WHETHER CONSENT TO SEARCH WAS GIVEN VOLUNTARILY: A STATISTICAL ANALYSIS OF FACTORS THAT PREDICT THE SUPPRESSION RULINGS OF THE FEDERAL DISTRICT COURTS

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Every year, police officers conduct thousands of searches without search warrants, relying instead on individuals' consent as authority for these searches. If an individual later denies that his consent was given voluntarily, the trial court must review his claim and determine whether to suppress evidence obtained during the consent search. The question of voluntariness is difficult to assess, however, despite attempts by appellate courts to provide guidepost factors for trial court analysis. For this Note, the author gathered consent search cases and used statistical methods to analyze whether a correlation exists between a federal district court's decision to suppress evidence and various factors relating to the voluntariness of consent. The study shows a statistically significant correlation between the suppression of evidence and factors related to police misconduct, and the absence of correlation for factors not related to police misconduct. Drawing on these statistical findings, this Note concludes that the voluntariness requirement is a legal fiction serving to balance the needs of effective law enforcement against the rights of suspects.

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INTRODUCTION

Police officers ordered Jose Perea out of his vehicle at gunpoint, handcuffed him, and placed him in the back of a police car.[1] After about twenty minutes in custody, the officers asked Perea for permission to search his vehicle.[2] Perea gave permission, whereupon officers discovered one pound of crack cocaine.[3] Charged with federal narcotics crimes, Perea moved to suppress the evidence obtained during the search on the ground that his consent was not given voluntarily.[4] The district court denied the motion, holding that neither detaining the suspect at gunpoint nor handcuffing and placing him in the back of a police car "automatically render[ed] the consent involuntary."[5] Instead, the court relied on the testimony of Officer James Harvey of the Albuquerque Police Department, who described the defendant as appearing calm, cooperative, and not under the influence of alcohol or drugs.[6] The court concluded that "based on the totality of the circumstances, Perea's consent was voluntary in that it was free of duress or coercion, it was specific and unequivocal, and it was freely and intelligently given."[7]

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1 United States v. Perea, 374 F. Supp. 2d 961, 968–69 & n.11 (D.N.M. 2005).
2 *Id.* at 979.
3 *Id.* at 970–71.
4 *Id.* at 977–78.
5 *Id.* at 978–79.
6 *Id.* at 978.
7 *Id.* at 979.

On these facts, it seems extraordinary to conclude that Perea believed that he could prevent the search of his vehicle by refusing permission. Why did the court find otherwise? Although mistaken, officers at the scene had good reason to believe that Perea was wanted in connection with a homicide.[8] In light of what the officers believed to be true about Perea, the court found that the amount of force used to detain and question him was reasonable in order to protect their safety.[9] Whether Perea actually found the police conduct coercive is unclear from the opinion, but the message of the case is clear: Consent is voluntary in the absence of police misconduct.[10]

On the basis of cases such as *United States v. Perea*, a number of commentators have concluded that the requirement that a suspect voluntarily consent to a warrantless search is a dead letter.[11] They argue that "voluntary consent" has become, or perhaps always was, a "legal fiction" that facilitates a compromise between the needs of law enforcement and the rights of suspects.[12] Perea's case presents a good example of how this compromise emerges. Excluding the evidence would have penalized appropriate police conduct, but admitting the evidence required the court to find that consent was voluntary.

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[8] *See id.* at 964–67 (describing events that led officers to believe Perea was a suspect in murder investigation).

[9] *See id.* at 975 ("[O]fficers had a reasonable belief that their safety was in danger.").

[10] Police misconduct is defined here as an unnecessary use of force, an abuse of authority, or an act of deceit. *See* Carroll Seron et al., *Judging Police Misconduct: "Street-Level" Versus Professional Policing*, 38 LAW & SOC'Y REV. 665, 666 (2004) (describing study that examined how residents of New York City judge police misconduct).

[11] I will refer primarily to the works of Ric Simmons, Marcy Strauss, and Janice Nadler, but there are many others. These three authors have all argued recently and persuasively that the doctrine of voluntary consent is a legal fiction in need of adjustment. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 156 ("[T]he Court's Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort . . . ."); Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 779 (2005) ("It is an open secret that the subjectivity requirement of *Schneckloth* is dead."); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 236 (2002) (titling one section "The Fiction of Consent: Authoritarian Dilemma and Racial Considerations"); *see also* José Felipé Anderson, *Accountability Solutions in the Consent Search and Seizure Wasteland*, 79 NEB. L. REV. 711, 717 (2000) ("Some scholars have gone so far as to consider much of the Fourth Amendment to be 'dead letter' . . . ."); Charles W. Chotvacs, *The Fourth Amendment Warrant Requirement: Constitutional Protection or Legal Fiction? Noted Exceptions Recognized by the Tenth Circuit*, 79 DENV. U. L. REV. 331, 351 (2002) (noting that exceptions to Fourth Amendment warrant requirement "might soon swallow the . . . rule").

[12] A legal fiction is "either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility." Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 875 (1986) (quoting LON L. FULLER, LEGAL FICTIONS 9 (1967)). For examples of commentators referring to the voluntariness requirement as a "legal fiction," see *supra* note 11 and *infra* Part I.B.

Where a suspect, like Perea, faces tremendous pressure to comply with an officer's request, a court's finding of voluntariness rings hollow.

But is Perea's case typical? None of the commentators have engaged in statistical analysis to confirm their legal fiction hypothesis.[13] This Note supplies the missing statistical analysis. By tabulating trial courts' findings of fact with respect to "voluntariness factors" enumerated by the Supreme Court[14] and applying statistical techniques, I estimate whether any of these factors correlate with the outcomes of the trial courts' suppression rulings. Strong correlation would indicate that courts consistently give weight to the enumerated factors; weak correlation would indicate that the factors are given inconsistent weight, are inconsistently utilized, or are less important than other factors—such as police misconduct.

The results of this study support the legal fiction hypothesis that "voluntariness" is "a placeholder for an analysis of the competing interests of order and liberty . . . ."[15] In particular, I found that factors associated with the individual traits and subjective state of mind of the defendant were seldom discussed in the trial court opinions and thus are poor predictors of the outcome of the suppression ruling.[16] The predictive value of factors associated with how an individual would objectively experience police acts[17] was mixed: Some factors (e.g., threats) were good predictors, while others (e.g., custody) had little effect.[18] Factors unrelated to the case, such as the political party of the President who nominated the judge, or whether the judge was a former prosecutor, were poor predictors of the suppression ruling.[19]

In light of these statistical findings, I conclude that the voluntariness factors enumerated by the Supreme Court and circuit courts do not constrain or predict district court decisionmaking in close cases. I argue that the best explanation for this result is that courts find consent voluntary if the evidence does not show police misconduct. In short, the "legal fiction" hypothesis is correct.

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[13] In fairness, Professor Strauss's survey of cases was extensive. Professor Strauss reported her conclusions after reading hundreds of suppression rulings, but she did not analyze the facts of those cases statistically. Strauss, *supra* note 11, at 222.

[14] *See infra* Part I.A (discussing voluntariness factors as enumerated by courts).

[15] Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 738 (2000).

[16] *See infra* Part III.A (summarizing data and observing that courts rarely discussed defendant's individual traits or subjective voluntariness).

[17] Put another way, the "objective" component of voluntariness is whether consent appeared voluntary to a reasonable police officer.

[18] *See infra* Part III.B (reviewing results of regression analysis).

[19] *See id.*

Part I briefly reviews the law of Fourth Amendment consent searches and situates this Note in the existing literature critiquing consent search jurisprudence. Part II explains the research methodology and model specification utilized in my analysis. Part III presents the results of the study and argues that they lead to the conclusions outlined above—namely, that voluntariness is a legal fiction that facilitates balancing the needs of law enforcement against the rights of citizens, and that a finding of police misconduct is required to tip the balance in favor of granting a motion to suppress for lack of voluntary consent.

I
FOURTH AMENDMENT CONSENT SEARCH LAW AND ITS CRITICISMS

A. The Consent Exception

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[20] A search that occurs without a warrant is presumptively unreasonable, but there are exceptions.[21] "Consent" is one of them.[22] The doctrine of consent provides that when a person voluntarily gives the police permission to search, a search warrant is not required.[23]

In *Schneckloth v. Bustamonte*,[24] the Supreme Court endeavored to define what the prosecution must prove "to demonstrate that a consent was 'voluntarily' given."[25] In that case, police stopped a car car-

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

[21] *See, e.g.*, California v. Acevedo, 500 U.S. 565, 580 (1991) ("It remains a cardinal principle that 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." (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978)) (internal quotation marks omitted)); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is '*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" (quoting Katz v. United States, 389 U.S. 347, 357 (1967))).

[22] *See Schneckloth*, 412 U.S. at 219 ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

[23] *See generally* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1 (4th ed. 2004) (discussing what is meant by "consent" to "search"). As Professor LaFave explains, one may consider consent to be the "waiver of constitutional rights," or "merely a voluntary choice" to give permission. *Id.* Further, the court may inquire whether the suspect's consent actually was voluntary or whether the police reasonably believed that it was. *Id.*

[24] 412 U.S. 218.

[25] *Id.* at 223.

rying six men at 2:40 a.m.[26] An officer asked passenger Joe Alcala for permission to search the car, but the officer did not inform him that he had the right to refuse permission.[27] Reversing the Ninth Circuit, the Court held that "proof of knowledge of the right to refuse consent is [not] a necessary prerequisite to demonstrating a 'voluntary' consent."[28] The Court then established that trial courts should determine whether the defendant voluntarily consented to a warrantless search under a "totality of the circumstances" standard.[29] Thus the trial court should consider all the facts of the case; the determination need not rest on any one finding of fact.

The *Schneckloth* Court listed factors that it had previously considered in assessing voluntariness;[30] these factors formed the original checklist to which the circuit courts have added their own factors.[31] Some of these factors are subjective—they relate to the defendant's state of mind. Other factors are objective—they relate to how a reasonable person in the defendant's position would experience the encounter with police officers, or alternatively, whether a reasonable

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[26] *Id.* at 220.

[27] *See id.* at 220 (describing Alcala's consent to search).

[28] *Id.* at 232–33.

[29] *See id.* at 227 ("[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.").

[30] In assessing voluntariness, the Court considered the totality of the circumstances, including the accused's youth, lack of education, low intelligence, lack of advice about constitutional rights, and length of detention, as well as the nature of the questioning and the use of physical punishment. *Id.* at 226.

[31] These factors include: the use of violence or threats of violence; the police's use of and the defendant's reliance upon promises, deception, or claims that a warrant is obtainable; whether the defendant was in custody at the time of consent; the defendant's physical or mental condition; the location where consent was given; the defendant's level of cooperation; the defendant's understanding or awareness of the right to refuse to consent; and the defendant's belief that no incriminating evidence would be found. *See, e.g.*, United States v. Raibley, 243 F.3d 1069, 1075–76 (7th Cir. 2001) (citing United States v. Strache, 202 F.3d 980, 985 (7th Cir. 2000); Valance v. Wisel, 110 F.3d 1269, 1278 (7th Cir. 1997)) (considering custodial status at time of consent); United States v. Worley, 193 F.3d 380, 386 (6th Cir. 1999) (quoting United States v. Riascos-Suarez, 73 F.3d 616, 625 (6th Cir. 1996)) (considering defendant's understanding of right to refuse consent); United States v. Chan-Jimenez, 125 F.3d 1324, 1327 (9th Cir. 1997) (citing United States v. Welch, 4 F.3d 761, 763 (9th Cir. 1993)) (considering officer's drawn weapon, claim that warrant was available, and failure to inform defendant of right to refuse consent); United States v. Glover, 104 F.3d 1570, 1583–84 (10th Cir. 1997) (citing United States v. McCurdy, 40 F.3d 1111, 1119 (10th Cir. 1994)) (considering defendant's physical and mental condition and capacity as well as officer's use of violence, threats of violence, promises or deception); United States v. Chaidez, 906 F.2d 377, 381 (8th Cir. 1990) (considering defendant's reliance upon promises or misrepresentations, his level of cooperation, and seclusion of location where consent was given); *see also* United States v. Solis, 299 F.3d 420, 436 n.21 (5th Cir. 2002) (quoting United States v. Kelley, 981 F.2d 1464, 1470 (5th Cir. 1993)) (considering defendant's belief that no incriminating evidence would be found).

police officer would believe that the defendant's consent was voluntary.[32] Subjective factors include: the suspect's age, education, intelligence, and English proficiency; the suspect's level of intoxication; his experience with the criminal justice system; and whether he had been informed of his rights.[33] Objective factors include: the length of detention; whether officers employed tactics such as prolonged or repeated questioning or physical abuse; and whether officers made threats or misrepresentations, displayed weapons, confronted the suspect in large numbers, or retained the suspect's property.[34]

A district court's analysis of relevant factors is sometimes, but not always, memorialized in a written opinion granting or denying the motion to suppress. Because the data for this study come from those written opinions, it is necessary to explain the sequence of events that leads to the publication of an opinion in LexisNexis and Westlaw databases.[35]

The process begins with the defendant's arrest and arraignment,[36] where he pleads "not guilty." Before trial, the defendant moves to suppress the evidence, requesting an evidentiary hearing.[37] The trial court has discretion to rule on the defendant's motion without a hearing, or to order a hearing to gather additional facts about the circumstances surrounding the consent search.[38]

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[32] *See* LAFAVE, *supra* note 23, § 8.1 (stating that determinations of limitations of consent are based on "objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" (quoting Florida v. Jimeno, 500 U.S. 248, 251 (1991))).

[33] The police officer cannot observe many of these traits. Therefore, whether the court considers the subjective qualities of the defendant, or only considers what the reasonable officer is able to observe, could affect its voluntariness determination.

[34] For a comprehensive list of subjective and objective voluntariness factors, see *Schneckloth*, 412 U.S. at 226, and *infra* note 75.

[35] *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 34 (2002) (arguing that in order to make their descriptive inferences "more accurate and less uncertain," scholars must "reveal . . . the process by which they generated and observed their data").

[36] At arraignment, the defendant hears the charges against him, whether by indictment or by information, and enters a plea in open court. FED. R. CRIM. P. 10. At arraignment or soon thereafter, the government may notify the defendant of its intent to use specified evidence at trial, or the defendant may request such notice. FED. R. CRIM. P. 12(b)(4).

[37] The defendant must file his motion to suppress evidence before trial, FED. R. CRIM. P. 12(b)(3)(C), although the court may excuse this requirement for good cause, FED. R. CRIM. P. 12(e).

[38] *See* United States v. Foster, 287 F. Supp. 2d 527, 529 (D. Del. 2003) (citing FED. R. CRIM. P. 12(c)). The defendant bears the burden of demonstrating that an evidentiary hearing is necessary; his motion papers must state a colorable claim for relief supported by specific, nonconjectural facts. *Id.* (quoting United States v. Rodriguez, 69 F.3d 136, 141 (7th Cir. 1995) and citing United States v. Brink, 39 F.3d 419, 424 (3d Cir. 1994)).

At a suppression hearing, the court will usually hear testimony from the officers who conducted the search.[39] The defense may call witnesses to testify—including the defendant himself—and may cross-examine government witnesses.[40] Where the defendant moves to suppress evidence on the ground that officers lacked consent to search, the government bears the burden of proving by a preponderance of the evidence that (1) consent was given specifically and unequivocally,[41] and (2) consent was given freely and voluntarily.[42] Whether consent was given is a question of fact that an appellate court reviews for clear error.[43]

At the conclusion of the hearing, the court may grant or deny the motion from the bench, giving reasons for the ruling on the record, or alternatively, take the ruling under advisement and issue a written opinion at a later time.[44] Should the court find that consent was not given, or was given involuntarily, the defendant's remedy is exclusion of the evidence at trial.[45]

B. Criticism of Consent Search Jurisprudence

Critics of consent search law contend that "voluntariness" is a legal fiction. Their critique has two parts. First, they argue that the courts' understanding of "voluntariness"—whether subjective or objective—is flawed for ignoring the insights provided by psychological research into consent and compliance.[46] Second, they argue that

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[39] United States v. Williams, 816 F. Supp. 1, 3 (D.D.C. 1993) ("There is, of course, nothing unique about having the testimony of officers provide the factual framework within which a case is decided.").

[40] United States v. Green, 670 F.2d 1148, 1154 (D.C. Cir. 1981) ("It is clear that a defendant has some right to cross-examine Government witnesses at a suppression hearing.").

[41] *E.g.*, United States v. Worley, 193 F.3d 380, 386 (6th Cir. 1999) (holding that government must prove that defendant consented "unequivocally, specifically, and intelligently" (quoting United States v. Tillman, 963 F.2d 137, 143 (6th Cir. 1992))).

[42] *E.g.*, Bumper v. North Carolina, 391 U.S. 543, 548 (1968) (holding that government must prove that consent was "freely and voluntarily given").

[43] *E.g.*, United States v. Snype, 441 F.3d 119, 131 (2d Cir. 2006) ("[The court] will not reverse a finding of voluntary consent except for clear error.").

[44] *See* FED. R. CRIM. P. 12(d) ("When factual issues are involved in deciding a motion, the court must state its essential findings on the record.").

[45] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence obtained by searches and seizures in violation of Fourth Amendment is inadmissible in state and federal courts).

[46] Nadler, *supra* note 11, at 155 (observing "ever-widening gap between Fourth Amendment consent jurisprudence, on the one hand, and scientific findings about the psychology of compliance and consent on the other"); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 193 (1991) ("Both law and psychology point to the same conclusion—consent in reality is consentless."); Simmons, *supra* note 11, at 800–10 (discussing experiments of Stanley Milgram and Leonard Bickman pur-

courts do not give factors related to subjective or objective "voluntariness" much weight, regardless of how the concept of voluntariness is understood.[47]

The first claim—that courts misunderstand the psychological nature of "voluntariness"—is normative and properly argued by reference to the decisions of the Supreme Court.[48] The second claim—that courts ignore the voluntariness factors in practice—is empirical, and it cannot be substantiated by reference to Supreme Court doctrine. To determine whether the lower courts give weight to the factors indicative of subjective and objective voluntariness, one must examine lower court decisions. Commentators appear to assume that *Schneckloth*'s totality-of-the-circumstances approach to voluntariness necessarily means that lower courts give voluntariness factors little weight in practice.[49] But this assumption has not been proven.

And it is worth proving. A court undermines public trust in the judicial system when it says it is doing one thing (finding voluntariness) but does another (finding police misconduct).[50] Also, the disconnect between doctrine and practice may make it difficult for a trial judge to ascertain the actual standard for finding voluntariness, if one

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porting to demonstrate social tendency to obey requests of authority figures but noting that experiments do not prove that police encounters are inherently coercive); Strauss, *supra* note 11, at 236–39 (same); Adrian J. Barrio, Note, *Rethinking* Schneckloth v. Bustamonte*: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 218 (arguing that "*Schneckloth* misapprehended the potential for psychological coercion in the context of consent searches" based on Milgram experiment); *see also* Illya Lichtenberg, Miranda *in Ohio: The Effects of* Robinette *on the "Voluntary" Waiver of Fourth Amendment Rights*, 44 HOW. L.J. 349, 365 (2001) (predicting that advising suspects of right to refuse consent will have "little or no effect on the rates at which motorists give consent" based on findings of Milgram experiment).

47 *See* Simmons, *supra* note 11, at 785–86 ("[T]he Court's actual inquiry in evaluating consent searches is into the reasonableness of the police officer's actions."); Strauss, *supra* note 11, at 233 (observing "overwhelming trend to focus on the reasonableness of the police officer's behavior").

48 *See, e.g.*, Simmons, *supra* note 11, at 775–76 (referencing "evolution" of consent search doctrine from *Schneckloth* to *Drayton*).

49 *See id.* at 788 (arguing that *Schneckloth* test "is . . . not an accurate description of what courts are doing when they analyze whether a consent was voluntary"). Professor Strauss offers some empirical evidence with respect to how the courts handle motions to suppress evidence from a consent search. She reports that she read "hundreds of decisions" of the federal and state courts and "discovered only a handful of cases . . . in which the court analyzed the suspect's particular subjective factors." Strauss, *supra* note 11, at 222.

50 *See, e.g.*, Simmons, *supra* note 11, 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."); Strauss, *supra* note 11, at 213 ("[T]he current doctrine of consent inherently fosters distrust of police officers as well as the judicial system.").

exists.[51] Finally, if the courts misapprehend voluntariness, it is plausible that a large number of searches are upheld—even though the suspects involuntarily consented to those searches—in violation of the Fourth Amendment rights articulated in *Schneckloth*.[52]

II
RESEARCH METHODOLOGY

This Part explains each step of my research: adopting the fact-model approach, selecting a sample of suppression rulings, and specifying the factors in the model. I identify assumptions and give rules for the process of selecting cases and coding factors.

A. Predecessor Research

This Note adopts the "fact-model" approach, which was developed by Professor Jeffrey Segal in his 1984 study of Supreme Court search and seizure decisions.[53] Against criticism by scholars that Fourth Amendment case law in the Supreme Court was a "mess," Segal argued that "these decisions can be successfully explained and predicted through the multivariate analysis of a legal model of the Court's decision-making."[54] By coding the facts of 123 cases, he isolated the factors that correlated most strongly with the outcome of each case and found a "clear and logical form" in the results, but he cautioned that "the Court is not immune from considering extralegal characteristics."[55] Segal concluded that the identified factors were reliable predictors of whether a search or seizure was "reasonable."[56]

This study applies Segal's methodology to federal district court suppression rulings in consent search cases. Because certain factors correlated with the Supreme Court's findings of reasonableness in search and seizure cases, it follows that certain discrete factors would correlate with district court findings of voluntariness in consent search

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[51] Nadler, *supra* note 11, at 156 (arguing that Supreme Court "creates a confusing standard for lower courts, because it is unclear in new cases how to weigh the 'totality of the circumstances' if the 'correct' result is virtually always that the encounter and search were consensual").

[52] *See id.* at 156 ("[T]he fiction of consent in Fourth Amendment jurisprudence has led to suspicionless searches of many thousands of innocent citizens who 'consent' to searches under coercive circumstances.").

[53] Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962–1981*, 78 AM. POL. SCI. REV. 891 (1984).

[54] *Id.* at 892.

[55] *Id.* at 900.

[56] *See id.* at 899–900 (concluding that factor analysis is better predictor of outcome than case method); *see also* Jeffrey A. Segal, *Supreme Court Justices as Human Decision Makers: An Individual Level Analysis of the Search and Seizure Cases*, 48 J. POL. 938, 939 (1986) (applying fact model to individual Justices).

cases. In particular, the lower courts should give meaning to the factors mentioned by the Supreme Court in *Schneckloth* and its progeny. Statistical analysis of these factors, therefore, will provide an estimate of how courts evaluate voluntariness in practice.[57]

This study differs from Segal's in several important respects. Cases were selected for this study from a two and one-half year time period during which the law of consent was essentially static.[58] This limits the criticism that the study ignores the role of law in decisionmaking.[59] Also, district courts do not have discretionary dockets, although their decisions to hold suppression hearings and write memorandum opinions are discretionary.[60] Furthermore, Segal coded the factors in his model according to the findings of the lower courts, such that the values were known before the event he sought to predict—the decision of the Supreme Court.[61] In my study, the findings of fact and the outcome of each suppression ruling necessarily come from the same written opinion; therefore I consider the possibility that the outcome and the values of each factor in the model are jointly determined.[62]

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57 For an example of a statistical analysis of federal district court decisionmaking, see Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998) (conducting statistical analysis of district court interpretation of constitutionality of Sentencing Reform Act of 1984).

58 The Supreme Court's most recent major statement on voluntariness of consent came in 2002. Drayton v. United States, 536 U.S. 194, 207 (2002) (reiterating "totality of the circumstances" standard and mentioning familiar factors bearing on voluntariness). The circuit courts are continually refining the contours of consent search law as appeals arise, but I found no case from the 2004–2006 period that significantly alters consent search law in any way.

59 *See generally* Herbert M. Kritzer & Mark J. Richards, *The Influence of Law in the Supreme Court's Search-and-Seizure Jurisprudence*, 33 AM. POL. RES. 33 (2005) (arguing that role of law was not adequately considered in Segal's model). Kritzer and Richards also criticized Segal for applying his "legal model" to a court with a discretionary docket. *Id.* at 34.

60 When factual issues are involved in deciding a suppression motion, the district court "must state its essential findings on the record," FED. R. CRIM. P. 12(d), but its decision to issue a written memorandum opinion is discretionary.

61 *See* Segal, *supra* note 53, at 893–94 ("[A]ll facts are as they are stated in the lower court decision.").

62 Two variables are jointly determined when the values of each of the two variables are simultaneously caused by other factors. For example, the price of a product (P) and the quantity of that product sold (Q) are jointly determined variables. *See* Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048, 1088 n.110 (1985); *see also* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 466 (2005) (explaining that underlying conditions—i.e., other factors—could cause factor whose effect researchers aim to measure, with result that targeted effect is jointly determined with the factor of study).

B. Gathering the Sample of Cases

The United States government prosecutes thousands of criminal cases every year. The Department of Justice does not gather data with respect to suppression motions, but it is safe to say that these prosecutions prompt hundreds of motions by defendants to suppress evidence each year.[63] The challenge is to gather a sample from this population of cases that will generate unbiased and statistically significant estimates of which factors most influence the court's decision to suppress evidence for lack of voluntary consent. The challenge has two separate components: first, defining consent search cases, and second, finding the cases that meet that definition.

For the purposes of this study, a consent search case is one in which the court's decision to suppress or not to suppress the evidence in controversy turns on whether consent was given voluntarily. The search must occur in circumstances that ordinarily require a warrant, such that but for the defendant's alleged consent, the search would be illegal under the Fourth Amendment. In these circumstances, the court must hold that the defendant's consent was given voluntarily in order to deny the motion to suppress.[64]

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[63] Between October 1, 2002, and September 30, 2003, the United States charged 85,106 defendants with criminal offenses in federal courts. Of this number, 72,589 defendants entered guilty pleas. Roughly 3500 cases went to trial, and the remainder were dismissed. *See* BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 62 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs03.pdf. These data do not reveal the number of suppression motions during the time period, because a defendant could move to suppress evidence and then plead guilty if the motion failed, and of course, not all cases that go to trial have evidence that is subject to a suppression motion. Nevertheless, the sheer volume of litigation indicates that a substantial number of suppression motions are filed every year.

[64] I include rulings that decide issues of third-party consent in the sample where the voluntariness of the third party is a contested issue in the case. *See, e.g.*, United States v. Duran, 957 F.2d 499, 501 (7th Cir. 1992) (defendant's wife voluntarily consented to search of house, outbuildings, and old farmhouse on property). If the defendant only contests the authority, but not the voluntariness, of the third party, I exclude the case. *See, e.g.*, United States v. Corral, 339 F. Supp. 2d 781, 793–94, 799 (W.D. Tex. 2004) (housekeeper lacked authority to consent to search). Rulings that focus on the scope of consent, as opposed to the question of whether consent was given voluntarily, are also excluded from the sample. *See, e.g.*, United States v. Touzel, 409 F. Supp. 2d 511, 518, 521 (D. Vt. 2006) (defendant contested scope of consent but not voluntariness). Decisions that turn on other exceptions to the warrant requirement, such as the inevitable discovery doctrine, the independent source doctrine, or exigent circumstances, are excluded as well. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 440–48 (1984) (invoking inevitable discovery doctrine); Wong Sun v. United States, 371 U.S. 471, 485 (1963) (applying independent source doctrine); United States v. Bell, 357 F. Supp. 2d 1065, 1072, 1075 (N.D. Ill. 2005) (finding exigent circumstances). Finally, some opinions dispose of motions by more than one defendant. In such instances, as long as at least one defendant moves to suppress evidence for lack of voluntary consent, the case is included in the sample.

After defining consent search cases for inclusion in the sample, the next step is to find cases that meet the definition. To search for district court opinions that decide contested voluntariness-of-consent issues, I ran a keyword search against the LexisNexis database of all federal district court cases.[65] The data gathered for this study come from federal district court opinions issued between January 1, 2004, and May 18, 2006.[66]

Two potential sources of bias arise from the process by which cases are published in the electronic databases. First, judges that are likely to write long, substantive opinions for publication might differ in some important way from judges that prefer to explain their rulings from the bench or otherwise not publish.[67] Second, cases that warrant the writing of memorandum opinions might differ in important respects from those that do not.[68]

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[65] The keyword search was as follows: "fourth amendment" and ((involuntar! w/5 consent!) or (voluntar! w/5 consent!)) and (exclude or suppress!) not habeas. For additional examples of the use of keyword searches and "Shepardizing" to gather cases for statistical analysis, see Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 313 & nn. 21–34 (2004).

Any keyword search, of course, creates the possibility of selection bias. *See* Epstein & King, *supra* note 35, at 111 ("[N]o matter how carefully a selection rule is designed, when it is based on human knowledge it may inadvertently be related to the outcome variable being studied and so may introduce bias."). If the keywords used to gather the sample are themselves correlated to rulings that grant motions to suppress, for example, the sample will fail to detect a substantial number of rulings that deny those motions, and will not be representative of even the published population of rulings.

Fortunately, judges deciding consent search cases seem to be very consistent in their citation to the foundational *Schneckloth* precedent, even though they could cite to more recent Supreme Court cases on the subject of voluntary consent. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 206–07 (2002) (addressing consent searches and reiterating "totality of the circumstances" test). Therefore, cross-checking the results of the keyword search against a list of district court citations to *Schneckloth* helped ensure that the final sample was reasonably representative and complete for the period selected. Although the cross-check was mostly reassuring, I discovered a small number of additional cases in this manner.

[66] I chose federal district courts, as opposed to state courts, because LexisNexis and Westlaw report the opinions of state trial courts sparingly, if at all.

[67] District courts and even individual judges varied greatly in terms of how many suppression orders they published in the federal reporters and in LexisNexis. The keyword and supplemental search produced thirty-four rulings by district court judges in the Tenth Circuit, but only four rulings by district court judges in the Ninth Circuit. This disparity only makes sense as a difference in the publication practices across circuits. *See* Donald R. Songer, *Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review*, 50 J. POL. 206, 206 (1988) ("The rates of opinion publication vary widely among judges.").

[68] *See* Epstein & King, *supra* note 35, at 106 (warning that judicial publication practices may correlate with dependent variable, thereby overestimating effect of independent variable(s)).

The sample almost certainly overestimates the percentage of motions to suppress that are granted in the general population. Judges likely write detailed explanations of their decisions when there are colorable arguments on both sides, and they probably decline to do so where the decision is clear.[69] Clear violations of the Fourth Amendment, for which suppression is the appropriate remedy, probably arise far less frequently than do clearly meritless motions to suppress. If the violation of the Fourth Amendment were clear, the prosecutor would not attempt to introduce the evidence at trial or would simply drop the prosecution altogether.[70] Moreover, because granting a motion to suppress can have severe consequences for the prosecution's case, it is possible that the judge will feel pressure to explain the decision in a written memorandum, making it more likely to appear in the sample. In other words, "hard" cases prompt the written decisions that appear in this study; easy cases do not.[71]

While hard cases are more likely to appear in the sample than easy cases, the sample still provides a reasonable estimate of how the recognized factors influence decisionmaking in the case population as a whole. Motions that do not raise credible issues with respect to any of the recognized factors teach little about the weight given to those factors. And it seems unlikely that motions raising credible issues would be kept out of the data set in a biased manner.[72] Assuming that judges apply the law of consent as they understand it consistently across published and unpublished rulings, the sample should provide insight into the judicial decisionmaking process for the total population of suppression cases.

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[69] Suppression rulings that warrant the writing of memorandum opinions are likely "nonroutine cases that require the exercise of judicial judgment." David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 588 (2003) (quoting C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 119 (1996)).

[70] *See, e.g.*, United States v. Dessesaure, 323 F. Supp. 2d 211, 213 (D. Mass. 2004) ("The United States Attorney's Office is obliged to screen its prosecutions to determine whether they conform to federal constitutional standards, regardless of the defendant's past history or present conduct.").

[71] *See* Sunstein et al., *supra* note 65, at 313 & n.36 ("As a general rule, unpublished opinions are widely agreed to be simple and straightforward and to involve no difficult or complex issues of law."); *see also* Strauss, *supra* note 11, at 214 n.7 ("[P]ublished cases that raise the issue of consent are only the tip of the iceberg.").

[72] *See* Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121, 134–35 (2004) (finding that judge's ideology does not affect decision to publish).

C. *Selecting and Coding Factors*

Under the totality of the circumstances standard, the court may rely on virtually any factor it deems relevant to its voluntariness finding. From this unlimited number of factors, a smaller number must be chosen for inclusion in the statistical model. My goal was to select factors for study that (1) are relevant to voluntariness and predictive of the court's decision; (2) are susceptible to reliable and valid measurement;[73] and (3) appear in many or most judicial opinions in the sample. This section explains how each of the factors in this study meets these criteria and acknowledges omissions.

Schneckloth provides the starting point for any list of relevant factors, but the opinion was not meant to offer a complete list to the district courts. The facts of *Schneckloth* did not raise certain issues that often implicate additional factors in other consent cases—such as whether the suspect was in custody at the time of consent, or whether the police claimed to have authority for the warrantless search.[74] Therefore it is necessary to look at other sources and the actual practice of the district courts for a complete perspective.

Professor Wayne LaFave's treatise on Fourth Amendment search and seizure law lists fourteen relevant factors[75] and offers qualitative assessments of the predictive power of some factors in probabilistic terms.[76] Unlike a judicial opinion, a treatise, by definition, aspires to provide a comprehensive view of the subject. Thus any factor that has

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[73] A measurement is reliable when it produces the same results repeatedly regardless of who or what is actually doing the measuring. A measurement is valid when it accurately reflects the underlying concept being measured. If a factor cannot be measured reliably or validly, it cannot be included in the model. *See* Epstein & King, *supra* note 35, at 83, 89.

[74] *See supra* notes 26–27 and accompanying text (describing facts of *Schneckloth*).

[75] Professor LaFave's treatise lists the following factors:

(a) Claim of authority.
(b) Show of force and other coercive surroundings.
(c) Threat to seek or obtain search warrant.
(d) Prior illegal police action.
(e) Maturity, sophistication, physical, mental, or emotional state.
(f) Prior or subsequent refusal to consent.
(g) Confession or other cooperation.
(h) Denial of guilt.
(i) Warning or awareness of Fourth Amendment rights.
(j) *Miranda* warnings.
(k) Right to counsel.
(l) "Implied" consent by engaging in certain activity.
(m) Deception as to identity.
(n) Deception as to purpose.

LAFAVE, *supra* note 23, § 8.2.

[76] *See id.* § 8.2(a) ("One factor which is very likely to produce a finding of no consent under the *Schneckloth* voluntariness test is an express or implied false claim by the police that they can immediately proceed to make the search in any event.").

judicially recognized significance is likely to appear in the LaFave treatise, even if it does not often surface in suppression rulings. Because a factor must receive consideration in a large number of opinions in order to have statistical significance in the model, however, many of LaFave's voluntariness factors are not included.

Before describing the factors examined in this study, it is necessary to include a few words about the process of analyzing judicial opinions with statistical methods. Statistical analysis of suppression rulings requires the translation of words into numbers—assigning numbers to recognizable fact patterns. The rules of translation, also known as the coding rules, govern this process. In each of the written memorandum opinions that form the original source of data for this study, I look for a clear indication from the court that something did or did not happen. For example, a search either occurs in the defendant's home, or it occurs somewhere else. All of the factors in this model are framed as a question that has a "yes" or "no" response. In numeric terms, the factor is coded as "1" when the response is affirmative and "0" when the response is negative.

This approach has certain advantages and disadvantages. For factors that are not naturally binary, it disregards differences that may be important to the court. For example, the "WEAPONS DISPLAYED" factor asks whether police officers displayed weapons before or during the request for consent to search. A negative answer is sufficiently clear, but a positive answer leaves room for varying degrees of coercion. A display of weapons could include drawing attention to a holstered gun, drawing a gun but pointing it at the ground, pointing a gun at a suspect in a car, holding a gun to a suspect's head, and so forth. Ignoring these distinctions may gloss over significant differences in coercive effect.

Recognizing this problem, one could attempt to assess the coercive force of each factor on a scale and assign a number accordingly. I reject this approach and utilize binary variables to preserve as much objectivity as possible. Since no two fact patterns are the same, the researcher would always need to choose a level of coercion from among the alternatives. Ranking fact patterns in order of coerciveness introduces an element of judgment on the part of the researcher and reduces the reliability of the measurement. In addition, the court may not provide enough detail in its opinion to make these judgments.

With these trade-offs in mind, it is better overall to frame the variables as, "Did the court find this fact: yes or no?"[77]

The data for the model come directly from the court's finding of fact as it relates to a yes-or-no question. Some questions of fact are subject to less disagreement than others. For example, whether consent was given voluntarily is said to be a question of fact, but it depends upon so many unspoken assumptions and vague definitions that reasonable people can disagree about the answer. On the other hand, whether police unholstered their guns during an encounter is a question of fact that may be contested in terms of the witness's veracity, recollection, and perception, but not in terms of ambiguity—everyone agrees on the definition of "unholstered." To the greatest extent possible, this study attempts to gather data about the latter type of factor (i.e., those factors that are determined "unambiguously"). Nevertheless, several relevant factors rely on potentially contentious findings of fact, such as whether the defendant was in custody, and whether the request for consent was preceded by a Fourth Amendment violation. Finally, all findings of fact come from the court, and contrary allegations of the defense or prosecution receive no consideration. If the court did not discuss the factor at all, I assumed that it was not important to the decision and coded it as "0."

D. Model Specification

This Section lists each of the factors (independent variables) in the model in alphabetical order, grouped either as case factors or as extrinsic factors. I give reasons for each factor's inclusion, explain how it is coded as a number, and hypothesize the effect that the factor will have on the court's suppression decision.

1. Dependent Variable: Outcome[78]

OUTCOME. The district court grants or denies a motion to suppress. A ruling that grants a motion to suppress for reasons relating to

[77] It would be possible to create binary variables that account for each of the various "WEAPONS DISPLAYED" scenarios described above, but this would create too many variables with too little difference among them.

[78] The dependent variable is the variable that the model attempts to predict. Here the dependent variable is the outcome of the suppression motion. The model estimates the effect of all the other variables—the independent variables—on the outcome. The coefficient of the independent variable is an estimate of how strong an effect the independent variable has on the outcome (the dependent variable), holding the other independent variables constant. If the coefficient is positive, the presence of the independent variable makes an outcome of suppression more likely; if the coefficient is

consent is coded as "1," even if the judge partly denies the motion;[79] otherwise, it is coded as "0."

2. *Independent Variables: Case Factors*

CONSENT FORM. Police officers often ask suspects to sign a consent form. The consent form is a written statement in place of a warrant that indicates the suspect's voluntary consent to the search. A defendant's signature on a consent form is relevant to the court's suppression ruling because it helps rule out ambiguity of communication. Also, the act of signing may alert the defendant that he is doing something weighty, akin to entering into a contract.[80] Although consent forms or the effect of written consent were not addressed in *Schneckloth* and did not warrant independent identification as a factor in LaFave's treatise,[81] I found that district courts frequently mentioned their usage. If the defendant gives written consent to search, the variable is coded as "1;" otherwise, it is coded as "0." The hypothesis is that courts will be less likely to grant the motion to suppress when a suspect signs the consent form, and the coefficient of the CONSENT FORM variable should be negative.

CUSTODY. Custodial interrogation is inherently coercive.[82] The fact of custody is relevant to the court's voluntariness determination, but it is not sufficient alone to "demonstrate a coerced . . . consent to search."[83] The suspect will be "in custody" when he is deprived of freedom of movement—surrounded by numerous police officers, handcuffed, or confined in a police car or room. Arrested defendants are in custody, but defendants detained by a *Terry*[84] stop are not.

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negative, the presence of the independent variable makes an outcome of suppression less likely.

[79] A motion is granted in part and denied in part when the court suppresses some evidence in controversy but not other evidence. Mixed decisions might also occur when the judge finds that police inevitably would have discovered some, but not all, of the evidence by lawful means.

[80] Refusal to sign a consent form would have an equally strong impact, but I did not track "refusals" for this study because very few refusals appear in the published cases. This might be because most refusals prevent the search, or because most suspects do not refuse an officer's request to search, or some combination thereof.

[81] *See supra* note 75. LaFave mentions consent forms in the context of revoking consent. *See* LAFAVE, *supra* note 23, § 8.2(f).

[82] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 455 (1966) ("[T]he the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").

[83] *See* LAFAVE, *supra* note 23, § 8.2(b) (quoting United States v. Watson, 423 U.S. 411, 424 (1976)).

[84] Terry v. Ohio, 392 U.S. 1, 20–27 (1968) (holding that police officers do not violate Fourth Amendment by stopping suspects based on "reasonable suspicion" and frisking them for weapons to protect officer safety).

Where the suspect is held in custody at the time police officers ask for consent to search, the variable is coded as "1;" otherwise, it is coded as "0." The hypothesis is that courts will be more likely to grant the motion to suppress if the suspect is in custody at the time of consent, and the coefficient of the CUSTODY variable should be positive.[85]

FOURTH AMENDMENT VIOLATION. A Fourth Amendment violation may occur before the police ask the suspect for consent to search. An illegal act by police may invalidate consent in two ways: The illegal act could render consent involuntary under the totality of the circumstances, or the consent to search could be inadmissible as the fruit of the prior violation.[86] Thus where the court finds that the police violated the Fourth Amendment before requesting consent to search, the "evidence obtained by the purported consent should be held admissible only if it is determined that the consent was both voluntary *and* not an exploitation of the prior illegality."[87]

The FOURTH AMENDMENT VIOLATION (FAV) variable is coded "1" if the court explicitly finds that officers violated the Fourth Amendment before requesting consent to search; otherwise, it is coded as "0." The hypothesis is that courts will be more likely to grant the motion to suppress if police violate the Fourth Amendment in some way before obtaining consent to search, and the coefficient of the FAV variable should be positive.

HOME. The home may be entitled to greater Fourth Amendment protection than other locations or property interests,[88] and if so, courts may look at consent to search the suspect's home with skepticism. The location of the search is rarely discussed as an important factor in the court's voluntariness determination, yet almost always the location is given as part of the background information of the case and is simple to ascertain. As such, the HOME variable has objective qualities that make it unlikely to be affected by the outcome of the case. The variable is coded as "1" when officers request to search the suspect's home, even if they also request to search other locations; otherwise, it is coded as "0." The hypothesis is that courts will be

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[85] *See* LAFAVE, *supra* note 23, § 8.2(b) ("[T]here is general agreement that custody makes the prosecution's burden particularly heavy.").

[86] *See id.* § 8.2(d) (discussing elements of determining admissibility of evidence obtained by consent "given following some form of illegal police action").

[87] *See id.* § 8.2(d) (emphasizing difference between and necessity of both admissibility tests) (emphasis added).

[88] *See* Kyllo v. United States, 533 U.S. 27, 31 (2001) ("At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (internal quotation marks omitted) (citations omitted)); Segal, *supra* note 53, at 896 (home afforded higher protection than car, business, or person).

more likely to grant the motion to suppress when the search occurs in the home, and the coefficient of the HOME variable should be positive.[89]

LANGUAGE. A difference in first language between the police officer and the suspect may give rise to an inference that the officer's request to search was not understood by the suspect, or that the suspect's response was misunderstood by the police officer.[90] If the court finds a language difference between the suspect and the police officer, the variable is coded as "1," even if the court concludes that the language barrier did not prevent effective communication; otherwise, it is coded as "0." The hypothesis is that courts will be more likely to grant the motion to suppress when language issues arise, and the coefficient of the LANGUAGE variable should be positive.

THREATS. Police officers sometimes say things to suspects who are contemplating whether to consent to a search that convinces (or coerces) them to submit to the officer's request. The question for the court is whether the officer's statement is a coercive threat or merely information that helps the suspect decide whether consent is in his best interest.[91] For example, absent "deceit or trickery," it is not a threat to inform a suspect that police will apply for a search warrant.[92] On the other hand, it is unduly coercive to tell a suspect that if he does not consent, his children will be taken away from him, even if that outcome is possible.[93]

To quantify this factor as objectively as possible for this study, a threat is any statement by police officers that describes an adverse consequence of refusing consent, including a promise to seek a search warrant, even if the statement is not held unlawful or criticized by the court. If the court finds that officers stated an adverse consequence of refusing consent to the defendant, the variable is coded as "1;" otherwise, it is coded as "0." The hypothesis is that courts will be more likely to grant the motion to suppress if police make statements that

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89 To be clear, the suggestion is that courts may require stronger proof of consent from the government when the home is involved, not that such requests are more coercive than requests to search any other location.

90 *See* United States v. Guerrero, 374 F.3d 584, 588 (8th Cir. 2004) (affirming suppression of evidence on ground that monolingual Spanish-speaking defendant did not consent to search).

91 *See* United States v. Faruolo, 506 F.2d 490, 493–95 (2d Cir. 1974).

92 *Id.* at 494.

93 *See* United States v. Ivy, 165 F.3d 397, 402 (6th Cir. 1998) (holding consent involuntary where police threatened to arrest defendant's girlfriend and place his child in foster care if he did not give consent). *But see* United States v. Hernandez, 341 F. Supp. 2d 1030, 1035 (N.D. Ill. 2004) (finding police officer's threat to call child protective services if suspect did not give consent "not improperly coercive") (coded as "1" for this study).

the suspect could perceive as threats, and the coefficient of the THREATS variable should be positive.

WEAPONS DISPLAYED. When police officers brandish or otherwise display weapons before or during a request for consent to search, the suspect may believe that he has no choice or that violence will ensue if he refuses. As observed above, the coercive force of the gun will vary depending on how it is used.[94] Here, the assumption is that an unholstered gun always intimidates to some extent. Therefore, where the court finds that any officer visible to the suspect has unholstered his or her gun, the variable is coded as "1;" otherwise, it is coded as "0." The hypothesis is that courts will be more likely to grant the motion to suppress if police display weapons during the encounter, and the coefficient of the WEAPONS DISPLAYED variable should be positive.[95]

3. Independent Variables: Extrinsic Factors

Extrinsic factors are those factors that are not part of the case. While each of the case factors relates to the interaction between suspect and officer, extrinsic factors have no relationship to the encounter because they are not known to the participants at the time. The extrinsic factors may provide additional insight into the decision-making process of the judge and shed light on the value of the intrinsic factors. Specifically, if the two extrinsic factors selected here correlate more strongly with the outcome than do the intrinsic factors, either the case factors are incomplete or the judge's findings related to the intrinsic factors are heavily influenced by a priori beliefs about the nature of police-suspect encounters.

FORMER PROSECUTOR. A substantial number of district judges in the sample were former prosecutors (twenty-six out of seventy-six). Some scholars have argued that former prosecutors are more likely to rule against the defendant in criminal cases, although this view does not appear to have a consensus following.[96] To test this view, a variable that accounts for whether the judge is a former prosecutor is included in the model. The FORMER PROSECUTOR variable is coded as "1" when the judge is a former prosecutor; otherwise, it is coded as "0." The hypothesis is that former prosecutors are less likely to grant

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[94] *See supra* note 76 and accompanying text.

[95] *See* LAFAVE, *supra* note 23, § 8.2(b) ("[T]he 'display of weapons is a coercive factor that sharply reduces the likelihood of freely given consent.'" (quoting Lowery v. Texas, 499 S.W.2d 160, 168 (Tex. Crim. App. 1973))).

[96] *See* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 835 (citing articles making this argument).

the motion to suppress, and the coefficient of the FORMER PROSECUTOR variable should be negative.

NOMINATING PARTY. Numerous academics have sought to observe the extent to which political factors predict judicial decisionmaking,[97] although many or most of these academics focus on the federal appellate courts.[98] The traditional line of inquiry looks for correlations between the political party of the nominating President and the decisions of nominated judges over many cases.[99] Following this admittedly simplistic convention,[100] judges nominated by Democratic Presidents are coded as "1," and judges nominated by Republican Presidents are coded as "0."[101] The hypothesis is that judges nominated by Democratic Presidents are more likely to grant the motion to suppress, and the coefficient of the NOMINATING PARTY variable should be positive.

The nominating party hypothesis is subject to criticism because it depends on two controversial and unproven propositions. The first is that judges nominated by Democrats are more likely to be liberal, while judges nominated by Republicans are more likely to be conservative.[102] The second is that, in close cases, judges who harbor a liberal ideology will be more likely to grant a motion to suppress than judges who adhere to a conservative worldview.[103]

Defending or refuting these two propositions is beyond the scope of this Note. Nevertheless, a strong correlation between NOMINATING

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[97] *See, e.g.*, Frank B. Cross, *Decisionmaking in the U.S. Courts of Appeals*, 91 CAL. L. REV. 1457, 1504–09 (2003) (finding that importance of ideology in appellate decisionmaking varies depending on factors such as appointing President and type of case); Nancy Scherer, *Who Drives the Ideological Makeup of the Lower Federal Courts in a Divided Government?* 35 LAW & SOC'Y REV. 191, 215 (2001) (finding that President—not Senate majority—shapes ideology of federal appellate judges); Sunstein et al., *supra* note 65, at 306 (finding that ideology does not predict judicial votes in criminal appeals).

[98] Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 258 (1995) ("Nearly all existing studies of ideological influence, however, are limited to cases in which the court publishes an opinion, and most focus on appellate opinions.").

[99] *See* Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1178 (2005).

[100] *See id.* at 1180–81 (refining methodology for coding political orientation of judges).

[101] Cases decided by magistrate judges are excluded because magistrate judges are not nominated by the President.

[102] *See* Ashenfelter et al., *supra* note 98, at 261 ("On balance, a pattern emerges of Democratic judges being more liberal than Republican judges.").

[103] *See, e.g.*, Lino A. Graglia, *The Myth of a Conservative Supreme Court: The October 2000 Term*, 26 HARV. J.L. & PUB. POL'Y 281, 299–305 (2003) (characterizing Supreme Court rulings that held various searches and seizures unconstitutional under Fourth Amendment as examples of "liberal activism"); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 364 (1999) ("The Fourth Amendment 'exclusionary rule' is one of the mainstays of liberal ideology.").

PARTY and OUTCOME would suggest that the judge's worldview colors his or her understanding of voluntariness. Moreover, while the NOMINATING PARTY variable is a blunt instrument for measuring the judge's policy preferences, it has the advantages of being easily observable, immutable, and completely extrinsic to the facts of the case.

III
RESEARCH RESULTS AND INTERPRETATION

Critics of consent search jurisprudence argue that voluntariness is a legal fiction designed to facilitate a compromise between the needs of law enforcement and the rights of defendants.[104] The critics offer intriguing anecdotal evidence in support of this thesis, but the question of how district courts actually decide suppression motions remains: Which fact patterns lead the district court to grant a motion to suppress evidence for lack of voluntary consent? This Part attempts to answer that question using statistical analysis.

A. Overview

The defendant's motion to suppress physical evidence for lack of voluntary consent was granted in 35 of the 142 cases in the sample, or about 25% of the time. In other words, roughly one-quarter of the rulings that were worthy of publication in the LexisNexis database granted the motion.[105] Seventy-six federal district judges issued 113 of 142 opinions in the sample; the remaining 29 were issued by magistrates. Of the 76 district judges in the study, 33 were nominated by Democrats; 43 were nominated by Republicans. There are 655 federal district judgeships in the United States.[106]

The sample data suggest that the factor most likely to invalidate consent is a Fourth Amendment violation by the police (i.e., illegal entry or seizure of the defendant). Threats are also likely to invalidate consent. Searches of the home receive slightly more protection than searches of other locations. A difference in first language between the officer and suspect has little effect, nor does the defendant's written consent to search. A display of weapons and placement

104 *See supra* Part I.B (reviewing legal fiction hypothesis).

105 Using the standard error of the mean, cases selected from the population of consent search rulings in the same manner as described in this paper will have a mean of the number of motions granted between 0.17 to 0.32 about 95% of the time. For an explanation of how standard error is calculated and utilized in statistics, see David H. Kaye & David A. Freeman, *Reference Guide on Statistics*, *in* FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83, 117–21 (2d ed. 2000).

106 28 U.S.C. § 133 (2000) (listing district judgeships by state).

of the suspect in custody each had little or no effect. The nominating party of the judge and the status of the judge as a former prosecutor each had slight or no correlation with the denial of the motion to suppress.

Factors relating to the individual traits of the defendant received relatively little discussion in the district courts' rulings. In fact, the district court did not review any of the subjective aspects of the defendant in 94 of the 142 cases in the sample. Of the 48 decisions that did discuss the defendant's age, intelligence, education, level of intoxication, experience with the criminal justice system, or in rare cases, the defendant's cultural expectations of police officers, 42 held that the subjective experience of the defendant weighed in favor of the government and a finding of voluntariness. The remaining six decisions held that the defendant's subjective state or capabilities rendered him incapable of consent and granted the motion to suppress.[107]

In many cases the court may find that more than one factor with potentially coercive effect was present, of course. In *United States v. Tuan Phu Pham*,[108] for example, the court found that consent was not freely and voluntarily given by a third party whose home was searched, and whom police offers detained at gunpoint, placed in custody, and threatened with the adverse consequences of refusing consent.[109] The statistical analysis below, therefore, is necessary in order to estimate the effect of each factor independently.

B. Statistical Analysis of Case Factors

This section analyzes the relationship between the court's findings of fact—quantified as factors in this study—and the court's decision to grant or deny the motion to suppress. Logistic regression was used to estimate coefficients for each of the factors in the model;[110] these coefficients can be used to predict the court's suppression decision as a probability. Each factor is analyzed below, presented in approximate order of statistical significance in the model. To simplify discussion, the numerical results from the analysis are presented in Appendix A.

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[107] *See, e.g.*, United States v. Brown, No. 8:05CR161, 2005 U.S. Dist. LEXIS 27549 (D. Neb. Oct. 24, 2005) (suppressing evidence where police requested consent from defendant who had been admitted to hospital for gunshot wound, was intoxicated, and had been given Demerol); United States v. Wogan, 356 F. Supp. 2d 462, 469 (M.D. Pa. 2005) (finding that grandmother's "will was overborne" in light of her knowledge of criminal justice system, her age, and medications she was taking).

[108] 2005 U.S. Dist. LEXIS 8497, No. 2:04CR00287DS (D. Utah Apr. 28, 2005).

[109] *Id.* at *8–11.

[110] I used Minitab, Release 14.20, to perform the calculations.

1. *Fourth Amendment Violation*

Where the court finds that a Fourth Amendment violation preceded an officer's request to search, it is highly likely to find any subsequent consent involuntary or otherwise tainted.[111] In the sample, the court granted the motion to suppress in 23 out of 28 such cases. Thus when police officers violate the Fourth Amendment, and the court so finds, they cannot often evade the consequences of that error by asking for the consent of the suspect.[112]

The FAV factor may be jointly determined with the OUTCOME, and therefore its high statistical significance[113] is potentially misleading. The same factors that cause the court to find a Fourth Amendment violation preceding consent may also cause the court to find that consent was involuntary. Whether the FAV factor is jointly determined with the OUTCOME depends on the kind of the violation at issue: seizure or illegal entry.

The same factors that cause an encounter to become an illegal seizure tend to render subsequent consent involuntary as well.[114] For example, CUSTODY is common to both a finding of illegal seizure and to some findings of involuntary consent.[115] Where the defendant claims that the *encounter* with police officers was not consensual, the question of coercion relating to the encounter and the question of

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111 *See* LAFAVE, *supra* note 23, § 8.2(d) (noting that prior illegal acts of police can invalidate consent for coercive force alone or under "fruit of the poisonous tree" doctrine).

112 In *Brown v. Illinois*, 422 U.S. 590 (1975), the Supreme Court established a multifactor test for determining whether a confession subsequent to an illegal arrest was voluntary. *Id.* at 603–04. Although this case directly addressed confessions, the *Brown* standard applies to consent searches as well. *See, e.g.*, United States v. Oguns, 921 F.2d 442, 447 (2d Cir. 1990) ("The government must show that the consent was sufficiently an act of free will to purge the primary taint of the unlawful invasion." (internal quotation marks omitted)).

113 The *p*-value for FOURTH AMENDMENT VIOLATION (FAV) was 0.000 in the model. *See infra* Appendix A, tbl.1. The *p*-value is the observed significance level of a statistical test; it measures the probability that the results of the test occurred by chance, assuming that the independent variable has no effect on the dependent variable. For the independent variable FAV, there is almost no chance of observing the results of the study as they were, if one assumes that FAV has no effect on the outcome of the suppression ruling. Therefore it is appropriate to reject the assumption that FAV has no effect on suppression ruling outcomes (known as rejecting the null hypothesis). Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra* note 105, at 179, 194 (explaining *p*-value calculation and null hypothesis).

114 *See, e.g.*, United States v. Brown, 405 F. Supp. 2d 1291 (D. Utah 2005) (illegal detention rendered subsequent consent involuntary).

115 Bus searches and traffic stops illustrate this phenomenon, where the officer is alleged to have detained the defendant without articulable suspicion. *See, e.g.*, Drayton v. United States, 536 U.S. 194, 200–08 (2002) (finding encounter between police and individual on bus "consensual," leading to valid consent to search).

coercion relating to the consent to search merge.[116] Therefore, in cases where the defendant did not "feel free to terminate the encounter,"[117] the dependent variable (OUTCOME) is too closely related to the independent variable (FAV), and the FAV factor will be artificially significant for that reason.[118]

In cases of illegal entry, the violation of the Fourth Amendment is less likely to be intertwined with other case factors and the final outcome of the opinion. For example, officers might illegally enter the defendant's home without meeting the defendant at all, thereby violating the Fourth Amendment without exerting direct pressure on the suspect.[119] Furthermore, some illegal entries do not involve significant police misconduct.[120]

The statistical evidence suggests that the FAV factor has independent explanatory power[121] but also distorts the regression somewhat. Dropping the FAV factor from the regression makes the HOME factor statistically significant and decreases the standard error for all factors, indicating some degree of multicollinearity[122] between the FAV factor and other factors in the model.[123] This means that the FAV factor is correlated with one or more of the others, making it difficult to distinguish the effect of the FAV factor from the effect of the other factors.[124]

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116 *See id.* at 206 ("[W]here the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts.").

117 *Id.* at 201.

118 Controlling for the FAV factor in such cases in order to observe the effect of other factors induces "post-treatment bias," where the other factors are the "treatment" and the violation is caused by the treatment. *See* Daniel E. Ho, Comment, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997, 1999–2000 (2005).

119 *See, e.g.*, United States v. Punzo, No. 03CR1075, 2004 U.S. Dist. LEXIS 20684, at *2–4 (N.D. Ill. Oct. 18, 2004) (discussing search in which agent entered garage illegally, but occupant of home was unaware of illegal entry at time he gave consent to search).

120 *See* United States v. Johnson, No. 5:04CR65-1-V, 2006 U.S. Dist. LEXIS 10524, at *26–27 (W.D.N.C. Feb. 21, 2006) (finding that officer violated Fourth Amendment by opening door of defendant's car, but finding violation "minimally intrusive" (quoting New York v. Class, 475 U.S. 106, 118 (1986))).

121 In the sample, courts granted the motion to suppress in 10 of 12 cases in which they found that a violation of the Fourth Amendment preceded consent, but did not find custody, weapons displayed, threats, or language barriers.

122 Multicollinearity occurs when two or more of the independent variables are correlated with one another. Rubinfeld, *supra* note 113, at 224.

123 *See id.* at 197 n.47. Each coefficient is lower in Table 2 where FAV has been dropped from the regression. *Compare infra* Appendix A, tbl.1, *with infra* Appendix A, tbl.2.

124 *See* David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1872 n.58 (2005) ("[I]n logistic regression multicollinearity can affect the regression weights as well as their significance levels."); *see also* Rubinfeld, *supra* note 113, at 197 (explaining that where perfect correlation between independent variables occurs, one

In addition, the overall measure of association of the model drops substantially when the FAV factor is excluded; from an estimated 0.76 to 0.44, as given by Somers's *D* regression diagnostic.[125] It is unclear how much of this decrease occurs because FAV is the most important variable in the model, and how much occurs because FAV is not sufficiently independent from the other factors in the model. Dividing FAV into illegal entries and illegal seizures is helpful: 10 of 11 illegal seizures rendered subsequent consent involuntary, while only 13 of 18 illegal entries had the same effect. Therefore, modifying FAV as a factor that includes only illegal entries (ILLEGAL ENTRY) may give the best regression results.[126]

2. *Threats*

Consent is likely to be held involuntary where the court finds that a police officer's request to search was accompanied by threats. The court granted the motion to suppress in 9 out of 14 such cases. The THREATS factor was highly significant,[127] and it is sufficiently independent from the OUTCOME and other independent variables. Because threats, promises, or misrepresentations are rarely necessary to fulfill an officer's duties, the significance and coefficient of the THREATS factor are consistent with the hypothesis that police misconduct actually drives the voluntariness determination.

While a violation of the Fourth Amendment and involuntary consent could, in some situations, be caused by the same factors, the same is not true of threats. For example, a statement made by police does not become a threat simply because the suspect is in custody or signs a consent form. A threat simply is a communication that has a coercive

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cannot "separate out the effect of the variable of interest on the dependent variable from the effect of the other variable[s]"). Here, the correlation among independent variables is far from perfect, so the remaining factors have distinguishable effects even when the FAV factor is included in the model.

125 *See infra* Appendix A, tbls.1 & 2. Somers's *D* is "a function of the number of concordant pairs, the number of discordant pairs, and the number of case types." Chambers et al., *supra* note 124, at 1872 n.57. The statistic is a number between –1 and 1, where a positive number reflects that the model improves the capability to predict the outcome. *See id.* at 1871–73 & nn.54–57 (critiquing Somers's *D* and explaining how it functions).

126 Eliminating seizures as a "cause" of involuntary consent reduces the multicollinearity in the model, while Somers's *D* rises to 0.52. In addition, ILLEGAL ENTRY, if excluded, might "cause an included variable to be credited with an effect that is actually caused by the excluded variable." Rubinfeld, *supra* note 113, at 188. See *infra* Appendix A, tbl.3 for results including ILLEGAL ENTRY as a modified version of FAV.

127 The THREATS factor had a *p*-value of 0.006 in the model. *See infra* Appendix A, tbl.3.

psychological impact on the defendant.[128] Thus the THREATS factor focuses directly on the effect the study aims to measure—coercion—and is unlikely to be the product of other factors in the study.

The method of coding the factor in the study reinforces the strong correlation between a finding of threats and a successful motion to suppress. As noted above, the THREATS factor was considered present any time officers told the suspect that adverse consequences would ensue if he or she refused to consent to the police search, regardless of whether the court actually held that the officers "threatened" the suspect.[129] One could look at the THREATS factor as an estimate of how often courts find a statement by officers of adverse consequences threatening or unduly coercive. Thus whether the legal standard for threats[130] is met or not, the courts give the THREATS factor, as defined in this study, substantial weight under the totality of the circumstances standard.

3. *Home*

On balance, evidence recovered from the home is more likely to be suppressed than evidence recovered from other locations. The HOME factor was a fairly good predictor of the court's decision in the sample, especially when the FAV factor was dropped from the regression.[131] This accords with the notion that the home is where a citizen has the greatest expectation of privacy.[132] Indeed, collinearity with the FAV factor may occur because the court is more likely to find a violation of the Fourth Amendment when the search location is the home. In the sample, 17 of 28 Fourth Amendment violations (61%) preceded a request to search the home of the suspect, a share disproportionate to the number of home searches.[133]

As a matter of coding, the HOME factor is very reliable: There is almost no chance that the court would reach a different finding of fact for HOME in order to achieve a preferred outcome. Additionally, the search location is not likely to be collinear with the remaining vari-

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128 *See* United States v. Faruolo, 506 F.2d 490, 495–98 (2d Cir. 1974) (Newman, J., concurring) (explaining distinction between coercive threats to obtain warrant and well-founded predictions that warrant may be obtained).

129 *See supra* note 91 and accompanying text.

130 For an in-depth analysis of the legal meaning of threats in the consent search context, see Judge Newman's concurrence in *Faruolo*, 506 F.2d at 495–98 (Newman, J., concurring).

131 The p-value for HOME was 0.015 after dropping the FAV factor from the regression. *See infra* Appendix A, tbl.2. After restoring ILLEGAL ENTRY as a factor in the model, the p-value climbed to 0.146. *See infra* Appendix A, tbl.3.

132 *See* Segal, *supra* note 53, at 896; *see also* Kyllo v. United States, 533 U.S. 27, 31 (2001).

133 The home, as opposed to a car or other location, was searched in 66 of 142 cases (46%) in the sample.

ables. Therefore the estimate of the HOME factor coefficient is probably valid, and the search location is relevant to the court's voluntariness determination.

4. *Consent Form*

The CONSENT FORM factor did not attain statistical significance, although the coefficient sign points in the anticipated direction (negative).[134] Naturally, police may coerce a suspect into signing a consent form, just as they might coerce his oral consent.[135] The act of signing the form is an affirmative one however, and suggests more than mere acquiescence. In addition, the written form gives the suspect notice of the import of giving consent and alerts the defendant that he is actually negotiating with police. The consent form may shift the voluntariness equation such that a greater showing of coercion by police is needed in order to find consent involuntary than is needed if the consent form had not been used. Though not conclusive, the sample data are consistent with this reasoning and suggest that courts weigh the presence of a signed consent form against granting the motion.

5. *Language*

The first language of the defendant has no statistical significance.[136] One interpretation of this finding is that the language of the suspect is irrelevant to the legality of the voluntariness determination, so long as the court is assured that the suspect's communication was sufficiently clear and unequivocal. If the LANGUAGE factor is viewed as a proxy for ethnicity, then one would hope that it has little correlation with the outcome of suppression motions generally.

Another interpretation is that courts fail to consider whether nonnative speakers actually understand police requests or are simply acquiescing to a show of authority.[137] Communication barriers can be

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134 The *p*-value for the CONSENT FORM variable is 0.729 for all cases. *See infra* Appendix A, tbl.3. The coefficient is –0.18. When the suspect signs the consent form, the factor is coded as "1." The negative coefficient means that signing the consent form makes a finding that consent was involuntary (OUTCOME = 1) less likely.

135 *See, e.g.*, United States v. Farmer, No. 3:04CR00204, 2006 U.S. Dist. LEXIS 7432, at *40 (M.D. Tenn. Feb. 7, 2006) ("Defendant was essentially required to sign the consent form before being permitted to use the bathroom."); United States v. Fenstermaker, 402 F. Supp. 2d 1349, 1354–55 (D. Utah 2005) (noting that defendant signed consent form; consent subsequently held involuntary).

136 The *p*-value for LANGUAGE was 0.934. *See infra* Appendix A, tbl.3.

137 *But see* United States v. Garcia-Rosales, No. CR-05-402-MO, 2006 U.S. Dist. LEXIS 10578, at *33 (D. Or. 2006) (holding that language difference prevented officer and subject "from ever truly reaching a meeting of the minds regarding consent to search").

confusing and can heighten anxiety.[138] At the same time, it may be difficult for police to perceive the suspect's comprehension problems. Thus the negligible effect of the LANGUAGE factor possibly indicates compromise—where police make good-faith attempts to communicate with the suspect, the court will be less likely to give weight to subjective language-related indicia of coercion or acquiescence. Such an interpretation would be consistent with the thesis that subjective voluntariness is not especially important so long as the police hold "an objectively reasonable belief that the defendant understood their conversation."[139]

6. *Weapons Displayed*

The district courts in the sample diligently noted whether police officers unholstered their firearms at any time during an encounter, finding that weapons were displayed in 21 of 142 cases, and commenting on their absence in many more. Thus, courts seem to acknowledge that the presence of weapons (especially guns pointed at the defendant at some point during the encounter) is potentially coercive, yet the WEAPONS DISPLAYED factor was statistically insignificant.[140] The court granted the motion to suppress in 6 of 21 cases (about 28% of the time) where police unholstered their weapons. It appears that the WEAPONS DISPLAYED factor had little independent effect on the court's decision.[141] Why is this?

One explanation is that the use of firearms is part of police work. If firearms were held to be per se coercive, this would interfere with police officers' ability to obtain consent in any case where officers had legitimate reasons to draw their weapons.[142] The ambiguity of the WEAPONS DISPLAYED factor suggests that courts are reaching a com-

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[138] *See id.* at *36 (finding that subject of consent request was confused and that agent's "poor Spanish made an already confusing situation worse").

[139] United States v. Gallardo, No. 4:05CR3085, 2006 U.S. Dist. LEXIS 14096, at *32 (D. Neb. Mar. 13, 2006).

[140] The *p*-value for the WEAPONS DISPLAYED factor was 0.945 for all cases when the FAV factor was dropped from the model. *See infra* Appendix A, tbl.2. The *p*-value was closer to a level of statistical significance when either FAV or ILLEGAL ENTRY was included, but still not significant. *See infra* Appendix A, tbls.1 & 3.

[141] The odds ratio is nearly equal to 1. It is at 0.96 when neither FAV nor ILLEGAL ENTRY are included in the model. *See infra* Appendix A, tbl.2. The odds ratio is estimated at 0.64 when ILLEGAL ENTRY is included in the model. The coefficient β estimates the change in the log odds that the dependent variable is equal to 1 (motion granted) for each unit increase in the independent variable. The odds ratio is equal to base e^{β}. When the odds ratio is substantially greater than or less than 1, the independent variable has explanatory power. *See* G. David Garson, Log-Linear, Logit, and Probit Models, http://www2.chass.ncsu.edu/garson/pa765/logit.htm (last visited Oct. 7, 2006).

[142] *See supra* notes 8–9 and accompanying text.

promise position where the safety needs of law enforcement are weighed against the coercive effect of firearms.

7. *Custody*

In the sample, whether the suspect was in custody at the time of consent had little or no effect on the court's voluntariness determination. The motion to suppress was granted in 12 of 41 such cases (29%). Although the coefficient sign points in the anticipated direction (positive), the odds ratio is close to 1 and it lacks statistical significance.[143] The CUSTODY factor data are thus inconsistent with the LaFave treatise, which states that "there is general agreement that custody makes the prosecution's burden particularly heavy."[144]

As with the WEAPONS DISPLAYED factor, the insignificance of the custodial request to search may be explained by the fact that exerting some control over the suspect's freedom of movement is a normal part of police work. In the cases in the study, handcuffing the defendant often occurred as a police safety measure[145] and lawful arrests frequently preceded requests for consent to search.[146] It is only when the length or means of detention exceeds that justified by articulable suspicion or probable cause that the custody becomes an illegal seizure.[147] This situation is captured by the FAV factor. The fact of custody, therefore, had little effect on the court's voluntariness determination unless it was shown to be unjustified by the surrounding circumstances.

C. *Statistical Analysis of Extrinsic Factors*

In this Section, the judge's nominating party, determined by the political party of the President that nominated the judge, and the judge's status as a former prosecutor are added to the model.[148]

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[143] The *p*-value for CUSTODY was 0.939, and the odds ratio was 1.04. *See infra* Appendix A, tbl.2.

[144] LAFAVE, *supra* note 23, § 8.2(b).

[145] *See, e.g.*, United States v. Tyson, 360 F. Supp. 2d 798, 801 (E.D. Va. 2005) (noting that police informed suspect that "he was going to be placed in handcuffs for his own safety and for the safety of the agents").

[146] *See, e.g.*, United States v. Brown, 405 F. Supp. 2d 1291, 1296 (D. Utah 2005) (involving defendant stopped by police officer on highway for speeding; court ruled "initially valid stop evolved into an unreasonable detention").

[147] Florida v. Royer, 460 U.S. 491, 500 (1983) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.").

[148] *See infra* Appendix A, tbl.4.

1. Nominating Party

For the cases in the sample, a judge nominated by a Democrat appeared slightly more likely to grant the motion to suppress than a judge nominated by a Republican.[149] In the sample of 113 cases (reached by excluding magistrates), evidence was suppressed in 14 of 41 cases decided by Democratic appointees (34%), and in 16 of the remaining 72 cases decided by Republican appointees (22%). Nevertheless, the NOMINATING PARTY factor lacked statistical significance. In other words, it is possible that the difference observed between Republican nominees and Democratic nominees came about through chance alone.[150]

The fact-intensive totality of the circumstances standard gives the trial judge an opportunity to find the final fact of voluntariness in light of his or her worldview[151]—that is, his or her general understanding of the relationships between citizens and police; liberty and order; force and coercion. The insignificance of the NOMINATING PARTY factor could mean, therefore, that judges broadly share a common understanding of "voluntariness" and the factors that tend to demonstrate it.

2. Former Prosecutor

The judge's status as a former prosecutor was more strongly correlated with the voluntariness finding than the nominating party of the judge, but it lacked high statistical significance.[152] Former prosecutors granted the motion to suppress in 8 of 39 cases that they decided (20%), while non-former prosecutors suppressed evidence in 22 of 74 cases (29%).

One explanation is that former prosecutors focus on the social cost of releasing factually guilty defendants more than their colleagues who lack prosecutorial experience.[153] Also, a former prosecutor

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[149] Although Democratic appointees granted the motion to suppress more frequently than did Republican appointees, the coefficient of the NOMINATING PARTY variable was actually negative, which, if significant, would indicate that judges appointed by Democratic presidents are *less* likely to grant the motion. Because the coefficient has no significance, however, the sign of the coefficient also lacks meaning. The *p*-value for NOMINATING PARTY is 0.972. *See infra* Appendix A, tbl.4.

[150] *Cf. id.*

[151] *See* Bruce W. Burton, *The "O.K. Corral Principle": Finding the Proper Role for Judicial Notice in Police Misconduct Matters*, 29 N.M. L. REV. 301, 309–10 (1999) (arguing that trial judges take judicial notice of "crime control model" or "police control model" as framework for evaluating police misconduct).

[152] The *p*-value for FORMER PROSECUTOR was 0.203. *See infra* Appendix A, tbl.4.

[153] *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1125 (1977) ("The fourth amendment's exclusionary rule . . . will command greater allegiance from a judge

might retain a sense of loyalty to law enforcement officers generally. The FORMER PROSECUTOR factor lacks statistical significance, but it suggests that former prosecutors may respond differently to motions to suppress than do their colleagues.

D. Summary Analysis and Interpretation

The data presented here support the thesis that a court's finding of "voluntary consent" is a legal fiction designed to facilitate a balancing of law enforcement needs and individual rights. The needs of law enforcement will prevail, however, unless the court finds police misconduct. In the absence of police misconduct, consent is voluntary.

Many factors enumerated by the Supreme Court in *Schneckloth* were not discussed at all in the majority of opinions in the sample, and other factors appeared to have no consistent effect on the courts' decisions. At the same time, the data showed that some factors did have a consistent effect: Specifically, where illegal entries or seizures were found, the court rarely found that subsequent consent was voluntary or untainted. Also, where police threatened suspects with the consequences of refusing permission, consent was consistently found involuntary. These findings are not contrary to the "legal fiction" hypothesis, however, because Fourth Amendment violations and threats exemplify police misconduct. Displays of weapons and holding the suspect in custody, on the other hand, may or may not indicate police misconduct, so these factors do not make good predictors.

Even under the broad totality of the circumstances standard, the factors enumerated by the Supreme Court in *Schneckloth* and its progeny would have more explanatory power if the courts actually relied on these factors in making their voluntariness determinations. District courts consistently list the same voluntariness factors in suppression rulings; it is the outcome that varies. The circuit courts have reaffirmed the importance of the factors,[154] and district courts acknowledge the message when they echo that guidance in their opinions. Scholars and judges have identified these factors many times over.[155] It is not lack of agreement as to what the relevant factors are that make them less reliable predictors than they might otherwise be.

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who has not been repeatedly exposed to the reality of the social harms inflicted by some felons whom the rule requires to be freed.").

[154] *See supra* note 31 (collecting cases that list voluntariness factors and cite *Schneckloth*).

[155] *See, e.g.*, *supra* note 75 (listing factors).

Moreover, the fact that human decisionmakers necessarily rely on cues and heuristics means that the most important factors within the totality of the circumstances standard should emerge over many like cases.[156] Yet they do not. Instead, most of the factors enumerated by courts and commentators do not predict or correlate with suppression outcomes to a high degree of statistical confidence[157] because courts are checking for police misconduct, not voluntariness, in many cases.[158] This methodology may be consistent with the Fourth Amendment, but it renders the voluntariness factors unreliable.

CONCLUSION

While the Supreme Court's decision in *Schneckloth* holds that trial courts must determine whether a defendant's consent was given voluntarily under the totality of the circumstances, in practice courts will find consent voluntary in the absence of police misconduct. The statistical evidence presented here shows that factors related to police misconduct—such as illegal entries, illegal seizures, and threats—are correlated with courts' final determinations of suppression motions. At the same time, acts that are considered coercive but may be necessary to police work—such as placing the suspect in some form of custody or unholstering firearms—lack meaningful correlation. These findings affirm that voluntariness is indeed a legal fiction that serves to balance the needs of effective law enforcement against the rights of citizens. Although this practice may be acceptable, and perhaps even desirable under the Fourth Amendment, it is inconsistent with consent law doctrine and causes confusion and indeterminacy for judges, prosecutors, and defendants when the voluntariness of consent is in dispute.

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156 *See* Segal, *supra* note 53, at 941–42 (applying fact model to individual Justices).

157 Only THREATS and FAV (and ILLEGAL ENTRY) have sufficient statistical significance, as measured by their *p*-values, to reject the null hypothesis that these variables have no correlation with the OUTCOME of the motion. *See* Rubinfeld, *supra* note 113, at 194 (indicating that *p*-value of 0.05 is generally sufficient to reject null hypothesis).

158 In other words, "police misconduct" is an omitted variable that, loosely speaking, encompasses an inquiry into whether the means selected by police officers were suited to the ends. Whether the defendant's actions warranted an armed response, handcuffs, or prolonged detention is not a factor in this study.

APPENDIX A
TABLES

TABLE 1
ALL SAMPLE CASES
n = 142

Factor	ß	SE	*p*-value	Odds Ratio
CONSTANT	–3.15	0.60	0.000	—
CONSENT FORM	0.11	0.60	0.851	1.12
CUSTODY	0.58	0.62	0.350	1.79
FOURTH AMENDMENT VIOLATION	3.98	0.68	0.000	53.26
HOME	0.74	0.61	0.223	2.09
LANGUAGE	0.44	0.75	0.555	1.56
THREATS	2.39	0.80	0.003	10.96
WEAPONS DISPLAYED	–0.79	0.82	0.338	0.45

Somers's D = 0.76

TABLE 2
ALL SAMPLE CASES; *FOURTH AMENDMENT VIOLATION* DROPPED FROM MODEL
n = 142

Factor	ß	SE	*p*-value	Odds Ratio
CONSTANT	–1.89	0.38	0.000	—
CONSENT FORM	–0.21	0.48	0.667	0.81
CUSTODY	0.04	0.46	0.939	1.04
HOME	1.15	0.47	0.015	3.17
LANGUAGE	–0.02	0.54	0.966	0.98
THREATS	1.81	0.63	0.004	6.10
WEAPONS DISPLAYED	–0.04	0.59	0.945	0.96

Somers's D = 0.44

TABLE 3
ALL SAMPLE CASES; *FOURTH AMENDMENT VIOLATION* REPLACED BY *ILLEGAL ENTRY*
n = 142

Factor	**ß**	**SE**	***p*-value**	**Odds Ratio**
CONSTANT	–2.19	0.43	0.000	—
CONSENT FORM	–0.18	0.52	0.729	0.84
CUSTODY	0.37	0.52	0.467	1.45
HOME	0.75	0.51	0.146	2.11
ILLEGAL ENTRY	2.53	0.63	0.000	12.58
LANGUAGE	0.05	0.60	0.934	1.05
THREATS	1.90	0.69	0.006	6.68
WEAPONS DISPLAYED	–0.49	0.69	0.513	0.64

Somers's D = 0.52

TABLE 4
CASE FACTORS AND EXTRINSIC FACTORS; ALL CASES DECIDED BY MAGISTRATES DROPPED FROM MODEL
n = 113

Factor	**ß**	**SE**	***p*-value**	**Odds Ratio**
CONSTANT	–1.50	0.49	0.002	—
CONSENT FORM	–0.33	0.58	0.572	0.72
CUSTODY	0.13	0.57	0.822	1.14
HOME	0.71	0.57	0.206	2.04
ILLEGAL ENTRY	2.04	0.66	0.002	7.73
LANGUAGE	–0.30	0.67	0.648	0.74
THREATS	1.74	0.78	0.026	5.70
WEAPONS DISPLAYED	–0.43	0.76	0.570	0.65
NOMINATING PARTY (1=Democrat)	–0.02	0.55	0.972	0.98
FORMER PROSECUTOR	–0.76	0.60	0.203	0.47

Somers's D = 0.50

APPENDIX B: CASES

The CODING VALUES column contains the binary value assigned to each factor, in the following order: OUTCOME, CONSENT FORM, CUSTODY, FOURTH AMENDMENT VIOLATION, HOME, LANGUAGE, THREATS, WEAPONS DISPLAYED, NOMINATING PARTY, FORMER PROSECUTOR. Cases decided by magistrates have the value "–1" in the NOMINATING PARTY and FORMER PROSECUTOR columns.

Case	Coding Values
United States v. Alcaraz-Arellano, 302 F. Supp. 2d 1217 (D. Kan. 2004)	(0,0,0,0,0,1,0,0,0,0,)
United States v. Allen, Criminal No. 04-08-P-S, 2004 U.S. Dist. LEXIS 18834 (D. Me. Sept. 20, 2004)	(0,0,1,0,0,0,0,1,–1,–1)
United States v. Alvarado, No. 2:04 CR 134 DAK, 2004 U.S. Dist. LEXIS 20519 (D. Utah Sept. 30, 2004)	(0,0,0,0,0,0,0,0,1,0)
United States v. Alvarez, No. 05-CR-94, 2005 U.S. Dist. LEXIS 32921 (E.D. Wis. Dec. 8, 2005)	(0,0,0,0,0,0,0,0,–1,–1)
United States v. Avila-Agramon, No. 04-40108-01/02/03-RDR, 2005 U.S. Dist. LEXIS 1732 (D. Kan. Jan. 13, 2005)	(0,0,0,0,0,1,0,0,0,0)
United States v. Bellinger, No. 04-40027-01-RDR, 2004 U.S. Dist. LEXIS 26967 (D. Kan. Aug. 20, 2004)	(0,1,0,0,1,0,0,0,0,0)
United States v. Benezario, 339 F. Supp. 2d 361 (D.P.R. 2004)	(1,0,0,1,1,0,0,1,1,0)
United States v. Bennett, No. 05-CR-6050 CJS, 2005 U.S. Dist. LEXIS 25349 (W.D.N.Y. Oct. 21, 2005)	(0,1,0,0,1,0,0,0,1,1)
United States v. Bercier, 326 F. Supp. 2d 992 (D.N.D. 2004)	(0,0,1,0,1,0,0,0,0,0)
United States v. Bolden, No. S1-4:02-CR-557 (CEJ), 2005 U.S. Dist. LEXIS 27782 (E.D. Mo. Oct. 31, 2005)	(0,1,1,0,1,0,0,0,0,0)
United States v. Broome, No. 1:05-cr-135-WSD, 2006 U.S. Dist. LEXIS 10848 (N.D. Ga. Feb. 28, 2006)	(0,0,0,0,0,0,0,1,0,1)
United States v. Brown, 405 F. Supp. 2d 1291 (D. Utah 2005)	(1,0,0,1,0,0,1,0,0,1)
United States v. Brown, No. 8:05CR161, 2005 U.S. Dist. LEXIS 27549 (D. Neb. Oct. 24, 2005)	(1,1,0,0,0,0,0,0,0,0)
United States v. Buckingham, No. 1:04-cr-10015-T, 2006 U.S. Dist. LEXIS 28327 (W.D. Tenn. filed Apr. 30, 2006)	(0,1,0,0,0,0,0,0,0,0)
United States v. Cannizzaro, Criminal No. 04-103-P-H, 2005 U.S. Dist. LEXIS 2976 (D. Me. Feb. 16, 2005)	(0,0,0,0,1,0,0,0,–1,–1)
United States v. Cardoso, No. 05-20162-CR-UNGARA-BENAGES, 2005 U.S. Dist. LEXIS 15410 (S.D. Fla. June 20, 2005)	(0,1,1,0,1,0,0,0,0,0)
United States v. Carrazco-Escalante, 300 F. Supp. 2d 1155 (D.N.M. 2004)	(1,0,0,0,0,0,0,0,1,0)
United States v. Carter, No. 02-40050-01-JAR, 2004 U.S. Dist. LEXIS 8567 (D. Kan. May 12, 2004)	(1,0,0,1,1,0,0,0,0,1)
United States v. Chao Xian Yao, No. 05 CR 1114 (SAS), 2006 U.S. Dist. LEXIS 27108 (S.D.N.Y. May 3, 2006)	(0,1,1,0,1,1,0,0,1,1)
United States v. Chavira, No. 05-40010-01-JAR, 2005 U.S. Dist. LEXIS 9082 (D. Kan. May 18, 2005)	(0,0,0,1,0,0,0,0,0,1)

Case	Coding Values
United States v. Cheney, No. 1:04-cr-100, 2004 U.S. Dist. LEXIS 25546 (E.D. Tenn. Sept. 9, 2004)	(0,0,1,0,0,0,0,0,0,0)
United States v. Coffey, No. 04-40139-01-RDR, 2005 U.S. Dist. LEXIS 15329 (D. Kan. Apr. 18, 2005)	(0,0,0,0,0,0,0,0,0,0)
United States v. Concepcion-Ledesma, No. 03-40100-01-SAC, 2004 U.S. Dist. LEXIS 8566 (D. Kan. Apr. 21, 2004)	(0,0,0,0,0,0,0,0,0,0)
United States v. Cooper, No. 1:05-CR-27-TS, 2006 U.S. Dist. LEXIS 26440 (N.D. Ind. Apr. 13, 2006)	(0,1,1,0,1,0,0,0,0,0)
United States v. Cortez, No. 05 Cr. 55 (DAB), 2006 U.S. Dist. LEXIS 6715 (S.D.N.Y. Feb. 15, 2006)	(0,1,0,0,1,0,0,1,1,1)
United States v. Cui Qin Zhang, No. 04-40084-01-JAR, 2005 U.S. Dist. LEXIS 4166 (D. Kan. Mar. 10, 2005)	(0,0,0,0,0,1,0,0,0,1)
United States v. Damrah, 322 F. Supp. 2d 892 (N.D. Ohio June 7, 2004)	(1,1,0,1,1,1,0,0,0,0)
United States v. Davis, No. 2:05CR483DAK, 2006 U.S. Dist. LEXIS 10566 (D. Utah Feb. 15, 2006)	(0,0,1,0,0,0,0,0,1,0)
United States v. De Jesus Abarca, No. 1:05CR 175 JCH, 2006 U.S. Dist. LEXIS 27482 (E.D. Mo. May 9, 2006)	(0,0,0,0,0,1,0,0,–1,–1)
United States v. Delmonaco, Crim. No. 5-20-B-W, 2005 U.S. Dist. LEXIS 18762 (D. Me. Aug. 31, 2005)	(0,1,1,0,0,0,0,0,–1,–1)
United States v. Devore, No. 4:03-cr-105, 2004 U.S. Dist. LEXIS 9904 (S.D. Iowa May 28, 2004)	(0,0,1,0,1,0,0,0,1,0)
United States v. Diaz, Civil Action No. SA-04-CR-079-XR, 2004 U.S. Dist. LEXIS 10421 (W.D. Tex. June 2, 2004)	(1,0,0,1,0,0,0,0,0,0)
United States v. Dimodica, No. 05-CR-064-C, 2005 U.S. Dist. LEXIS 16076 (W.D. Wis. Aug. 5, 2005)	(0,0,0,0,1,0,0,0,–1,–1)
United States v. Edgerson, No. 05-80763, 2006 U.S. Dist. LEXIS 2773 (E.D. Mich. Jan. 12, 2006)	(0,1,0,0,1,0,0,0,0,1)
United States v. Edgerton, No. 04-40045-01/02-SAC, 2004 U.S. Dist. LEXIS 21642 (D. Kan. Sept. 9, 2004)	(0,0,0,0,0,0,0,0,0,0)
United States v. Escobar, Criminal No. 1:05-CR-0487, 2006 U.S. Dist. LEXIS 29735 (M.D. Pa. Apr. 27, 2006)	(0,1,0,0,0,1,0,0,0,0)
United States v. Esquilin, No. 04 Cr. 221 (LMM), 2005 U.S. Dist. LEXIS 1262 (S.D.N.Y. Jan. 28, 2005)	(1,0,1,1,1,0,0,0,0,0)
United States v. Farmer, No. 3:04cr00204, 2006 U.S. Dist. LEXIS 7432 (M.D. Tenn. filed Feb. 7, 2006)	(1,1,1,1,1,0,1,0,1,0)
United States v. Fenstermaker, 402 F. Supp. 2d 1349 (D. Utah 2005)	(1,1,0,0,1,0,1,0,0,1)
United States v. Fernandez-Jimenez, No. 03 Cr. 1493 (RPP), 2004 U.S. Dist. LEXIS 13351 (S.D.N.Y. July 16, 2004)	(0,0,0,0,0,1,0,0,0,1)
United States v. Fiasche, No. 05-cr-675, 2006 U.S. Dist. LEXIS 10529 (N.D. Ill. Mar. 10, 2006)	(0,0,0,0,1,0,0,0,1,0)
United States v. Flores, 359 F. Supp. 2d 871 (D. Ariz. 2005)	(0,1,0,0,0,0,0,0,0,0)
United States v. Flores-Ocampo, No. 04-40120-01-JAR, 2005 U.S. Dist. LEXIS 2914 (D. Kan. Feb. 21, 2005)	(0,0,0,0,0,1,0,0,0,1)
United States v. Franklin, Criminal Action No. 04-10117-RWZ, 2006 U.S. Dist. LEXIS 10269 (D. Mass. Mar. 15, 2006)	(0,0,0,0,0,0,0,0,1,0)
United States v. Gaines, Criminal Action No. 03-102 JJF, 2004 U.S. Dist. LEXIS 25163 (D. Del. Nov. 15, 2004)	(1,0,0,1,1,0,0,0,0,1)

Case	Coding Values
United States v. Gallardo, No. 4:05CR3085, 2006 U.S. Dist. LEXIS 14096 (D. Neb. Mar. 13, 2006)	(0,1,1,0,0,1,0,0,0,0)
United States v. Gamez, 389 F. Supp. 2d 975 (S.D. Ohio 2005)	(1,1,0,0,1,1,0,1,1,0)
United States v. Garcia, No. 2:05CR280 DAK, 2005 U.S. Dist. LEXIS 25843 (D. Utah Oct. 20, 2005)	(0,0,0,0,0,1,0,0,1,0)
United States v. Garcia-Rosales, No. CR-05-402-MO, 2006 U.S. Dist. LEXIS 10578 (D. Or. Feb. 27, 2006)	(1,0,1,0,1,1,0,0,0,1)
United States v. Gonyer, Crim. No. 05-79-B-W, 2006 U.S. Dist. LEXIS 2676 (D. Me. Jan. 25, 2006)	(0,0,0,0,1,0,0,0,–1,–1)
United States v. Gonzalez, No. 1:05CR499, 2005 U.S. Dist. LEXIS 32089 (N.D. Ohio Nov. 30, 2005)	(0,0,0,0,0,0,0,0,1,0)
United States v. Gonzalez-Noyola, No. 8:05CR274, 2006 U.S. Dist. LEXIS 29120 (D. Neb. May 9, 2006)	(0,1,1,0,1,1,0,0,–1,–1)
United States v. Gosnell, No. 02: 05cr00005, 2005 U.S. Dist. LEXIS 19968 (W.D. Pa. Sept. 14, 2005)	(0,1,0,0,0,0,0,0,0,1)
United States v. Gray, 302 F. Supp. 2d 646 (S.D.W.V. Feb. 19, 2004)	(1,0,0,1,1,0,0,0,1,0)
United States v. Greenwood, 405 F. Supp. 2d 673 (E.D. Va. 2005)	(0,0,0,0,0,0,0,0,0,0)
United States v. Griffin, 431 F. Supp. 2d 164 (D. Mass. 2006)	(1,0,1,0,1,0,0,0,1,0)
United States v. Guerrero, 379 F. Supp. 2d 1138 (D. Kan. 2005)	(0,0,0,0,0,1,0,0,0,0)
United States v. Gunning, 405 F. Supp. 2d 79 (D. Mass. 2005)	(1,0,1,0,0,0,0,0,0,1)
United States v. Hendrix, No. 3:05-00215, 2006 U.S. Dist. LEXIS 28331 (M.D. Tenn. filed May 2, 2006)	(0,0,0,0,1,0,0,0,1,0)
United States v. Hernandez, 341 F. Supp. 2d 1030 (N.D. Ill. 2004)	(0,1,1,0,0,0,1,1,1,0)
United States v. Hernandez-Bustos, No. 04-40159-01-RDR, 2005 U.S. Dist. LEXIS 16311 (D. Kan. Jul. 12, 2005)	(0,0,0,0,0,1,0,0,0,0)
United States v. Hill, Criminal Action No. 2:04-CR-30, 2005 U.S. Dist. LEXIS 2263 (N.D.W.V. Feb. 14, 2005)	(1,0,0,1,1,0,0,0,–1,–1)
United States v. Hinojosa, No. 8:05CR145, 2005 U.S. Dist. LEXIS 39921 (D. Neb. Dec. 22, 2005)	(1,1,1,1,1,1,1,0,–1,–1)
United States v. Jahkur, 409 F. Supp. 2d 28 (D. Mass. 2005)	(0,0,0,0,0,0,0,0,0,0)
United States v. Jeter, No. 2:04-CR-00624 PGC, 2005 U.S. Dist. LEXIS 6790 (D. Utah Apr. 20, 2005)	(0,0,0,0,0,0,0,0,0,1)
United States v. Johnson, Criminal Docket No. 5:04CR65-1-V, 2006 U.S. Dist. LEXIS 10524 (W.D.N.C. Feb. 21, 2006)	(0,0,1,1,0,0,0,0,0,0)
United States v. Johnson, No. CR05-4063-MWB, 2005 U.S. Dist. LEXIS 22451 (N.D. Iowa Sept. 22, 2005)	(0,1,0,0,0,0,0,0,–1,–1)
United States v. Johnson, No. IP-03-43-CR-01, 2005 U.S. Dist. LEXIS 12805 (S.D. Ind. Jun. 3, 2005)	(1,0,0,1,1,0,0,1,0,1)
United States v. Jones, Crim. No. 05-84-P-S, 2006 U.S. Dist. LEXIS 13048 (D. Me. Mar. 24, 2006)	(0,0,1,0,0,0,0,1,–1,–1)
United States v. Jones, No. 05-00422-01-CR-W-DW, 2006 U.S. Dist. LEXIS 26688 (W.D. Mo. Mar. 28, 2006)	(0,0,1,0,0,0,0,1,–1,–1)

Case	Coding Values
United States v. Keough, No. CR05-3003-MWB, 2005 U.S. Dist. LEXIS 15112 (N.D. Iowa Jul. 15, 2005)	(1,1,0,0,1,0,1,0,–1,–1)
United States v. Kurtz, No. 04-CR-155E - 01, 2006 U.S. Dist. LEXIS 3228 (W.D.N.Y. Jan. 12, 2006)	(0,1,1,0,1,0,0,0,–1,–1)
United States v. Lasso, No. 03 Cr. 0528 (RWS), 2004 U.S. Dist. LEXIS 3897 (S.D.N.Y. Mar. 10, 2004)	(0,0,0,0,0,0,0,0,1,1)
United States v. Lately, No. 04-CR-80292, 2005 U.S. Dist. LEXIS 35580 (E.D. Mich. Dec. 13, 2005)	(0,1,0,0,0,0,0,1,0,0)
United States v. Leyva, Civil Action No. SA-05-CR-500-XR, 2006 U.S. Dist. LEXIS 8000 (W.D. Tex. Feb. 17, 2006)	(0,0,0,1,0,0,0,0,0,0)
United States v. Lockett, Criminal No. 03-421, 2004 U.S. Dist. LEXIS 517 (E.D. Pa. filed Jan. 13, 2004)	(0,0,0,0,0,0,0,0,0,0)
United States v. Lopez, No. 05-CR-82, 2005 U.S. Dist. LEXIS 28991 (E.D. Wis. Nov. 15, 2005)	(0,0,0,0,1,0,0,0,–1,–1)
United States v. Lowery, Criminal Action No. 04-757, 2005 U.S. Dist. LEXIS 28146 (E.D. Pa. Nov. 15, 2005)	(0,0,0,0,0,0,0,0,0,1)
United States v. Lyons, No. CR206-04, 2006 U.S. Dist. LEXIS 26995 (S.D. Ga. May 8, 2006)	(0,0,0,0,0,0,0,0,–1,–1)
United States v. Mabe, 330 F. Supp. 2d 1234 (D. Utah 2004)	(1,1,0,0,1,0,1,0,1,0)
United States v. Mackey, No. SA-04-CR-0191 (1)-RF, 2005 U.S. Dist. LEXIS 8470 (W.D. Tex. May 9, 2005)	(1,0,1,1,1,0,0,0,1,0)
United States v. Martin, No. NA 02-23-CR-01 B-F, 2004 U.S. Dist. LEXIS 3655 (S.D. Ind. Feb. 27, 2004)	(0,1,1,0,1,0,0,1,0,1)
United States v. Martinez, 356 F. Supp. 2d 856 (M.D. Tenn. 2005)	(1,1,0,1,0,0,0,0,0,0)
United States v. Mathis, 377 F. Supp. 2d 640 (M.D. Tenn. 2005)	(0,1,0,0,1,0,0,0,0,0)
United States v. Matos, No. 02-CR-0245E, 2004 U.S. Dist. LEXIS 13826 (W.D.N.Y. Jun. 16, 2004)	(0,0,0,0,0,1,0,0,–1,–1)
United States v. Matthews, Cr. No. 05-10073-NG, 2006 U.S. Dist. LEXIS 7701 (D. Mass. Mar. 1, 2006)	(1,1,0,1,1,0,0,0,1,0)
United States v. McCarter, No. 05-CR-181-C, 2006 U.S. Dist. LEXIS 6705 (W.D. Wis. Feb. 17, 2006)	(0,0,0,0,0,0,0,0,–1,–1)
United States v. Medina, 301 F. Supp. 2d 322 (S.D.N.Y. Feb. 10, 2004)	(0,0,0,0,0,1,0,0,1,0)
United States v. Medina, No. SA-04-CR-163-RF, 2004 U.S. Dist. LEXIS 22710 (W.D. Tex. Oct. 5, 2004)	(1,0,1,0,0,1,0,0,1,0)
United States v. Memoli, 333 F. Supp. 2d 233 (S.D.N.Y. 2004)	(0,0,1,0,1,0,1,0,1,1)
United States v. Miranda, No. 04-40088-01-RDR, 2004 U.S. Dist. LEXIS 26969 (D. Kan. Dec. 14, 2004)	(0,0,0,0,0,1,0,0,0,0)
United States v. Molina, 351 F. Supp. 2d 1164 (D. Kan. 2004)	(0,0,0,0,0,0,0,0,0,0)

Case	Coding Values
United States v. Molson, No. 8:05CR318, 2006 U.S. Dist. LEXIS 2292 (D. Neb. Jan. 4, 2006)	(0,0,0,0,0,0,0,0,–1,–1)
United States v. Monette, No. 06-Cr-011, 2006 U.S. Dist. LEXIS 31231 (E.D. Wis. Apr. 6, 2006)	(0,0,1,0,1,0,0,0,–1,–1)
United States v. Morgan, No. 3:04cr261, 2005 U.S. Dist. LEXIS 26594 (W.D.N.C. Oct. 19, 2005)	(0,0,0,0,1,0,1,0,0,1)
United States v. Munoz-Villalba, Criminal No. 1:05-CR-248, 2005 U.S. Dist. LEXIS 28974 (M.D. Pa. Nov. 15, 2005)	(0,0,0,0,0,1,0,0,0,1)
United States v. Nelsen, Criminal No. 05-98-P-S, 2006 U.S. Dist. LEXIS 12610 (D. Me. Mar. 22, 2006)	(0,1,0,0,1,0,0,0,–1,–1)
United States v. Nunez-Bustillos, No. 05-40045-01-RDR, 2005 U.S. Dist. LEXIS 24343 (D. Kan. Aug. 11, 2005)	(0,1,0,0,0,1,0,0,0,0)
United States v. Olivas, 351 F. Supp. 2d 1180 (D. Kan. 2004)	(0,0,0,0,0,0,0,0,0,0)
United States v. Paracha, No. 03 Cr. 1197 (SHS), 2004 U.S. Dist. LEXIS 16892 (S.D.N.Y. Aug. 24, 2004)	(0,1,1,0,1,0,0,0,1,0)
United States v. Perea, 374 F. Supp. 2d 961 (D.N.M. 2005)	(0,0,1,0,0,0,0,1,0,1)
United States v. Punzo, No. 03 CR 1075, 2004 U.S. Dist. LEXIS 20684 (N.D. Ill. Oct. 18, 2004)	(0,1,0,1,1,1,0,1,1,0)
United States v. Renken, No. 02 CR 1099, 2004 U.S. Dist. LEXIS 21707 (N.D. Ill. Oct. 27, 2004)	(0,1,0,0,1,0,0,1,1,0)
United States v. Rios-Ramirez, Criminal No. 04-0031(HL), 2004 U.S. Dist. LEXIS 26573 (D.P.R. Nov. 10, 2004)	(1,1,1,1,1,0,0,1,–1,–1)
United States v. Roberts, No. 03-20041-BC, 2004 U.S. Dist. LEXIS 12018 (E.D. Mich. May 17, 2004)	(1,0,0,0,0,0,0,0,1,0)
United States v. Robles, 313 F. Supp. 2d 1206 (D. Utah 2004)	(0,0,0,0,0,1,0,0,1,1)
United States v. Rodriguez-Davila, Criminal Case No. 05-91-KKC, 2006 U.S. Dist. LEXIS 13436 (E.D. Ky. Mar. 21, 2006)	(0,0,0,0,0,0,0,0,–1,–1)
United States v. Rodriguez-Solis, No. 8:05CR199, 2006 U.S. Dist. LEXIS 6164 (D. Neb. Jan. 27, 2006)	(1,0,1,1,1,1,0,0,–1,–1)
United States v. Romero, No. 05-10080-01-WEB, 2005 U.S. Dist. LEXIS 26000 (D. Kan. Oct. 19, 2005)	(0,0,1,0,1,0,0,1,1,0)
United States v. Rucker, 348 F. Supp. 2d 981 (S.D. Ind. 2004)	(0,1,1,0,1,0,0,0,0,1)
United States v. Saenz, No. 4:05CR595HEA(MLM), 2006 U.S. Dist. LEXIS 239 (E.D. Mo. Jan. 5, 2006)	(0,0,0,0,0,0,0,0,–1,–1)
United States v. Samuels, No. 04 Cr. 649 (RPP), 2004 U.S. Dist. LEXIS 24677 (S.D.N.Y. Dec. 7, 2004)	(0,0,0,0,0,0,0,0,0,1)
United States v. Sanchez-Vela, No. 05-40032-02-JAR, 2005 U.S. Dist. LEXIS 28236 (D. Kan. Nov. 16, 2005)	(0,0,0,0,0,0,0,0,0,1)
United States v. Santos, 340 F. Supp. 2d 527 (D.N.J. 2004)	(1,1,0,1,1,0,1,1,1,1)
United States v. Shi Ming Fang, No. EP-04-CR-2753-PRM, 2005 U.S. Dist. LEXIS 11612 (W.D. Tex. May 20, 2005)	(0,1,0,0,1,1,0,0,0,0)
United States v. Slater, 351 F. Supp. 2d 1214 (D. Utah 2005)	(0,0,0,0,0,0,0,0,1,1)
United States v. Smith, No. 2:03 CR 97 PS, 2004 U.S. Dist. LEXIS 17943 (N.D. Ind. Apr. 27, 2004)	(0,1,0,0,1,0,0,0,0,1)
United States v. Smith, No. 4:03-cr-305, 2004 U.S. Dist. LEXIS 5652 (S.D. Iowa Apr. 1, 2004)	(1,1,0,1,0,0,0,0,1,0)
United States v. Sparks, No. 03 Cr. 269 (DAB), 2004 U.S. Dist. LEXIS 2278 (S.D.N.Y. Feb. 13, 2004)	(0,0,1,0,0,0,0,0,1,1)

Case	Coding Values
United States v. St. Claire, No. S1 04 Cr. 147 (LTS), 2005 U.S. Dist. LEXIS 5262 (S.D.N.Y. Mar. 29, 2005)	(0,0,1,0,1,0,0,0,1,0)
United States v. Stephens, No. 1:05-cr-87, 2006 U.S. Dist. LEXIS 8969 (E.D. Tenn. filed Feb. 13, 2006)	(0,1,1,0,1,0,0,1,1,1)
United States v. Stewart, 353 F. Supp. 2d 703 (E.D. La. 2004)	(0,1,0,1,1,0,0,1,1,0)
United States v. Taitano, Criminal No. 04-00017, 2004 U.S. Dist. LEXIS 19351 (D. N. Mar. I. Sept. 24, 2004)	(0,1,0,0,1,0,0,1,0,0)
United States v. Taylor, No. 3:05CR297, 2006 U.S. Dist. LEXIS 5544 (W.D.N.C. Feb. 1, 2006)	(0,0,0,0,1,0,0,0,–1,–1)
United States v. Tejada, No. 04 Cr. 1174 (LMM), 2005 U.S. Dist. LEXIS 24398 (S.D.N.Y. Oct. 20, 2005)	(0,1,0,0,1,1,0,0,0,0)
United States v. Torres-Castro, 374 F. Supp. 2d 994 (D.N.M. 2005)	(0,0,0,0,1,0,0,0,1,0)
United States v. Tuan Phu Pham, No. 2:04CR00287 DS, 2005 U.S. Dist. LEXIS 8497 (D. Utah Apr. 28, 2005)	(1,1,1,0,1,0,1,1,0,0)
United States v. Tyson, 360 F. Supp. 2d 798 (E.D. Va. 2005)	(0,1,1,0,1,0,0,0,0,0)
United States v. Urrea-Leal, 322 F. Supp. 2d 1213 (D. Kan. 2004)	(0,0,0,0,0,1,0,0,0,1)
United States v. Valdez, No. 2:04-CR-97 PS, 2005 U.S. Dist. LEXIS 1569 (N.D. Ind. Jan. 27, 2005)	(0,0,0,0,1,1,0,0,0,1)
United States v. Velazco-Durazo, 372 F. Supp. 2d 520 (D. Ariz. 2005)	(1,0,0,1,1,0,0,0,0,0)
United States v. Vincente-Hernandez, No. 4:04 CR 578 ERW DDN, 2004 U.S. Dist. LEXIS 26722 (E.D. Mo. Nov. 29, 2004)	(0,0,0,0,0,0,0,0,–1,–1)
United States v. Wendel, No. CR05-3020-MWB, 2005 U.S. Dist. LEXIS 23364 (N.D. Iowa Oct. 6, 2005)	(0,1,1,0,1,0,0,0,–1,–1)
United States v. Wheeler, Criminal Action No. SA-03-CR-0391-XR, 2004 U.S. Dist. LEXIS 1972 (W.D. Tex. Feb. 4, 2004)	(0,1,0,0,1,0,0,0,0,0)
United States v. White, 339 F. Supp. 2d 1165 (D. Kan. 2004)	(0,0,0,0,0,0,1,0,0,1)
United States v. Whitehead, 428 F. Supp. 2d 447 (E.D. Va. 2006)	(0,0,0,0,0,0,1,0,1,1)
United States v. Williams, 346 F. Supp. 2d 934 (E.D. Mich. 2004)	(0,0,0,0,0,0,0,0,0,0)
United States v. Williams, Criminal No. 05-125-01, 2005 U.S. Dist. LEXIS 7947 (E.D. Pa. May 3, 2005)	(1,1,0,1,1,0,1,0,1,0)
United States v. Williams, No. 03-CR-95 (JMR/FLN), 2004 U.S. Dist. LEXIS 16824 (D. Minn. Apr. 21, 2004)	(0,1,0,0,0,0,0,0,0,1)
United States v. Wise, No. 4:05-CR-170, 2006 U.S. Dist. LEXIS 8743 (S.D. Iowa Mar. 2, 2006)	(1,0,1,1,0,0,0,0,0,0)
United States v. Wogan, 356 F. Supp. 2d 462 (M.D. Pa. 2005)	(1,1,0,1,0,0,0,0,0,0)