Two-Stepping Around Reasonable Suspicion: How *Shaw v. Jones* Remedies the Present Battle but Fails to Win the War on Fourth Amendment Abuses in Kansas

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Since 2014, the Kansas Highway Patrol has used the "Kansas Two-Step" to combat the so-called "war on drugs." To effectuate this strategy, troopers primarily stopped travelers from states which have legalized marijuana. Once a trooper initiates a legal pre-textual stop on an individual traveling through Kansas, they must have reasonable suspicion before searching the vehicle. This "two-step" strategy plays on a show of authority by officers unreasonably extending traffic stops to coerce consent to search a vehicle. The officer begins by telling a detained individual an ambiguous statement that may signal they are free to go, but after a momentary pause re-engages the motorist to attempt to coerce consent to search. The question before the Kansas district court was: does a reasonable person feel free to leave after the conclusion of a traffic stop, and does that person's continued interaction with police suffice as a consensual encounter? The district court said no and found the Two-Step tactic unconstitutional, violating both the Fourth Amendment and 42 U.S.C § 1983. Yet, the court failed to provide a mechanism to prevent the possibility of future Fourth Amendment abuses on a nationwide scale. To counter this problem, a bright line rule requiring officers to inform motorists of their right to end the encounter is needed. This prerequisite helps ensure officers inform unaware citizens of their rights and then they can make the informed choice of whether to continue the encounter. This bright line rule would help officers to understand their Fourth Amendment obligations.

I. INTRODUCTION

Shaw v. Jones[1] has the potential to usher in a new step in criminal procedure reforms both in Kansas and nationwide. The United States District Court for the District of Kansas's holding that the Kansas "Two-

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1. Shaw v. Jones, No. 19-1343-KHV, 2023 WL 4684682 (D. Kan. July 21, 2023).

Step" tactic violated motorists' Fourth Amendment rights provides only a temporary sigh of relief from police intrusion.[2] *Shaw* presents an opportunity to cement equitable application of a right to know that a motorist can refuse a search of their car or end the encounter with law enforcement officers after a completed traffic stop.[3] This can act as a deterrent to help prevent further Fourth Amendment abuses for Kansans and Americans alike. Currently, the Supreme Court does not require that that motorists are informed of their right to refuse consent after a traffic stop.[4] Therefore, motorists, many of whom are often unaware of such a right, often consent to searches.[5] Tactics like the Two-Step, which involve providing nominal ambiguous statements,[6] have the possibility to make a reasonable person question whether they are free to go.[7] Moreover, officers who use this tactic to prevent drug trafficking can have a degrading impact on those stopped.[8] A bright line rule requiring motorists to be informed of their right to refuse consent to a further police encounter would help remedy this Fourth Amendment overreach by officers.

II. BACKGROUND

A. The Balance Between Pretextual Traffic Stops & Consent Searches

The United States Constitution protects citizens and their effects from "unreasonable searches and seizures."[9] In *Mapp v. Ohio*,[10] this right was incorporated against the states. In order for a police officer to search a person's property in accordance with the Fourth Amendment, the officer must have either a probable cause, or a reasonable ground for belief of guilt

2. *Id.* at *36.

3. *See generally id.*

4. *See* United States v. Mendenhall, 446 U.S. 544, 558 (1980) (noting that no Constitutional requirement exists for the proof of knowledge of a right to refuse consent).

5. Schneckloth v. Bustamante, 412 U.S. 218, 227 (1973) (announcing that consent must not be the byproduct of express or implied coercion).

6. *Contra Shaw*, 2023 WL 4684682, at *24. These statements included "have a good day," "take care," or "have a safe trip." *Id.* These statements might sound like the end of a conversation. *Id.* However, the motorists never felt as if they were free to go. *See id.* at *6–20.

7. *Id.* at *25–27 (holding that the evidence in this case proved this encounter was not consensual). Plaintiffs like Dunn felt extremely uncomfortable and never felt free to leave. *See id.*

8. Press Release, ACLU of Kansas, In Victory for Civil Rights, Federal Judge Orders Kansas Highway Patrol to Stop the Two-Step and Other Unconstitutional Practices (July 21, 2023), https://www.aclukansas.org/en/press-releases/victory-civil-rights-federal-judge-orders-kansas-highway-patrol-stop-two-step-and (highlighting how the Two-Step procedure assumes motorists to be drug traffickers and may also have negative stereotypical effects on marginalized communities).

9. U.S. CONST. amend. IV.

10. Mapp v. Ohio, 367 U.S. 643 (1961). Incorporation means the States cannot violate these federal rights. Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 253 (1982). This extends to police officers acting as agents of the state. Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns that Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1255 (2008).

and that guilt is particularized with respect to the person to be searched or seized.[11] The predominant focus of *Shaw* asks whether the "short" break in time between the end of a pretextual traffic stop and the consent to search constitutes the motorist's knowingly and voluntary consent.[12]

i. Searches of Automobiles

The Supreme Court of the United States has made it clear officers may use traffic violations to make pretextual stops.[13] The Court outlined in *Whren v. United States*[14] that the officer's state of mind does not invalidate their actions as long as the circumstances surrounding the stop are objectively legal.[15] Justice Scalia noted that an automobile stop must also satisfy the constitutional mandates of the Fourth Amendment.[16] Yet, the Court justified pretextual stops when a driver violates applicable traffic regulations.[17] Since *Whren*, traffic codes have become invaluable tools in the war against drugs, as they provide police officers with broad power to engage in pretextual stops to develop a reasonable suspicion to further search the motorist's car.[18]

Nineteen years after *Whren*, the Court added checks to prevent unfettered pretextual policing by limiting the tolerable duration of a stop and requiring officers obtain the motorists' consent to extend the stop's

11. *Mapp*, 367 U.S. at 646 n.4 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (quoting U.S. CONST. amend. IV)); Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("[T]he 'substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' . . . and that the belief of guilt must be particularized with respect to the person to be searched or seized." (internal citations omitted) (first quoting Brinegar v. United States, 338 U.S. 160, 175 (1949); and then citing Ybarra v. Illinois, 444 U.S. 85, 91 (1979))).

12. *Shaw*, 2023 WL 4684682, at *25.

13. Whren v. United States, 517 U.S. 806, 815–19 (1996).

14. *Id.*

15. *Id.* at 813; *see also* Scott v. United States, 436 U.S. 128, 136–38 (1978) ("Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.").

16. *Whren*, 517 U.S. at 810 (citing Delaware v. Prouse, 440 U.S. 648, 659 (1979)).

17. *Id.* at 817 (citing *Prouse*, 440 U.S. at 661). This constitutes probable cause for the officer to engage in a search of the car. *Id.* at 819. Justice Scalia was writing for a unanimous court. *Id.* at 808.

18. *See* David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545, 557–58 (1997) ("The average driver cannot go three blocks without violating some traffic regulation. Reading the codes, it is hard to disagree; the question is how anyone could get *as far as three blocks* without violating the law."). *See also* Max Carter-Oberstone, *America's Traffic Laws Give Police Way Too Much Power*, TIME (May 11, 2022, 4:45 PM), https://time.com/6175852/pretextual-traffic-stops/ ("The offenses that populate our traffic codes are so numerous and sprawling that the average driver can scarcely hope to spend a few minutes behind the wheel without committing an infraction.").

duration.[19] The majority opinion in *Rodriguez*,[20] written by Justice Ginsburg, noted that an officer's authority for the seizure terminates when tasks tied to the traffic infraction end or when they reasonably should have been completed.[21] Similarly, Justice Ginsburg distinguished the interests in highway or officer safety[22] as different in kind than the endeavor to detect crime in drug trafficking.[23] The difference being that on-scene investigations into other crimes, like drug trafficking, fail to rise to the same level of burdensome precautions that justify officer safety.[24]

ii. Consent as an Exception to a Warrant

The Supreme Court provided an exception to the warrant requirement by allowing officers to search a vehicle without a warrant if there is probable cause to do so, or the motorist consents to the search.[25] To be valid, the motorist's consent must be "voluntarily given."[26] The Court in *Schneckloth v. Bustamonte*[27] explained that the government bears this burden under the totality of the circumstances. Additionally, a motorist's consent may not involve implied force or coercion.[28] The Court concluded that there is no talismanic definition to voluntariness.[29]

However, the Court updated this constraint in *United States v. Mendenhall*,[30] describing that consent must be given "freely and voluntary."[31] Justice Stewart explained that the traveler's actions in this case gave the clearest indicator of voluntariness.[32] The Court also highlighted that no threats nor any show of force was used to persuade the

19. Rodriguez v. United States, 575 U.S. 348, 354 (2015) ("[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' . . . Because addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate th[at] purpose.'" (internal citations omitted)). Absent additional reasonable suspicion, an officer must allow the seized person to depart once the purpose of the stop has concluded. *Id.*

20. *Id.*

21. *See id.* at 361 (Kennedy, J., dissenting) ("The majority's rule thus imposes a one-way ratchet for constitutional protection linked to the characteristics of the individual officer conducting the stop."); United States v. Sharpe, 470 U.S. 675, 686 (1985).

22. *Rodriguez*, 575 U.S. at 357. The Government tried to argue that by completing tasks in an expeditious manner that somehow it gives them bonus time to pursue an unrelated criminal investigation. *Id.* Nonetheless, the Court found this argument to be unpersuasive due to its tension with illegally prolonging the stop. *Id.*

23. *Contra* Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977).

24. *Rodriguez*, 575 U.S. at 356.

25. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

26. *Id.* at 248.

27. *Id.* at 226.

28. *Id.* at 227.

29. *Id.* at 223–27 (highlighting that voluntariness be viewed by a multitude of factors looking at whether it was made willingly by the maker of the statement).

30. United States v. Mendenhall, 446 U.S. 544 (1980).

31. *Id.* at 559.

32. *Id.* (explaining that the respondent went with Drug Enforcement Agency ("DEA") agents voluntarily in a spirit of cooperation).

traveler to go with the officers.[33] Consequentially, the Court declined to require that proof of knowledge of the right to refuse the search as a *sine qua non* to show one's voluntary consent.[34]

Three years later, the Court re-examined this standard in *Florida v. Royer*.[35] The Court again adamantly highlighted that the burden to prove consent required a person to give it freely and voluntarily.[36] Nevertheless, that burden could not be satisfied by a "mere submission to a claim of lawful authority."[37] Justice White distinguished submission to authority from common interactions between the police and citizens.[38] Neither officers approaching citizens in public spaces and asking them questions, nor officers simply identifying themselves to citizens would constitute a Fourth Amendment violation.[39] Further, Justice White explained that a person approached by police may choose to decline to answer an officer's questions, and such refusal fails to warrant a temporary detention of the individual.[40] The Court also noted that no type of "litmus-paper test" existed to determine whether an encounter became coerced rather than consensual.[41] Nonetheless, the Court found that the consent relied upon by the officers remained ineffective to justify the search of Royer because his consent "was tainted by the illegality and was ineffective to justify the search."[42]

The Court shortly updated the standards from *Mendenhall* and *Royer* several years later in *Florida v. Bostick*,[43] deciding that an encounter is not consensual unless a reasonable person would feel free to disregard the police and go about his or her own business.[44] Justice O'Connor rationalized that a seizure does not occur when an officer approaches an individual and asks them mere questions.[45] Her premise centered around

33. *Id.* at 558.

34. *Id.* at 558–59. A *sine qua non* is Latin for an essential element, which the Supreme Court thought was inappropriate to use regarding the knowledge of a right to refuse consent in determining what constituted a consensual encounter with police. *Id.*

35. Florida v. Royer, 460 U.S. 491 (1983).

36. *Id.* at 497.

37. *Id.* Justice White explained that "the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Id.*

38. *Id.* at 497–98 ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.").

39. *Id.*

40. *Id.* at 498.

41. *Id.* at 506–07. The Court highlighted that there could be an endless amount of distinct factual scenarios which would vary which made it impossible to simplify a rule into a single sentence or paragraph. *Id.*

42. *Id.* at 507–08.

43. Florida v. Bostick, 501 U.S. 429 (1991).

44. *Id.* at 434 (citing California v. Hodari D., 499 U.S. 621, 628 (1991)).

45. *Id.*; *see also Royer*, 460 U.S. at 497.

the guarantee that citizens do not forfeit their constitutional rights when they face coercion by officers, and they would rather choose to leave than stay in an encounter with the police.[46] Nonetheless, the Court concluded that the actions taken by officers in this context did not amount to a Fourth Amendment violation because a reasonable person in Bostick's situation would have felt free to decline the encounter with officers.[47]

B. Stopping the Supposed I-70 Drug Corridor

To effectively administer a successful Two-Step, officers attempt to elicit consent by concluding the traffic stop and somehow signal the driver that they may go.[48] Yet, in the same breath, these officers immediately re-engage the driver in a "separate" conversation to develop reasonable suspicion of criminal activity.[49] The most concerning part of the Two-Step is that officers may have just chosen to search a vehicle and claim reasonable suspicion existed anyways if the driver did not consent to the search when re-engaged.[50]

The impetus behind the "Kansas Two-Step" was a desire to win the "war on drugs" after states adjacent to Kansas legalized recreational marijuana.[51] In 2014, the Kansas Highway Patrol ("KHP") implemented this two-step tactic to initially target individuals traveling from Colorado, a state with legalized marijuana, through Kansas along Interstate 70 East.[52] As such, a driver's travel plans were considered by officers and could give rise to reasonable suspicion for drug trafficking or possession.[53] Once the Kansas Two-Step was implemented, the amount of out-of-state drivers stopped by KHP officers increased dramatically compared to that of Kansas

46. *Bostick*, 501 U.S. at 438 ("Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse."). However, one should ask if citizens even know they have the ability to deny consent when engaging with an officer.

47. *Id.* at 439. The Court noted that a per se rule singling out random bus searches remains unnecessary since an individual could decline a police encounter equally on planes, trains, and city streets all the same. *Id.* at 439–40.

48. Shaw v. Jones, No. 19-1343-KHV, 2023 WL 4684682, at *2 (D. Kan. July 21, 2023).

49. *Id.*

50. *Id.* ("[T]he trooper has a fallback position: search the vehicle anyway and claim that he had reasonable suspicion all along.")

51. *Id.* at *3. Under this strategy, travelers coming both to and from states like Missouri and Colorado on I-70 were considered as coming from "drug source" states. *Id.*

52. *Id.* at *1. Kansas remains one of the states in the majority having not legalized marijuana under state law. *Id.*

53. *Id.* The officers usually consider out-of-state travel origin and destination as factors. *Id.* at *3.

drivers.[54] Specifically, KHP troopers stopped over seventy percent more out-of-state drivers than in-state drivers, over a two year period.[55]

As a result of this tactic, several lawsuits were filed against the officers administering the Two-Step and KHP Superintendent Herman Jones, alleging that Jones, in his official capacity as a state official, violated motorists Fourth Amendment rights by maintaining a practice which illegally detained drivers based on state residency.[56] Previously, the Tenth Circuit made attempts to curb the KHP from using the motorist's "drug source state" as justification for reasonable suspicion in a separate suit.[57] In *Shaw*, the KHP argued that the expectation for troopers to ignore drivers traveling from states that have legalized marijuana remained unreasonable.[58]

III. THE COURT'S DECISION

After hearing argument by both the Plaintiffs and the KHP, the District Court of Kansas found in favor of Plaintiffs, holding that the Two-Step tactic established an impermissible violation of motorists' Fourth Amendment rights.[59] Although the court agreed that the KHP officers used legal means to engage in the pretextual stop, the court reprimanded the KHP for lacking reasonable suspicion and voluntary consent in the vast majority

54. *Id.* at *2 n.11 ("[T]he record evidence is scarce, but it indicates that from 2016 to 2021, the [Kansas Highway Patrol "KHP")] conducted between 124,387 and 211,531 traffic stops per year, and only recovered contraband in 0.16 per cent to 0.28 per cent of them. Further, the KHP presented no evidence on the volume of innocent people who have been subjected to pretextual traffic stops or unlawful searches, or the percentage of traffic stops that were too pretextual to warrant a traffic warning, let alone a traffic citation.").

55. *Id.* at *5 ("From January of 2018 to November of 2020, KHP troopers stopped 70 per cent more out-of-state drivers than would be expected if KHP troopers stopped in-state and out-of-state drivers at the same rate."). The analysis obtained in order to determine the discrepancy was provided by Princeton professor Jonathan Mummolo who also provides statistical consulting services through Knox & Mummolo LLC. *Id.* His data illustrated that the seventy percent discrepancy accounted for around 50,000 traffic stops made on out-of-state residents. *Id.* The district court found this highly persuasive in discerning that the KHP's justification of speeding habits could not statistically legitimize their claims. *Id.*

56. *Id.* at *6–20. The court consolidated several of these lawsuits into one action and added Superintendent Jones as a defendant due to the nature of his position as the ultimate policymaker for the agency. *See id.* at *4–5. Similarly, two of the claims against individual officers became incorporated as part of the record under the stipulation of both parties. *Id.* at *5.

57. Vasquez v. Lewis, 834 F.3d 1132, 1137–38 (10th Cir. 2016). "Drug source states" refer to those jurisdictions which have legalized marijuana which officers were not allowed to use as a factor under reasonable suspicion. *See id.* Originally, the KHP sent an email informing troopers of *Vasquez* but declined to make policy changes until 2020 which never changed any of the policies until this current litigation. *Shaw*, 2023 WL 4684682, at *21. In *Vasquez*, officers primarily used the license plates of individuals from "drug source states" to justify reasonable suspicion under the totality of circumstances. *Vasquez*, 834 F.3d at 1136.

58. *Shaw*, 2023 WL 4684682, at *21.

59. *Id.* at *36.

of their stops.[60] Ultimately, the court held that Two-Step intentionally pressured drivers into coercive situations for the purposes of developing reasonable suspicion where officers had none.[61]

To justify the District Court of Kansas's ruling, Judge Vratil's analysis considered the totality of circumstances behind each plaintiffs' encounter with a KHP trooper and the total data involving searches and seizures since the implementation of the Two-Step tactic.[62] Out of all the plaintiffs in this litigation, only one encounter with officers had the requisite reasonable suspicion warranting a search of their vehicle.[63] The rest of the officers involved all used the Two-Step tactic as a show of authority in order to try and develop reasonable suspicion based on out-of-state travel where none existed.[64]

The most frightening thing discovered within the court's analysis highlighted the KHP's willingness to cast aside constitutional protections even when they lacked reasonable suspicion.[65] To make matters even worse, the overall data regarding stops in correlation to successful drug interdiction was insufficient to continue justifying the use of the "Two-Step."[66] The court also noted that some officers who violated the constitutional rights of motorists received only a slap on the wrist as punishment.[67] Therefore, the court concluded Superintendent Jones and the KHP impermissibly violated the Fourth Amendment because of their continued use of the "Two-Step" tactic.[68]

IV. COMMENTARY

Judge Vratil determined that granting declaratory relief would settle the controversy in this case.[69] Nonetheless it is clear that the fight to prevent officers from eroding motorists' Fourth Amendment rights remains

60. *Id.* at *6–20; *see also* Rodriguez v. United States, 575 U.S. 348, 354 (2015). Each pretextual stop in *Shaw* was valid, but only one had enough evidence to warrant reasonable suspicion to conduct a search. *Shaw*, 2023 WL 4684682, at *20.

61. *Shaw*, 2023 WL 4684682, at *28.

62. *Id.* The litigation included seven plaintiffs. *Id.* at *6–20.

63. *Id.* at *20 (noting that Lieutenant Proffitt was the only officer whose situation analyzed under a totality of the circumstances would satisfy the reasonable suspicion standard).

64. *Id.* at *25. *See* Vasquez v. Lewis, 834 F.3d 1132, 1137–38 (10th Cir. 2016) (The fact that a driver is traveling "from a drug source city" or state, such as Colorado, "does little to add to the overall calculus of suspicion." (quoting United States v. Guerrero, 472 F.3d 784, 787–88 (10th Cir. 2007))).

65. *Shaw*, 2023 WL 4684682, at *7 (noting how officers like Schulte may possibly disregard reasonable suspicion guidelines to search a car while claiming the opposite).

66. *Id.* at *2 n.11. From 2016 to 2021 the KHP only recovered contraband in 0.16 to 0.28 percent of all traffic stops. *Id.*

67. *Id.* at *13 (highlighting Trooper McMillan's disregard of motorist Bosire's constitutional rights and how the KHP did little to nothing to punish McMillan).

68. *Id.* at *33.

69. *Id.* at *36.

ongoing. This legal issue is not unique to Kansas.[70] A case currently pending in Bexar County, Texas also illustrates just how law enforcement officers use their authority to overstep the Constitution like in *Shaw*.[71] Here, the officer allegedly pulled the plaintiff over for supposedly drifting too far over into the opposite side of the road.[72] Similarly, Texas allegedly has a policy which uses traffic stops as a means to search motorists vehicles without reasonable suspicion.[73] Similar to *Shaw*, officers assert that after Schott (the plaintiff) was given his "warning," he was then free to go.[74] However, in both cases none of the plaintiffs in their respective states felt free to go.[75] Thus, it becomes evident that these tactics are not exclusive to Kansas.[76]

This situation runs counter to Judge Vratil's opinion and similar themes espoused by Justice O'Connor's in *Bostick*.[77] Motorists supposedly still have the right to refuse consent and do not forfeit this right when dealing with officers trying to elicit consent.[78] However, if motorists do refuse consent and officers still decide that they are going search a vehicle even without reasonable suspicion of any crime, what's next?[79] States support these intrusions under the belief that they supposedly benefit drug interdiction.[80] Furthermore, courts will need to ask the tough public policy question of whether the benefit of hopefully making a drug bust outweighs the psychological damage done to motorists and the physical damage done to their property when there is little evidence of drugs.[81]

Another important feature in *Shaw* finds a glaring similarity to *Bostick*, regarding the officer's show of authority to elicit consent.[82] Using that authority creates a situation where individuals become more likely to forfeit

70. Schott v. Babb, No. 5-23-CV-00706-OLG-RBF, 2023 WL 7201157, at *2 (W.D. Tex. Sept. 27, 2023).

71. *Id.*

72. *Id.*

73. *Id.* at *5.

74. *See Shaw*, 2023 WL 4684682, at *8; *Schott*, 2023 WL 7201157, at *2.

75. *See Shaw*, 2023 WL 4684682, at *8; *Schott*, 2023 WL 7201157, at *2.

76. *Schott*, 2023 WL 7201157, at *5. The complaint alleges that the officer in *Schott* used his authority to coerce consent to search the plaintiff's truck for a crime he had not committed. *Id.*

77. *See* Florida v. Bostick, 501 U.S. 429, 438 (1991) ("Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse."); *Shaw*, 2023 WL 4684682, at *7.

78. *Bostick*, 501 U.S. at 438; *Shaw*, 2023 WL 4684682, at *25 (highlighting that most drivers do not know they have a right to consent, and troopers are happy to exploit their lack of knowledge).

79. This question signifies that the current approach to dealing with these violations provides a remedy too little too late.

80. *See Shaw*, 2023 WL 4684682, at *1. Yet as highlighted previously, the data shows that in ten years this tactic has only resulted in less than one percent of stops resulting in drug busts. *See id.*

81. *See id.* at *33; *Schott*, 2023 WL 7201157, at *3–6. Both cases had plaintiffs who alleged suffering psychological and physical damage to their property.

82. *Bostick*, 501 U.S. at 446 (Marshall, J., dissenting) (illustrating that while no officer brandished a weapon at him, both blocked his only way of leaving and failed to apprise him of his freedom to break off the interview).

their rights to not face the possibility of feared repercussions.[83] Likewise, the respondent in *Florida. v. Royer*,[84] illustrates a great example of how individuals submit to the authority of officers even in what the Court considers a consent encounter.[85] In *Royer*, like in *Shaw*, all defendants acquiesced to the demands of the officer because of their shows of authority.[86] What distinguishes these two scenarios revolves around the court noting that these motorists, as reasonable persons, would not have felt free to go because of how the officers positioned themselves after the traffic stop ended.[87] Justice Marshall also points out that a passenger unadvised of his rights has no reason to know the police cannot hold the refusal to cooperate against him.[88] Yet, those officers who choose to take unethical and unconstitutional actions damage trust in the judicial system and the constitutional rights of citizens through a well-intentioned fishing expedition.

Despite the court's decision in *Shaw*, officers may still find workarounds to reasonable suspicion and may use impermissible means to satisfy drug interdiction policies.[89] Nevertheless, a solution lies within the previous Supreme Court precedent which would help to better protect motorists' Fourth Amendment rights.[90] The first step in this prospective

83. Illya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the "Voluntary" Waiver of Fourth Amendment Rights*, 44 HOW. L.J. 349, 367 (2001) (finding that more than 88 percent of drivers gave consent to search when asked before implementation of a Robinette warning and approximately 92.2 percent gave consent after the warning); *see also* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 2007 (2019); Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250 (1991) (underscoring most people do not have the courage to reject consent to an encounter with an officer).

84. Florida v. Royer, 460 U.S. 491, 501–02 (1983).

85. *Id.* at 498 ("[R]easonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop."). The officers came up to the respondent to ask him some questions, and then inquired if he would follow them to a secluded area of the airport for more questioning. *Id.* The respondent said nothing but followed the officers to the room. *Id.*

86. *See id.* at 501–02 (noting that officers had kept him in a position where a reasonable person would not feel free to leave under their show of official authority); *Shaw*, 2023 WL 4684682, at *6–25. The proximity of the police officers to the cars made a reasonable person feel that they were unable to leave. *Id.*

87. *Shaw*, 2023 WL 4684682, at *6–25 . Each time the officers supposedly ended traffic stops with each individual defendant, it is documented by the Court that each officer set themselves up in a position to immediately re-engage the driver with a new round of questions. *Id.* Thus, a reasonable person would not have felt free deny consent to continuing the encounter with an officer. *See id.* This litigation also provides evidence to counter the assertions by police that these momentary continued interactions are knowingly and voluntarily consensual. *See id.*

88. Florida v. Bostick, 501 U.S. 429, 447 (1991) (Marshall, J., dissenting) ("[A] passenger unadvised of his rights and otherwise unversed in constitutional law *has no reason to know* that the police cannot hold his refusal to cooperate against him.").

89. *Shaw* itself was born as a workaround of criminal procedure to satisfy the goal of drug interdiction. It makes sense that other states may create policies of a similar or different nature to get around reasonable suspicion.

90. *See* United States v. Mendenhall, 446 U.S. 544, 558–59 (1980); *Bostick*, 501 U.S. at 447 (Marshall, J., dissenting). Both of these cases provide the key to creating a solution which satisfies the voluntary consent standard under Rodriguez v. United States, 575 U.S. 348 (2015).

solution entails the Supreme Court providing a bright line rule requiring officers to inform motorists that they have a right to refuse consent to a continued encounter with officers.[91] The innate difference between the factual situation in *Mendenhall*[92] and the litigation in *Shaw* illustrates the difference of officers using their authority to coerce individuals into consenting.[93]

Furthermore, policies guaranteeing motorists are informed of the right to refuse consent stem from the reality that an individual does not have to know about the right before waiving it.[94] Some in the field of criminal procedure note that most people do not feel free to deny a request from officers, and the likelihood of compliance only increases when the visible trappings of an officer are present.[95] Interestingly enough, those who consent usually do so unaware of their rights, even when they know that they have incriminating evidence in the car.[96] Data confirms that ninety percent of all searches conducted by police are consensual in nature.[97] Justice Stevens correctly pointed out that these voluminous decisions by citizens to surrender their privacy interests cannot be explained, unless its assumed they believed a legal duty existed for them to comply with the officer's request.[98] As a result, if the Supreme Court acted upon this

91. *Contra Mendenhall*, 446 U.S. at 559.

92. *Id.* at 549. The Respondent went voluntarily with DEA agents when they motioned for her to follow them. *Id.* They also told her after the fact that she didn't have to consent once she already consented. *Id.*

93. Shaw v. Jones, No. 19-1343-KHV, 2023 WL 4684682, at *25 (D. Kan. July 21, 2023).

94. Arthur J. Park, *Automobile Consent Searches: The Driver's Options in a Lose-Lose Situation*, 14 RICH. J. L. & PUB. INT. 461, 463 (2011).

95. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 236 (2001) (citing Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47 (1974)). Professor Strauss of Loyola Law School is a widely cited scholar of criminal procedure with her areas of expertise including the nature of consent. Professor Straus contends:

> While the magnitude of harm to individuals in situations where police request to search may provide some hesitation in applying the lessons of the experiments, I believe the studies can still provide useful insight. The point is that people follow or obey a "request" made by police officers in authority positions in situations where there is not only no ostensible benefit to do so, there is likely harm.

Id. at 239. *See also* Sommers & Bohns, *supra* note 83, at 2002 ("Turning down a direct request constitutes a potentially face-threatening act, implying that the requester is untrustworthy or that the request is inappropriate.").

96. Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 772, 800–01 (2005).

97. *Id.* at 773; Park, *supra* note 94, at 464. It should also be noted that the current Fourth Amendment precedent fails to square with other paramount constitutional rights of criminal procedure like the Fifth and Sixth Amendments where consent remains a cornerstone of the analysis. Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963); Miranda v. Arizona, 384 U.S. 436, 444 (1966) This includes the right to counsel and the right to an attorney where consent must be given to waive one's rights after they've been informed of them. *See Gideon*, 372 U.S. at 339–40; *Miranda*, 384 U.S. at 444.

98. Ohio v. Robinette, 519 U.S. 33, 48 (1996) (Stevens, J., dissenting) ("Repeated decisions by ordinary citizens to surrender that [privacy] interest cannot satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so.").

proposed solution, it would create a tougher standard to satisfy for the government under the *Rodriguez* test, but it would benefit all Americans.[99]

V. CONCLUSION

Even though this proposed plan has some merit, it seems unlikely the Court would reconsider with the public policy benefits given to officers. The Court has continued to tailor the constraints of consent searches over the years while routinely rejecting the idea that informing motorists of their right to refuse consent is required.[100] Because of *Schneckloth*, the Court outlined several public policy factors that gave legitimacy to officers who did not advise stopped individuals of their right to refuse consent to a search of their car.[101] Critics of *Schneckloth* highlight this by asserting the average American citizen has little knowledge about their rights.[102]

Ultimately, this means that *Shaw v. Jones* provides no long-term solution. *Shaw* also feels disheartening at a time where trust in law enforcement and the criminal justice system exists on life support.[103] Therefore, even though the District Court of Kansas may have helped motorists win the battle against Fourth Amendment violations by the KHP,[104] the inability to create a bright line rule will only embolden officers to continue impermissible violations of the Fourth Amendment.

99. Rodriguez v. United States, 575 U.S. 348, 354–55 (2015) (noting that troopers who do not have reasonable suspicion must gain the driver's consent to extend the duration of the stop). The bright line rule would make it so that officers cannot dance around following procedural requirements, and it leaves the ability to waive one's rights to the individual motorist.

100. *See generally* Florida v. Royer, 460 U.S. 491, 497–98 (1983); Florida v. Bostick, 501 U.S. 429, 438 (1991).

101. *See* Park, *supra* note 94 ("(1) [T]he police have a 'legitimate need' for consent searches, (2) a consent search 'may result in considerably less inconvenience for the subject of the search,' and (3) 'the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime.'" (footnotes omitted)); Schneckloth v. Bustamonte, 412 U.S. 218, 227–28, 234 (1973). *See also* United States v. Drayton, 536 U.S. 194, 205 (2002) (asserting that the lack of application of force, intimidating movement, overwhelming show of force, brandishing of weapons, no blocking of exits, no threat, no command, or not even an authoritative show of force made an encounter voluntary). *But see* Shaw v. Jones, No. 19-1343-KHV, 2023 WL 4684682, at *6–26 (D. Kan. July 21, 2023) (stressing the importance that the Two-Step tactic blocks the motorist's exit back on the Interstate once a traffic stop has concluded).

102. Simmons, *supra* note 96, at 779. *See also* Sean Stevens, *Do Americans Know Their Rights? Survey Says: No.*, FIRE (Feb. 1, 2023), https://www.thefire.org/news/do-americans-know-their-rights-survey-says-no#:~:text=The%20average%20number%20of%20rights,protected%20by%20the%20First%20Amendment.

103. *See* Emily Washburn, *America Less Confident in Police than Ever Before: A Look at the Numbers*, FORBES (Feb. 3, 2023, 4:04 PM), https://www.forbes.com/sites/emilywashburn/2023/02/03/america-less-confident-in-police-than-ever-before-a-look-at-the-numbers/?sh=7b7e6c656afb.

104. *Shaw*, 2023 WL 4684682, at *36.