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You Do Not Have the Right to Remain Drunk: Expanding the Scope of Implied Consent Through Fifth Amendment Voluntariness Standards

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YOU DO NOT HAVE THE RIGHT TO REMAIN DRUNK: EXPANDING THE SCOPE OF IMPLIED CONSENT THROUGH FIFTH AMENDMENT VOLUNTARINESS STANDARDS

SUPREME COURT OF NEW YORK KINGS COUNTY

People v. Perez[1]
(decided August 2, 2012)

I. INTRODUCTION

The prosecution charged the defendant, Hector Perez, with criminal possession of a weapon in the second degree.[2] On June 5, 2012, the Supreme Court of Kings County held a combined *Mapp/Huntley* hearing to decide the admissibility of seized evidence and statements made to the police by the defendant on the night of his arrest.[3] The defendant was arrested at the home of his girlfriend, Elsa Diaz, on February 5, 2011, after an altercation involving her grandson, Cesar Pabon.[4] Officers were called to the building and then sought Ms. Diaz's consent to search her apartment.[5] Consent was granted, but the defendant challenged the prosecution's use of her consent.[6] The defendant argued that Ms. Diaz's consent was not given with the requisite degree of voluntariness, for a number of reasons, including her level of intoxication.[7]

Voluntary consent to search can only be given as "a true act of the will, an unequivocal product of an essentially free and uncon-

[1] 951 N.Y.S.2d 335 (Sup. Ct. 2012).
[2] *Id.* at 338.
[3] *Id.*
[4] *Id.* at 340.
[5] *Id.* at 339.
[6] *Perez*, 951 N.Y.S.2d at 339, 341.
[7] *Id.* at 343.

strained choice."[8] Both the United States Supreme Court and the New York Court of Appeals have determined that voluntarily granting officers consent to search is a valid exception to the Fourth Amendment's warrant requirement.[9] Consent searches are one of the most useful tools in law enforcement's repertoire.[10] Obtaining consent can help an officer seize evidence that could be destroyed in the time it would take to obtain a warrant.[11] Because of the value and broad possibility of intrusion on personal liberty associated with this type of search, prosecutors bear a heavy burden in establishing that consent to search was voluntarily given.[12]

The voluntariness of an individual's grant of consent can be challenged in a variety of ways as was done in *Perez*.[13] This Note focuses on one aspect, the effects of intoxication on an individual's ability to freely consent to a search.[14] As this Note demonstrates, the prosecution must satisfy what is in reality an extremely deferential standard when showing that an individual is too intoxicated to understand his or her choice to consent. Establishing that an individual is overly intoxicated negates the voluntariness of his consent to the search,[15] however, in New York, proving that an individual is too impaired to consent is exceedingly difficult.[16] This standard, which weakens the effect of subjective intoxication on the validity of consent, is useful, providing an excellent model for analyzing a different type of consent search—the implied consent statute created in con-

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[8] People v. Gonzalez, 347 N.E.2d 575, 580 (N.Y. 1976).

[9] Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is well settled under the Fourth Amendment that a search conducted without a warrant issued upon probable cause is '*per se* unreasonable . . . .' It is equally well settled that one of the specifically established exceptions . . . is a search conducted pursuant to consent."); *see Gonzalez*, 347 N.E.2d at 580 (incorporating the *Schneckloth* totality of the circumstances test into New York Law).

[10] *Schneckloth*, 412 U.S. at 227 (reasoning that frequently officers will suspect illicit activity, but not have the required probable cause, and in those circumstances a valid consent search will be the only means of obtaining the evidence).

[11] *Id.*

[12] Vale v. Louisiana, 399 U.S. 30, 34 (1970) (holding that the State bears the burden of establishing an exceptional situation to justify a warrantless search).

[13] *Perez*, 951 N.Y.S.2d at 341, 343-44, 346 (compiling and assessing defendant's multiple challenges to the voluntariness of consent).

[14] *See infra* Parts III-V (discussing the effect of intoxication or mental impairment on the validity of voluntary consent to search).

[15] *See infra* Part III (discussing the *Schompert* mania test for determining whether intoxication affects the voluntariness of a grant of consent).

[16] *Id.*

junction with New York's driving under the influence law.[17]

Because of the expansive use and high value of consent searches, the New York legislature was the first in the country to create an implied consent statute for drivers within the state.[18] Drivers in all fifty states, as a condition of accepting a license, consent to a search of their body for the presence of drugs or alcohol in connection with an arrest for driving under the influence.[19] However, in New York, this consent is qualified by a statutorily created right to revoke this implied consent and refuse the test.[20] Legislation has recently been proposed to weaken the right to refuse[21] in an effort to deter driving under the influence[22] and help combat one of the most dangerous activities affecting our society.[23] The standards discussed in the traditional consent search context suggest that the time has come for approval of this legislation,[24] reflecting important and needed changes,[25] strengthening the validity of implied consent and weakening the right to refuse a search.

II. THE OPINION: *PEOPLE V. PEREZ*

On the evening of February 5, 2011, the defendant, Hector

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[17] *See* N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney 2013) (granting the State implied consent to search any individual over the age of twenty-one who operates a motor vehicle, for the presence of drugs or alcohol, if arrested for driving under the influence) [hereinafter VTL].

[18] Penn Lerblance, *Implied Consent to Intoxication Tests: A Flawed Concept*, 53 ST. JOHN'S L. REV. 39 n.2 (1978).

[19] *Id.* at 39; 2011 S.B 3768 234th Sess. (N.Y. 2011) (highlighting that nine states have a stronger version of an implied consent law).

[20] *See* VTL § 1194(2)-(3) (creating, penalizing, and limiting a statutorily created right to refuse the chemical test, and revoke implied consent).

[21] 2011 S.B 3768 234th Sess. (N.Y. 2011) (proposing an elimination of the right to refuse in New York whenever an officer has probable cause to suspect an individual of driving under the influence).

[22] *Id.* (suggesting this legislation would "add real teeth to the implied consent provision" in VTL § 1194).

[23] *See Drunk Driving Facts*, MADD, http://www.MADD.org/drunk-driving/ (last visited Apr. 15, 2012) (stating that 350,000 people a year are killed or seriously injured by drunk driving).

[24] *See infra* Parts III-VII.

[25] Maine received the top score in the nation as just twenty-three people died in DUI related deaths, in part because of the state's partial denial of the right to refuse. *MADD–Maine*, MADD, http://www.madd.org/drunk-driving/state-stats/Maine.html (last visited Apr. 15, 2013).

Perez, was staying at the home of his girlfriend, Elsa Diaz.[26] Ms. Diaz lived in the same apartment building as Emerson and Hernan Hernandez, two friends of her grandson, Cesar Pabon.[27] While Mr. Pabon was visiting the Hernandez brothers, he went downstairs to speak with his grandmother, Ms. Diaz.[28] During Mr. Pabon's conversation with Ms. Diaz, the defendant came out of the apartment and began to argue with her.[29] The defendant then momentarily left the argument, re-entered the apartment, and returned allegedly brandishing a handgun.[30] Mr. Pabon, who witnessed the incident, testified at the hearing that both Ms. Diaz and the defendant were intoxicated during this altercation.[31]

The police, who were called because of the incident, arrived about fifteen minutes later.[32] During that time, Mr. Pabon and the Hernandez brothers physically assaulted and locked the defendant in the basement.[33] The police searched the basement of the apartment building after breaking up the fight, but found nothing.[34] After the fruitless search, police officer Gabriel Cuevas noticed Ms. Diaz who was "shaking and mumbling."[35] The officer offered Ms. Diaz assistance, which she refused, and then began to question her about the presence of any guns in the apartment.[36] Ms. Diaz admitted that the defendant lived in her apartment, but refused to say anything about a gun.[37] Officer Cuevas then requested permission to search the apartment, and Ms. Diaz responded by claiming that "she was not aware of any gun in the apartment."[38]

Ms. Diaz then reluctantly agreed to let officers conduct the search.[39] Officer Cuevas retrieved a consent-to-search form from his patrol car, which Ms. Diaz signed.[40] Once inside the apartment, Of-

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[26] *Perez*, 951 N.Y.S.2d at 338.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Perez*, 951 N.Y.S.2d at 338-39.
[32] *Id.*
[33] *Id.* at 339.
[34] *Id.*
[35] *Id.*
[36] *Perez*, 951 N.Y.S.2d at 339.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*

ficer Cuevas began to search the bedroom.[41] When searching a filing cabinet within the bedroom, Officer Cuevas discovered an unloaded revolver and a box of fifty rounds of ammunition, and he then called for backup.[42] Ms. Diaz noticed this, began screaming uncontrollably, and had to be detained by the officers.[43] Mr. Pabon subsequently identified the weapon as the one the defendant threatened him with.[44] The defendant was arrested and later indicted for criminal possession of a weapon.[45]

The court in *Perez* began by laying out the procedural requirements for a challenge to a search, stating the hallmark of search challenges: that any warrantless search of a home conducted without a warrant is *per se* unreasonable.[46] In the instant case, no warrant was sought.[47] When no warrant is sought, but there is ample time to obtain one the prosecution bears a heavy burden in establishing the search was conducted reasonably.[48] As stated above, voluntarily granting consent to search is an exception to the Fourth Amendment's typical requirement of a warrant and probable cause.[49] Therefore, if Ms. Diaz's consent to search was given voluntarily, the search would be reasonable and constitutional as long as officers did not exceed the scope of that consent.[50]

Before assessing the intoxication challenge to the consent search, the court in *Perez* first dealt with the threshold issue of per-

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[41] *Perez*, 951 N.Y.S.2d at 339.

[42] *Id.* at 339-40.

[43] *Id.* at 340.

[44] *Id.*

[45] *Id.*

[46] *Perez*, 951 N.Y.S.2d at 340 (citing *Schneckloth*, 412 U.S. at 219).

[47] *Id.* at 342.

[48] *Id.* at 340 (citing People v. Knapp, 422 N.E.2d 531, 535 (N.Y. 1981)).

[49] *See Schneckloth*, 412 U.S. at 219 (defining the voluntary consent exception to the warrant requirement).

[50] *See id.* (establishing that once voluntary consent has been established the search has been conducted validly). The search, however, must remain within the scope of the consent given. *See* Florida v. Jimeno, 500 U.S. 248 (1991) (setting up an objective reasonableness test for determining whether an officer's search exceeded the scope of the voluntary consent). Coercion, when present, invalidates the consent, and consequently the search. Bumper v. North Carolina, 391 U.S. 543, 550 (1968). Coercion means that an individual acquiesced to authority, and did not possess the requisite free and unconstrained state of mind needed for voluntariness. *Id.* at 548-50. For an overview of the elements, concerns, and practical considerations assessed in determining whether voluntary consent was established, in New York and Federal law see Daniel Fier, Note, *It's In The Bag: Voluntariness, Scope, and the Authority to Grant Consent*, 28 TOURO L. REV. 687 (2012).

sonal standing.[51] The court also assessed the defendant's other challenges, namely that Ms. Diaz did not have the authority to grant consent and that her consent was not given voluntarily.[52] While the court in *Perez* decided that the defendant passed the threshold test,[53] it ultimately concluded that although Ms. Diaz had the authority to consent to the search,[54] she did not do so voluntarily,[55] and therefore ordered the suppression of the seizures of the gun and the ammunition.[56]

One of the defendant's challenges to the validity of Ms. Di-

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[51] Personal standing is defined as a reasonable expectation of privacy in the premises searched, or the thing seized, and is required before a search can be challenged. Rakas v. Illinois, 439 U.S. 128, 128 (1978).

[52] The defendant argued that Ms. Diaz did not have the requisite authority to grant consent to search because he was a co-occupant of the residence, and that Ms. Diaz did not consent to the search of the premises voluntarily. *Perez*, 951 N.Y.S.2d at 342, 344, 345.

[53] The test of personal standing has an objective and subjective component, which examine whether the defendant took steps to preserve the property, and whether society is willing to accept his or her connection to the property as reasonable. People v. Ramirez-Portoreal, 666 N.E.2d 207, 212 (N.Y. 1996). The defendant stayed in Ms. Diaz's home most weekend nights and left clothing there to be washed. *Perez*, 951 N.Y.S.2d at 342. Additionally, Ms. Diaz identified part of the bedroom as the defendant's side, and the defendant was held to have established the required expectation of privacy to meet the test of personal standing. *Id.*

[54] An individual must have the requisite degree of control over the premises to grant consent. People v. Cosme, 397 N.E.2d 1319, 1321 (N.Y. 1979). Although consent cannot be given over the objection of a co-occupant when he or she is present, if one co-tenant is not present, or does not object, the other co-occupant's grant of consent is valid, and officers may conduct the search. Georgia v. Randolph, 547 U.S. 103, 120 (2006). The defendant was not present and therefore, Ms. Diaz had the requisite authority to grant permission for a search of the apartment and the filing cabinet in the bedroom. *Perez*, 951 N.Y.S.2d at 344-45.

[55] By definition, consent must be given voluntarily, and is incompatible with official coercion of any kind. *Gonzalez*, 347 N.E.2d at 580. The court in *Gonzalez* identified five factors, viewed in the totality of the circumstances with no one factor being determinative, that are assessed to determine whether coercion invalidates a grant of consent to search:

> [W]hether the consenter was in custody at the time she gave her consent; whether the consenter acted evasively in her encounter with the police; any threats or coercive techniques employed by the police prior to the obtaining of consent; whether the officers advised the consenter that she has the right to refuse to consent to the requested search; and the number of law enforcement personnel present when consent to search was granted.

Perez, 951 N.Y.S.2d at 345 (citing *Gonzalez*, 347 N.E.2d 575) (citations omitted). Applying this test, the court in *Perez* found several of these factors weighed in favor of the defendant, particularly the fifth factor, as a total of fourteen officers were present at the time Ms. Diaz consented to the search, and her consent was therefore involuntary, and constituted a mere submission to lawful authority. *Id.* at 345-46.

[56] *Id.* at 346.

az's consent concerned her mental state at the time she gave consent.[57] Defendant argued that Ms. Diaz was too intoxicated to have the requisite state of mind to grant police a valid consent to search.[58] The court in *Perez* rejected this argument and set out the high standard that must be met for an individual's intoxication or impairment to invalidate his or her consent to search.[59] A defendant must prove that the individual who granted consent was so intoxicated that he or she reached the level of mania, or an inability to remain in touch with the reality of the situation.[60] Although Ms. Diaz had to be restrained by officers, admitted to having multiple drinks that evening, and appeared as if she were shaking and mumbling, the court held her intoxication did not meet the requisite level.[61] What is important, however, is not the specific result, but rather the analysis used by the court in *Perez*, which was the same analysis used by the United States Supreme Court in *Schneckloth v. Bustamonte.*[62]

III. THE SCHNECKLOTH DEFINITION OF "VOLUNTARY": THE INCORPORATION OF FIFTH AMENDMENT CONFESSION STANDARDS

In *Schneckloth*, the Court was faced the difficult task of defining the word "voluntary," specifically what "the prosecutor [must] prove to demonstrate that a consent was 'voluntarily' given."[63] The Court began by examining what it considered to be the most extensive judicial attempt to define this elusive phrase—the standards applied in determining the voluntariness of a confession under the protections of the Fifth Amendment.[64]

While the Fifth Amendment voluntariness cases did not provide a talismanic definition of the word, several relevant concerns

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[57] *Id.* at 343.

[58] *Id.*

[59] *Perez*, 951 N.Y.S.2d at 343 ("The requirement of 'mania' is . . . reflected in the level of intoxication required to negate an individual's consent to search[;] . . . consent . . . is admissible when [the individual is] sufficiently sober to have understood his rights and to have acted voluntarily, knowingly and intelligently."); *Id.* at 343 (holding there was no evidence Ms. Diaz met this standard despite her aberrant behavior, and visible intoxication).

[60] *Id. See infra* Part IV for a discussion of the mania standard in New York law.

[61] *Perez*, 951 N.Y.S.2d at 339, 340.

[62] 412 U.S. 218 (1973).

[63] *Id.* at 223.

[64] *Id.* at 223-24.

were identified and fleshed out.[65] The main concern was the effect of subjective knowledge on the choice to voluntarily consent to a search,[66] an important consideration because in this context, the item sought to be proven is literally an individual's subjective knowledge.[67] Two protective safeguards have developed for situations when a court is attempting to define an individual's subjective voluntariness. These safeguards are the knowing choice requirement[68] and the formal waiver requirement.[69] However, the Court held these protections were unnecessary in the consent search context.[70]

The Court reasoned that although it was adopting elements of the Fifth Amendment test for the voluntariness of a confession, it was excluding the more protective requirements because of specific considerations supporting the Fourth Amendment.[71] These considerations, such as encouraging free communication with law enforcement, informed the Court's ultimate holding that voluntariness would be analyzed by the same basic test as the confession context. The test requires that in order to find a voluntary grant of consent, the totality of the circumstances, specifically, whether the statement was made freely and with an unconstrained mind, should be examined.[72] However, the more protective safeguards were found to be unnecessary in

[65] *Id.* at 224 (rejecting a literal definition of a voluntary choice as a knowing choice, as even a choice made under torture literally represents a choice between two definite possibilities, and rejecting a "but for" test asking whether the statement would have been made absent official action, as under that test no statement could ever be considered voluntary).

[66] *Id.* at 224-25 (reasoning that looking at the totality of the circumstances to determine subjective voluntariness reflects an important set of values, that include both the police need to question citizens to determine the truth, and the individual interest in preventing the criminal law from becoming an instrument of unfairness).

[67] *Schneckloth*, 412 U.S. at 230.

[68] *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966) (requiring that before a defendant's statements be used against him, he must be informed of his right to remain silent, so that his subsequent choice to speak despite this becomes a knowing and voluntary one).

[69] *See* Edwards v. Arizona, 451 U.S. 477, 484, 488 (1981) (requiring that for certain pretrial protections, such as the right to assistance of counsel, a defendant must do more than make a knowing choice; there must be a formal waiver, "[a]n intentional relinquishment or abandonment of a known right or privilege").

[70] *Schneckloth*, 412 U.S. at 248-49.

[71] *Id.* at 234, 245 (reasoning that voluntariness is possible without a formal waiver or knowledge, and that other formal requirements could frustrate otherwise reasonable police activity, and rejecting these protections in favor of the Fourth Amendment's ultimate goal, merely securing individuals from unreasonable intrusions).

[72] *Id.* at 248-49.

this field.[73] Therefore, what is important about *Schneckloth* is not what it added to the test of consent, but what it excluded.[74]

The Court first explained why the knowing choice requirement was unnecessary in the consent search context. This requirement was articulated in the context of the Fifth Amendment's protections over confessions and requires that an individual be informed of his or right to refuse to make a particular statement.[75] However, the Court rejected applying this requirement to the consent to search context for several reasons, reflecting both practical and policy based considerations.[76]

In the context of a confession, the Fifth Amendment's protections are necessary because the statement is made in a custodial situation which can significantly affect the individual's rights.[77] The privilege against self-incrimination requires that an individual have knowledge of their right to refuse to confess, and officers suffer the risk that, if the right to refuse is not effectively communicated, they may lose the use of that confession.[78] However, injecting the knowing choice requirement into the consent search would hamper important functions protected by the Fourth Amendment;[79] namely, the individual's ability to freely communicate with law enforcement to help apprehend criminals,[80] and law enforcement's ability to courteously, and without any assertion of authority, ask individuals questions that aid in investigations.[81] This distinction was further supported in the Court's opinion, by the non-custodial locations in which consent to search is typically requested, such as a car, home, or office.[82] In fact, a key case on voluntary confessions, *Miranda v. Ari-*

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[73] *Id.* at 234, 245.

[74] *Id.*

[75] *Miranda*, 384 U.S. at 444-45.

[76] *Schneckloth*, 412 U.S. at 231.

[77] *Id.* at 232; *Miranda*, 384 U.S. at 455 ("The very fact of [a] custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").

[78] *Miranda*, 384 U.S. at 444-45.

[79] *Schneckloth*, 412 U.S. at 284-85.

[80] *Id.* at 243 (" 'It is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals . . . . ' Rather, the community has a strong interest in encouraging consent, for the resulting search may yield necessary evidence . . . that may insure that a wholly innocent person is not wrongly charged." (quoting Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971))).

[81] *Id.* at 230-31.

[82] *Id.* at 231-32.

zona,[83] expressly made this distinction, excluding "general on-the-scene questioning" from its protective holding.[84]

The distinction between confessions and consent searches is also supported by practical considerations, specifically, situations in which two different statements take place.[85] When an individual is making a confession in a custodial setting, they are protected by the Fifth Amendment; as such, officers are more likely to have the ability to effectively communicate the right to refuse.[86] However, an on-the-scene request for consent, protected by the Fourth Amendment, is part of the way law enforcement has to operate, and it is essential that an officer be able to follow an impromptu investigative lead.[87] The police would undoubtedly be severely hampered by having to pause and inform the individual of his or her right to refuse.[88] The Court in *Schneckloth* reasoned that this particular consideration explains why its prior decisions, in the consent search context, focused on the totality of the circumstances and not the knowing choice requirement.[89]

The Court in *Schneckloth* also declined to add a requirement that a formal waiver be required as an element of voluntary consent.[90] A formal, knowing waiver of constitutional rights is required in many circumstances which implicate the Fifth and Sixth Amendment's protections over pre-trial procedure.[91] Protections over rights, such as assistance of counsel, help "promote the fair ascertainment of truth at a criminal trial," a value at the heart of our society, and without which, "justice will not . . . be done."[92] Therefore, the reason these pre-trial procedures are protected by a formal waiver requirement is that they are of a "wholly different order" than the reasons for ensur-

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[83] 384 U.S. 436 (1966).

[84] *Schneckloth*, 412 U.S. at 232. *See also Miranda*, 384 U.S. at 477) ("Our decision today is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime [is therefore] . . . not affected by our holding.").

[85] *Schneckloth*, 412 U.S. at 232 (reasoning that consent searches are undertaken in an atmosphere that is "immeasurably far removed from [a] custodial interrogation").

[86] *Miranda*, 384 U.S. at 467.

[87] *Schneckloth*, 412 U.S. at 231-32.

[88] *Id.* at 231.

[89] *Id.* at 234 ("Implicit in all of these cases [discussing the consent search exception] is the recognition that knowledge of a right to refuse is not a perquisite to a voluntary consent.").

[90] *Id.* at 245.

[91] *Id.* at 237 (listing a variety of circumstances where a knowing and intelligent waiver is required before a defendant can waive his or her rights including, the right to refuse counsel, to confrontation, to a jury trial, and to a speedy trial, amongst others).

[92] *Schneckloth*, 412 U.S. at 236, 242.

ing the protections of the Fourth Amendment.[93] The protections of the Fourth Amendment, unlike the pre-trial protections, have never been thought of as completely and entirely necessary to maintain the societal interest in truth and justice. In other words, the formal waiver is not required because an individual could receive a fair and just resolution at trial without this protection.[94] Additionally, the requirement of a formal waiver would frustrate authorities, much like the knowing choice requirement would, because it could not be effectively established in the field.[95] Without the important policy justifications requiring officers to go through the complex task of determining whether the waiver had been established, there was no need to force officers to undertake this task.[96] The Court added there was also an inherent fairness in allowing an individual to consent to a search, even without specific knowledge or waiver of his or her rights.[97] This fairness stems from the implicit assumption that law enforcement's conduct when consent is granted may be identical to what occurs when officers seek a warrant.[98] This assumption also furthers the strong societal interest in encouraging cooperation with the police.[99] In essence, the Court in *Schneckloth* rejected requirements of knowing choice and of formal waiver because these elements are incompatible with both the policy and practicalities underlying the use of the Fourth Amendment.[100]

IV. SUBSTANTIVE DEFINITIONS OF INTOXICATION: THE *SCHOMPERT* MANIA STANDARD

The Court in *Schneckloth* was able to borrow a test that not only protected individual rights, but also fit the investigatory needs of the consent search.[101] This test defines voluntariness in an identical

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[93] *Id.* at 242.

[94] *Id.* (reasoning that the rights protected by the Fourth Amendment are of a lesser order, and are not vital to the fair ascertainment of truth at a criminal trial).

[95] *Id.* at 245 ("It would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded" by the waiver requirement.).

[96] *Id.* at 246.

[97] *Schneckloth*, 412 U.S. at 242.

[98] *Id.* at 243.

[99] *Id*

[100] *Id.* at 248-49.

[101] *Id.* at 224-25 ("Voluntariness [reflects] an accommodation of the complex of values implicated in police questioning of a suspect [including the] . . . need for police questioning

manner to the definition utilized in determining whether a confession was voluntarily given.[102] Therefore, common real world circumstances that may affect an individual's ability to speak freely are analyzed under the same test.[103] This Section will look at a commonly occurring circumstance, mental impairment due to intoxication, and show how courts in New York have analyzed the effect of this mental state on the validity of a voluntary consent to search.

The court in *Perez* used this test to reach its conclusion that intoxication did not have an effect on whether Ms. Diaz's consent was voluntary.[104] Although Ms. Diaz's consent was found not to be given freely for other reasons, had those circumstances not existed, her intoxication alone would likely not have hindered her ability to speak voluntarily.[105]

The showing required to establish that an individual does not meet the test of voluntariness because of intoxication is a high one; the individual must prove that he or she reached the point of "mania," or that he or she was so intoxicated that they were "unable to comprehend the meaning of [their] words."[106] This standard, which was borrowed from the context of voluntary confessions and applied to the consent search context, was first articulated in New York in *People v. Schompert*.[107]

In *Schompert*, the defendant, a chronic alcoholic with a history of psychosis, was convicted of grand larceny and burglary.[108] The defendant was so intoxicated that, while drinking in a bar, he chose to call the police himself and confess to his crimes.[109] Officers testified that the defendant was in an advanced state of alcoholic intoxication and "on the verge of delirium tremens" when police spoke to him.[110]

[and] . . . civilized notions of justice.").

[102] *Schneckloth*, 412 U.S. at 225, 227.

[103] *See, e.g.*, Mary West, *Intoxication*, 32 Carmody-Wait 2d § 176:104 (2013) (compiling precedent analyzing different types of intoxication, and an individual's ability to speak voluntarily).

[104] *Perez*, 951 N.Y.S.2d at 343.

[105] *Id.* at 343, 345 ("In this case, although Mr. Pabon testified that his grandmother was intoxicated, there is no evidence that Ms. Diaz appeared confused, disoriented or unsure about what was occurring when interacting with the police.").

[106] *Id.* at 343 (citing People v. Shields, 742 N.Y.S.2d 909, 909 (App. Div. 2d Dep't 2002); People v. Kehn, 486 N.Y.S.2d 380, 383 (App. Div. 3d Dep't 1985)).

[107] 226 N.E.2d 305 (N.Y. 1967).

[108] *Id.* at 306-07.

[109] *Id.* at 307.

[110] *Id.* Delirium tremens is a very severe form of alcohol withdrawal, and involves sudden

The defendant had been released just days before from the hospital, where he was treated for alcoholism and psychosis.[111] When the police arrived at the bar they did not believe the defendant's drunken bragging, presumably because of his advanced intoxication and the peculiar circumstances.[112] However, the defendant insisted on proving his guilt, and at his request, police took him to the bus station where he opened a locker and revealed the stolen goods.[113] The question presented to the Court of Appeals was whether his confession could still be considered voluntary despite his "evidently high degree of alcoholic intoxication."[114]

The court held that, because the principal reason for excluding a confession was to limit the possibility of coercion by authorities and not to protect wrongdoers, a confession should be deemed valid if the defendant is sufficiently in touch with the realities of the situation.[115] The principal question that must be examined is the trustworthiness and reliability of the statement, not the specific level of intoxication of the speaker.[116] Without the speaker's intoxication reaching the rare level of mania, eliminating the speaker's ability to understand the specifics of the circumstances around him, the confession would be deemed voluntary.[117] The court held that as long as the police do not cause the defendant's intoxication, the general presumption is that the typical rules of trustworthiness and admissibility apply.[118] Utilizing this test, the court held the confession was voluntary, despite the defendant's extreme intoxication.[119] The statement was also deemed highly reliable and trustworthy because the evidence was recovered shortly after the confession.[120]

The requirement of "mania," the inability to comprehend reality, as set out in *Schompert*, appears to be an exceedingly difficult one to prove; courts have held confessions to be voluntary in a num-

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and severe mental or nervous system changes, including but not limited to confusion, agitation, hallucinations, and seizures. David C. Dugdale, *Delirium Tremens*, PUBMED HEALTH, http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001771/ (last visited May 9, 2013).

111 *Schompert*, 266 N.E.2d at 307.

112 *Id.*

113 *Id.*

114 *Id.* at 306-07.

115 *Id.* at 307-08.

116 *Schompert*, 226 N.E.2d at 309.

117 *Id.* at 308.

118 *Id.*

119 *Id.* at 307.

120 *Id.*

ber of outrageous circumstances, particularly circumstances where a high degree of individual impairment is evident to most people based on common sense and experience.[121] In *People v. Roth*,[122] the defendant sold drugs to an undercover informant after admitting that he had been "freebasing"[123] crack-cocaine for over twenty hours.[124] In *People v. Perry*,[125] the defendant made his confession while under the influence of numerous mind-altering drugs, including cocaine and alcohol.[126] In *People v. Kehn*,[127] the defendant was so intoxicated that he remembered absolutely nothing, including confessing to or committing the crime.[128] The defendant's blackout in *Kehn* lasted from the time he was a passenger in a car, the evening before the crime, until the next morning when he awoke in a jail cell.[129] In *People v. Adams*,[130] the defendant, who suffered from a serious mental illness, ingested the same sleeping pills she gave her husband before attacking him.[131] These pills were so strong, and affected the victim so strongly, that he was bludgeoned to death without even stirring.[132] However, none of these defendants' confessions were held to be made involuntarily because of their impairment.[133] All of these defendants were deemed to be sufficiently in touch with the realities of their individual situations to confess voluntarily.[134] While the court in *Schompert* specifically held that it was theoretically possible for a defendant's confession to be made involuntarily because of their in-

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[121] *See* David J. Hanson, *How Alcohol Affects Us*: *The Biphasic Curve*, ALCOHOL: PROBLEMS AND SOLUTIONS, http://www2.potsdam.edu/hansondj/HealthIssues/1100827422.html (last visited May 9, 2013) (demonstrating how in many individuals, a minimum of two drinks can bring an individual to a level of intoxication that would affect their ability to drive, and cause euphoria).

[122] 527 N.Y.S.2d 97 (App. Div. 2d Dep't 1988).

[123] "Freebasing" is the act of preparing to use cocaine in a very specific, and dangerous manner, involving taking purified solid cocaine, mixing it an alkaloid base, and then heating it over a metallic surface.

[124] *Roth*, 527 N.Y.S.2d at 99.

[125] 535 N.Y.S.2d 33 (App. Div. 2d Dep't 1988).

[126] *Id.* at 34.

[127] 486 N.Y.S.2d 380 (App. Div. 3d Dep't 1985).

[128] *Id.* at 382.

[129] *Id.*

[130] 257 N.E.2d 610 (N.Y. 1970).

[131] *Id.* at 610-11.

[132] *Id.*

[133] *Roth*, 527 N.Y.S.2d at 100; *Perry*, 535 N.Y.S.2d at 34; *Kehn*, 486 N.Y.S.2d at 382; *Adams*, 257 N.E.2d at 613.

[134] *Id.*

toxication,[135] it seems difficult to imagine a scenario that would meet this criterion.[136]

V. THE SCOPE OF INTOXICATED CONSENT: LESSONS TAKEN FROM COMBINING *SCHNECKLOTH* AND *SCHOMPERT*

The *Schompert* mania standard relies on the basic definition of voluntariness set out in *Schneckloth*,[137] and has been used to determine whether consent to search has been voluntarily given despite an individual's intoxication.[138] As such, it would seem to be equally difficult to establish that an individual was too intoxicated to give a valid consent to search.[139] However, *Schneckloth*'s second holding, that the knowing choice and waiver requirements are not applicable in assessing the voluntariness of a search, is more useful to a discussion of the effect of intoxication on the validity of consent.[140] Excluding these requirements is important because the limitations presented by the knowing choice and waiver requirements helped fashion the only limit presented by the court in *Schompert*. Specifically, in *Schompert* the court held that it was possible for a confession to be made involuntarily because of alcoholic mania.[141] The court reasoned that this would be possible for example if someone was unconscious but still somehow confessing.[142] This hypothetical was based on the fact that while unconscious there would be no pos-

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[135] *Schompert*, 226 N.E.2d at 308.

[136] For example in *Roth*, the defendant admitted to ingesting cocaine by freebasing or smoking it for a period of twenty-five hours. *Roth*, 527 N.Y.S.2d at 99. According to the National Drug Administration, ingesting cocaine in this manner, for that extended period of time could cause hallucinations, or even full-blown paranoid psychosis, and death. *Drug Facts: Cocaine*, NATIONAL INSTITUTE ON DRUG ABUSE, http://www.drugabuse.gov/publications/drugfacts/cocaine (last visited May 9, 2013). If a scenario such as the one in *Roth* did not invalidate the voluntariness of the statement, the question is begged whether any human being could be intoxicated enough to invalidate his or her statement without dying because of their intoxication.

[137] *Schompert*, 226 N.E.2d at 307.

[138] *See, e.g.*, *Shields*, 742 N.Y.S.2d at 909 (App. Div. 2d Dep't 2002) (using the *Schompert* mania standard to determine whether a defendant's intoxication invalidated his voluntary grant of consent to search).

[139] *See Roth*, 527 N.Y.S.2d at 100; *Perry*, 535 N.Y.S.2d at 34; *Kehn*, 486 N.Y.S.2d at 382; *Adams*, 257 N.E.2d at 613.

[140] *See supra* Part III (discussing how the Court in *Schneckloth*, 412 U.S. 218, refused to apply the protective requirements of a knowing choice, and intelligent waiver to the context of Fourth Amendment consent searches).

[141] *Schompert*, 226 N.E.2d at 305.

[142] *Id.*

sibility of informing the individual of the consequences of his choice.[143]

However, as the Court held in *Schneckloth*, the policy interests behind the Fourth Amendment are of a lesser order, merely providing security against arbitrary intrusions by police.[144] It follows then that an individual's grant of consent while intoxicated would have essentially only one major limitation, which is that the statement never be coerced.[145] In fact, in *People v. Kates*,[146] the Court of Appeals reached the result suggested as inappropriate by the hypothetical in *Schompert*[147] when it permitted a search of a defendant's body while he was unconscious, pursuant to a previously existing valid grant of consent.[148] In *Kates*, the defendant was arrested for driving under the influence of alcohol and causing a fatal car wreck.[149] After interviewing witnesses, officers went to examine the defendant in the emergency room of a nearby hospital.[150] When officers arrived at the hospital, the defendant was essentially unconscious; he was too intoxicated and disoriented to object or refuse the officers' requests to perform a blood test.[151] Relying on the implied consent law discussed in the next Section, the court in *Kates* found that the defendant had given consent in advance of the crash for a search of his blood for the presence of alcohol, and that officers had acted constitutionally when relying on that consent and taking a blood sample.[152]

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[143] *Id.* at 308.

[144] *Schneckloth*, 412 U.S. at 242.

[145] *Id.* at 247 ("There is no reason to believe . . . that the response to a policeman's [request for consent] is presumptively coerced.").

[146] 428 N.E.2d 852 (N.Y. 1981).

[147] *Schompert*, 226 N.E.2d at 308 (refusing a *per se* rule that intoxication has no effect on voluntariness, because of the possibility that an individual could be so intoxicated he or she would not be sufficiently in touch with their faculties to voluntarily confess). Although the grant of consent in *Kates* occurred before the defendant became intoxicated, his consent extended beyond the time he drank himself into unconsciousness. *Kates*, 428 N.E.2d at 447-48.

[148] *Id.*

[149] *Id.* at 447.

[150] *Id.*

[151] *Id.*

[152] *Kates*, 428 N.E.2d at 448 (holding that the blood test was constitutional under the statutorily granted consent and pursuant to the exigent circumstances exception to the warrant requirement). *See* Schmerber v. California, 384 U.S. 757 (1966) (holding that exigent circumstances, and the ready destructibility of evidence permits officers to take a blood test from an arrestee if they suspect him or her of driving under the influence of alcohol, because the evidence consists of alcohol in the bloodstream, which rapidly deteriorates after he or she stops drinking).

VI. NEW YORK DUI PROCEDURE: IMPLIED CONSENT AND THE RIGHT TO REFUSE

New York State has expanded the distinction between protected confessions and searches with its implied consent law.[153] Since 1953, drivers in New York have impliedly consented to a search of their bodies for the presence of alcohol, simply by operating a motor vehicle.[154] Pursuant to Vehicle and Traffic Law ("VTL") section 1194, drivers are deemed to have given consent for a search of their "breath, blood, urine, or saliva, for the purpose of determining" the alcohol or drug content of the sample.[155] This sample can only be seized if the officer has probable cause to believe an individual committed the offense of driving while intoxicated and the sample is requested within two hours after the arrest.[156]

However, the New York driver does have a right to revoke this consent.[157] In 1953, the legislature added the right to refuse to "avoid the unpleasantness" associated with "administering a chemical test on an unwilling subject."[158] But the right to refuse is in no way constitutionally necessary.[159] In fact, the United States Supreme Court and the Court of Appeals have determined that the right to refuse is merely a grace provided by the legislature.[160] The right to refuse in New York functions as follows: a report of the individual's refusal is issued, and their driver's license is temporarily suspended pending a hearing to determine whether there was probable cause to believe the defendant was intoxicated and whether the defendant was adequately warned of the consequences of his or her refusal.[161] If the prosecution prevails at the hearing, the defendant's license is suspended for twelve to eighteen months, and he or she is also required to pay civil penalties of at least five-hundred dollars.[162] However, in

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[153] Implied consent means that an individual consents to a search by engaging in a specific activity, for example a search of his or her body by choosing to operate a motor vehicle. VTL § 1194(2).

[154] People v. Daniel, 446 N.Y.S.2d 658, 659 (App. Div. 4th Dep't 1981) ("Present section 1194 has its origin in chapter 854 of the laws of 1953.").

[155] VTL § 1194(2)(a)(1)-(4).

[156] *Id.* at § 1194(2)(a)(1).

[157] *Id.* at § 1194(2).

[158] People v. Haitz, 411 N.Y.S.2d 57, 60 (App. Div. 4th Dep't 1978).

[159] *Kates*, 428 N.E.2d at 448 (citing *Schmerber*, 384 U.S. 757).

[160] South Dakota v. Neville, 459 U.S. 553, 565 (1983); *Kates*, 428 N.E.2d at 448.

[161] VTL § 1194(2)(b)-(c).

[162] *Id.* at § 1194 (1)(c)-(2).

some circumstances the right to refuse can be overridden by police pursuant to a court order.[163] This occurs when the police or district attorney's office requests and obtains a court order compelling the individual to undergo the test.[164] In the current state of the law, however, the prosecuting authority can only seek such an order if the driver killed or caused serious physical injury to someone other than themselves.[165]

In December of 2010, Ray LaHood, the United States Secretary of Transportation, called for all states to weaken or eliminate a driver's right to refuse.[166] Senator Fuschillo of the New York State Legislature attempted to introduce this policy into New York law, and sought to eliminate the right to refuse contained in VTL section 1194.[167] The bill presented the justification that because of the right to refuse, prosecutors are often forced to proceed to trial without the sole piece of objective evidence that would prove their case, and therefore, many defendants opt for the civil penalties and license revocation.[168]

The change in refusal procedure presented by Fuschillo's bill is an important one. If an arrestee refuses the search, an officer would be required to request a court order compelling the defendant to submit to the test.[169] The officer would have to certify under oath that there is probable cause to believe the individual committed the offense of driving while intoxicated.[170] The court order could be sought in any case where there is probable cause to suspect the defendant committed the offense, and not just in cases where injury or death has occurred.[171] The committee report asserts that this "would add real teeth to the implied consent provision."[172] Additionally, as will be discussed in the next Section, the standards utilized in *Perez*

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[163] *Id.* at § 1194 (3).

[164] *Id.* at § 1194 (3)(d).

[165] *Id.* at § 1194 (3)(b)(1) ("Court ordered chemical tests . . . [are] authorized . . . [upon a finding that the driver] . . . was the operator of a motor vehicle and in the course of such operation a person other than the operator was killed or suffered serious physical injury . . . .").

[166] *U.S. Transportation Secretary Ray LaHood Announces Holiday Drunk Driving Crackdown*, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (Dec. 13, 2010), http://www.nhtsa.gov/PR/DOT-209-10.

[167] S. Res. 3768, 2011 Leg., 234th Sess. (N.Y. 2011).

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] S. Res. 3768, 2011 Leg., 234th Sess. (N.Y. 2011).

have already developed a model that balances individual liberties with the bite that the new legislation seeks to add to New York implied consent law.

VII. THE EXPANSION OF IMPLIED CONSENT: A BETTER MODEL FOR ELIMINATING THE RIGHT TO REFUSE

As the United States Supreme Court and the Court of Appeals have held, eliminating the right to refuse would be constitutionally permissible, as a defendant may be required to provide non-testimonial bodily evidence, such as blood, breath, urine, or saliva, lawfully under the Fourth Amendment, if there is probable cause to suspect him or her of driving under the influence.[173] For whatever reason, presumably the distasteful image of officers physically forcing drunken individuals to comply with blood tests, the right to refuse remains alive and well in New York.[174]

This may be in part because the current model for assessment of this practice focuses on its constitutionality either as a function of the warrant requirement,[175] or as a means of seizing readily destructible evidence which is a valid exception to the warrant requirement.[176] While these two methods of analyzing the permissibility of the practice reach the same result as an analysis under the doctrine of consent searches, their focus is entirely different.[177] Seizures of evidence conducted pursuant to a warrant, or the readily destructible evidence exception focus on constraining police procedures in order to maintain the traditional balance of reasonableness.[178]

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[173] *Neville*, 459 U.S. at 565 (1983); *Kates*, 428 N.E.2d at 448.

[174] *Haitz*, 411 N.Y.S.2d at 60 (asserting that the purpose of the right to refuse is to avoid the unnecessary unpleasantness of forcing the unwilling individual to undergo the test).

[175] *See* VTL § 1194(3)(b) (requiring officers to get a court order, founded on probable cause to believe the driver committed the offense of DUI, essentially a warrant, to force a defendant to undergo a compulsory chemical test).

[176] *See Schmerber*, 384 U.S. at 770 (permitting the seizure of a defendant's blood without a warrant because the evidence in his blood stream was readily destructible); *see also* Skinner v. Nat'l Ry. Labor Exec. Ass'n., 489 U.S. 602, 617 (1989) (extending *Schmerber*'s protections over a search to an individual's urine and breath samples obtained for the purpose of determining his or her level of intoxication).

[177] *See Kates*, 428 N.E.2d at 448 (holding that the search of defendant's blood for the presence of alcohol was permissible as either a grant of consent, pursuant to the implied consent statute, or as a search conducted validly under *Schmerber*).

[178] Nicholas v. Goord, 430 F.3d 652, 679 (2005) (Lynch, J., concurring) (arguing that the purpose of probable cause and the warrant requirement is to force the government to justify its choice of a particular investigative technique despite its intrusion into an individual's lib-

The consent search rationale, however, focuses on assessing the permissibility of a particular search or seizure of evidence through an entirely different lens. The consent search is in part about the individual coming forward to participate in the greater goal of ridding society of wrongdoing.[179] Assessing the constitutionality of destroying the right to refuse from this perspective presents an entirely different, and more palatable, focus.[180] With the implied consent model, the discussion is no longer about restraining police conduct, but rather focuses on considerations that affect an individual's mindset. This mindset centers around the legal fiction that all individuals agree to grant the implied consent when accepting their license as part of the societal goal of maintaining safer roads.[181] The goal of protecting drivers is furthered by expanding the scope of implied consent searches. Under the principle of general deterrence, it is likely that if the right to refuse was removed from New York law, many more individuals would choose to partake in society's goal of maintaining safe and sober roadways.[182] This presents a much more appealing image, in that instead of police choosing to invade on individual drivers' lives, the focus is now on all citizens choosing to

erty interests).

[179] "It is an act of responsible citizenship for individuals to give whatever information they have to aid in law enforcement." *Miranda*, 384 U.S. at 477-78. Additionally, citizens have a strong interest in encouraging consent searches to help ensure the accurate determination of criminal trials, and should never be discouraged from pursuing this interest. *Schneckloth*, 412 U.S. at 243 (citing *Coolidge*, 403 U.S. at 488).

[180] *Compare Schneckloth*, 412 U.S. at 225 (assessing whether the consenter had a subjective state of voluntariness), *with Schmerber*, 384 U.S. at 770 (assessing whether an officer was justified in invading an individual's bodily integrity in light of his suspicions about the individual's suspected involvement in a crime).

[181] *See* NY Bill Jacket, 2010 S.B. 46, ch. 169 (asserting that the purpose of implied consent and driving under the influence law is to protect individual safety when using the road).

[182] S. Res. 3768, 2011 Leg., 234th Sess. (N.Y. 2011) (suggesting that eliminating the right to refuse would strengthen the implied consent provision in VTL § 1194). *Compare MADD-Maine*, *supra* note 25 (twenty-three DUI fatalities), *with MADD–New York*, MADD, http://www.MADD.org/drunk-driving/state-stats/New_York.html (last visited Feb. 19, 2013) (315 DUI fatalities).

allow this procedure to help maintain society's safety.[183]

It could be argued that the drunk driver does not choose to submit to the societal goal of maintaining safe roadways, as evidenced by his or her dangerous choice to get behind the wheel.[184] However, a focus on implied consent, rather than traditional intrusion paradigms, again provides a more tolerable image when analyzing the role of a driver in the general scheme.[185] If the right to refuse is eliminated, the driver will have made a statement, reflecting a choice, which affects his constitutional rights, the grant of consent given at the time he or she received a license.[186] Under *Schneckloth*, that consent, once validly given without coercion, supports the constitutionality of the search in reliance on an individual's choice to participate in protecting society's interests.[187] In this situation, the search is specifically part of society's interest in helping law enforcement's on-the-scene investigation into whether the specific crime of driving under the influence has occurred,[188] and shifts the focus towards the driver's choices.[189]

However, *Schompert* is what adds the key piece to the equation. Under the *Schompert* mania standard, intoxication has little to no effect on the voluntariness of the statement, and the individual is held to the consequences of his or her choice.[190] When *Schneckloth* and *Schompert* are combined, they stand for the proposition that an

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[183] *Compare Coolidge*, 403 U.S. at 488 (distinguishing the interest in maintaining a safe society by encouraging citizens to come forward with evidence that may aid law enforcement), *with* Rochin v. California, 342 U.S. 165, 169 (1951) (using a "shock the conscience" test to determine whether a police action violates due process because of the inappropriate manner in which it was conducted), *and Miranda*, 384 U.S. at 446 (discussing the effect of police brutality on efforts to secure testimony from witnesses as part of its holding that voluntariness is a key factor to assessing whether a confession can be used against an individual constitutionally). "It is an act of responsible citizenship for individuals to give whatever information they have to aid in law enforcement." *Miranda*, 384 U.S. at 477-78.

[184] *See Drunk Driving Facts*, *supra* note 23 (highlighting that 360,000 people are killed or injured by drunk drivers).

[185] *See Schneckloth*, 412 U.S. at 225 (highlighting a variety of the individual interests furthered and protected by an individual's ability to consent to a search, such as the community interest in pursuing justice for all).

[186] *See* VTL § 1194(2)(a) ("Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test.").

[187] *Schneckloth*, 412 U.S. at 248-49.

[188] *See* VTL§ 1194(2)(a)(1) (requiring an in the field officer to assess whether there is probable cause to believe the individual committed the offense of driving under the influence before using the individual's implied consent to require them to undergo testing).

[189] *See supra* note 181.

[190] *Schompert*, 226 N.E.2d at 308.

individual, even an intoxicated individual, is held to the consequences of his or her voluntary statement.[191] Therefore, it follows that intoxication should have no bearing on the scope of consent that has already been validly given in advance.[192] Nor should an individual's subjective impairment be permitted to bear any weight on an attempt to revoke that valid consent.[193] When individuals give implied consent to search they further an important societal goal, and they have subjective knowledge of their choice to help further that goal. Therefore, individuals cannot be allowed to attempt to revoke consent and avoid promoting those goals because of drunken lapses in judgment.

VIII. CONCLUSION: THE VALUE OF *PEREZ*

The court in *Perez* continued to extend two important facets of the voluntary consent search, first, the application of Fifth Amendment voluntary confession standards to the test of voluntariness of a grant of consent to search.[194] Second, the court in *Perez* continued to apply these standards correctly to the specific test of whether intoxication has any bearing on the validity of consent.[195] As is shown by the Supreme Court's ruling in *Schneckloth*, the dangers presented by a voluntary consent search are minimal, and distinguished from many other important constitutional protections.[196] This leaves room for the test of voluntary consent used in *Perez* to be applied to an individual's choice to obtain a driver's license, and submit to a test of their body for the presence of alcohol.[197] When

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[191] *See supra* Parts III-V (discussing the effect of intoxication on an individual's subjective voluntariness and consent to search).

[192] *See Jimeno*, 500 U.S. at 252 (using an objective reasonableness test to determine whether an officer's communication with a consenter presented a limit on the scope of his or her consent). It is likely that despite an attempt to refuse, a driver's consent under N.Y. VEH. & TRAF. LAW § 1194 would not be exceeded by the scope of a search of his or her body for alcohol if the statutory language is updated to expressly expand consent, and eliminate the right to refuse, as was suggested by S. Res. 3768, 2011 Leg., 234th Sess. (N.Y. 2011).

[193] Subjective impairment has no effect on the validity of implied consent. *Kates*, 428 N.E.2d at 448. Subjective impairment also has no effect on the validity of traditional grants of consent. *See Shields*, 742 N.Y.S.2d at 909 (holding that unless an individual is so intoxicated they cannot remain in touch with the world, his or her consent is valid). *See also supra* Part IV.

[194] *Perez*, 951 N.Y.S.2d at 343.

[195] *Id.*

[196] *Schneckloth*, 412 U.S. at 226-27.

[197] The consent is granted at the time the individual chooses to operate a vehicle under the influence. *See* VTL § 1194(2)(a).

this test is applied correctly, it supports new legislation eliminating the right to refuse both legally,[198] and practically, by providing a paradigm focusing on individual responsibility and choice.[199] Undoubtedly, it is the act of a responsible citizen to come forward and aid the police if possible,[200] and the deterrent effect of eliminating the right to refuse bolsters the impression that this is simply the right thing to do.[201] There is arguably no more responsible act for citizens of New York than to come forward and help combat one of the greatest dangers in our society today.[202]

Avi Goldstein[*]

[198] *See* S. Res. 3768, 2011 Leg., 234th Sess. (N.Y. 2011) (eliminating the right to refuse from New York law). The right to refuse is nothing more than a statutory grace provided to citizens. *Neville*, 459 U.S. at 565.

[199] *See supra* note 181.

[200] *Schneckloth*, 412 U.S. at 243.

[201] "Whoever saves a life, it is considered as if he saved an entire world." *Babylonian Talmud: Sanhedrin, Folio* 37a. *See also supra* note 182 (highlighting that lives are saved by strengthening the right to refuse in limited circumstances). A combination of these principles justifies cracking down on drunk driving by adding strength to our implied consent laws.

[202] New York State drunk drivers cause 27% of the total traffic related deaths in the state and cost the taxpayers over two billion dollars a year. *See MADD–New York*, *supra* note 182.

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