. I could not have completed this project without each and every one of you, especially my wife, Jennifer, and the two best kids a Dad could ask for, Ashley and Trevor—I love you all. Second, this Note would not have been possible without the advice and suggestions Dean Bruce Berner provided. Third, to the Honorable Dean A. Colvin—thank you for your friendship and mentoring. The opportunity you gave me was the best legal experience any 1L could hope for. Last, but certainly not least, to Paul Twenge—your unconditional friendship goes beyond anything I could have imagined 18 years ago when I first arrived to play for you. I owe you more than I can ever repay.