

**MORE THAN A PLAZA
DC JUSTICE LAB + STAAND**

ELIMINATE CONSENT SEARCHES

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Eliminate Consent Searches

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

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

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

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

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

Race, “Consent,” and Police Brutality

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

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

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

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

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

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

Consent Searches and Harassment

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

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

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

Warnings will Not Suffice

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

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

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

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

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

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

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

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

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

– The District of Columbia Court of Appeals³⁵

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

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



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

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

References

¹ Bill 23-0825.

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

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

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

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

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

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

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

⁷ For an example of a "consent" search that will not be counted in the statistics, consider the video of a police officer in a cruiser repeatedly requesting that a young man lift his shirt even after the individual said he did not consent to searches: @Soup Visions, *White Washington Dc Police Harassing Me Again*, YOUTUBE (Nov. 15, 2017), available at <https://www.youtube.com/watch?feature=youtu.be&v=cghtBX19cJA>.

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

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

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

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- ¹⁰ Rev blog Political Transcripts, *Rayshard Brooks Shooting Police Body Cam Footage Transcript*, REV (June 14, 2020), available at <https://www.rev.com/blog/transcripts/rayshard-brooks-death-police-body-cam-footage-transcript>.
- ¹¹ Sophia Bollag and Terri Langford, *Video: DPS Officer Became Enraged Over Cigarette*, THE TEXAS TRIBUNE (July 22, 2015), available at www.texastribune.org/2015/07/21/video-officer-became-enraged-bland-over-cigarette/.
- ¹² Kia Gregory, *How Videos of Police Brutality Traumatize African Americans and Undermine the Search for Justice*, THE NEW REPUBLIC (February 13, 2019), available at www.newrepublic.com/article/153103/videos-police-brutality-traumatize-african-americans-undermine-search-justice.
- ¹³ Evelyn M. Simien, *Race, Gender, and Linked Fate*, *Journal of Black Studies*, Vol. 35, No. 5, 529 (2005).
- ¹⁴ Frances Robles and Julie Bosman, *Autopsy Shows Michael Brown Was Struck at Least 6 Times*, NEW YORK TIMES (August 18, 2014).
- ¹⁵ Bridgette Baldwin, *Black, White, and Blue: Bias, Profiling, and Policing in the Age of Black Lives Matter*, 40 *Western New England Law Rev.*, 431, 432 (2018).
- ¹⁶ See, e.g., Khama Ennis, *In black families like mine, the race talk comes early and it's painful. And it's not optional.*, WASHINGTON POST (June 5, 2020).
- ¹⁷ Rhea Mahbubani, *As police violence comes under more scrutiny, Black parents say they're still giving their kids 'The Talk' about dealing with cops*, INSIDER (June 27, 2020).
- ¹⁸ "Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data," ACLU D.C. June 16, 2020, www.acludc.org/sites/default/files/2020_06_15_aclu_stops_report_final.pdf (data from July 22, 2019 through December 31, 2019).
- ¹⁹ Police Complaints Board Office of Police Complaints, *PCB Policy Report #17-5: Consent Search Procedures* (2017) available at <https://policecomplaints.dc.gov/node/1276396>.
- ²⁰ *Id.* The *PCB Policy Report* also addresses Body Worn Cameras (BWC) and consent:

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

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

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

²² Bill 23-0825.

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

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

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

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

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

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

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

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

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

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

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

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

³⁴ *Id.*

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

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

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

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

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

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

Appendix: Proposed Amendments

SUBTITLE G. LIMITATIONS ON CONSENT SEARCHES

Sec. 107. Limitations on consent searches.

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