



1200 U Street NW
Washington, DC 20009

February 27, 2024

Re: Bill 2-24, Police – Traffic Stops – Consent Search of Motor Vehicle and Data Collection (“Freedom to Leave Act”)

Greetings,

Please see attached documents, report, and video testimony for tonight’s upcoming hearing on Bill 2-24, Police – Traffic Stops – Consent Search of Motor Vehicle and Data Collection (“Freedom to Leave Act”). We are thrilled that Councilmember Jawando is working on this. Attached you’ll find what we recently submitted to support ending consent searches in Washington, D.C. Please don’t hesitate to reach out to us if there is more we can do to support this effort.

Respectfully,

Patrice A. Sulton
Executive Director,
DC Justice Lab

Video Package List:

Oct 15, 2021 Testimony

[Josephine Ross](#)

[Kaylah Alexander](#)

[Leah Wilson](#)

May 20, 2021 Testimony

[Josephine Ross](#)

[Kaylah Alexander](#)

Statement Submitted by Professor Josephine Ross

To The

Committee on the Judiciary and Public Safety
The Honorable Charles Allen, Chair

The Recommendations of the D.C. Police Reform Commission

Regarding Section 110 of Act 23-336 (“Limitations on Consent Searches”)

Submitted

Friday, May 28, 2021

By

Josephine Ross
Professor of Law
jross@law.howard.edu

&

Kaylah Alexander
Howard Law Student
kaylah.alexander@law.bison.howard.edu

Greetings Chairman Allen, Council members, staff, and residents of the District. We commend the Committee on the Judiciary and Public Safety for grappling with the complicated and necessary task of police reform and want to focus specifically on abolition of consent searches.

In addition to our oral testimony regarding the modification of Section 110 of Act 23-336 to eliminate the Metropolitan Police Department's use of consent searches, we take this opportunity to address a question that a council member asked another presenter during the hearing on May 20, 2021.

The question asks how the proposed change in consent law would affect a situation where a domestic violence victim wants police to search the home they share with another person?

There are two answers to this question, depending on the actual factual scenario.

- 1) If a victim of domestic violence wants police to enter to arrest an abuser who is in the home, this fits squarely within the "exigent circumstances" exception to the warrant and probable cause requirements. The new legislation does not change this.

The exigent circumstances exception allows the police to conduct a warrantless search when it is "objectively reasonable" under the Fourth Amendment. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (Court held that law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury). This factual example would be considered an exigent circumstance allowing a warrantless search. If the Council adopts the recommendation to abolish consent searches, this will not interfere with the police's ability to enter a home to provide emergency assistance.

- 2) If a victim of domestic violence wants to get their partner or child in trouble by asking police to search for drugs, the police cannot rely on consent but are not left without options.

If the situation does not qualify as an emergency, the police will need to evaluate the tip rather than harnessing the consent exception. The responding officer will ask the complainant why that person suspects that police will find contraband items in the home. If the allegation is credible, then police may obtain a warrant that allows them to search. To apply for a search warrant, the police must have “probable cause,” that is, a reasonable basis for believing that evidence of a crime is present in the place to be searched. *Commonwealth v. Jacoby*, 642 Pa. 623, 652 (2017)(police need reasonably trustworthy information that would warrant a person of reasonable caution to believe that a search should be conducted).

Warrants can now be obtained by telephone. D.C. Code Ann. § 23-522(a). Moreover, police are empowered to secure the premises while they obtain a warrant. In the scenario envisioned by the council member’s question, officers could prevent the domestic partner (alleged abuser) from reentering his or her home as a measure to guard against the destruction of evidence while police prepare the paperwork and assemble a team for the search. *See Illinois v. McArthur*, 531 U.S. 326, 337 (2001).

In fact, a warrant protects the domestic violence survivor who consented to the search by preventing police from conducting a fishing expedition within that person’s home and possibly charging them based on something found during a general search. The new rule protects domestic violence survivors in another way too. Under current law, abusers can employ consent searches to retaliate against their partners, since people generally do not want police rummaging through their drawers. Survivors of domestic abuse who possess illicit drugs risk arrest and prosecution in addition to the unwanted intrusion and the inconvenience of repairing any damage caused by the officers during the process. Requiring the person seeking consent to give the police trustworthy information therefore adds a layer of protection for domestic violence victims against this type of retaliation.

Interestingly, warrants actually provide greater protection than consent searches if a defendant challenges the legality of the search in court. Notably, the Supreme Court excluded evidence seized during a consent search when one of the roommates refused consent. *See Georgia v. Randolph*, 547 U.S. 103 (2006); cf. *Fernandez v. California*, 571 U.S. 292 (2014). Similarly, courts will refuse to find implied consent for searches of spaces that belong to the non-consenting party, such as a son’s bedroom. *See e.g., United States v. Robinson*, 999 F. Supp. 155 (D. Mass. 1998) (mother’s consent did not extend to a closed vinyl bag within son’s bedroom).

In sum, the proposed legislation will not hamper police efforts to respond to domestic violence victims. In the first scenario above, the search will continue to be permitted

through the exigent circumstances exception to the warrant. In the second scenario above, the legislation would prevent a consent search; however, the statutory change will actually improve police practices that better protect victims of domestic violence. This is in addition to protecting the general public against unwanted searches of their homes, bodies and property.

Statement Submitted To
The Committee on the Judiciary and Public Safety
The Honorable Charles Allen, Chair

On Youth Rights Amendment Act B24-0306

Submitted
Friday, April 16, 2021
By
Josephine Ross
Professor of Law
Howard University School of Law
Jross@law.howard.edu
&
Kaylah Alexander, law student
Howard University School of Law

We write in support of the Youth Rights Amendment Act of 2021 and propose an amendment to the bill that will immensely improve the importance and reach of the legislation. Admirably, the current bill would prohibit “consent” searches of those under the age of 18. As the bill recognizes, “consent” is never truly consensual given the power differential that exists between a police officer and civilian. As this testimony will show, the power differential does not disappear on someone’s eighteenth birthday.

Legally, police officers do not need consent to search. Without consent, police still have the authority to search our bodies, bags, automobiles, and homes. However, police may only do so when they have facts that would reasonably justify the intrusion. To go into our pockets or handbags or the trunk of our car, police need probable cause to believe there is evidence of contraband or wrongdoing in the place to be searched. To search our homes, police need a warrant that sets forth probable cause. To frisk of our bodies, or request people to lift their shirts, police need something less than probable cause, namely, reasonable suspicion that the civilian is armed and dangerous. But consent creates an end-run around these rules. Police may claim that a search was consensual when they lack proper justification. Most civilians cooperate fully with police, saying yes to whatever officers’ request, and then this cooperation excuses unreasonable searches and racial profiling, immunizing police conduct that we want to eliminate from the District.

We propose abolishing consent as an excuse for otherwise improper searches regardless of age, except when the person has had an opportunity to confer with their lawyer. Adults and youth alike should not need to refuse a police officer who wants to look in our pockets in order to preserve fundamental constitutional rights. In fact, the proposed amendment would instill a spirit of cooperation with police since people would no longer be penalized for cooperating fully with officers.

The DC Police Reform Commission recommended this change to DC law in their thorough and well-reasoned 2021 Report. The Commission explained that the data shows that consent searches yield little in the way of public safety and that benefit is far outweighed by the negative impact on the thousands of searches of innocent civilians:

MPD has only recently begun to make data available on the scope and efficacy of its consent searches during stops. The data show that, between July 22, 2019 and December 31, 2020, MPD officers conducted 4,427 consent searches of persons. Only 2.3% resulted in the seizure of a gun and only 9.5% resulted in the seizure of any evidence of a crime. And those figures assume that officers reported all of their consent searches of individuals (including, e.g., all the times they asked someone on the street to lift their shirt and show their waistband), which is doubtful.¹

Data also confirms that police exercise consent searches in a racially problematic manner.

MPD officers are also conducting a disproportionate number of consent searches of Black people. From July 22, 2019 through December 31, 2020, 92% (4,779 out of 5,188) of all consent searches were of Black people. These figures confirm the concerns expressed by the District’s Office of Police Complaints in 2017: “This disproportionate use of consent searches causes concern for the Police Complaints Board that the practice is undermining community trust in the police, especially in areas with substantial minority populations.”

... There is no justifiable reason to permit a practice that is not only inherently coercive and intrusive, but also ineffectual and prone to extreme racially disparate effects. By enacting legislation to prohibit consent searches altogether, the Council will properly require officers who wish to conduct searches to properly focus on safety, rather than on targeting individuals who are likely to consent.²

Elsewhere in the Report, the Commission put it more bluntly: “The Council should correspondingly pass legislation curtailing several invasive, ineffectual enforcement tactics. . . It should prohibit consent searches, given that voluntary consent is an oxymoron in the policing context and that residents, especially in over-policed communities, rarely feel sufficiently free and safe to voluntarily consent.”³

Multiple racial implications flow from the consent loophole. First, there’s the unequal application of so-called “consent” searches that the Report documented. Second, the consent loophole allows illegal racial profiling to flourish by pretending that those targeted wanted to

¹ Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission (April 1, 2021), available at <https://img1.wsimg.com/blobby/go/dd0059be-3e43-42c6-a3df-ec87ac0ab3b3/DC%20Police%20Reform%20Commission%20-%20Full%20Report.pdf>.

² *Id.* at p. 104-05 [of Decentering Police]. This follows Recommendation 8 that reads: “The Council should modify Section 110 of Act 23-336 (“Limitations on Consent Searches”) by prohibiting all consent searches—warrantless searches permitted based solely on the consent of the individual whose person or property is searched—and, in criminal cases, should require the exclusion of any evidence obtained from a consent search.”

³ *Id.* at p. 21 [of Decentering Police] (The report goes on to state: “And it should allow ‘pretext’ stops—stops for minor offenses when the actual purpose is to conduct a fishing expedition on a more serious offense—only with supervisory approval and only to investigate violent crimes.”)

waive their rights. Third, black and brown civilians are more likely to be afraid of police violence, increasing the power imbalance between officer and civilian. As screenwriter Lena Waithe told Jelani Cobb, she pays attention to police violence against black bodies. “I am like every other black person – I am traumatized every time these stories come out. Every time these stories hit our phones, our Instagram feed, our Twitter, our TV, a piece of us dies because we know that we could be next.”⁴ This is not a child or teenager afraid of police, but a grown woman.

Thanks to social media, images of police brutality are shared widely. When Eric Garner refused to consent to a search, he was tackled and placed in a deadly chokehold by members of the New York Police Department. Thousands of people saw him plead with officers to “please, don’t touch me.”⁵ No-one who watched that video or other similar videos will ever feel safe saying no to a consent search, especially black men. In one study of black men from California who had seen media accounts of the 2018 shooting of Stephon Clark, all the participants reported what researchers termed “psychological anguish” that included the loss of “feeling safe in their existence.”⁶

This fear of police crosses class status as well as age boundaries. The “consent” search captured on the officer’s body camera in October 2020 was both chilling and typical. Beverly Hills police stopped a Black Versace consultant named Salehe Bembury after he jaywalked.⁷ One officer asked the executive if he minded putting his hands behind his back so police could pat him down. Mr. Bembury allowed them to do whatever they asked. Following the “consent” frisk, officers received his permission to search the executive’s wallet, thumbing through it for identification.

To obtain the Versace executive’s legal “consent,” officers followed the script set out by the Supreme Court interpreting the Fourth Amendment. The Beverly Hills officers did not raise their voice nor brandish their guns, and they used practiced phrases like “you don’t mind if I take a look.”⁸ Although the man’s cooperation might pass as voluntary consent in a courtroom, nothing

⁴ Cobb, Jelani, “Lena Waithe on Police Violence and Queen & Slim.” The New Yorker Radio Hour. Podcast audio, December 16, 2019, www.newyorker.com/podcast/politicalscene/lena-waithe-on-police-violence-and-queen-and-slim

⁵ Although the police later said they planned to arrest Eric Garner, they lacked probable cause for the arrest or the search. To legally find out if Eric Garner carried untaxed cigarettes, he needed to consent to the search. JOSEPHINE ROSS, *A FEMINIST CRITIQUE OF POLICE STOPS* (Cambridge University Press, 2021) at 127-128.

⁶ Allen E. Lipscomb et al., “Black Male Hunting! A Phenomenological Study Exploring the Secondary Impact of Police Induced Trauma on the Black Man’s Psyche in the United States,” *Journal of Sociology and Social Work*, 7 (2019): 11–18.

⁷ Sarah Moon, *Versace executive accuses Beverly Hills police of racial profiling after jaywalking stop*, CNN (Oct. 7, 2020, 8:03 PM), <https://www.cnn.com/2020/10/07/us/versace-exec-accuses-beverly-hills-police-racial-profiling/index.html> (the stop of Salehe Bembury occurred on October 1, 2020); *see also* Priya Elan, *Versace executive accuses Los Angeles police of racial profiling*, THE GUARDIAN (Oct. 10, 2020), <https://www.theguardian.com/fashion/2020/oct/10/versace-executive-salehe-bembury-accuses-los-angeles-police-of-racial-profiling>; Video: *Versace VP gets stopped, pat down asked about weapons for Jaywalking Beverly Hills police*, YOUTUBE (Oct. 3, 2020), <https://www.youtube.com/watch?v=SyFU5ne7LYo>.

⁸ I write “arguably” because certainly there are judges who would allow Mr. Bembury to proceed with a civil rights lawsuit to proceed based on the violation of his Fourth Amendment rights and the equal protection clause. *Id.* at Video: *Versace VP gets stopped, pat down asked about weapons for Jaywalking Beverly Hills police*, YOUTUBE (Oct. 3, 2020), <https://www.youtube.com/watch?v=SyFU5ne7LYo>. (An officer can be heard asking “you

here was truly “consensual.” Mr. Bembury did not truly wish to have his body touched nor his wallet inspected. There is too much power differential between officer and civilian for consent to ever be truly voluntary. The viewer knows there is no true choice here given everything we know about how police punish people who do not fully cooperate. These punishments can take various forms, including the application of gratuitous physical force, or a “contempt of cop” arrest, where police might claim the person failed to follow an order or disturbed the peace or resisted arrest.

Cooperating fully, Mr. Bembury was soon permitted to leave. But this should not diminish the harm of this so-called “consensual encounter.” There’s the stigma of being selected as a potential criminal, the fear of knowing that American police kill one thousand people a year, and the sense of powerlessness as a stranger puts his hands over one’s body. Race and racial profiling are on full display here, from the officer’s selection of the executive for investigation and search, to the way Mr. Bembury responds, and the particular stigma implied. Victim blaming compounds these harms, an inescapable offshoot of the consent doctrine. For example, if the police had found some contraband item during the search, a judge would allow the evidence found to be submitted against him at trial based on the consent loophole. In essence the law would instruct Mr. Bembury that the ruling against him was his own fault, based on his own decision to give up his constitutional rights during the encounter.⁹ This is true in the District of Columbia where I practiced in DC Superior Court with my clinical Howard law students.

As I wrote in my book, *A Feminist Critique of Police Stops* (Cambridge University Press 2021), feminists showed how the power imbalance in the workplace between a boss and an employee makes it difficult if not impossible for employees to say no, and the law should acknowledge that there is no such thing as true consent in these situations. Police possess more power over civilians than a boss in one’s workplace. As Mr. Bembury’s ordeal illustrates, consent is a fiction that the Supreme Court designed to give the police easy, gratuitous access to bodies and property. The book also draws the parallel to consent within sexual assault laws.

In 2018, New York State recognized that any sex with an on-duty officer is inherently coercive. Under the new law, police officers can’t argue consent when they’re accused of on-duty rape. The law was inspired by a rape allegation against uniformed police officers. Before the alleged rape occurred, one of the officers asked the woman to lift her shirt to see if she was hiding drugs: Was this a consensual exercise? Eliminating the consent defense for sex recognizes that police hold all the cards. That’s an excellent step, but then why should the law allow that officer to claim that the civilian consented to a search of her body or purse? The situations involve the same unfair power differential. In both situations, police have the power to let you go or charge you, what to charge, and whether to be rough or gentle. Ultimately, civilians submit to police because it’s the safest thing to

said I could search you, right?” while halfway through a pat down). See *United States v. Drayton*, 536 U.S. 194, 210 (2002) (6-3 decision) (Souter, J., dissenting) (“The police not only carry legitimate authority but also exercise power free from immediate check, and when the attention of several officers is brought to bear on one civilian the imbalance of immediate power is unmistakable.”) See also Janice Nadler, *No Need to Shout*, 2002 SUP. CT. REV. 153.

⁹ For more on how the consent loophole constitutes victim-blaming, see generally See ROSS, A FEMINIST CRITIQUE OF POLICE STOPS, Chapter 3; Josephine Ross, Blaming the Victim, 26 Harvard Journal of Racial and Ethnic Justice 1 (2010).

do. Consent within the Fourth Amendment suffers from the same legal myopia as consent within rape law. In both instances, courts often blame the victim for their fate.

There is no difference between the reasoning in the current bill that prevents the consent loophole when police search youth and the amendment proposed here. Children should be applauded – not punished – for submitting to police requests. Same for adults. Children will view police as authority figures, but so do adults. Children may not know the harm that will flow from displeasing a police officer, so they may be more insulated than adults, who understand how a retaliatory arrest might cost them time and money and collateral consequences.

The legislative language needed here is relatively straightforward. In testimony to the City Counsel in 2020, we appended a draft of the language that the Council could use to amend the current DC law and make policing fairer in the District. Please see More Than A Plaza:

Eliminate Consent Searches for more information (appendix):

<https://static1.squarespace.com/static/5edff6436067991288014c4c/t/5f81728032d45901b878f85f/1602318977141/Eliminate+Consent+Searches.pdf>

MORE THAN A PLAZA
DC JUSTICE LAB + STAAND

ELIMINATE CONSENT SEARCHES

October 2020

Kaylah Alexander • Josephine Ross • Patrice Sulton • Leah Wilson



Eliminate Consent Searches

In passing the “Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020,”¹ the D.C. Council recognized that often when police obtain “consent” to search, the cooperation is not truly consensual. Rather, civilians waive their rights because they believe they do not have a choice.² DC Justice Lab and the Howard law student members of STAAND³ applaud the Council’s recognition of the problem but propose an alternate solution to ensure that consent searches are, in fact, voluntary.⁴ (See Appendix for proposed amended statutory language.)

Consent searches are a widespread problem. **Nationwide, over 90% of police searches are accomplished through the use of the consent exception to the Fourth Amendment.**⁵ In the District of Columbia, the Metropolitan Police Department (MPD) officers reported approximately 1,093 consent searches of an individual’s property and approximately 1,714 consent searches of an individual’s person in only five months in 2019.⁶ That is well **over 500 times per month** that a single department recorded searching people without a warrant or probable cause. There may be many more encounters that are unreported.⁷

Normally, police need a warrant or a good reason—what the law calls “probable cause”—before they may rummage through an individual’s possessions. But, call it a “consent” search and police don’t need a shred of evidence to search people’s homes, bodies, or possessions. In this way, consent creates an end run around people’s fundamental right to privacy and dignity.

“It is easy for the police to get consent from citizens...[L]aw enforcement takes advantage of the fact that citizens are generally honest and want to be law abiding citizens...they want to cooperate, they feel obliged to give consent to the police officer...The police are preying on the public.”

— Ronald Hampton, Retired MPD Officer and former Executive Director of the National Black Police Association⁸

Race, “Consent,” and Police Brutality

The District of Columbia Court of Appeals (DCCA) has recognized that people—especially Black people—have reason to fear police.

As is known from well-publicized and documented examples, an African-American man facing armed policemen would reasonably be especially apprehensive. The fear of harm and resulting protective conditioning to submit to avoid harm at the hands of police is relevant...because feeling ‘free’ to leave or terminate an encounter with police officers is rooted in an assessment of the consequences of doing so.⁹

Social media has made it possible for countless people to watch and share videos of the police killing citizens like George Floyd, Eric Garner, and Philando Castille. The world watched Georgia police officers fatally shoot Rayshard Brooks even after he consented to a search that proved he was unarmed.¹⁰ Viewers saw Sandra Bland’s minor traffic stop turn into arrest when she refused a police request to put out her cigarette.¹¹ Through these examples and countless others, people learn that when officers politely ask for consent, there may be an underlying threat of physical punishment.

While watching the videos of deadly police encounters may affect anyone's perception of police, the violent images and videos are especially disturbing to the African American community. Black people see themselves and the ones they love in these encounters, and are fearful.¹² Social scientists have labeled a concept known as "linked fate" that means that "those who identify with a group label accepts the belief that individual life chances are inextricably tied to the group as a whole."¹³ When African Americans saw graphic pictures of Michael Brown, an unarmed teenager who was shot down by a police officer and left in the street for hours,¹⁴ it generated "a collective confirmation that Black lives truly do not matter" to police.¹⁵ Consequently, for many Black individuals, **consenting is a survival tactic, not a choice.**

While still in middle-school, many Black children are given "the talk" by loving parents or guardians, to minimize the chance that they will trigger an officer's violent response during an encounter.¹⁶ Black teenagers are taught to make no sudden movements and comply with whatever the officer asks.¹⁷ Black people who follow this advice will not be able to exercise their rights in an encounter with police; at least not without a lawyer present.

Consent hits the Black community harder on two fronts. Not only are Black people more likely than white people to give consent to avoid angering an officer, they are also more likely to be asked for their consent. Black people made up over 90% of searches in Washington, D.C. in 2019, were more than six times as likely to undergo a pat-down or search of their person, and were more than five times as likely to undergo a search of their property.¹⁸

Consent Searches and Harassment

The Office of Police Complaints recommended consent search reform in 2017, noting that the number of complaints involving searches was large enough to "indicate a pattern of police-community engagement that warrants further attention."¹⁹

The Office of Police Complaints (OPC) has received a number of complaints concerning searches of a person, vehicle, or home that were conducted without consent. In fact, in fiscal years 2015, 2016 and 2017 so far, OPC received 112 cumulative separate complaints for harassment related to searches. Analysis of the complaints indicates that 76% of the complainants were African-American. Further, 44% of the complaints are related to incident in the 6th or 7th Districts. **This disproportionate use of consent searches causes concern for the Police Complaints Board that the practice is undermining community trust in the police, especially in areas with substantial minority populations.**²⁰

"[L]ike many Black men and youth my daily regimen—demeanor, appearance, socialization, and driving routes—were largely shaped, informed, and even controlled by probable confrontation with police. This made life extremely stressful; sadly, my experience reveals that many Black men are more concerned with unprovoked and hostile police encounters than with violent criminal elements."²¹

Warnings will Not Suffice

The warning requirement in the Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020²² does not adequately ensure that consent searches are voluntary. Consider what we have learned in the 50 years since the Court decided that suspects must be given *Miranda* warning in custody.²³ Under the emergency legislation, the police must inform individuals that they have a right to withhold consent, similar to the way *Miranda* warnings operate. And, courts must determine if the consent was given knowingly, intelligently, and voluntarily, the same standard judges apply when evaluating *Miranda* waivers. However, the *Miranda* experiment revealed that most people waive their rights because the power imbalance between officer and civilian still exists despite oral or written warnings.

There is a growing consensus among scholars and social scientists that *Miranda* warnings do not deliver on their promise. Despite the fact that *Miranda* warnings are ubiquitous on television, four out of five people waive their rights after hearing them.²⁴ It is generally understood that **the most vulnerable individuals—those most in need of protection from police overreach—are the most likely to waive their rights.**²⁵ There is “a growing scientific understanding of brain science and forensic science about problems with *Miranda* waivers, especially involving vulnerable suspects such as people with intellectual disabilities, mental illness, and juveniles.”²⁶ These groups are more susceptible to authority figures, less likely to fully grasp the import of the warnings and fail to think about long-term implications.²⁷ For example, when the teenagers in the Central Park Jogger case were asked why they waived their *Miranda* rights, they explained that they did so because they thought the police would then allow them to leave.²⁸

Miscomprehension thrives even among people who do not fit into those categories. One study reported that 70% of people who had never been convicted of a crime misunderstood the right to silence.²⁹

Women represent another group with heightened risk of waiving rights, in both the *Miranda* and consent search contexts.

Studies in psychological reactance—a measure of people's responses to threats to their liberty—as well as studies on confidence and risk-taking, confirm that gender contributes to an individual's compliance with or defiance of authority. These studies suggest that men may be more willing to challenge authority and terminate a police-citizen encounter, whereas women are more likely to feel compelled to submit to authority and to continue participating in the interaction even when it is against their best interests.³⁰

While this may be a question of personal psychology, it may also stem from societal pressures such as the pressure on women and girls to be nice or the pressure on Black men to defeat anti-Black stereotypes.

In fact, social scientists have recently examined the role of “stereotype threat” to explain *Miranda*'s failure among Black civilians.³¹ Because Black people know that society stereotypes Black people as dangerous criminals, this creates pressure to prove to officers that they are compliant and innocent.³² This additional pressure makes it more likely that Black suspects will waive their right to silence despite warning. The same rationale applies to consent searches. **Stereotype threat increases the likelihood that Black civilians will agree to searches** even when they really want police to simply walk away and leave them alone.

In addition, “many people believe that police may ignore or penalize a suspect for asserting rights.”³³ Whether true or false, researchers suggest that this viewpoint creates a “unique vulnerability” for African Americans.³⁴ Without a lawyer to guide them, many people will be too timid to stand on their rights.

We cannot turn a blind eye to the reality that not all encounters with the police proceed from the same footing, but are based on experiences and expectations, including stereotypical impressions, on both sides.

– The District of Columbia Court of Appeals³⁵

In a forthcoming book about consent searches, Howard Law Professor Josephine Ross writes about working with law students to teach teenagers their rights at Youth Court, a former diversion program in D.C. Even after the teens learned to say “I don’t consent to searches” and ask “Am I free to leave?” they had difficulty actually standing up to police officers during role-plays. They worried about retaliation. One of the participants phrased it as a question that was difficult to answer: “What if the police think I’m a smart-ass if I ask am I free to leave [and retaliate by hurting or arresting me]?”³⁶

Although the emergency legislation requires proof that individuals waive their rights knowingly, intelligently, and voluntarily, courts will not necessarily treat these terms as the Council intended. As one group of scholars put it, *Miranda* “waivers are rarely invalidated by reviewing courts. Once the warnings are given, ‘courts find waiver in almost every case. *Miranda* waiver is extraordinarily easy to show.’”³⁷ For example, “courts regularly find that juvenile suspects as young as ten years old validly waive constitutional rights that research establishes they do not understand, and with profound consequences that they do not foresee.”³⁸ The unintended result of *Miranda v. Arizona*’s warning requirements is that “courts may tolerate more coercion.”³⁹ In sum, warnings alone will not provide sufficient protection when police lack warrants or any justification to search someone’s home, body, or possessions.



It is not easy to say no to an officer.⁴⁰ After all, police have the badge, the gun and the authority to arrest. In addition to controlling every situation, police have a reputation for punishing individuals who are uncooperative or not sufficiently submissive. In every officer-civilian encounter, officers hold all the power. **Consent searches are never really consensual.**

DC Justice Lab and STAAND urge the Council to eliminate the primary mechanism police use to harass and racially profile and to allow consent searches only if the person who consents had an opportunity to speak to a lawyer. (See Appendix for proposed amended statutory language.)

References

¹ Bill 23-0825.

² *Jones v. United States*, 154 A.3d 591, 595-96 (D.C. 2017) (citing *Guadalupe v. United States*, 585 A.2d 1348, 1361 (D.C. 1991):

The officer, however well-intentioned and polite, initiates the meeting with an undeniable air of authority that ordinary persons do not presume to possess when interrupting strangers on the street. Where, as here, the questioning is at least implicitly accusatory (if not explicitly so), a reasonable person's natural reaction is not only to show respect for the officer's authority, but also to feel vulnerable and apprehensive. The circumstances are more intimidating if the person is by himself, if more than one officer is present, or if the encounter occurs in a location that is secluded or out of public sight. This court accordingly has recognized that a police officer's "questioning d[oes] not have to assume an intensity marking a shift from polite conversation to harsh words to create an intimidating atmosphere." In such an atmosphere, a reasonable person who can tell from the inquiries that the officer suspects him of something, and who cannot know whether the officer thinks there is sufficient reason to detain him, may well doubt that the officer would allow him to avoid or terminate the encounter and just walk away.

Jones v. United States, 154 A.3d 591, 595-96 (D.C. 2017) (citing *Guadalupe v. United States*, 585 A.2d 1348, 1361 (D.C. 1991).

³ Founded by Howard Law students in May 2020, Students Taking Action Against National Discrimination (STAAND) is a student-led organization building power on campuses and in communities to support the movement for racial justice. Through the coordination of legal support, advocacy, research, mobilization, electoral justice, and social media tools, STAAND is building an organizing platform to support students' rising up for justice and against racism.

⁴ Under the Fourth Amendment, the Supreme Court envisions that "consent" would be both free and voluntary, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973), and not the mere "acquiescence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968); see also *(Lisa) Oliver v. United States*, 656 A.2d 1159, 1179 (D.C. 1995). "[A]ccount must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *(James) Oliver v. United States*, 618 A.2d 705, 709 (D.C. 1993) (quoting *Schneckloth*, 412 U.S. at 229).

⁵ Susan A. Bandes, *Police Accountability and the Problem of Regulating Consent Searches*, 2018 U. Ill. L. Rev. 1759, 1760 (2018). Other writers believe the number is higher than 95%. In 1986, one expert wrote that "most searches are actually conducted pursuant to the consent of the person searched. In Mountain City, [Tennessee] we were told that 98 percent of searches were by consent. Indeed, listening to law enforcement officials there, one would think consent was the easiest thing in the world to come by." Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 415 (1986).

⁶ Metropolitan Police Department Washington D.C., Stop Data Report (Feb., 2020), available at <https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/Stop%20Data%20Report.pdf>.

⁷ For an example of a "consent" search that will not be counted in the statistics, consider the video of a police officer in a cruiser repeatedly requesting that a young man lift his shirt even after the individual said he did not consent to searches: @Soup Visions, *White Washington Dc Police Harassing Me Again*, YOUTUBE (Nov. 15, 2017), available at <https://www.youtube.com/watch?feature=youtu.be&v=cghtBX19cjA>.

⁸ Interview September 18, 2020 (notes on file with the author).

⁹ *Dozier v. United States*, 220 A.3d 933, 944 (D.C. 2019). See also *Miles v. United States*, 181 A.3d 633, 641-642 (D.C. 2018):

A person who reasonably is apprehensive that walking away, ignoring police presence, or refusing to answer police questions or requests might lead to detention and, possibly, more aggressive police action, is not truly free to exercise a constitutional prerogative — 'to be secure in their persons,' even if they do not submit—in the same manner as a person who is not viewed with similar suspicion by police and, as a result, largely unafraid of triggering an aggressive reaction.

¹⁰ Rev blog Political Transcripts, *Rayshard Brooks Shooting Police Body Cam Footage Transcript*, REV (June 14, 2020), available at <https://www.rev.com/blog/transcripts/rayshard-brooks-death-police-body-cam-footage-transcript>.

¹¹ Sophia Bollag and Terri Langford, *Video: DPS Officer Became Enraged Over Cigarette*, THE TEXAS TRIBUNE (July 22, 2015), available at www.texastribune.org/2015/07/21/video-officer-became-enraged-bland-over-cigarette/.

¹² Kia Gregory, *How Videos of Police Brutality Traumatize African Americans and Undermine the Search for Justice*, THE NEW REPUBLIC (February 13, 2019), available at www.newrepublic.com/article/153103/videos-police-brutality-traumatize-african-americans-undermine-search-justice.

¹³ Evelyn M. Simien, *Race, Gender, and Linked Fate*, *Journal of Black Studies*, Vol. 35, No. 5, 529 (2005).

¹⁴ Frances Robles and Julie Bosman, *Autopsy Shows Michael Brown Was Struck at Least 6 Times*, NEW YORK TIMES (August 18, 2014).

¹⁵ Bridgette Baldwin, *Black, White, and Blue: Bias, Profiling, and Policing in the Age of Black Lives Matter*, 40 *Western New England Law Rev.*, 431, 432 (2018).

¹⁶ See, e.g., Khama Ennis, *In black families like mine, the race talk comes early and it's painful. And it's not optional.*, WASHINGTON POST (June 5, 2020).

¹⁷ Rhea Mahbubani, *As police violence comes under more scrutiny, Black parents say they're still giving their kids 'The Talk' about dealing with cops*, INSIDER (June 27, 2020).

¹⁸ "Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data," ACLU D.C. June 16, 2020, www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf (data from July 22, 2019 through December 31, 2019).

¹⁹ Police Complaints Board Office of Police Complaints, *PCB Policy Report #17-5: Consent Search Procedures* (2017) available at <https://policecomplaints.dc.gov/node/1276396>.

²⁰ *Id.* The PCB Policy Report also addresses Body Worn Cameras (BWC) and consent:

This increase in volume of complaints indicates that a body-worn camera recording of an officer interacting with a complainant regarding a search does not ensure that officers act properly, nor that the complainant had a full understanding of the consent search, and BWC does not proactively protect the constitutional rights of the complainant to decline the search.

Id. (emphasis added). For a critique of consent law, see Josephine Ross, *Can Social Science Defeat a Legal Fiction?: Challenging Unlawful Police Stops Under the Fourth Amendment*, 18 *Was. & Lee J. of Social Justice*. 315 (2012) (discussing a case in the Superior Court of the District of Columbia where police claimed that both the stop and the search were consensual.)

²¹ See Jeremy I. Levitt, *'Fuck Your Breath': Black Men and Youth, State Violence, and Human Rights in the 21st Century*, Washington University Journal of Law and Policy, Vol. 49, 87, 96 (2015).

²² Bill 23-0825.

²³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁴ Kiera Janzen, *Coerced Fate: How Negotiation Models Lead to False Confessions*, 109 *J. Crim. L. & Criminology* 71, 82–83 (2019).

²⁵ See generally, William J. Stuntz, "Miranda's Mistake," 99 *Mich. L. Rev.* 975 (2001).

²⁶ Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of Miranda Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 *B.U. L. Rev.* 1157, 1176 (2017); Andrew Guthrie Ferguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 *Am. Crim. L. Rev.* 1437, 1454 (2012).

²⁷ See Kenneth King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, And Involuntary Waivers of Miranda Rights*, *Wis. L. Rev.* 431, 478 (2006); Abigail Baird and Jonathon A. Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, 359 *Phil. Transactions Royal Soc'y B: Biological Scis.* 1797, 1798–99, 1800 (2004); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 *Law & Hum. Behav.* 333, 356–57 (2003).

²⁸ Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 *Law & Psychology Review*. Vol. 31, pg. 53, 68 (2007).

²⁹ "One study showed that forty-three percent of adult offenders and seventy percent of adult non-offenders misunderstand the right to silence in court. Similarly, twenty-one percent of adult offenders and thirty-

five percent of adult non-offenders do not understand the right to silence in an interrogation.” Andrew Guthrie Feguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 Am. Crim. L. Rev. 1437, 1455–56 (2012).

³⁰ Jesse-Justin Cuevas and Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 Cardozo L. Rev. 2161, 2163 (2016); see also Janet E. Ainsworth, *In A Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 Yale L.J. 259, 318 (1993).

³¹ C. J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects Are at Risk for Confessing Falsely*, Psychology, Public Policy, and Law, 17(4), 562–591 (2001).

³² Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 946 (2002), available at <https://respository.law.umich.edu/mlr/vol100/iss5/3>.

³³ B. Matthew Johnson, Kimberly Citron-Lippmann, Christina Massey, Chitra Raghavan & Ann Marie Kavanagh, *Interrogation Expectations: Individual and Race/Ethnic Group Variation Among an Adult Sample*, Journal of Ethnicity in Criminal Justice. Vol. 13, Iss. 1. 16, 29 (2015).

³⁴ *Id.*

³⁵ *Dozier v. United States*, 220 A.3d 933, 944 (D.C. 2019); see also *Miles v. United States*, 181 A.3d 633, 641-642 (D.C. 2018).

³⁶ Josephine Ross, *A Feminist Critique of Police Stops at 98* (forthcoming with Cambridge University Press). For a discussion of how MPD officers sometimes claim both a consent stop and a consent search, see Josephine Ross, *Can Social Science Defeat a Legal Fiction?: Challenging Unlawful Police Stops Under the Fourth Amendment*, 18 WASHINGTON & LEE JOURNAL OF CIVIL RIGHTS & SOCIAL JUSTICE 315 (2012).

³⁷ Morgan Cloud et. al. “Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects,” 69 U. Chi. L. Rev. 495, 497–98 (2002) (citing George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 Mich. L. Rev. 1081, 1082 (2001)).

³⁸ Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. Rev. 902, 905 (2017).

³⁹ William J. Stuntz, “Miranda’s Mistake,” 99 Mich. L. Rev. 975, 988 (2001).

⁴⁰ See, e.g., *Sharp v. United States*, 132 A.3d 161 (D.C. 2016) (“While theoretically an officer might ask a vehicle’s occupant if he would consent to getting out of a car in a way that gave the occupant a ‘realistic right to decline,’” under the circumstances, a reasonable person would not have felt that he had that right. *Id.* at 167) (quoting *Gomez v. United States*, 597 A.2d 844, 891 n. 16 (D.C. 1991)).

Appendix: Proposed Amendments

SUBTITLE G. LIMITATIONS ON CONSENT SEARCHES

Sec. 107. Limitations on consent searches.

- (a) In cases where a search is based solely on the subject's consent to that search, and is not executed pursuant to a valid warrant or conducted pursuant to **another** exception to the warrant requirement, **the search is invalid and any evidence seized as a result of that search is inadmissible against any person in a criminal trial, unless the subject:**
 - (1) Is given a reasonable opportunity to confer privately and confidentially with an attorney; and**
 - (2) Through an attorney, knowingly, intelligently, and voluntarily waives their right to decline the search in writing.**
- (b) **It shall be unlawful for a law enforcement officer to knowingly conduct an invalid search and the Police Complaints Board shall promulgate rules to implement the provisions of this section, pursuant to D.C. Code § 5-1106(d).**
- (c) **Any civilian or class of civilians who suffer one or more violations of section (a) of this section may bring an action in the Superior Court of the District of Columbia to recover or obtain any of the following:**
 - (1) A declaratory judgment;**
 - (2) Injunctive relief;**
 - (3) Reasonable attorney's fees and costs;**
 - (4) Actual damages;**
 - (5) Punitive damages; and**
 - (6) Any other equitable relief which the court deems proper.**