Consent Searches as Police Violence

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I. INTRODUCTION

Henderson and Krishnamurthi's new paper—*A Wolf in Sheep's Attire: How Consent Enfeebles Our Fourth Amendment* (hereinafter *Sheep's Attire*)—powerfully advocates for reform to the consent doctrine. The paper is thoughtful, well-intentioned, and useful for challenging core assumptions about the law to help us evaluate how it *should* work. [1] The piece is also fun to read as the authors breathe real-world insight into old doctrine. In the end, though the article flirts with a categorical rule about consent searches, and while the authors "think it categorically unreasonable for police to ask individuals to forgo their rights" in the context of Fourth Amendment searches premised on consent, they stop short of calling for a total ban on consent searches.[2] Instead, they seek to abolish the Fourth Amendment consent doctrine except in various "emergency" circumstances.[3]

This response makes four points. The first two address the ubiquity of racialized police violence in America and how this fact (of both present and history) may impact how to view the proposal in *Sheep's Attire*. Particularly when juxtaposed against the legacy and reality of racialized terror, I suggest, police seeking consent to search may amount to act of violence or a very real threat of violence. The third point deals with the emergency-only proposal and raises some doubts about how issues related to the "emergency" doctrine will be adjudicated. The emergency-only consent doctrine is creative, but it seems the proposal does not solve all of the problems it sets out to fix and may

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[1] Stephen E. Henderson & Guha Krishnamurthi, *A Wolf in Sheep's Attire: How Consent Enfeebles Our Fourth Amendment*, 85 OHIO STATE L.J. 33, 42 (2024).

[2] *Id.* at 46.

[3] *Id.* at 7.

necessarily involve unbalanced adjudication about what constitutes an "emergency" that ditching the inquiry about "what constitutes consent" was supposed to fix because it will still be judges making the decisions (and often relying on police narrative versus a criminal defendant to resolve them). Fourth, in risky fashion, I offer a proposal that does not involve abolishing the notion of consent searches categorically, or limiting them to emergency situations. Instead, what if we consider that the issue of voluntariness of any situation where consent is sought should be a question of fact decided by a jury rather than a question of law decided by a judge? In this thought experiment, imagine that the question of whether a search is consensual is not decide by a judge using some invented set of factors but is, instead, placed in the hands of the legal system's proxy for democratic adjudication—the jury. Thorny questions about how consent is defined wash away. Thorny questions about what constitutes an emergency and other inquires mandated by the Henderson-Krishnamurthi proposal also fade away. In this universe, a pre-trial jury answers the question, plain and simple.

A. *Consent Searches Must Be Understood in Context of the Spectacle of Police Violence*

Race (and racism) are certainly on the minds of the authors as it relates to police searches that begin with a request for consent. The authors point to the issue of how "[t]he consent search doctrine is the handmaiden of racial profiling."[4] *Sheep's Attire* argues the "consent doctrine enfeebles intended constitutional protection against encroachments by the State, and because that State disproportionately targets racial minorities and the poor, they are left even more vulnerable."[5] As a result, *Sheep's Attire* emphasizes that the issue with race is a "problem of disparate impact" that "arises on account of to the rampant racial and socioeconomic profiling endemic to the criminal justice system."[6] I have no quarrel with these statements.

However, from my vantage, there is something missing about this story of racialized policing in *Sheep's Attire*. That missing element impacts how to think about what makes Fourth Amendment consent "illusory," as Henderson and Krishnamurthi argue it is.[7] That missing element? Police violence. The problem with consent, particularly for people of color and other over-policed communities, is not just about racial profiling; it is about what happens when consent is not sought: beatings, electrocution by taser, death and despair by gunfire; and the list goes on.[8] In short, to complete the story of how race impacts

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[4] *Id.* at 25 (quoting George C. Thomas III, *Terrorism, Race and A New Approach to Consent Searches*, 73 MISS. L.J. 525, 542 (2003)) (internal quotes omitted).

[5] *Id.*

[6] *Id.*

[7] Henderson & Krishnamurthi, *supra* note 1, at 19.

[8] *See* David B. Owens, *Violence Everywhere: How the Current Spectacle of Black Suffering, Police Violence, and the Violence of Judicial Interpretation Undermine the Rule*

consent—and makes it illusory—police stops and subsequent requests for "consent" must not just be understood against the backdrop of racial profiling but against the backdrop of racialized terror occasioned by spectacle police violence.

We do not know the full numbers, but the number of annual police contacts with civilians is staggering. The Department of Justice estimates that 21% of U.S. residents aged 16 or older—about 53.8 million persons—had police contacts in 2020 alone.[9] Police in the United States are more likely to kill people they encounter than anywhere else in the world; roughly 1,000 people are usually killed in police shootings alone each year.[10] And, despite the pandemic and the international calls for police reform after George Floyd was murdered, the numbers have not materially changed.[11]

We can sort of get a sense for what subset of police contacts involve consent by looking at traffic stop data, where at least 20 million traffic stops are made each year.[12] Data unequivocally show that consent searches are only a small fraction of these *encounters*. For example, pursuant to state law, Texas annually publishes its traffic stop data.[13] In 2022, there were over 1.6 million traffic stops.[14] Of those stops, just over 82,000 (4.9%) involved a search at all, and just under 17,500 (1%) stops involved consent searches.[15] These figures did not meaningfully differ in other years.[16] Data from Washington State paints a similar picture. There, a study (controversial for unrelated reasons) examined the Washington State Patrol between 2015 and 2019, which involved more than

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of Law, 17 STAN. J. CIV. R. & CIV. LIB. 475, 477–79, 485–89 (2022) (discussing various forms of spectacle police violence).

[9] Press Release, Bureau of Just. Stat. Dep't of Just., Contacts Between Police and the Public, 2020, (Nov. 18, 2022), https://bjs.ojp.gov/press-release/contacts-between-police-and-public-2020 [https://perma.cc/LX25-X5RB]; *see also*, SUSANNAH N. TAPP, & ELIZABETH J. DAVIS, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2020 at 1 (Department of Justice 2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cbpp20.pdf [https://perma.cc/GEF4-U3FQ].

[10] *See* Curtis Bunn, *Report: Black People Are Still Killed by Police at a Higher Rate than Other Groups*, NBCNEWS.COM (Mar. 3, 2022), https://www.nbcnews.com/news/nbcblk/report-black-people-are-still-killed-police-higher-rate-groups-rcna17169 [https://perma.cc/4E8Y-5EEX] (reporting police shot and killed at least 1,055 people nationwide in 2021, 1,021 via shootings in 2020, and 999 in 2019).

[11] *Id.*

[12] *See Findings*, OPENPOLICING, https://openpolicing.stanford.edu/findings/ [https://perma.cc/6DBY-P8MP], (last visited Apr. 1, 2024) ("Police pull over more than 50,000 drivers on a typical day, more than 20 million motorists every year.").

[13] TX. CODE CRIM. P. ART. 2.133.

[14] TEXAS DEP'T OF PUB. SAFETY, 2022 ANNUAL TRAFFIC STOP DATA REPORT 2 (2022), https://www.dps.texas.gov/sites/default/files/documents/director_staff/public_information/2022_traffic_stop_data_report.pdf [https://perma.cc/UZ9T-EEGP].

[15] *Id.* at 5, 68.

[16] *See* TEXAS DEP'T OF PUB. SAFETY, 2021 ANNUAL TRAFFIC STOP DATA REPORT 2 (2021); TEXAS DEP'T OF PUB. SAFETY, 2019 ANNUAL TRAFFIC STOP DATA REPORT 2 (2019).

7 million officer contacts.[17] Searches occurred in less than 3% of cases, and the supermajority of these searches (over 3/4ths) involve searches incident to arrest and only under 4,500 of the searches altogether—a percentage so far under 1% this author's basic calculator cannot provide a meaningful way of representing it.[18]

Part of the reason police can even pretextually target people of color (and others, including the poor and disabled or due to someone's gender or perceived gender) with virtual immunity has nothing to do with consent doctrine and everything to do with the massive expansion of traffic laws in the last half century;[19] the expansion of circumstances where "reasonable suspicion stops" can be made;[20] and the Supreme Court's blessing of pretextual stops that removed the question of racial motivation from the Fourth Amendment calculus.[21] And, when determining whether these laws are enforced, police have the exceedingly lax rules for clearing a constitutional hurdle. The deferential rule of "reasonable suspicion"— which the Court only tells us is low and, in reality, embraces many forms of pretext—is all that is needed to conduct a temporary search and then permit an invasive search of one's body politely called a "pat down" or "stop and frisk."[22] Though nominally more exacting, the Fourth Amendment's probable-cause requirement is differential and does not occasion much scrutiny of police, either.[23] The Fourth Amendment has essentially become the regulator of police conduct; it has failed at this task.[24] The Supreme Court continues to spend time talking about things that happened in 1789 or 1871 when constables were armed, if at all, with clubs and muskets even though modern police departments have "professionalized" in the sense that even small units are frequently paramilitary organizations armed with weapons of war like tanks, explosives, and assault rifles.[25] Fourth Amendment doctrine ignores basic views of privacy, reasoning that telling a private detail to one person means it has been told to all (including permitting detection by the

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[17] DIV. OF GOVERNMENTAL STUD. AND SERVS. WASH. STATE UNIV., REPORT TO THE WASHINGTON STATE PATROL 1 (2022).

[18] *Id.* at 32.

[19] *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 3 (1985).

[20] *See* Terry v. Ohio, 392 U.S. 1, 27–29 (1968). This case occasioned this, and data around the country show pervasive police contacts involving "stop and frisk" and racial disparities in those stops (NYC, Seattle, other cities). This is not uniquely a problem about race. *See, e.g.*, Kahn et al., *Racial and Ethnic Disparities in "Stop-and-Frisk" Experience among Young Sexual Minority*, PLOS ONE (2021).

[21] Whren v. United States, 517 U.S. 806, 813 (1996).

[22] Terry v. Ohio, 392 U.S. 1, 8 (1968).

[23] *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017).

[24] *See, e.g.*, Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 521 (2021).

[25] *See generally* RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES (2014); ALEX S. VITALE, THE END OF POLICING 121–22 (2017).

government).[26] Fourth Amendment doctrine permits invasive searches of people simply because they are near a border.[27] And, as mentioned, the absence of meaningful remedies makes this all the worse.

This is not to diminish the impact or ubiquity of the police tactic of seeking consent to search by the police that *Sheep's Attire* points out.[28] Instead, the point is that consent searches must be understood within the context of broader spectacle police violence. The question people of color often ask—the question I myself ask when stopped by the police—is whether the encounter is going to end with embarrassment, physical harm, or death. Will I be killed as a result of this traffic stop if I do not perform perfect compliance? Is this a "Comply or Die" situation? I think these thoughts every time I am pulled over by a police officer. Every. Time. The fear in that moment—the anguish in that moment—is deeply imbedded in the collective consciousness of the folks overpoliced under the backdrop of spectacle police violence.[29]

Judge Reeve's decision in *Jamison* has been famously cited for its blistering critique of qualified immunity.[30] And, issued as the world was grappling with the death of George Floyd and other events of 2020, the decision begins with a recitation of dozens of Black people harmed or killed by the police for trivial offenses, if offenses at all.[31] But, the case is actually about a traffic stop that has gone off the rails—where an officer dismantled Mr. Jamison's car, held him on

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[26] *See* United States v. Miller, 425 U.S. 435, 444 (1976) (announcing third-party doctrine that provides disclosure to one constitutes forfeiture of a reasonable expectation to all, including government investigators); Smith v. Maryland, 442 U.S. 735, 743–746 (1979) (extending third-party doctrine to pen registers used to monitor phone calls). Though the Supreme Court declined to extend this doctrine to cell phone tower data in 2018, in *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018), the decision was controversial and, perhaps more notably, 5–4, with Justices Kennedy, Thomas, Alito, and Gorsuch dissenting and Justices Breyer and Ginsburg no longer on the Court. It remains to be seen whether *Carpenter*'s move away from *Miller* and *Smith* will stand the test of time with the current mix of justices.

[27] *See, e.g.*, United States v. Ramsey, 431 U.S. 606, 616 (1977) ("That searches made at the border…are reasonable simply by virtue of the fact that they occur at the border should, by now, require no extended demonstration."); Carroll v. United States, 267 U.S. 132, 151–53 (1925) (recognizing boarder search exception).

[28] Henderson & Krishnamurthi, *supra* note 1, at 54.

[29] I have elsewhere discussed these issues and attempted to collect voices of other Black authors along the way. See Owens, *supra* note 8, at 486. In his powerful decision discussing the consent doctrine in the same light, see Judge Reeves' decision in Jamison v. McClendon, 476 F. Supp. 3d 386, 414 (S.D. Miss. 2020).

[30] *See, e.g.*, Carrie Johnson, *Judge, Shielding Cop Via 'Qualified Immunity,' Asks Whether it Belongs in 'Dustbin'*, NPR (Aug. 6, 2020), https://www.npr.org/2020/08/06/899489809/judge-shielding-cop-via-qualified-immunity-asks-whether-it-belongs-in-dustbin [https://perma.cc/PF9N-CF69]; EQUAL JUST. INITIATIVE, *Federal Judge Calls for Qualified Immunity Reform* (Aug. 10, 2020), https://eji.org/news/federal-judge-calls-for-qualified-immunity-reform/ [https://perma.cc/3Y8J-ZMPW].

[31] *Jamison*, 476 F. Supp. 3d at 390–91 nn.1–20.

the road for hours, repeatedly lied to him, claiming there was inculpatory evidence (when there was not), and reached into the vehicle while repeatedly seeking "consent."[32] One of the questions was whether, after repeatedly asking for consent, Mr. Jamison's acquiescence (called "consent" by the officer) was voluntary under the doctrine.[33] The court found that, even under the inadequate doctrine described as feeble in *Sheep's Attire*, a jury could reasonably conclude that the officer's actions amounted to coercion.[34] Indeed, Judge Reeves found a reasonable jury could conclude the officer's lies "reasonably caused Jamison to fear that the officer would plant drugs in his car, *or worse*."[35]

The realistic prospect of violence or death at the hands of the police is the "or worse" part of the story here. As a result, Judge Reeves began an opinion about a consent search where no excessive force occurred by listing dozens of acts of police violence for a reason: though Jamison "left the stop with his life," "[t]oo many others have not" and "thousands have died at the hands of law enforcement over the years" with numbers continuing to rise, while countless more have "suffered from other forms of abuse and misconduct by the police."[36] Turning back to evaluation of whether the requested consent was involuntary, *Jamison* called race the elephant in the room, and described the history and spectacle of violence as follows:

Jamison was a Black man driving through Mississippi, a state known for the violent deaths of Black people and others who fought for their freedom. Pelahatchie is an hour south of Philadelphia, a town made infamous after a different kind of traffic stop resulted in the brutal lynching of James Chaney, Michael Schwerner, and Andrew Goodman. Pelahatchie also less than 30 minutes east of Jackson, where on June 26, 2011, a handful of young white men and women engaged in some old-fashioned Redemption and murdered James Craig Anderson, a 47-year old Black, gay man. Pelahatchie is also in Rankin County, the same county the young people called home. Only a few miles separate the two communities.[37]

Again, as *Jamison* points out: "For Black people, this isn't mere history. It's the present."[38] Consistent with how things still operate a decade later, "more than 600 people had been killed by police officers in 2013 alone."[39]

In *Sheep's Attire*, the authors note that "individuals targeted by officers may believe that there are nontrivial *costs* to refusing consent," recognizing, without much elaboration, that reasons to fear prolonged interaction with law enforcement are "especially the case for people of color."[40] This point is worthy

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[32] *Id.* at 393.
[33] *Id.* at 393, 411–12.
[34] *See id.* at 413.
[35] *Id.* (emphasis added).
[36] *Id.* at 391–92.
[37] *Jamison*, 476 F. Supp. 3d at 413–14.
[38] *Id.* at 414.
[39] *Id.*
[40] Henderson & Krishnamurthi, *supra* note 1, at 52–53.

of elaboration: part of the reason that people of color may feel reluctant to deny consent—even when they have "contraband"—may have to do with the very real fear that they will be killed if they do not consent. The fear is so real that innocent children are given the "talk" by their parents about how to act when getting pulled over by the police.[41] And, there is a further fear that calling a prolonged racially-biased, invasive police stop biased will *increase* the intrusion, not limit it.[42] Police will break out the K-9s or drum up other types of "suspicion" to dismantle our cars on the side of the road, assuming the beasts do not attack or bite us along the way.[43] This is why it matters that consent searches make up such a small part of the police contacts part of the puzzle—those asked to consent may, in some instances, feel lucky they have not already been subjected or forced to relent without the gesture of a question at all. Along these lines, reforming Fourth Amendment doctrine must account for how over-policed and over-killed communities might view the question being asked, as some courts have started to recognize.[44]

With this in the background, the question is whether Henderson and Krishnamurthi should really stop short of a categorical approach? Is there a reason to keep the consent-doctrine if all of this is true?

At minimum, there is a further question: how does their proposal assess these issues? In their emergency-aid version of consent, police can still ask for consent when (1) a person expresses belief in an emergency situation, and (2) she provides a "knowing and voluntary waiver" of her Fourth Amendment rights after being informed of something akin to *Miranda*-like "right to refuse" and right to advice of counsel.[45] But, how might the fact that an officer approaching someone in a "less volitional" context, as the authors call it, be impacted by these exact same issues? Would the officers just repeatedly ask: "are you saying there is an emergency"? Or would they need only say something like "please confirm this is an emergency before giving warnings just as infective as

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[41] *See* Owens, *supra* note 8, at 486 n.54.

[42] *See, e.g.*, Jamison v. McClendon, 476 F. Supp. 3d 386, 413 (S.D. Miss. 2020).

[43] *Cf.* Matthew Willis, *The Police Dog as Weapon of Racial Terror*, JSTOR DAILY (Feb. 9 2023), *https://daily.jstor.org/the-police-dog-as-weapon-of-racial-terror/* [https://perma.cc/XL6A-U3V4]; *e.g.*, Jack Hitt, *Police Dog Bites Black Man*, NEW YORKER (Mar. 18, 2015), https://www.newyorker.com/news/news-desk/police-dog-bites-black-man [https://perma.cc/X6B6-9P6L] (describing Black man bitten by police dog and results of Ferguson DOJ showing pervasive dog bites of Black civilians); Latisha Jensen, *Portland Police Dogs are Biting White People Less—And Black People Just As Often*, WILLAMETTE WEEK (Jan. 27, 2021), https://www.wweek.com/news/2021/01/27/portland-police-dogs-are-biting-white-people-less-and-black-people-just-as-often/ [https://perma.cc/VVH2-WQYX](documenting how racial disparities in police dog bites of Black people *increased* in the midst of police reforms following George Floyd's murder).

[44] *See, e.g.*, State v. Sum*,* 199 Wash. 2d 627, 638 (2022) (race of person interacting with the police is relevant to the question of whether they have been seized); Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016) (Black man fleeing from the police cannot be considered inherently suspicious or criminal due to over policing and killing of Black men).

[45] Henderson & Krishnamurthi, *supra* note 1, at 68.

Miranda itself"? Can we disaggregate the threat of violence from the initial interaction (prompted by police) that involves inquiring about whether an emergency exits or will police just drum up "exigency" as they do elsewhere? I have my doubts.

B. *Requests for Consent Are an Expression of Authority (Backed with a Threat of Violence). Can They Ever Be Voluntary?*

That real world and ubiquitous presence of police violence impact the hearts and minds of people interacting with the police who feel like they cannot say "no" is only part of the missing element of police violence in *Sheep's Attire*. Police violence also involves a more fundamental, theoretical notion of what the law is and who police are. On this account, the very notion of law itself involves, and depends on, the threat of enforcement; a threat backed by the prospect of violence.[46] In other words, law itself is constitutive with the idea that it can be *enforced* and relies upon the threat of some mechanism for enforcement as part of its legitimacy.

As with the issue of race, *Sheep's Attire* flirts with but does not fully embrace these issues. The authors point out that people may be "overcome by the power of authority," and draw from work in linguistics arguing that because an officer is "perceived as an authority, he need not rely on coercive statements to achieve a goal—his role is adequate to involve "coercive power."[47] There is more to the story here. It is not that police officers are *perceived* as an authority; it is the fact that they *are* the authority that makes their requests different from other types of requests. They literally have weapons and the backing of the State when they interact with civilians. Refusal to answer questions or be sufficiently "cooperative" in some contexts are themselves crimes.[48]

In sum, there is an (persuasive to me) argument that a request for consent to search can be—and perhaps should be or must be—viewed itself as an act of the State's expression of power; *i.e.*, an act at least backed by the threat of violence for refusal to comply at all times. This draws upon the suggestion in *Sheep's Attire* that it would be unreasonable to even *ask* civilians to forgo their rights in certain situations.[49]

But no one is arguing—and *Sheep's Attire* does not argue—that rights can *never* be waived. Indeed, the emergency-aid proposal depends on the notion that people can "knowingly and voluntarily" waive their Fourth Amendment rights.[50] This is the paradox of consent doctrine. On one hand, here is a strong intuitive, common-sense pull to current Fourth Amendment consent doctrine. It

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[46] *See generally* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); AUSTIN SARAT & THOMAS R. KEARNS EDS, LAW'S VIOLENCE (1995).

[47] Henderson & Krishnamurthi, *supra* note 1, at 53.

[48] *See, e.g.*, WASH. REV. CODE ANN. § 46.61.020 (West) (making it a crime for a "refusal to give information to or cooperate with" an officer).

[49] Henderson & Krishnamurthi, *supra* note 1, at 67.

[50] *Id.* at 36.

would be counterintuitive to maintain that the Fourth Amendment's prohibition on "unreasonable searches,"[51] cannot be satisfied by having truly voluntary and meaningful consent from the person being searched.[52] Thus, at least at some theoretical level, current Fourth Amendment doctrine derives from the common-sense notion that it is not unreasonable for police to search things if they have been given consent to do so—regardless of what legal gloss is used to adjudicate that claim. But, on the other hand, as *Sheep's Attire* demonstrates, and as the foregoing further highlights, there are strong reasons to reject the notion, particularly as set forth in current doctrine, that consent can meaningfully exist in light of empirical evidence concerning acquiescence, racial profiling, spectacle violence, and the theory of what law enforcement is itself.[53] It takes zero stretch of the imagination to see there is a serious question of what really constitutes voluntary and meaningful consent when a gun-wielding state agent with nearly unfettered discretion to completely ruin your day—and whose colleagues have killed many people for trivial slights—makes the "request."

In the end, even if Henderson and Krishnamurthi's approach were adopted, we are in a position where a waiver of rights can sometimes be valid and sometimes such a waiver cannot (even theoretically) be valid. But, how do we decide how or where to draw that line? A significant problem in recognizing the inherent coercion of law's violence but the ability of people to be able, in some circumstances, to provide a valid waiver seems to require a coherent theory of when it is acceptable (reasonable? lawful?) for us to permit someone to provide a knowing and voluntary waiver and when it is not.

A worry I have about the emergency-aid version of consent is that it shifts disputes about *coercion* to those about whether a person voluntarily expressed that an emergency existed or whether what they described was sufficient to constitute an "emergency" sufficient to permit consent to be sought in the first place. These two problems of *invoking* the "emergency" doctrine seem rife for police to expand what *Sheep's Attire* hope will remain narrow. Indeed, if we look at other contexts, we can see warnings of how things might play out. When determining whether someone has invoked their right to counsel, disputes often arise about whether someone said something that qualified as an invocation.[54] Though the consent situation here involves the inverse—*i.e.*, where it would be about whether a person who the police approach actually expressed an emergency rather than whether a person the police are interrogating asked for

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[51] U.S. CONST. amend. IV.

[52] *Cf.* Henderson & Krishnamurthi, *supra* note 1, at 58 ("The consent doctrine operates under the view that if people offer their free and voluntary consent to a search it must be reasonable.").

[53] *Id.* at 24–25.

[54] *See, e.g.*, Davis v. United States, 512 U.S. 452, 458–59 (1994) (holding invocation must be unequivocal); Tobias v. Arteaga, 996 F.3d 571, 580 (9th Cir. 2021) (finding invocation unequivocal and colleting cases where whether invocation was equivocal was disputed).

an attorney—these threshold issues, and remedies for violations, are structurally set up to favor police interpretation. Moreover, disputes about whether an emergency exists abound in Fourth Amendment law, perhaps in no greater manner than whether police violence constitutes "excessive force." That is, in determining whether force is excessive, the law often inquires whether there was an emergency or something like it (*i.e.*, was the situation "rapidly evolving) and demands that courts not engage in the judgment of 20/20 hindsight. In some ways, excessive force lawsuits are often about whether an emergency (or threat of one) truly exists.

How can the Henderson-Krishnamurthi proposal fare better? Take the following hypothetical: a police officer approaches a person in some sort of distress in front of an apartment building and asks whether there is an emergency. The person gives a vague response that there is "danger" in their home. What does an officer do here? Walk away? Or inquire further: are you saying this is an emergency? Or, is the officer free to assume and interpret—based upon demographics, race, crime activity in the neighborhood, etc.—that this is an expression of an emergency? The police give the warnings, get consent, go into the apartment, search it, see a Black man and shoot him and find mounds of drugs that have been deemed illegal and arrest the person they were supposed to help.[55] Suppose the person who gave this "consent" disagrees that they expressed something that would be an emergency, sues the police and seeks suppression of the drugs? What now? At current, it seems likely that qualified immunity is going to be a barrier to the lawsuit and the good faith exclusionary rules are going to allow the admission of the drugs.

Both of these questions would be decided by a judge as a matter of law—based upon some sort of legal test—rather than a jury as a matter of fact. Perhaps this is the problem.

II. A PROPOSED SOLUTION: KEEP CONSENT BUT MAKE IT A JURY QUESTION?

Henderson & Krishnamurthi scrutinize reasonableness directly.[56] I share their skepticism. But, for better and worse, we are stuck with this concept. After all, "reasonableness is the textual Fourth Amendment criterion."[57] In addition,

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[55] Social science demonstrates that Black men are more likely to be perceived as a threat—and therefore more likely to be considered an "emergency" than others. *See, e.g.*, Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. J. 276, 278 (2007); Jennifer L. Eberhardt, Valerie J. Purdie, Phillip Atiba Goff, & Paul G. Davies, *Seeing Black*: *Race, Crime, and Visual Processing*, 87 J. PERSONALITY AND SOC. PSYCH. 876, 889 (2004); Joshua Correll, Bernd Wittenbrink, Bernadette Park, Charles M. Judd & Arina Goyle, *Dangerous Enough: Moderating Racial Bias with Contextual Threat Cues*, 47 J. EXPERIMENTAL SOC. PSYCH. 184, 188 (2011). Race will inevitably impact how the Henderson and Krishnamurthi proposal would operate in reality.

[56] Henderson & Krishnamurthi, *supra* note 1, at 77–78.

[57] *Id.* at 77.

Sheep's Attire does not—and cannot—maintain that consent cannot ever be given or provided "reasonably" as a categorical matter. The proposed emergency-exception presupposes that people have the ability to provide meaningful permission to search. Meaningful consent seems awfully reasonable to me. In addition, it is difficult to imagine legal doctrine categorically precluding a finding that, at least in some circumstances, people can well and truly give police permission to search things outside of emergency contexts without the resulting search being deemed unconstitutional.

This is the crux of the issue: *how* should we evaluate what constitutes an "unreasonable search" under the Fourth Amendment? My view of reasonableness is most certainly different than what many judges applying doctrine say the law *is*. Judge Reeve's views about the stop in Jaimison are almost certainly different than other judges who do not share the lived experiences of being a Black man in Mississippi.[58] And, like myself, Henderson and Krishnamurthi's views about what is or is not objectively reasonable in a certain context are motivated by their own lived experience and what they know about the circumstances.[59] That is not a criticism. And, differing views about what is reasonable in a particular situation do not depend solely on judicial ideology or anything like that—views on what is unreasonable differ by person, by context, and are informed by lived experience. That being the case, *how* should we resolve concrete disputes about whether a particular search was unreasonable in specific cases? One answer is to say judges can decide these questions as a matter of constitutional law. But, given that reasonableness can vary so significantly, having a judge declare in the abstract or as some sort of rule that certain actions are always reasonable is problematic, to put it mildly. The Supreme Court weighed-in about video evidence of a police chase and entered judgment as a matter of law premised on the majority's view of how to interpret the tape, but that video can be viewed very differently than how the majority insisted it *must* be viewed.[60] Permitting judges to say their view of

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[58] Judge Reeves was only the second Black person to be appointed to the federal bench and has famously invoked the history of Black suffering in his work. See NPR Staff, *A Black Mississippi Judge's Breathtaking Speech To 3 White Murderers*, NPR (Feb. 13, 2015) https://www.npr.org/sections/codeswitch/2015/02/12/385777366/a-black-mississippi-judges-breathtaking-speech-to-three-white-murderers [https://perma.cc/65S6-T2DP].

[59] *See* Avani Mehta Sood, *Motivated Cognition in Legal Judgments—an Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 307 (2013) (collecting studies about how motivated judgment, informed by background and perspective, impact legal decisionmaking and undermine the notion that all aspects of video or other evidence can be viewed "objectively"); Dan M. Kahan, David A. Hoffman, Donald Braman, & Danieli Evans, *"They Saw A Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 851 (2012) (illustrating how people responded to watching the same video differently based upon what they were told about the nature of that it depicted).

[60] *See generally* Scott v. Harris, 550 U.S. 372 (2007). As was no surprise, it turns out, the Court majority's view was not the only view of the tape. *See* Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 880 (2009).

reasonableness is the *only permissible* view of how disputed events can be interpreted eliminates, as a matter of law, the varied perspectives that lie at the heart of the democratic justification for government in the first place. The system does not work. This system is not fair. But, when disputes arise in motions to suppress in civil cases and dispositive motions to dismiss in civil cases, judges may (and do) reject challenges about what is reasonableness is in a particular case based upon what is reasonableness as a matter of law. And, in the end, that process may lack constitutional legitimacy.

Sheep's Attire supports this argument. As Henderson and Krishnamurthi demonstrate by showing the differing views of majority and dissenting justices in myriad decisions, there is a problem with the fact judges are purporting to decide—as a *legal* matter dispositive of an issue—things like whether consent was sufficient enough to make a warrantless search constitutional.

So, what to do? Briefly, I argue that we should empanel juries to determine whether a challenged police search based upon consent is unreasonable. In a criminal case, this would involve some type of jury to decide issues at a suppression hearing. While that would certainly occasion costs to the system (and while juries have their own sets of biases that are beyond the scope of this response to address), as a matter of constitutional fidelity and democratic involvement, it is a vast improvement over somehow picking whose view of "objective reasonableness" should win-out as a matter of constitutional law. In civil cases, and as I have argued elsewhere, the resulting rule would be a juror-deference canon, whereby these issues are decided by juries rather than judges as a matter of judicial fiat.[61] If a person was searched without a warrant, and a dispute arises about whether the police say there was consent and the person says they were coerced, let the jury decide if consent, as an affirmative defense, has been established. The problem, it seems, is not actually with consent; it is with vesting certain people with deciding whether that existed (or did not exist) as a matter of law when the question is well and truly contested.

III. CONCLUSION

Henderson and Krishnamurthi make a valuable, thought-provoking contribution to our conceptions of the Fourth Amendment consent doctrine. We should continue the discussion, because—as we all agree—a stronger version of the Fourth Amendment is necessary and current doctrine is irretrievably broken.

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[61] Owens, *supra* note 8, at 512.