

**TESTING JUDICIAL ASSUMPTIONS OF THE “CONSENSUAL”  
ENCOUNTER: AN EXPERIMENTAL STUDY<sup>1</sup>**

*Alisa M. Smith\**  
*Erik Dolgoff\*\**  
*Dana Stewart Speer\*\*\**

**ABSTRACT**

Because consensual encounters are not seizures, they do not trigger Fourth Amendment<sup>2</sup> protections.<sup>3</sup> When determining whether encounters are consensual, the United States Supreme Court used a “reasonable, innocent person” test.<sup>4</sup> Under this test, an encounter is not a seizure if “a reasonable [innocent] person would feel free to decline the officers’ requests or otherwise terminate the encounter.”<sup>5</sup> Whether an encounter is consensual is an empirical question with an empirical answer.<sup>6</sup> Yet, no experimental research has examined if *reasonable*

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\* Associate Professor, Law, Justice & Advocacy, The University of Tampa. Assistant Public Defender, Polk County Public Defender’s Office, Bartow, Florida. Ph.D. 1998, The Florida State University; J.D. 1988, The Florida State University.

\*\* Managing Partner, Real Life Recovery. B.A. Psychology 2012, The University of Tampa.

\*\*\* B.A. Government & World Affairs 2011. J.D. Candidate 2015, DePaul School of Law.

<sup>2</sup> U.S. CONST. amend. IV. The Fourth Amendment provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .” *Id.*

<sup>3</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.” (citations omitted)).

<sup>4</sup> See *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

<sup>5</sup> *Id.*

<sup>6</sup> See Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 525 (2001).

people who encounter the police would decline officer requests, terminate encounters, or even feel free to do so.<sup>7</sup> Without direct, experimental data on the reactions and perceptions of *reasonable, innocent people*, judges employ untested assumptions about human behavior when drawing legal conclusions.<sup>8</sup> The research set forth in this Article tests the consensual-encounter assumptions by capturing the perceptions of eighty-two individuals immediately following structured, “consensual” encounters with security officers through four progressively intrusive stages under varying conditions.<sup>9</sup> The findings raise serious questions about the assumptions of consensual-encounter jurisprudence.<sup>10</sup>

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<sup>7</sup> Scholars have called for the empirical study of the consensual encounter doctrine. *See id.* at 551-52; Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 201.

<sup>8</sup> *See* David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 51 (2009); *infra* text accompanying note 26.

<sup>9</sup> Eighty-three individuals encountered and complied with every request by security; eighty-two of the individuals agreed to participate in the postencounter interview. *See infra* Part IV.

<sup>10</sup> *See infra* Part VI.

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## I. INTRODUCTION

Consensual encounters are not seizures.<sup>11</sup> During a consensual encounter, the Fourth Amendment requirements of probable cause and a warrant do not apply; neither does the lower, reasonable suspicion standard for a brief investigatory stop.<sup>12</sup> In distinguishing between seizures and consensual encounters, the United States Supreme Court, in *Terry v. Ohio*, noted that not all encounters between police and citizens involved seizures.<sup>13</sup> The Court stated, “Only when the officer, by means of *physical force or show of authority*, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred.”<sup>14</sup>

In later decisions, the United States Supreme Court, employing the reasonable, innocent person test, held that encounters involving questioning, examining identification, and requesting consent to search luggage were consensual as long as the police did not convey the message that the individual must comply with the officer’s requests.<sup>15</sup> However, none of the Court’s decisions rest on extra-judicial, empirical studies examining whether reasonable persons would feel compelled to comply with authority.<sup>16</sup> The Court has grounded its determinations regarding the reasonableness of people to feel free to terminate police encounters or refuse police requests on the judges’ own untested assumptions and beliefs instead of scholarly research findings.<sup>17</sup>

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<sup>11</sup> The Court has defined three types of encounters with police: consensual encounters, investigative detentions, and arrests. *See Terry v. Ohio*, 392 U.S. 1, 17-19 (1968).

<sup>12</sup> *See Florida v. Royer*, 460 U.S. 491, 497 (1983) (“[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in a 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.” (citing *Dunaway v. New York*, 442 U.S. 200, 210 n.12 (1979))).

<sup>13</sup> *Terry*, 392 U.S. at n.16.

<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (consent to search luggage); *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984) (consent to questioning and consent to search luggage); *INS v. Delgado*, 466 U.S. 210, 216 (1984) (consent to questioning); *Royer*, 460 U.S. at 501 (consent to search luggage); *United States v. Mendenhall*, 446 U.S. 544, 552 (1980) (consent to examine identification).

<sup>16</sup> Kessler, *supra* note 8, at 51.

<sup>17</sup> *Id.*

Social-psychological research, which dates to Milgram's 1963 obedience-to-authority study,<sup>18</sup> unequivocally demonstrates that reasonable people comply with authority figures.<sup>19</sup> Yet, no experimental research has directly examined whether reasonable individuals feel free to leave or terminate "consensual" encounters with authority figures, such as police or security officers.<sup>20</sup> A recent empirical study, by David K. Kessler, surveyed respondents on their projected and predicted reactions to encounters with the police in two situations: one, an approach on the sidewalk, and the other, an approach while on a bus.<sup>21</sup> Although Kessler's research found that most individuals, in both scenarios, stated that they would not have felt free to leave,<sup>22</sup> research has demonstrated that people do not accurately predict their responses, particularly in authority-subject situations.<sup>23</sup> As one author stated, "What people perceived they would do, or perhaps would want to do, in such a situation, is very different from what people actually do when confronted with an asymmetrical authority relationship."<sup>24</sup> The research in this Article expands on Kessler's by employing an experimental design, including observations of how people respond during structured, but "real" encounters with security officers, followed by interviews of those individuals immediately after the encounter.<sup>25</sup>

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<sup>18</sup> See generally STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1st ed. 1974) [hereinafter Milgram II]; Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 376-77 (1963) [hereinafter Milgram I], available at <http://www.columbia.edu/cu/psychology/terrace/w1001/readings/milgram.pdf> (showing social-psychological research with a shock generator).

<sup>19</sup> See Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47, 47 (1974); Brad J. Bushman, *Perceived Symbols of Authority and Their Influence on Compliance*, 14 J. APPLIED SOC. PSYCHOL. 501 (1984).

<sup>20</sup> Kessler, *supra* note 8, at 51.

<sup>21</sup> *Id.* at 68-71.

<sup>22</sup> *Id.* at 52.

<sup>23</sup> Nadler, *supra* note 7, at 171-73.

<sup>24</sup> ILLYA D. LICHTENBERG, VOLUNTARY CONSENT OR OBEDIENCE TO AUTHORITY: AN INQUIRY INTO THE "CONSENSUAL" POLICE-CITIZEN ENCOUNTER 90 (UMI 1999) (studying consensual searches during traffic stops); see also Leaf Van Boven et al., *The Illusion of Courage in Self-Predictions: Mispredicting One's Own Behavior in Embarrassing Situations*, 25 J. BEHAV. DECISION MAKING 1 (2012); Philip Zimbardo, *The Mind is a Formidable Jailer: A Prirandellian Prison*, N.Y. TIMES MAG., Apr. 8, 1973, at 38; *Quiet Rage: The Stanford Prison Experiment* (CBS News television broadcast 1992), available at <http://www.prisonexp.org/documentary.htm>.

<sup>25</sup> See *infra* Part IV.

This research is the first empirical and experimental step in examining whether consensual encounters are truly consensual.<sup>26</sup> In other words, this research tests the Court's assumptions about how reasonable individuals interact with authority and perceive those interactions.<sup>27</sup> Do reasonable people terminate, walk away from, or ignore requests during "consensual" police encounters?<sup>28</sup> Do they know during these encounters that they have the right to ignore the police or terminate the encounter?<sup>29</sup> Finally, do they perceive the encounters as consensual?<sup>30</sup>

We found that, upon an encounter with security, not one of the eighty-three people during the four stages of the encounter<sup>31</sup> terminated the encounter with, walked away from, or ignored the officers.<sup>32</sup> One hundred percent of those encountered complied through every stage of the interaction.<sup>33</sup> Not a single individual even questioned the officer's authority or asked whether he had to comply.<sup>34</sup> Gender, race, or situational factors (including the number of officers, location of the encounter, or time of day) did not matter.<sup>35</sup>

Contrary to judicial reasoning that individuals, under most noncommanding or physically restraining circumstances, "feel free" to walk away from, terminate an encounter with, or ignore the police,<sup>36</sup> the quantitative and qualitative observations from postencounter interviews demonstrated that reasonable and innocent individuals complied with authority without any physical show of force or commanding authority.<sup>37</sup> Most individuals complied with or submitted to security officers

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<sup>26</sup> See *infra* Parts III-VI.

<sup>27</sup> See *infra* Part IV.

<sup>28</sup> See *infra* Part IV.

<sup>29</sup> See *infra* Table 3.

<sup>30</sup> See *infra* Table 3. On-campus security officers are in uniform and carry a weapon. They have the authority to detain and, although they are not police officers, they hold similar powers on campus. Most of the students, surveyed after their encounters, compared security officers to the police or considered the security officers as the police. See *infra* Part IV.

<sup>31</sup> See *infra* Part IV.A (describing the four stages of each encounter).

<sup>32</sup> See *infra* Table 3.

<sup>33</sup> See *infra* Part V.

<sup>34</sup> See *infra* Part V.

<sup>35</sup> See *infra* Part V.

<sup>36</sup> See *supra* notes 25-27 and accompanying text.

<sup>37</sup> See *infra* Part V.

merely because they were authority figures.<sup>38</sup> Few knew of their right to terminate encounters with, walk away from, or ignore police; and those who did know simply chose not to be disobedient.<sup>39</sup> The results show that judicial assumptions are flawed about the reactions of reasonable, innocent people during “consensual” encounters with police.<sup>40</sup>

This Article proceeds in five parts. Part II provides a brief review of the law that differentiates seizures and consensual encounters. Part III provides a brief summary of the psychological literature on compliance with authority. Part IV identifies the research questions and methodology for this experimental study. Part V discusses the quantitative and qualitative findings of the experimental study and follow-up, postencounter interviews. Part VI draws conclusions from the research for implications regarding judicial decision-making and future research.

## II. DIFFERENTIATING SEIZURES AND CONSENSUAL ENCOUNTERS: A LEGAL ANALYSIS

In footnote sixteen of *Terry v. Ohio* (1968), the United States Supreme Court first distinguished between seizures and consensual encounters: “Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”<sup>41</sup> By 1980, the plurality decision of *United States v. Mendenhall* fleshed out the “distinction between an intrusion amounting to a ‘seizure’ of the person and an encounter that intrudes upon no constitutionally protected interest.”<sup>42</sup> Relying on the observations of Justices White and Harlan in their concurring decisions in *Terry* that “[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets,”<sup>43</sup> and like others, “police officers

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<sup>38</sup> See *infra* Part V.

<sup>39</sup> See *infra* Part V.

<sup>40</sup> See *infra* Part VI.

<sup>41</sup> *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

<sup>42</sup> *United States v. Mendenhall*, 446 U.S. 544, 552 (1980).

<sup>43</sup> *Id.* at 553 (quoting *Terry*, 392 U.S. at 34 (White, J., concurring)).



enjoy the liberty (again possessed by every citizen) to address questions to other persons,”<sup>44</sup> the *Mendenhall* Court narrowly defined seizures:

We adhere to the view that a person is “seized” only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but “to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.” *As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy* as would under the Constitution require some particularized and objective justification.<sup>45</sup>

The *Mendenhall* Court concluded that a person is seized, “only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”<sup>46</sup> Circumstances that may amount to seizures, as the Court suggested, include: (1) “the threatening presence of several officers,” (2) “the display of a weapon by an officer,” (3) “some physical touching of the person of the citizen,” or (4) “the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.”<sup>47</sup> Employing this test, the Court held that the encounter in *Mendenhall* was not a seizure.<sup>48</sup> In *Mendenhall*, federal agents approached Mendenhall on a public concourse at an airport.<sup>49</sup> The agents, who did not wear uniforms, approached her and identified themselves as federal agents and requested, but did not demand, her identification and ticket.<sup>50</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 553-54 (emphasis added) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

<sup>46</sup> *Id.* at 554.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 555.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

Similarly, and again employing the *Mendenhall* test, the Court determined that no seizure existed when INS agents systematically questioned factory workers about their identification and citizenship while they worked, even when the agents were stationed at the factory exits.<sup>51</sup> In doing so, the Court concluded that “police questioning, by itself, is unlikely to result in a Fourth Amendment violation.”<sup>52</sup> Even if “most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.”<sup>53</sup> These circumstances were not, according to the Court, “so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded.”<sup>54</sup> If, however, a person refuses (which did not happen during the questioning of factory workers) and the police “take additional steps . . . to obtain an answer,” only then does the Fourth Amendment impose “some minimal level of objective justification to validate the detention or seizure.”<sup>55</sup>

In *Florida v. Bostick*, the Court slightly altered the *Mendenhall* free-to-leave test<sup>56</sup> into the free-to-decline or terminate-the-encounter

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<sup>51</sup> *INS v. Delgado*, 104 S. Ct. 1758, 1765 (1984).

<sup>52</sup> *Id.* at 1762.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1763.

<sup>55</sup> *Id.* Later, in *California v. Hodari D.*, 499 U.S. 621, 629 (1991) and *Michigan v. Chesternut*, 486 U.S. 567, 577 (1988), the Court held that an individual had to submit to the authority of the police in order for the Court to find that the police seized the individual. The police did not “seize” Hodari and Chesternut because they ran from the police (a clear showing of authority), rather than submit. *Hodari D.*, 499 U.S. at 629; *Chesternut*, 486 U.S. at 577. On the other hand, detaining a suspect at a police station is a seizure. *See Kaupp v. Texas*, 538 U.S. 626, 630 (2003). An encounter is not consensual when law enforcement officers retain a person’s airline ticket and identification, inform the individual that the officers are narcotics officers and that the individual is suspected of transporting narcotics, and ask the individual to accompany the officers to a police room. *See Florida v. Royer*, 460 U.S. 491, 501-02 (1983). The Court reasoned that the officers’ asking Royer to accompany them to the police room while retaining his personal documents and without indicating he was free to leave was a “show of official authority such that ‘a reasonable person would have believed he was not free to leave.’” *Id.* (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

<sup>56</sup> *See supra* note 46 and accompanying text.

test.<sup>57</sup> In *Bostick*, the Court confronted the police's drug interdiction practice of boarding interstate buses to ask passengers for consent to search their luggage.<sup>58</sup> Obviously, passengers who were on the buses, stopped at a midpoint in their travels, would not "feel free to leave" the bus.<sup>59</sup> The Court determined this was the wrong question.<sup>60</sup> The correct question concerned the passengers' free choice to refuse to participate in the officers' inquiry: "[T]he appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."<sup>61</sup> Under this new test, the Court found that the bus passengers were not seized by police officers boarding the buses and asking questions because reasonable people would have felt free to refuse the officers' requests to search their luggage or to otherwise dismiss the officers.<sup>62</sup>

Most recently, in *Brendlin v. California*, the Court distinguished between seizures and encounters in concluding that passengers in cars stopped for traffic violations are seized for purposes of the Fourth Amendment.<sup>63</sup> In doing so, Justice Souter, writing for the majority, summarized the test adopted in *Mendenhall* and revised by *INS v. Delgado*,<sup>64</sup> *Michigan v. Chesternut*,<sup>65</sup> *California v. Hodari D.*,<sup>66</sup> and *Bostick*,<sup>67</sup> which distinguishes seizures from consensual encounters:

When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall*, who wrote that a

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<sup>57</sup> *Florida v. Bostick*, 501 U.S. 429, 436-37 (1991).

<sup>58</sup> *Id.* at 431.

<sup>59</sup> *Id.* at 435.

<sup>60</sup> *Id.* at 436.

<sup>61</sup> *Id.*

<sup>62</sup> *See id.* at 437; *see also* *United States v. Drayton*, 536 U.S. 194, 203-04 (2002).

<sup>63</sup> *Brendlin v. California*, 551 U.S. 249, 256-57 (2007).

<sup>64</sup> *INS v. Delgado*, 466 U.S. 210, 216-17 (1984).

<sup>65</sup> *Michigan v. Chesternut*, 486 U.S. 567, 572-73 (1988).

<sup>66</sup> *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

<sup>67</sup> *Florida v. Bostick*, 501 U.S. 429, 439 (1991).

seizure occurs if “in the view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” Later on, the Court adopted Justice Stewart’s touchstone, but added that when a person “has no desire to leave” for reasons unrelated to the police presence, the “coercive effect of the encounter” can be measured better by asking whether “a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”<sup>68</sup>

In all of its encounter decisions, the Court has not cited to a single empirical authority in holding that reasonable people feel free to ignore officers, refuse their requests, or terminate encounters with them.<sup>69</sup> The Court, however, is not completely to blame for this oversight. As Kessler noted, the Court has struggled with the lack of an empirical study that might assist it in applying and drawing conclusions about the *reasonable innocent person*:

So what do we do if we don’t know? I can follow my instinct. My instinct is he would feel he wasn’t free because the red light’s flashing. That’s just one person’s instinct. Or I could say, let’s look for some studies. They could have asked people about this, and there are none . . . . What should I do?<sup>70</sup>

Research directly examining the behaviors and perceptions of reasonable people during police encounters, until now, has not existed.<sup>71</sup>

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<sup>68</sup> *Brendlin*, 551 U.S. at 255 (internal citations omitted).

<sup>69</sup> Kessler, *supra* note 8, at 52.

<sup>70</sup> *Id.* at 51 (quoting Transcript of Oral Argument at 43, *Brendlin v. California*, 551 U.S. 249 (2007) (No. 06-8120) (Breyer, J.)).

<sup>71</sup> *See id.* at 53 (presenting the first empirical evidence of whether people feel free to terminate encounters with law enforcement but failing to examine the perceptions and behaviors of the reasonable person); *United States v. Little*, 18 F.3d 1499, 1508 (10th Cir. 1994) (Logan, J., dissenting).

### III. COMPLYING WITH AUTHORITY: THE PSYCHOLOGICAL LITERATURE<sup>72</sup>

Legal scholars have criticized the Court's decisions applying the reasonable, innocent person test in distinguishing consensual encounters from seizures,<sup>73</sup> and some have relied on Stanley Milgram's (1963, 1974) work on obedience to authority in identifying the flaws in the Court's reasoning.<sup>74</sup>

Stanley Milgram published his findings from a study that measured obedience to authority among typical, reasonable individuals in a laboratory experiment purportedly on memory and learning.<sup>75</sup> Experimental subjects were asked to administer shocks to subject learners each time the learners gave the wrong answer to a question.<sup>76</sup> The shocks were not real, but the experimental subjects believed they were shocking the learners.<sup>77</sup> For each wrong answer that the learner gave, the experimental subject was told to increase the strength of the shocks.<sup>78</sup> Milgram found that individuals administered shocks that they believed were inflicting severe pain on participants based on nothing more than the verbal insistence of a man in a gray lab coat, who directed the experimental subjects to comply.<sup>79</sup>

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<sup>72</sup> The focus of this Article's study, like that of Kessler, is to examine consensual encounters, not consensual searches. See Kessler, *supra* note 8, at 51-53. Some of the psychological research or legal scholarly debate concerning consensual searches, however, is relevant to understanding whether an individual who interacts with the police is doing so consensually or voluntarily. See *infra* Part III. Therefore, this Article cites some of that research.

<sup>73</sup> See, e.g., Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 815, 817-18 (2005); Steinbock, *supra* note 6, at 522-25.

<sup>74</sup> See Nadler, *supra* note 7, at 175-77 (noting that Milgram's obedience study is "[p]erhaps the most well-known scientific study of compliance with authority"); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 236, 239-40 (2002) (recognizing that the psychology experiments conducted by Milgram "support[s] the general idea that obedience to authority is deeply ingrained").

<sup>75</sup> See Milgram I, *supra* note 18, at 371-72.

<sup>76</sup> *Id.* at 373-74.

<sup>77</sup> See *id.* at 371-72.

<sup>78</sup> *Id.* at 374.

<sup>79</sup> See *id.* at 373-74, 376.

In a later study, Leonard Bickman (1974) sought to differentiate the effects of varied uniforms on compliance rates.<sup>80</sup> Bickman investigated the impact of dress and compliance with commands.<sup>81</sup> Specifically, he tested the differential effect of uniformed and nonuniformed individuals' commands to (1) pick up a piece of trash, (2) provide a dime in a parking meter for an unknown motorist, and (3) move away from a public bus stop.<sup>82</sup> Bickman used three variants of dress: guard uniform, milkman uniform, and no uniform.<sup>83</sup> He found that the uniform mattered.<sup>84</sup>

Compliance with commands significantly increased for uniformed rather than nonuniformed individuals.<sup>85</sup> Compliance was even higher for individuals wearing the "guard" uniform.<sup>86</sup> When the guard asked individuals to pick up trash, 82% complied; 89% put money in the parking meters; and 56% left a public bus stop.<sup>87</sup> Fewer complied with the commands of the milkman and nonuniformed citizen.<sup>88</sup> Between 21% and 64% complied with commands from the milkman, and 20-36% complied with the commands of a typical citizen.<sup>89</sup> The Milgram and Bickman research examined responses to commands, not requests, and these studies did not use police officers or security officers with police authority.<sup>90</sup>

Kessler (2009) conducted the first empirical study of whether people would actually feel free to leave or terminate an encounter with

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<sup>80</sup> Bickman, *supra* note 19, at 47-49.

<sup>81</sup> *See id.* at 49.

<sup>82</sup> *See id.* at 49-50.

<sup>83</sup> *Id.* at 49.

<sup>84</sup> *Id.* at 50.

<sup>85</sup> *See id.* at 50-51 & tbl.1.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 51 tbl.1.

<sup>88</sup> *See id.*

<sup>89</sup> *Id.*

<sup>90</sup> Kessler, *supra* note 8, at 63. "There are limitations on how much light Milgram's and Bickman's work sheds on the seizure question. Neither set of experiments actually involved a police officer, and both sets of authority figures commanded, rather than asked, subjects to comply." *Id.* (citing Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 449 (2004)); Simmons, *supra* note 73, at 807.

the police.<sup>91</sup> He surveyed 406 respondents regarding their perceptions on hypothetically encountering the police on the street or on a bus.<sup>92</sup> Based on his survey results, Kessler found that, contrary to the Court's conclusions, people reported that they would not feel free to end encounters with the police in either situation.<sup>93</sup> Moreover, Kessler found that knowing about the right to terminate an encounter did not result in respondents saying that they would feel free to do so.<sup>94</sup> Kessler also found that women and people under the age of twenty-five reported that they would feel less free to leave, whereas men and people over the age of twenty-five did not feel as restricted.<sup>95</sup> Although important, one prominent concern with the research findings, as Kessler himself noted, is that:

[P]eople cannot accurately know how they *would* feel in a situation that they have not experienced; the forces that would act on them in the heat of the moment are difficult to express while filling out a piece of paper. . . . The coercive pressures experienced when actually dealing with a police officer are likely to make one feel less free than when one is standing in a train station.<sup>96</sup>

The present research enhances that of Kessler's by simulating and observing actual police-citizen encounters through four stages of interaction immediately followed by postencounter interviews about respondent reactions, beliefs, and perceptions.<sup>97</sup>

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<sup>91</sup> *See id.* at 52-53.

<sup>92</sup> *Id.*

<sup>93</sup> *See id.* at 74-75.

<sup>94</sup> *Id.* at 75-79.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 80. "[R]esearch confirms the difficulty of accurately imagining the extent to which situational constraints shape our behavior." Nadler, *supra* note 7, at 171; *see also* Charles K. Hofling et al., *An Experimental Study in Nurse-Physician Relationships*, 143 J. NERVOUS MENTAL DISEASE 171 (1966).

<sup>97</sup> *See infra* Part IV.

#### IV. RESEARCH QUESTIONS AND METHODS

Three empirical questions emerge from the Court's consensual-encounter decisions<sup>98</sup>:

1. Do encountered and questioned individuals walk away, terminate encounters, refuse to cooperate, question authority, or ignore police requests through four increasingly intrusive stages of an encounter: stop, identification, proof of identification, and questioning as to the reason for being on campus?
2. Do the rates of compliance with police requests vary depending on the following circumstances: number of officers present during the encounter, number of respondents present during encounter, indoor or outdoor encounter, and day or evening encounter?
3. Is there a standard "reasonable" person? Or, do individuals' understanding of their rights, reasons for complying with requests, and perceptions of the consensual nature of police-initiated encounters vary?

##### A. *Methods*

Intending to answer the questions that prior research left open and to improve jurisprudence that defines and distinguishes consensual encounters and seizures, quantitative and qualitative data were collected by observing structured encounters of one, two, and four university security officers with eighty-three single or group passersby, inside and outside a main university building on campus during the day and evening, and by immediately interviewing the encountered passersby after the encounter.<sup>99</sup> Two independent observers, one male and one female, catalogued the interactions with the security officers, interviewed the

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<sup>98</sup> See generally Kessler, *supra* note 8, at 60 (noting an examination of the United State Supreme Court's essential encounter decisions reveals a consistent application of the Court's "free to leave" standard, which essentially states that absent some outward coercion, "a reasonable person would feel free to leave or otherwise terminate his encounters with law enforcement officers").

<sup>99</sup> The study was conducted at a medium-sized, southern private university. The Institutional Review Board granted approval for this research project. Each individual



participants, recorded their responses to the questions, and later transcribed them.<sup>100</sup>

The security guards were provided the same protocol for each encounter. The guards were asked to approach individuals who were walking by and ask the following questions, in the following order, without a commanding voice:

1. “Please come here, I’d like to speak with you.”
2. If complies: “May I have your name?”
3. If complies: “May I see your identification?”
4. If complies: “Why are you on campus?”

If at any point during the encounter a participant ignored, walked away from, or raised questions about the encounter, security was instructed to do nothing or advise the passersby that they were under no obligation to comply. In other words, the approached individuals were free to leave and did not have to comply with the security officers’ requests. None of the participants ignored the security officers, walked away from them, or even questioned the officers’ requests. During each of the eighty-three interactions, the participants complied with each of the four commands of the security officers.

Immediately after the encounter, the interviewers read each participant the approved informed-consent form, and, with the exception of one person, all agreed to participate. They were asked the following questions: (1) why they did not ignore or walk away from security; (2) whether they thought they had the right to ignore or walk away from security, and why or why not; and (3) whether they considered the interaction with security as consensual, and why or why not. Participants identified their gender, race, and student status. They were asked about prior encounters with the police, and if they had prior encounters, whether those encounters were positive or negative.<sup>101</sup>

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gave informed consent before the interview. Only one individual refused to participate.

<sup>100</sup> The two independent observers were the non-attorney co-authors of this Article, Dana Stewart Speer and Erik Dolgoff, undergraduate students of Professor Alisa M. Smith.

<sup>101</sup> With the exception of one, every interviewed participant was a university student.

**B. Participants**

Eighty-three individuals encountered security officers, and eighty-two agreed to participate in the follow-up interviews. A snapshot of the participants is provided in Table 1. Of the participants, 50% were female (forty-one).<sup>102</sup> Additionally, 80% of the participants reported being Caucasian (sixty-six), 11% African American (nine), 6% Hispanic (five), and 2% reported another race (two). Only one of the eighty-two individuals was not a student. Of the 54% (forty-five) who had previous contact with law enforcement, 22% (eighteen) reported those past interactions were negative, almost 21% (seventeen) reported that they were positive, and 11% (nine) reported both positive and negative encounters with the police.<sup>103</sup>

**TABLE 1: SNAPSHOT OF PARTICIPANTS**

Variable	Coding	Percent
Gender	Male	50.0
	Female	50.0
Race/Ethnicity	Caucasian	80.0
	African American	11.0
	Hispanic	6.0
	Other	2.0
Prior encounters with law enforcement	Yes	54.3
	No	45.1
Nature of previous law enforcement encounters (For those who had previous exposure)	Negative	22.0
	Positive	21.0
	Both	11.0
	Neutral	1.2

N = 83

<sup>102</sup> See *infra* Table 1. This evenly divided participant pool on gender was purely coincidental. Observations naturally occurred with groups and individuals that encountered security during the observation periods. We did not select participants by gender or any other demographic characteristic. We attempted to collect observations equally on the following variables: day/evening, inside/outside, and number of officers. The number of security officers, however, fluctuated by the number of officers that showed up to participate.

<sup>103</sup> Forty-five percent (37) did not have a prior interaction with the police and 1% (1) did not answer the question.

Forty-two encounters occurred outside, and forty occurred inside a university building. Forty-two encounters occurred in the evening (beginning at 10 p.m.), and forty during the day (beginning at 9 a.m.). Officers approached individuals and groups as they naturally occurred during the observation periods.<sup>104</sup> Of the encounters, 42% (thirty-five) involved one individual, almost 25% (twenty) involved two individuals, 14% (twelve) involved three individuals, and 14% (twelve) involved four individuals. One security officer was involved in 50% of the observations, 28% involved two security officers, and 22% involved four officers. During the observation periods, a variety of officers participated.<sup>105</sup> They were male and female, African American, Caucasian, and Hispanic. Table 2 provides the situational context for the encounters.

**TABLE 2: SITUATIONAL CHARACTERISTICS**

Variable	Coding	Percent
Location of Experimental Encounter	Inside	48.7
	Outside	51.2
Number of Officers in Experimental Encounter	One Officer	50.0
	Two or More Officers	50.0
Number of Students in Experimental Encounter	One Student	42.7
	Two Students	20.0
	Three Students	14.6
	Four Students	14.6
Time of Day	Night	51.2
	Day	48.8

*N* = 83

## V. QUANTITATIVE AND QUALITATIVE FINDINGS

### A. *Quantitative Results*

No differences emerged on any of the demographic or situational factors. One hundred percent of the participants complied with the security officers' requests. Not a single individual questioned the officers on their authority to approach, stop, question, or ask for identi-

<sup>104</sup> The two students collected data during eight separate observation times.

<sup>105</sup> The observation periods took place over the course of several weeks in March and April, 2011.

fication. As such, cooperation or compliance with security did not vary depending on any of the controlled variables. It did not matter whether there was one, two, or four security officers who approached individuals or students in groups; the race or gender of the security officers did not matter; nor did it matter whether the encounters occurred in the evening or day, or inside or outside a building. Gender, race, and prior interaction with law enforcement were irrelevant. Under all circumstances, individuals complied with all of the officers' requests. This was true even for the few students who were drunk or possessed beer but were underage during the encounter. In postencounter interviews, the individuals stated that they attempted to avoid security because of the alcohol violations, but when asked to approach, they complied. In other words, even those individuals who were violating the law or wanted to avoid security, and it would have been in their best interest not to interact with security, complied.<sup>106</sup> Despite the consistency of compliance, the views of the students varied on (1) why they did not walk away, (2) whether they understood that they had the right to walk away or ignore the officer(s), (3) what their perceptions were about that right, and (4) whether they perceived the encounter as consensual and why they perceived it as consensual or not.

First, participants were asked: Why did you comply? Sixty-one percent (50) responded that they complied because of their respect for authority. The remaining reasons concerned the individuals' preference for avoiding conflict or trouble, trying to help the officers, believing they had done nothing wrong and had no reason for not complying, and having no reason at all or were confused and scared.<sup>107</sup>

Participants were asked two questions that called for a yes or no response. They were asked whether they had the right to walk away from the security officers and whether they considered the encounter consensual. Forty-six percent (thirty-eight) of participants reported that they did not believe they had the right to walk away or ignore the officer(s). Thirty-four percent (twenty-eight) reported that they understood that they had the right to walk away or ignore the officer(s).

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<sup>106</sup> The underage students were not arrested. After the encounter, security asked them to discard the beer.

<sup>107</sup> The qualitative responses are examined and discussed more fully below. *Infra* Part V.B.

Twenty percent (sixteen) did not know. Regarding the perceived consensual nature of the encounter, more than 70% (fifty-eight) perceived the encounter with security as consensual, and almost 20% (sixteen) perceived the encounter as nonconsensual. Ten percent (eight) did not answer the question. A summary of participant responses on why they complied, their knowledge of their rights, and perceptions about the encounter is set forth in Table 3.

**TABLE 3: REASONS FOR COMPLYING, KNOWLEDGE OF RIGHTS, AND PERCEPTIONS OF ENCOUNTER**

Variable	Coding	Percent
Did you view the encounter as consensual?*	No	19.5
	Yes	70.7
Did you think you had the right to walk away, ignore the request, or terminate the encounter?*	No	47.6
	Yes	34.1
Why did you comply?	I did nothing wrong / nothing to hide	3.7
	Respect for authority	61.0
	Avoid conflict / trouble	9.8
	Trying to help, be nice / polite	7.3
	No reason / won't ignore anyone	7.3
	Confused or scared	1.2

*N* = 82 \*Missing responses account for the columns not adding to 100%

The next step required examining the data for relationships between demographic characteristics; situational factors; participants' knowledge of the right to walk away, ignore officer requests, or terminate the encounter; and their perceptions about the consensual nature of the encounter. Participants' knowledge of their rights and their perceptions of the encounter were unrelated. Of those thirty-eight participants who reported that they did not believe they had the right to walk away from or ignore the security officers, almost 70% (twenty-six) perceived the encounter as consensual. In other words, even though they believed that they had no right to walk away from or ignore the officer requests, those individuals also perceived the encounter as consensual. Similar contradictory responses were given by 14% (four) who reported that they knew they had the right to walk away from or ignore the security officers but perceived the encounter as nonconsensual. Eighty-five percent (twenty-four) of the twenty-eight participants who understood that

they had the right to walk away from or ignore the requests perceived the encounter as consensual. Table 4 reports these findings.

**TABLE 4: KNOWLEDGE OF RIGHTS AND PERCEPTIONS OF ENCOUNTER**

	Not Consensual	Consensual
No Right to Walk Away, Ignore, or Terminate	23.7% (n = 9)	68.4% (n = 26)
Right to Walk Away, Ignore, or Terminate	14.3% (n = 4)	85.7% (n = 24)

N = 82 \*Missing responses account for the number of responses not adding to 100%

More males (51.5%, seventeen) than females (32.4%, eleven) knew of the right to walk away from or ignore the security officers. Males (73%, twenty-seven) and females (83.8%, thirty-one), however, were equally likely to perceive the encounter as consensual. Caucasians (46%, twenty-four) were more likely than African Americans (25%, two) and Hispanics (25%, one) to know of the right to walk away or ignore security. Yet proportionally equal numbers of Caucasians (22%, thirteen), African Americans (22%, two), and Hispanics (22%, one) perceived the encounter as *nonconsensual*, with nearly 75%, fifty-eight, perceiving the encounters as consensual.

The number of officers affected, but not significantly so, whether those encountered believed they had the right to walk away or ignore the officers' requests. Thirty-one percent (thirteen) of those who encountered a single police officer believed that they had the right to walk away or ignore the officer requests, and only 17% (four) believed that when two officers approached them. The majority (61%, eleven) of those approached by four officers, however, knew of the right to walk away or ignore the requests. As noted previously, most perceived the encounter as consensual. Of those confronted by one officer, 70% (twenty-nine) perceived the encounter as consensual. Sixty-five percent (fifteen) of those interacting with two officers, and 78% (fourteen) of those interacting with four officers, perceived the encounter as consensual. Even those with prior negative interactions with police, who knew of the right to walk away (62.5%, nine), perceived the encounter as consensual (75%, seven). Whereas, more than half (53%, nine) of those with prior positive interactions knew of the right but overwhelmingly

(93%, eight) perceived the encounter as consensual. Some students were by themselves when approached, others were with one other student, and several were in groups of three or more. The number of students in the group had no affect on whether the encounter was perceived as consensual, or not. The only statistically significant finding was the relationship between the location of the experimental encounter and respondents' perceptions of consent ( $p = 0.017$ ). Participants approached outside (67%, twenty-four) were less likely to report that the encounter was consensual than participants approached inside (89.5%, thirty-four).<sup>108</sup>

## B. Qualitative Results

### 1. Coding Procedures

Following the interviews, the responses were transcribed and the qualitative answers categorized and coded.<sup>109</sup> One author read through all of the responses and noted patterns and themes that developed in the answers to the three questions calling for qualitative responses: (1) Why did you not walk away from or ignore the officer? (2) Why did you think you had or did not have the right to walk away from or ignore the officer? (3) Why do you consider the encounter consensual, or not? Using a grounded theory approach, the transcripts were reviewed allowing themes to emerge from the data.<sup>110</sup> Once the emerging themes developed into stable patterns, categories were created for the responses to each question.<sup>111</sup>

Two of the authors reviewed the responses and individually coded and categorized the responses (with intercoder agreement at

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<sup>108</sup> Of those individuals who responded, thirty-eight were approached inside with thirty-four reporting the encounter was consensual, and thirty-six were approached outside with only twenty-four reporting the encounter was consensual.

<sup>109</sup> *Infra* Tables 5 & 6. See BRUCE L. BERG & HOWARD LUNE, *QUALITATIVE RESEARCH METHODS FOR THE SOCIAL SCIENCES* CH. 11 (8th ed. 2011); IAN DEY, *QUALITATIVE DATA ANALYSIS: A USER-FRIENDLY GUIDE FOR SOCIAL SCIENTISTS* (2003).

<sup>110</sup> See BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* (1967); ANSELM L. STRAUSS, *QUALITATIVE DATA ANALYSIS FOR SOCIAL SCIENTISTS* (1987).

<sup>111</sup> See DEY, *supra* note 109.

85%).<sup>112</sup> After the coders agreed on the categorized responses, the responses were transcribed and coded using Provalis Software QDA Minor and Simstat<sup>113</sup> (which allowed for qualitative and quantitative analyses of the data). Categories were not mutually exclusive, and some participants reported more than a single reason or explanation for compliance or perception about the encounter. Each category was coded. The following section identifies the themes that emerged for each of the interview questions and the differences across demographic characteristics and participant reasons, explanations, and perceptions.

## 2. Interview Themes

To comprehend the respondents' characterizations and understanding of their rights and perceptions, they were asked four questions. Some respondents provided more than one reason or explanation for complying with security, knowing their rights, and perceiving the encounter. Each is reported.<sup>114</sup> The answers to the questions are explored below.

### *a. Why Did You Not Walk Away From or Ignore the Security Officer(s)?*

Respondents' reasons for not walking away from or ignoring security evolved into five general categories: (1) most verbalized respect for law enforcement, authority, or the status of police in society (60%, fifty); (2) some proclaimed innocence, nothing to hide, or no wrongdoing (13.6%, eleven); (3) a few said that they wanted to avoid conflict or trouble (10.9%, nine); (4) a few reported that they perceived security as polite or nice with good intentions or needing assistance (8%, seven); and (5) a very small number simply would not ignore anyone (3%, three). Some individuals were unable to give reasons for complying or

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<sup>112</sup> In this instance, the two independent coders agreed with the original coding 85% of the time. So, intercoder reliability is simply the consistency rate for agreement on the coded responses.

<sup>113</sup> QDA MINER 3, (Provalis Research 2007), available at <http://provalisresearch.com/products/qualitative-data-analysis-software/>; SIMSTAT 2 (Provalis Research 2007), available at <http://provalisresearch.com/products/simstat/>.

<sup>114</sup> The *n* identified is, in some instances, greater than eighty-two and the percentages do not add up to 100% because individuals provided more than one of the reported reasons or explanations.



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they simply did not know why they complied (12%, ten), and one individual reported being confused and scared (.01%).

Many reported respect for authority, particularly law enforcement, as a reason for complying:

- “Because he’s an officer.” (Respondent 2)
- “I did not [walk away or ignore him] because he’s my authoritative figure and I was always taught to listen to authority.” (Respondent 8)
- “Out of respect I guess.” (Respondent 11)
- “He’s security. He has authority.” (Respondent 27)
- “It’s security. You do what they say.” (Respondent 28)
- “It’s a hierarchy. They are in charge.” (Respondent 29)
- “He has authority over me.” (Respondent 31)
- “Because he was wearing a security uniform.” (Respondent 33)
- “[Be]cause it’s the cops.” (Respondent 39)
- “Oh I didn’t walk away from security because I believe they deserve respect.” (Respondent 49)
- “I wanted to be respectful.” (Respondent 52)
- “Um, [be]cause they are like officials and I don’t disrespect officials.” (Respondent 58)
- “Doing his job.” (Respondent 66)

Fewer respondents stated they complied to avoid trouble or appearing suspicious:

- “Just to avoid conflict, if any.” (Respondent 4)
- “I didn’t want to get into trouble.” (Respondent 12)
- “I stopped because if I didn’t they would run after us.” (Respondent 22)

Others complied because they were not doing anything wrong and had no reason to walk away or ignore security:

- “I wasn’t doing anything wrong.” (Respondent 1)
- “There’s no reason to walk away from security if you got nothing to hide.” (Respondent 8)

- “I have nothing to hide, so I’m not going to run away.” (Respondent 10)
- “Didn’t have anything to be scared of.” (Respondent 66)

Some respondents complied to be polite, assumed security had a good reason for stopping them, or simply would not ignore anyone:

- “Because I like being nice to people and he looked like he needed our help in some way.” (Respondent 13)
- “To be polite.” (Respondent 32)
- “I didn’t walk away from security because they weren’t stopping us in a violent manner. They were being friendly and just asking questions. I didn’t see any reason not to cooperate.” (Respondent 73)
- “I wouldn’t ignore anyone.” (Respondent 34)
- “Because when people ask me questions, I’ll answer them unless I don’t like them. I don’t really care. Security doesn’t really bother me because they haven’t done anything rude to me.” (Respondent 59)

There were some differences in the reasons given for complying with the officer(s) based on gender, race/ethnicity, and prior experience with police officers. Males more than females relied on respect for authority, avoidance of conflict, reporting nothing to hide, or commenting on the officers’ positive demeanor. Females tended to explain that they complied because they would not ignore anyone, they were confused or scared, or they did not know why they complied. The findings are reported in Table 5.

**TABLE 5: GENDER AND EXPLANATIONS FOR COMPLYING (%)**

	Male	Female
Officer authority	61.7	51.4
Avoid conflict	14.9	5.4
Officer demeanor	12.8	2.7
Nothing wrong	6.4	5.4
Did not know	2.1	18.9
No reason	2.1	13.5
Confused or scared	0.0	2.7

*N* = 82

Differences in views by race or ethnicity of the respondents materialized as well. Only Caucasian respondents explained that (1) they did nothing wrong or had nothing to hide, (2) they were scared or confused, or (3) they did not know why they complied. Some Caucasian respondents reasoned that they stopped because of the officer's demeanor, but no African American or Hispanic respondents reported stopping for the same reason. Eleven percent of Caucasian and African American respondents explained that they wanted to avoid conflict, trouble, or being chased, or they were simply scared; no Hispanic or other ethnic respondent reported those reasons. The findings are shown in Table 6.

**TABLE 6: RACE/ETHNICITY AND EXPLANATIONS FOR COMPLYING (%)**

	Caucasian	African American	Hispanic	Other
Officer authority	54.4	77.8	60.0	50.0
Avoid conflict	11.8	11.1	0.0	0.0
Officer demeanor	8.8	0.0	0.0	50.0
Nothing wrong	7.4	0.0	0.0	0.0
Did not know	11.8	0.0	0.0	0.0
No reason	4.4	11.1	40.0	0.0
Confused or scared	1.5	0.0	0.0	0.0

*N* = 82

Those respondents who had prior experience with the police were more likely to explain that they complied because (1) the officer was an authority figure or out of respect for the officer, (2) they did nothing wrong or had no reason to hide, or (3) they wanted to avoid conflict, trouble, believed they would be chased, or were scared. Those without prior experience with the police were more likely to explain that they complied because (1) the officer had a positive demeanor, (2) they had no reason, (3) they were confused and scared, or (4) they did not know why. The findings are shown in Table 7.

**TABLE 7: PRIOR EXPERIENCE WITH POLICE AND EXPLANATIONS FOR COMPLYING (%)**

	No	Yes
Officer authority	52.6	62.2
Avoid conflict	10.5	11.1
Officer demeanor	13.2	4.4
Nothing wrong	2.6	8.9
Did not know	10.5	6.7
No reason	7.9	6.7
Confused or scared	2.6	0.0

*N* = 82

*b. Why Did You Think You Had or Did Not Have the Right to Walk Away or Ignore Security?*

The reasons that respondents gave for believing they did or did not have this right varied, with some respondents giving more than one reason, and some of the reasons overlapping between those who thought they had a right to walk away from or ignore security and those who did not. Four categories of reasons emerged: (1) respect for authority or the role of security officers (45%, thirty-seven); (2) belief that it was not a good idea to walk away from or ignore security because doing so would cause suspicion (18%, fifteen); (3) belief that the respondent was innocent, had nothing to hide, or had done nothing wrong (14%, twelve); and (4) knowledge that security had no lawful right to stop them either because it was the respondent’s right not to be stopped, security had no probable cause, the officers were not real police, or the officers would not arrest the respondents (8%, seven). Some individuals did not know whether they had the right to walk away from or ignore security or not (19.5%, sixteen).

Respondents who stated that they did not have the right to walk away from or ignore security (48.7%, thirty-eight) were more likely to explain that they held security in high regard, respected security as authority, or believed security was doing their job (65.7%) more than any of the following reasons: (1) innocent or not doing anything wrong (5.7%), (2) no lawful right to stop (2.9%), or (3) walking away would cause suspicion or trouble (20%). Those who understood that a right to walk away from or ignore security existed (34%, twenty-eight) endorsed all four responses more equally: (1) respect for authority

(25.9%), (2) innocent or nothing to hide (29.6%), (3) no lawful right to stop (22.2%), and (4) walking away would cause suspicion or invoke trouble (18.5%).

Similar to most of the respondents' reasons for complying with the encounter requests, respondents stated that respect for authority and the authority's role was the foundation of their beliefs about the right to walk away or ignore security. Even when the respondents believed they had the right to walk away, they thought they should still comply with the officer's request for the following reasons:

- "I had the right to, but it's more of a respect type thing." (Respondent 7)
- "Because sometimes they have your best interest in mind, there might be somebody bad on campus." (Respondent 9)
- "If I chose to, but I probably wouldn't. It's the cops." (Respondent 31)
- "Because they are authority figures." (Respondent 35)
- "[You have the right] but I don't think you should [be]cause they're respected authority, you should follow the rules and what not." (Respondent 52)
- "Because they're just like—I don't know—they're people that are of a higher standard . . . I would just never walk away from a police officer." (Respondent 57)

Respondents who knew they had the right, but thought it would be imprudent to walk away or ignore security, gave different reasons:

- "[N]ot a good idea though, it would cause suspicion." (Respondent 28)
- "[B]ut it probably would have looked bad that there was something wrong." (Respondent 42)
- "[B]ecause they would perhaps might follow me, and it may get me in more trouble . . ." (Respondent 72)

Others mimicked the refrain about not doing anything wrong, so they believed that they may as well comply:

- "[Be]cause I was not doing anything wrong, so I didn't feel the need to walk away." (Respondent 4)

- “[B]ut I would anyway. I had nothing to hide.” (Respondent 26)
- “Well, if I mean really we’re doing nothing wrong, so I mean there’s nothing that we’re hiding, so we wouldn’t ignore them.” (Respondent 55)
- “[B]ecause it’s definitely easier just to comply with them, and do what they ask especially if it’s nothing that you find a big deal or that you think is in any malicious way.” (Respondent 73)

Gender, race/ethnicity, and prior experience with police influenced the respondents’ reasons. Only the differences in gender ( $p = .039$ ) and prior experience with police ( $p = .045$ ) were statistically significant. More males (54.3%) than females (29.4%) understood that they had the right to walk away. Yet, more females than males explained that their beliefs about the right to walk away were rooted not only in the officers’ high position, authority, due respect, or job responsibilities, but also in being scared, not wanting to cause suspicion, or thinking it was a generally bad idea. In explaining their beliefs, more men explained that they had done nothing wrong, they were innocent, or the police had no right or lawful authority to detain or arrest them. These findings are shown in Table 8.

**TABLE 8: GENDER AND REASON FOR BELIEFS ABOUT RIGHTS (%)**

	Male	Female
Officer authority	42.1	56.8
Nothing wrong	23.7	8.1
No lawful right	13.2	5.4
Confused or scared	15.8	24.3
Did not know	5.3	5.4

$N = 82, p = .039$

Race and ethnicity did not produce dramatic differences in the respondents’ reasons for why they believed they had or did not have a right to walk away or ignore officer requests. Proportionally, more Hispanic respondents (75%) identified respect and authority as the reason as compared to Caucasian (47.5%), African American (50%), and other (50%) respondents. Hispanic and nonwhite or African American re-

spondents did not identify belief in innocence or the police not having any lawful right as a reason. The other responses were more evenly distributed among respondents.

Respondents who had prior interactions with the police (52.5%) were more likely to know that they had the right to walk away than those without prior interactions with the police (28.6%). Proportionally more respondents with prior experiences with the police, as compared to those without those experiences, reasoned that they had the right to walk away because they were innocent, had nothing to hide, or the police had no lawful right to detain them. Those without prior experiences were more likely to reason that officers are due respect, they were scared, or they did not know. The findings are shown in Table 9.

**TABLE 9: PRIOR EXPERIENCE WITH POLICE AND REASON FOR BELIEFS ABOUT RIGHTS (%)**

	No	Yes
Officer authority	52.9	46.3
Nothing wrong	8.8	22.0
No lawful right	5.9	12.2
Confused or scared	20.6	19.5
Did not know	11.8	0.0

*N* = 82, *p* = .045

*c. Why Do You Consider the Encounter Consensual or Not?*

Respondents who perceived the encounter as consensual (70.7%, fifty-eight) gave four different reasons: (1) security was doing its job and no wrongdoing was involved (32%, nineteen), (2) no force was involved because security was not demanding or commanding but polite (26%, fifteen), (3) the respondent trusted security because they were from the government or others were around (22%, thirteen), and (4) the stop was short in duration and was not inconvenient (16%, ten). Those that perceived the encounter as nonconsensual (19.5%, sixteen) gave two reasons with no overlapping answers: (1) the officer approached the respondent and the encounter felt forced (92.3%, fifteen), and (2) security was doing its job (7.7%, one). Some did not know why the encounter was perceived as consensual or not (9.7%, eight).

Some respondents characterized the encounter as consensual because security was doing its job, security's position of authority, or the respondents simply complied because they had nothing to hide:

- "He's just doing his job." (Respondent 1)
- "He asked me for my I.D., and I gave it to him." (Respondent 2)
- "I didn't do anything wrong." (Respondent 40)
- "[Be]cause I like them to be there for my security." (Respondent 74)

Others considered the encounter consensual because it was not inconvenient:

- "[D]on't mind answering his questions." (Respondent 3)
- "I didn't mind helping him." (Respondent 23)
- "[B]ecause I actually didn't mind and was willing to engage in a conversation with her even though I was confused." (Respondent 49)

For others, the demeanor of the security officers was essential to their characterization of the encounter being consensual:

- "[B]ecause he didn't say 'come here right now,' he didn't demand anything from me, he just asked if he could ask me a question real quick." (Respondent 7)
- "[B]ecause he didn't demand me to come over, he just asked and agreed." (Respondent 8)
- "He approached me nicely." (Respondent 21)

For those who perceived the encounter as nonconsensual, force was the overriding characterization because security initiated the encounter:

- "[B]ecause I didn't go up and try to talk to him." (Respondent 12)
- "[B]ecause he approached me." (Respondent 17)
- "It was forced on me." (Respondent 20)
- "I'd say—would say, they were being the aggressor in the situation." (Respondent 72)



- “[A]nd they kept pounding us with questions not in such a friendly way after a while, it seemed as though they were actually being serious . . . .” (Respondent 73)

In characterizing the encounters as consensual, race was not a factor, but gender was. Proportionally more male respondents identified several factors as important: (1) the officers were doing their jobs, (2) there were no consequences from the encounter, (3) the respondent trusted the government, and (4) the nonisolated nature of the encounter. On the other hand, proportionally more female respondents described the encounter as not inconvenient or noted the police officers’ demeanor as polite rather than demanding or commanding as the reasons for perceiving the encounter as consensual. The findings are shown in Table 10.

**TABLE 10: GENDER AND CONSENSUAL NATURE OF THE ENCOUNTER (%)**

	Male	Female
Doing job, nothing wrong	32.4	25.7
Trust	17.6	14.3
Not inconvenient	11.8	14.3
Not demanding	17.6	20.0
Did not know	0.0	5.7
Nonconsensual	20.6	20.0

*N* = 82

A stark difference emerged among those with prior police experience. Proportionally fewer of those with prior police experience (19.5%) described the encounter as consensual because the police were doing their job as compared to those without prior experiences with the police (44.4%). Proportionally more respondents with prior police experience reasoned that the encounter was consensual because the officer was from the government, the approach was willing, others were around, or the officer was polite rather than demanding or commanding. The findings are shown in Table 11.

**TABLE 11: PRIOR EXPERIENCE AND CONSENSUAL NATURE OF THE ENCOUNTER (%)**

	No	Yes
Doing job, nothing wrong	44.4	19.5
Trust	7.4	19.5
Not inconvenient	11.1	14.6
Not demanding	7.4	26.8
Did not know	3.7	2.4
Nonconsensual	25.9	17.1

*N* = 82

## VI. CONCLUSIONS AND IMPLICATIONS FOR JUDICIAL DECISION MAKING AND FUTURE RESEARCH

The findings of this research raise serious questions about two primary assumptions of the consensual-encounter jurisprudence.<sup>115</sup> First, this research contradicts the judicial assumption that reasonable people feel free to ignore officers, decline their requests, and terminate encounters with them, or alternatively that they are not merely submitting to the authority of the police during these encounters.<sup>116</sup> Second, this research does not support the one-size-fits-all approach of the “reasonable person” standard.<sup>117</sup>

First, not a single participant walked away, ignored a request, or terminated the encounter. Although Kessler found that, on average, most survey respondents reported that they would not have felt free to leave and that some groups perceived greater police coercion than others,<sup>118</sup> here none walked away, terminated the encounter, or ignored any of the officers’ requests. Each encountered individual complied, and not a single respondent even questioned why the officers were singling them out or whether they were free to leave or decline the requests. Each individual was fully compliant. Assuming reasonable, innocent people would feel free to walk away or ignore the officers’

<sup>115</sup> See generally Kessler, *supra* note 8 (discussing the results of a survey testing whether “reasonable people” feel free to leave during an encounter with a security figure).

<sup>116</sup> *Id.* at 81.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 74-77.

requests,<sup>119</sup> one could reasonably expect that at least a few of the participants would have done just that. But, none did.

The various circumstances—which figure prominently in judicial opinions to determine whether a reasonable person would feel free to ignore the police or terminate an encounter<sup>120</sup>—had no effect. One factor identified in *Mendenhall* that might suggest the encounter was not consensual was the number of officers present during the encounter.<sup>121</sup> Here, the number of officers did not change the dynamic of the encounter. Even those few students who were violating state law and university alcohol policies complied without objection.<sup>122</sup> Those who knew of their rights during these encounters did not act on that right, and consistent with Kessler’s findings, many characterized the encounter as not consensual.<sup>123</sup> Second, the use of a noncommanding tone of voice, another factor identified in *Mendenhall*,<sup>124</sup> did not increase the likelihood of noncompliance, and many still perceived the encounter as nonconsensual because of force and authority.<sup>125</sup> Moreover, even though all participants approached inside and outside complied with all requests, the location of the encounter mattered to their perceptions of the encounter. Consistent with the conclusions of *Mendenhall*,<sup>126</sup> *INS*,<sup>127</sup> and *Bostick*<sup>128</sup> that reasonable individuals would feel free to ignore the requests of officers while questioned in a public airport concourse, inside a factory, or travelling on a bus, participants who officers encountered inside the building rather than outside were significantly more likely to perceive the encounter as consensual.<sup>129</sup>

Nearly three-quarters of the sample perceived the encounters with sworn, armed security as consensual, but 45% also believed they

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<sup>119</sup> *See id.* at 52-53.

<sup>120</sup> *See supra* Part IV.

<sup>121</sup> *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

<sup>122</sup> *See supra* Part V.A.

<sup>123</sup> *See supra* notes 21-23 and accompanying text.

<sup>124</sup> *Mendenhall*, 446 U.S. at 554.

<sup>125</sup> *See supra* Part V.B.

<sup>126</sup> *Mendenhall*, 446 U.S. at 554.

<sup>127</sup> *INS v. Delgado*, 466 U.S. 210, 216 (1984).

<sup>128</sup> *Florida v. Bostick*, 501 U.S. 429, 438 (1991).

<sup>129</sup> *See supra* Part IV.A.

had no right to walk away or ignore the security officers' requests.<sup>130</sup> This contradictory result should give judges and others in the legal profession pause. Not believing that people have the right to walk away or ignore officers' requests undermines the characterization of consensual.<sup>131</sup> For encounters to be consensual, reasonable people must know or believe that they have the right to walk away or ignore requests without repercussion.<sup>132</sup> Otherwise, contrary to consensual-encounter jurisprudence,<sup>133</sup> reasonable people are simply complying with the authority of police, not engaging in the free will necessary for those encounters.<sup>134</sup>

Participant explanations for complying suggest that most reasonable people are complying with officers because the officers represent authority.<sup>135</sup> Even without physical force or a commanding voice, the vast majority (60%) of the participants submitted to the inherent authority of the officers.<sup>136</sup> Others reported complying to avoid trouble, conflict, or being chased (11%), but like those who complied because they respected the officers as authority figures, those who wanted to avoid trouble or conflict merely complied with law enforcement for the same reason; they are authority figures in American society.<sup>137</sup>

Overall, these findings suggest the untested judicial assumption that police-initiated encounters are consensual<sup>138</sup> is flawed. Most reasonable, innocent people do not engage in "consensual" encounters with security or police officers.<sup>139</sup> Even without physical restraint, force or commands, reasonable people are constrained to comply with authority.<sup>140</sup> The Court should consider recharacterizing police-initiated en-

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<sup>130</sup> See *supra* Part V.B.

<sup>131</sup> See, e.g., *Mendenhall*, 446 U.S. at 554.

<sup>132</sup> See *id.*

<sup>133</sup> See *id.*; see also *Bostick*, 501 U.S. at 438; *INS v. Delgado*, 466 U.S. 210, 216 (1984).

<sup>134</sup> See *supra* Part V.

<sup>135</sup> See *supra* Part V.B.

<sup>136</sup> See *supra* Part V.B.

<sup>137</sup> See *supra* Part V.B.

<sup>138</sup> See, e.g., *Bostick*, 501 U.S. at 438; *INS*, 466 U.S. at 216; *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

<sup>139</sup> See *supra* notes 28-32.

<sup>140</sup> See *supra* Part V.B.

counters as consensual and require reasonable suspicion or some other suspicion standard before engaging citizens in these encounters.<sup>141</sup> Citizens are submitting to police authority, complying out of respect based on the belief that police deserve compliance or the fear of raising suspicion, resulting in reprisal.<sup>142</sup> Therefore, police-initiated encounters are the result of submission, rather than consent.

Second, this research does not support the one-size-fits-all approach of the reasonable-person standard.<sup>143</sup> Although all participants complied with officer requests, differences emerged among participant reasons for compliance, their knowledge about the right to walk away from or ignore officers, and their perceptions about whether and why the encounter was perceived as consensual or not.<sup>144</sup> Particularly interesting was that more males than females knew that they had the right to walk away or ignore officers' requests.<sup>145</sup> Likewise, participants who had previous interactions with police were more likely to perceive the encounters as nonconsensual.<sup>146</sup> In other words, gender and past experience with the police influenced participants' knowledge of their rights and perceptions of the encounters.

Even with 60% of the participants reporting respect for authority as a reason for complying with the officers, there were a variety of other reasons provided as well.<sup>147</sup> There were similar varying reasons or explanations for understanding the right to ignore officers and perceptions about what makes an encounter consensual or not.<sup>148</sup> One-fourth of the participants perceived the encounter as nonconsensual because the officer approached and asked questions.<sup>149</sup> Even those who perceived the encounters as consensual reasoned, in large part, that the officers were doing their jobs.<sup>150</sup> The differences in views, reasoning, and percep-

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<sup>141</sup> See *Terry v. Ohio*, 392 U.S. 1, 37 (1968) (establishing the reasonable suspicion standard).

<sup>142</sup> See *supra* Part V.B.

<sup>143</sup> See, e.g., *Bostick*, 501 U.S. at 434.

<sup>144</sup> See *supra* Part V.B.

<sup>145</sup> See *supra* Part V.B.

<sup>146</sup> See *supra* Table 11.

<sup>147</sup> See *supra* Part V.B.

<sup>148</sup> See *supra* Part V.B.

<sup>149</sup> See *supra* Part V.

<sup>150</sup> See *supra* Part V.

tions begin to debunk the myth of the standardized “reasonable innocent person.”<sup>151</sup>

This empirical research was a first step in testing the validity of the judicial assumptions, which have informed consensual-encounter jurisprudence.<sup>152</sup> The study suffers from several limitations, including small sample size, a nonrepresentative sample, and only a few varying conditions with security officers, rather than real police.<sup>153</sup> Future research should focus on larger, more diverse, and representative samples using real police officers in a wider variety of situational encounters that mirror those litigated in court decisions, particularly focusing on the variables that courts have identified in distinguishing between seizures and consensual encounters, including tone of voice, physical touching, and show of authority.<sup>154</sup> Here, location (inside versus outside) was significant; future research should expand on that finding to more particularly determine the influence of various locations on perceptions of the encounter.<sup>155</sup> Similarly, the postinterview questions should develop detailed information about participant knowledge, history, and experiences with law enforcement, which also significantly influenced perceptions.<sup>156</sup>

Without empirical answers, legal formalism, which Oliver Wendell Holmes critiqued, dating to his 1881 writing of *The Common Law*, in which he famously stated: “The life of the law has not been logic; it has been experience,” prevails.<sup>157</sup> Assumptions must give way to the empirical, studied approach of assessing human behavior in the constitutional law context.<sup>158</sup> In a variety of legal contexts, but none more important than in the area of criminal law, should empirical research be

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<sup>151</sup> See *Florida v. Bostick*, 501 U.S. 429, 438 (1991).

<sup>152</sup> See, e.g., *id.*; *INS v. Delgado*, 466 U.S. 210, 216 (1984); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

<sup>153</sup> See *supra* Part IV.

<sup>154</sup> *Mendenhall*, 446 U.S. at 554.

<sup>155</sup> See *supra* Part V.B.

<sup>156</sup> See *supra* Part V.B.

<sup>157</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Boston: Little, Brown, and Co. 1881).

<sup>158</sup> See David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 544 (1991).

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conducted and contribute to improving the accuracy of the Court's decisions and the legitimacy of its judicial fact finding.<sup>159</sup> Aiding the judiciary, in this way, is essential.<sup>160</sup> Courts should not be "guessing" when empirical research holds the answers.

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<sup>159</sup> See, e.g., *id.*; John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 478 (1986).

<sup>160</sup> Henry F. Fradella et. al., *Quantifying Katz: Empirically Measuring "Reasonable Expectations of Privacy" in the Fourth Amendment Context*, 38 AM. J. CRIM. L. 289, 293-94 (2011) (reporting the findings from an empirical study of societal conceptualizations of expectations of privacy in the context of the Fourth Amendment and noting that empirical study provides "a more sound basis for determining whether an expectation of privacy is 'objectively reasonable'").

