
THE CONSEQUENCES OF REFUSING CONSENT TO A SEARCH OR SEIZURE: THE UNFORTUNATE CONSTITUTIONALIZATION OF AN EVIDENTIARY ISSUE

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Some time in the early morning hours, a silent alarm sounds, indicating a burglary in progress at a jewelry store. The police are notified, and the first officer arriving at the scene views two apparent burglars coming from the store long after business hours. Able to gather only general descriptions of the burglars due to the limited lighting, the officer calls for the two to stop. One of the burglars immediately displays a pistol and fires several shots at the officer, who is unharmed. The officer returns fire and, based upon the reaction of the burglar, it is clear that the officer's shot has struck one of the burglars in the shoulder area. Nevertheless, both burglars are able to escape in a car.

About one hour later, a second police officer pulls over a speeding car on the nearby interstate. The driver and sole occupant of the car appears exceedingly nervous and explains the discrepancy between the name on the driver's license and the name on the automobile registration by claiming that the car is borrowed from a friend. Suspicions aroused, the officer requests permission to search the car, and the driver agrees.¹ After a search

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1. Ordinarily, the Fourth Amendment allows searches only if there is probable cause for the search and a valid search warrant has been obtained. *E.g.*, *Johnson v. United States*, 333 U.S. 10, 14 (1948). A search conducted upon the voluntary consent of a person with a right to give such consent is constitutionally acceptable even in the absence of both a search warrant and probable cause. *Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973); H. Richard Uviller, *Self-Incrimination by Inference: Constitutional Restrictions on the Evidentiary Use of a Suspect's Refusal to Submit to a Search*, 81 J. CRIM. L. & CRIMINOLOGY 37, 39 (1990).

of the passenger area reveals nothing of significance, the officer asks the driver to open the trunk, and the driver does so. Among several containers in the trunk is a shoebox. When the officer picks up the shoebox to look inside, the driver angrily grabs the shoebox from the officer's hands, returns it to the trunk and screams that the search is over. Nevertheless, the officer retrieves the shoebox and discovers inside jewelry soon thereafter determined to be jewelry taken in the burglary earlier that same morning.

Meanwhile, officers investigating the jewelry store burglary travel to the local hospital and, as they hoped, they discover an individual who had arrived minutes earlier with a bullet wound in the shoulder. The police hope to recover the bullet in order to attempt to match it ballistically to the gun fired by the officer at the burglary scene. Despite both the medical advice of the doctor and the request from the police that the bullet be removed, the wounded suspect declines to have the bullet removed.

Based upon these and other facts, both the driver of the car and the wounded patient are charged with burglary, theft, and attempted murder. Prior to trial, the first defendant, the driver of the car containing the stolen jewelry, moves to suppress the jewelry seized from the car on the basis that the officer lacked probable cause to conduct a search of the shoebox in the car.² In support of the state's position that the officer did indeed have probable cause for the search, the state relies in part on the fact that the defendant withdrew previously granted consent only when the officer focused upon the shoebox, and in particular that the defendant was agitated and physical in withdrawing his consent. At trial, the state also wishes to introduce evidence of these facts to show the defendant's knowledge of the inculpatory contents of the shoebox, thus tying the driver to the crimes. The state also wishes to introduce evidence of the codefendant's decision, against the medical advice of the treating physician, to decline surgery to remove the bullet. It is the state's position that the bullet might have produced evidence conclusively determining whether the codefendant had been shot at the crime scene. Thus, the decision to refuse surgery creates an inference that the defendant knew that the evidence would be incriminating.

May the court consider the defendant's withdrawal of consent to search in determining whether the police had probable cause to continue the search into the shoebox? May the jury consider the defendant's same

2. A search of an automobile may be conducted upon probable cause without a search warrant. *United States v. Ross*, 456 U.S. 798 (1982); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925).

withdrawal of consent as evidence of the defendant's guilt of the charged crimes? May the codefendant's refusal to consent to a medical procedure constituting a search for the bullet be admitted into evidence for the same purpose? In other words, may a defendant's refusal to consent to a search or seizure be used as evidence, either as proof that a subsequent search or seizure was lawful, or as evidence of guilt at trial?

On the chance that I have generated some interest in these questions, I will attempt to answer them at the conclusion of this Article. What I will address in this Article as the more interesting and useful question is this: what is the source of the rule which controls the answers to questions such as these? Is it, as most courts routinely state, the Constitution? Or is it, as I will suggest here, the ordinary rules of evidence, particularly those requiring that admissible evidence be relevant and not unfairly prejudicial?

On the further chance that I have not lost all readers to the temptation to skip forward to the answers to the earlier questions (or to skip forward to the next article), a further preliminary word may be in order at this point. Some readers might be disappointed, and even hostile, at the suggestion that the Constitution protects us less rather than more. But I do not believe there should be cause for alarm in that regard here. In my view, courts by and large get the answers to questions such as those generated by the above scenario right, albeit often for the wrong articulated reasons. So admittedly, and comfortably, no radical shift in outcomes would follow from the thesis of this Article.

What I do hope to demonstrate is that the Constitution-based analysis of the consequences of refusing consent is intellectually unsatisfying; is both overinclusive and underinclusive when applied faithfully; and, despite professions of fidelity, does not really account for judicial behavior in many cases. By contrast, a "rules of evidence"-based paradigm is analytically superior and allows for an appropriate flexibility actually present in many judicial decisions, and does so without any disingenuous violence to governing principles.

I. HOW COURTS RULE

With very few exceptions,³ courts that have addressed the issues have consistently held that a routine refusal to consent to a search or seizure may

3. *See, e.g., State v. Bowles*, 18 P.3d 250, 254 (Kan. Ct. App. 2001) (holding it was not error to consider the defendant's refusal to let a police officer come into his home as one of several factors supporting the conclusion that there existed probable cause to search the defendant's residence).

not be admitted as evidence of guilt,⁴ may not be considered as supporting a determination of probable cause,⁵ and may not be considered as supporting a determination of reasonable suspicion⁶ for a *Terry* stop.⁷ Aside from specifying that such conclusions are constitutionally mandated, the judicial explanations for these results are often quite conclusory.

A few judicial decisions summarily dismiss the suggestion that a refusal to consent to a search or seizure may be admissible for any purpose, suggesting instead that the matter has already been resolved by the United States Supreme Court in *Florida v. Royer*⁸ and *Florida v. Bostick*.⁹ For

4. *Duran v. Thurman*, No. 96-15213, 1997 WL 30243, at **4 (9th Cir. Jan. 23, 1997); *United States v. Thame*, 846 F.2d 200, 207 (3d Cir. 1988); *United States v. Prescott*, 581 F.2d 1343, 1350-51 (9th Cir. 1978); *Anable v. Ford*, 653 F. Supp. 22, 36 (W.D. Ark.), *modified*, 663 F. Supp. 149 (1985); *United States v. Turner*, 39 M.J. 259, 262 (C.M.A. 1994); *Elson v. State*, 659 P.2d 1195, 1197 (Alaska 1983); *Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979); *Buck v. State*, No. A-7299, 2000 WL 1634272, at *4 (Alaska Ct. App. Nov. 1, 2000); *State v. Palenkas*, 933 P.2d 1269, 1278-80 (Ariz. Ct. App. 1996), *amended by* 1 CA-CR 95-0752, 1996 Ariz. App. LEXIS 267 (Dec. 19, 1996); *People v. Keener*, 195 Cal. Rptr. 733, 736 (Ct. App. 1983); *Gomez v. State*, 572 So.2d 952, 953 (Fla. Dist. Ct. App. 1990); *Mackey v. State*, 507 S.E.2d 482, 484 (Ga. Ct. App. 1998); *People v. Stephens*, 349 N.W.2d 162, 163-64 (Mich. Ct. App. 1984); *Garcia v. State*, 712 P.2d 1375, 1376 (N.M. 1986); *Commonwealth v. Tillery*, 611 A.2d 1245, 1249-50 (Pa. Super. Ct. 1992); *Commonwealth v. Welch*, 585 A.2d 517, 518 (Pa. Super. Ct. 1991); *Simmons v. State*, 419 S.E.2d 225, 226-27 (S.C. 1992); *Reeves v. State*, 969 S.W.2d 471, 493-95 (Tex. Ct. App. 1998); *Powell v. State*, 660 S.W.2d 842, 845 (Tex. Ct. App. 1983).

5. *United States v. Alexander*, 835 F.2d 1406, 1409 (11th Cir. 1988); *People v. Miller*, 496 P.2d 1228, 1232 (Cal. 1972); *State v. Ripperger*, 514 N.W.2d 740, 746 (Iowa Ct. App. 1994); *State v. Zelinske*, 779 P.2d 971, 975 (N.M. Ct. App. 1989); *State v. Gressel*, 554 P.2d 1014, 1016 (Or. 1976) (en banc); *State v. Gilmour*, 901 P.2d 894, 896 (Or. Ct. App. 1995); *State v. Brown*, 825 P.2d 282, 284-85 (Or. Ct. App. 1992); *State v. Butler*, 641 P.2d 655, 657 n.1 (Or. Ct. App. 1982); *Whitehead v. State*, 698 A.2d 1115, 1118-19 (Md. Ct. Spec. App. 1997); *State v. Gibbs*, 31 N.W.2d 143, 147 (Wis. 1948).

6. *United States v. Hunnicutt*, 135 F.3d 1345, 1350-51 (10th Cir. 1998); *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997); *United States v. Mason*, 976 F.2d 1445 (D.C. Cir. 1992) (unpublished table decision), *text at* 1992 WL 266016, at **1; *United States v. White*, 890 F.2d 1413, 1417 n.4 (8th Cir. 1989); *United States v. Williams*, No. CRIM.A. 99-140, 2000 WL 1273407, at *5 (E.D. La. Sept. 5, 2000); *United States v. Edmonds*, 948 F. Supp. 562, 566 (E.D. Va. 1996), *aff'd*, 149 F.3d 1171 (4th Cir. 1978); *United States v. Gordon*, 917 F. Supp. 485, 487-88 (W.D. Tex. 1996); *United States v. Turner*, 815 F. Supp. 1332, 1341 (N.D. Cal. 1993); *State v. Washington*, 623 So.2d 392, 397 (Ala. Crim. App. 1993); *State v. Mather*, No. A-6594, 1998 WL 791731, at *5 (Alaska Ct. App. Nov. 10, 1998); *D.K. v. State*, 736 N.E.2d 758, 762 (Ind. Ct. App. 2000); *Snow v. State*, 578 A.2d 816, 825 (Md. Ct. Spec. App. 1990); *State v. Slavin*, 944 S.W.2d 314, 319 (Mo. Ct. App. 1997); *State v. McGinnis*, 608 N.W.2d 605, 610 (Neb. Ct. App. 2000).

7. A *Terry* stop is a brief investigative detention, short of an arrest, for questioning. *Terry v. Ohio*, 392 U.S. 1, 10 (1968). It is allowable upon reasonable suspicion, i.e., "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21 (footnote omitted). If the officer has reasonable suspicion that the suspect is armed with a weapon, a frisk—a limited search designed solely to discover weapons—is also permitted. *Id.* at 10, 24, 27.

8. 460 U.S. 491 (1983).

9. 501 U.S. 429 (1991).

example, in *United States v. White*,¹⁰ the Eighth Circuit cited *Royer* for the proposition that the defendant's refusal to consent to the search of his bags could not be considered as support for the reasonable suspicion necessary to detain those bags for a narcotics detection dog to sniff them.¹¹ And in *United States v. Hunnicutt*,¹² the Tenth Circuit cited both *Royer* and *Bostick* for its conclusion that the defendant's "refusal to consent should not have been considered in determining reasonable suspicion."¹³

In fact, however, the Court in both *Royer* and *Bostick* addressed the issue of sufficiency of evidence of nonconsent, not the admissibility of such evidence. In *Royer*, the Court stated only that a suspect's refusal to listen or answer questions from a police officer in a nonseizure circumstance "does not, *without more*, furnish" the officers with reasonable suspicion for a seizure.¹⁴ Similarly, in *Bostick*, the Court repeated that "a refusal to cooperate, *without more*, does not furnish the minimal level of objective justification needed for a detention or seizure."¹⁵ Thus, while the Court has made clear that a refusal to consent is not sufficient by itself to constitute probable cause¹⁶ or even reasonable suspicion,¹⁷ it has never addressed whether such refusal can be part of the basis for a search or a *Terry* stop.¹⁸

II. THE GRIFFIN INFLUENCE

By far the most oft-cited explanation for the inadmissibility of "refusal to consent" evidence is the authority of—or at least the analogy to—*Griffin v. California*.¹⁹ In *Griffin*, the Court entertained a Fifth Amendment

10. 890 F.2d 1413 (8th Cir. 1989).

11. *Id.* at 1417 n.4.

12. 135 F.3d 1345 (10th Cir. 1998).

13. *Id.* at 1350.

14. 460 U.S. 491, 498 (emphasis added) (citations omitted).

15. 501 U.S. 429, 437 (emphasis added) (citations omitted).

16. *See, e.g.*, *United States v. Robinson*, 6 M.J. 109, 111 (C.M.A. 1979).

17. *See, e.g.*, *United States v. Williams*, No. 00-30074, 2001 WL 337857, at *1 (9th Cir. Apr. 4, 2001).

18. *United States v. Edmonds*, 948 F. Supp. 562, 566–67 (E.D. Va. 1996) (noting that the Court has held refusal to consent alone can constitute neither probable cause nor reasonable suspicion but that the Court has not ruled on whether the refusal may be part of the calculus), *aff'd*, 149 F.3d 1171 (4th Cir. 1998); Rachel Karen Laser, *Unreasonable Suspicion: Relying on Refusals to Support Terry Stops*, 62 U. CHI. L. REV. 1161, 1161, 1172, 1175 (1995).

19. 380 U.S. 609 (1965). *Griffin* has been explicitly cited as a source of a rule barring adverse evidentiary consequences of asserting Fourth Amendment rights. *See, e.g.*, *United States v. Thame*, 846 F.2d 200, 206 (3d Cir. 1988); *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978); *United States v. Turner*, 39 M.J. 259, 261 (C.M.A. 1994); *People v. Keener*, 195 Cal. Rptr. 733, 736 (Ct. App.

challenge to the then-prevailing practice in California of permitting comment by both prosecutors and judges on the criminal defendant's election not to testify.²⁰ At the time of *Griffin*, a federal statute prohibited the use in federal prosecutions of the adverse inference commentary then used in California,²¹ and forty-four states had, by legislation or judicial decision, outlawed such adverse inference argument and instructions.²² Just one year earlier, the Court had held that the Fifth Amendment privilege against self-incrimination was a fundamental right incorporated into the Due Process Clause of the Fourteenth Amendment and thereby governed state, as well as federal, prosecutions.²³ And so, the Court in *Griffin* standardized the prevailing practice by constitutionally mandating it.²⁴

The Court offered two rationales for its decision. First, characterizing the adverse inference commentary as "in substance a rule of evidence,"²⁵ the Court essentially found the inference to be either irrelevant or at least more prejudicial than probative.²⁶ Quoting *Wilson v. United States*,²⁷ the Court refused to endorse the inference of guilt from a refusal to testify.

It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.²⁸

1983); *People v. Redmond*, 169 Cal. Rptr. 253, 260 (Ct. App. 1980), *superseded*, 633 P.2d 976 (Cal. 1981); *Snow v. State*, 578 A.2d 816, 825 (Md. Ct. Spec. App. 1990); *Laser*, *supra* note 18, at 1178.

20. The prosecutor in *Griffin* had specifically suggested that the defendant's decision not to testify was motivated by his desire to avoid confessing his own complicity in the charged murder. *Griffin*, 380 U.S. at 610–11. The trial judge had also specifically instructed the jury that, although the defendant had a constitutional right not to testify, his failure to deny or explain evidence against him could be taken to indicate the truth of such evidence. *Id.* at 609–10.

21. *Id.* at 612 n.4.

22. *Id.* at 611 n.3.

23. *Malloy v. Hogan*, 378 U.S. 1 (1964).

24. *Griffin*, 380 U.S. at 615.

25. *Id.* at 613.

26. To be admissible, all evidence must be relevant. *E.g.*, FED. R. EVID. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at 401. Even if evidence is relevant, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Id.* at 403.

27. 149 U.S. 60 (1893). In *Wilson*, the Court held that an adverse inference argument by a federal prosecutor was reversible error in light of a federal statute specifying that a defendant's election not to testify "shall not create any presumption against him." *Id.* at 63.

28. *Griffin*, 380 U.S. at 613 (quoting *Wilson*, 149 U.S. at 66).

Moreover, explained the Court, a defendant's reason for choosing to remain off the witness stand might well be for fear "that his prior convictions will be introduced in evidence to impeach him and not that he is unable to deny the accusations."²⁹

Had the Court's analysis of the adverse inference commentary ended there, little justification could be found for constitutionalizing the prohibition of such commentary. Problems of relevance and prejudice do not on their face present constitutional questions. They are contextual issues resolved by the rules of evidence in each jurisdiction. Had the Court merely perceived that California had misapplied these evidentiary considerations, federalist concerns would have prevented the Court from intruding into the fray as it did. Moreover, given the growing consensus among the states on the issue, the uniformity that *Griffin* created might well have come about shortly thereafter even without any federal constitutional mandate.

Nevertheless, to the extent that *Griffin* rests even in part on the notion that an assertion of one's Fifth Amendment privilege is insufficiently relevant to allow any evidentiary adverse inference, it does provide a tempting model for its Fourth Amendment counterpart. If there are innocent explanations for one's election not to testify sufficient to render the adverse inference inadmissible, then there are equally innocuous explanations for persons to refuse to consent to searches of their persons, possessions and residences, and a similar rationale should bar the state from making any evidentiary use of that refusal. Many courts have excluded "refusal to consent" evidence for exactly that reason.³⁰ As one court has stated the matter:

We do not think that a refusal to allow police to search one's bedroom without first producing a warrant is probative of the fact the items the police suspect are present are actually present. There are many personal reasons that an individual would not wish to have the police searching through their room. Indeed, if the police suddenly appeared at someone's door and indicated they wanted to search their bedroom, we

29. *Id.* at 615 (quoting *People v. Modesto*, 398 P.2d 753, 763 (1965)) (citation omitted).

30. *E.g.*, *United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978) ("so ambiguous as to be irrelevant" and "subject to misinterpretation by a jury"); *Anable v. Ford*, 653 F. Supp. 22, 36 (W.D. Ark.) ("supports no inference at all"), *modified*, 663 F. Supp. 149 (1985); *United States v. Turner*, 39 M.J. 259, 262, 263 (C.M.A. 1994) ("not relevant"); *State v. Mather*, No. A-6594, 1998 WL 791731, at *5 (Alaska Ct. App. Nov. 10, 1998) ("not relevant"); *People v. Keener*, 195 Cal. Rptr. 733, 736 (Ct. App. 1983) ("questionably relevant" and "open to various interpretations and is not encouraged"); *State v. Sellers*, 507 N.W.2d 235, 236 (Minn. 1993) ("ambiguous"); *Garcia v. State*, 712 P.2d 1375, 1376 (N.M. 1986) ("ambiguous"); *State v. Zelinske*, 779 P.2d 971, 975 (N.M. Ct. App. 1989) ("ambiguous"); *Burchette v. Commonwealth*, 425 S.E.2d 81, 85 (Va. Ct. App. 1992) ("proof of nothing").

would think that the average citizen would protest. In fact, anyone with a sense of privacy would likely object. Thus, one cannot necessarily assume the refusal is based upon the fact that one is attempting to prevent the discovery of incriminating evidence. However, apparently all involved in the present case agree that a jury is likely to infer this fact from the refusal.³¹

The argument thus stated is certainly a compelling one if advanced in aid of an objection on the grounds of relevance or unfair prejudice, at least in many factual settings. But to the extent that courts leap from this premise to the conclusion that somehow the Fourth Amendment would otherwise be offended, their reasoning, without any obvious bridge, seems to have spanned a canyon both very wide and very deep. Whether advanced in the Fifth Amendment context, as in *Griffin*, or in the Fourth Amendment context here, the fundamental problem with the “irrelevant therefore unconstitutional” deduction is the absence of any intrinsic connection between the admissibility of irrelevant evidence and the violation of constitutional rights. Those hungry for some analytical connection will not be satiated by the simple assurance that “it should go without saying that consideration of such a refusal would violate the Fourth Amendment.”³²

Moreover, constitutionalizing inherently flexible concepts such as “relevance” and “unfair prejudice” straightjackets the courts in the application of these rules. By creating a constitutional, rather than a mere evidentiary, barrier to the admissibility of “refusal to consent” evidence, the possibility of a factual scenario in which the defendant’s refusal to consent is unambiguously probative of criminal activity is preemptively dismissed. Confronted with such a scenario, courts are forced either to exclude very probative evidence or to avoid their own supposedly constitutional rule.

III. THE CONSTITUTIONAL PENALTY THEORY

If there is truly a constitutional basis for barring adverse inference evidence, it must be based on something more than just its meager relevance. As previewed earlier, however, the *Griffin* Court did offer a second justification for the adverse inference ban. And this one, at least, is truly constitutional in nature. In the words of the Court, adverse inference

31. Commonwealth v. Welch, 585 A.2d 517, 520 (Pa. Super. Ct. 1991).

32. United States v. Wood, 106 F.3d 942, 946 (10th Cir. 1997).

commentary “is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.”³³

This famous passage does indeed offer a constitutional syllogism of sorts. First, it appears that any state action that makes the assertion of a constitutional right costly constitutes a penalty imposed for the exercise of a constitutional right, a penalty that is thereby itself a violation of that very constitutional right. Second, an adverse inference drawn against a defendant who exercises his or her right not to testify makes the assertion of that right costly and hence penalizes the exercise of that right. Finally, any adverse inference commentary in the *Griffin* context renders the election of one’s right not to testify costly and thus is itself violative of the Fifth Amendment.

Thus stated, the transposition of this logic from the Fifth Amendment to the Fourth Amendment is not merely valid; it is irresistible. If a defendant’s refusal to consent to a search could be used as some part of the government’s evidence establishing reasonable suspicion for a stop or a frisk, or probable cause for a search or an arrest, or even guilt, there would be a cost for the assertion of the right to refuse such consent. The assertion of the right would thereby be penalized. Thus, the introduction of such “refusal to consent” evidence would itself constitute a violation of the defendant’s rights under the Fourth Amendment.

The easy adjustment of the *Griffin* constitutional penalty theory to the Fourth Amendment context is substantiated not only logically, but empirically as well. Many courts have embraced the constitutional penalty theory as an apparently straightforward and irrefutable basis for declaring any evidentiary use of a refusal to consent to be unconstitutional.³⁴

33. *Griffin*, 380 U.S. at 614.

34. *E.g.*, *Karnes v. Skrutski*, 62 F.3d 485, 495–96 (3d Cir. 1995) (“exercise of that right cannot be penalized by adding his refusal to consent as a factor in this inquiry”); *United States v. Thame*, 846 F.2d 200, 206 (3d Cir. 1988) (“This court has not confined the *Griffin* rationale to the fifth amendment. . . . [There is] little, if any, valid distinction between the privilege against self-incrimination and the privilege against unreasonable searches and seizures which is relevant to the propriety of the prosecutor’s argument.”) (footnote omitted); *United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978)

(This [*Griffin* constitutional penalty theory] reasoning is equally applicable to using against the defendant her refusal to consent to entry into her home without a warrant. The right to refuse protects both the innocent and the guilty, and to use its exercise against the defendant would be, as the Court said in *Griffin*, a penalty imposed by courts for exercising a constitutional right.);

United States v. Turner, 39 M.J. 259, 262 (C.M.A. 1994) (“the same reasoning that protects from comment an accused’s exercise of a Fifth Amendment privilege applies equally to assertion of the right to privacy under the Fourth Amendment”); *State v. Palenkas*, 933 P.2d 1269, 1279 (Ariz. Ct. App. 1996) (“We can see no valid distinction between the privilege against self-incrimination and the right to

The constitutional penalty theory would seem to have made quick work of the issue of evidentiary use of refusals to consent to search. Despite the popular embrace of the constitutional penalty theory, however, some problems exist. The most fundamental failing of the constitutional penalty theory is that its basic premise—that it is always unconstitutional to make costly the exercise of a constitutional right—is manifestly incorrect.

A criminal defendant has a constitutional right to a trial,³⁵ usually with the attendant constitutional rights of a jury as factfinder³⁶ and to be represented by counsel even if he or she cannot afford one,³⁷ as well as the rights to produce his or her own witnesses and to confront the

be free from warrantless searches, when invoked, that would justify a different rule about inadmissibility as evidence of guilt.”), *amended by* 1 CA-CR 95-0752, 1996 Ariz. App. LEXIS 267 (Dec. 19, 1996); *State v. Wilson*, 914 P.2d 1346, 1350 (Ariz. Ct. App. 1995) (“Just as it is generally impermissible for a prosecutor to comment on a defendant’s invocation of his Fifth Amendment right to silence, so it is generally impermissible to use a defendant’s invocation of Fourth Amendment protections against him.”) (citations omitted); *People v. Miller*, 496 P.2d 1228, 1232 (Cal. 1972)

([F]ormulating ‘probable cause’ from an individual’s refusal to consent to a police search or seizure—would directly penalize an individual simply for exercising his constitutional right to be free from unreasonable searches and seizures by police . . . [The state may not] impose[] adverse treatment on individuals for exercising constitutional rights intended to protect against such adversity.)

(citations omitted); *People v. Keener*, 195 Cal. Rptr. 733, 736 (Ct. App. 1983) (“Presenting evidence of an individual’s exercise of a right to refuse consent to entry in order to demonstrate a consciousness of guilt merely serves to punish the exercise of the right to enter without warrant”); *People v. Redmond*, 169 Cal.Rptr. 253, 260 (Ct. App. 1980), *superseded en banc*, 633 P.2d 976 (Cal. 1981) (“We find the instant case analogous to *Griffin*. The prosecution’s extensive references to appellant’s assertion of his Fourth Amendment privilege to be free from warrantless searches and seizures is in effect a penalty imposed on appellant for exercising his constitutional right to object to a warrantless search.”); *Gomez v. State*, 572 So.2d 952, 953 (Fla. Dist. Ct. App. 1990) (“Comment on a defendant’s denial of permission to search a vehicle, although not exactly the same thing as comment on a defendant’s right to remain silent, since the Fourth Amendment is involved rather than the Fifth, constitutes constitutional error of the same magnitude.”); *Mackey v. State*, 507 S.E.2d 482, 484 (Ga. Ct. App. 1998) (“A refusal of permission to search is analogous to the assertion of the privilege against self-incrimination.”); *Snow v. State*, 578 A.2d 816, 825 (Md. Ct. Spec. App. 1990) (referring to the *Griffin* constitutional penalty theory: “The same rationale applies to a defendant’s desire to avail himself or herself of the Fourth Amendment right to be free from warrantless searches.”) (citations omitted); *Garcia v. State*, 712 P.2d 1375, 1376 (N.M. 1986) (“One cannot be penalized for . . . asserting this [refusal to consent to search] right, regardless of one’s motivation.”) (quoting *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978)); *Commonwealth v. Welch*, 585 A.2d 517, 519–20 (Pa. Super. Ct. 1991) (“Although the cases have discussed the Fifth Amendment right we see no reason to treat one’s assertion of a Fourth Amendment right any differently . . . The point of significance is that one should not be penalized for *asserting* a constitutional right.”); *Simmons v. State*, 419 S.E.2d 225, 226 (S.C. 1992) (“[T]he state cannot, through evidence or argument, comment upon an accused’s exercise of a constitutional right.”); *Reeves v. State*, 969 S.W.2d 471, 495 (Tex. Ct. App. 1998) (“To allow the use of one’s refusal to consent to entry into his home without a warrant would be to impose a penalty for exercising a constitutional right.”) (citation omitted).

35. U.S. CONST. amend. VI.

36. *Id.*; *Duncan v. Louisiana*, 391 U.S. 145 (1968).

37. U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963).

government's witnesses.³⁸ Yet it is not unconstitutional for the government to burden the exercise of these rights by seeking a harsher sentence following conviction at trial than the sentence to be imposed if the defendant waives all of these rights and pleads guilty.³⁹ The defendant's constitutional right to a jury trial constitutionally may be burdened by exposure to a harsher sentence after a jury trial *de novo* following conviction and sentencing at a bench trial.⁴⁰

A criminal defendant has a constitutional right to testify in his or her own defense.⁴¹ But that constitutional right constitutionally can be burdened by the otherwise avoidable consequences of being forced to answer questions on cross-examination;⁴² being impeached with one's prior convictions;⁴³ being impeached with one's constitutionally protected silence at a previous trial;⁴⁴ being impeached with one's constitutionally protected silence prior to receiving *Miranda*⁴⁵ warnings, whether that silence occurred before arrest⁴⁶ or after arrest;⁴⁷ being impeached by evidence otherwise suppressed because such evidence was unconstitutionally obtained;⁴⁸ and suffering a harsher sentence because the sentencing judge does not believe the testimony.⁴⁹

In addition to a constitutional right to testify in one's own defense, a criminal defendant also enjoys a constitutional right to be present

38. U.S. CONST. amend. VI.

39. *Corbitt v. New Jersey*, 439 U.S. 212, 219–20 (1978). This is true even when the legislature has precluded a lighter sentence for those who elect to proceed to trial, *id.* at 220, even when the prosecutor carries out a threat to reindict on more serious charges if the defendant exercises these constitutional rights, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), and even when the defendant is exposed to a sentence of death only by exercising these constitutional rights, *North Carolina v. Alford*, 400 U.S. 25 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

40. *Ludwig v. Massachusetts*, 427 U.S. 618, 627 (1976).

41. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987).

42. *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900).

43. FED. R. EVID. 609.

44. *Raffel v. United States*, 271 U.S. 494, 499 (1926).

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

46. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980).

47. *Fletcher v. Weir*, 455 U.S. 603, 607 (1982).

48. A defendant may be impeached with evidence obtained in violation of the Fourth Amendment. *United States v. Havens*, 446 U.S. 620, 628 (1980); *Walder v. United States*, 347 U.S. 62, 64–65 (1954). Also, a defendant may be impeached by evidence obtained in violation of *Miranda*. *Oregon v. Haas*, 420 U.S. 714, 723–24 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971). Finally, a defendant may be impeached by evidence obtained in violation of the Sixth Amendment right to counsel. *Michigan v. Harvey*, 494 U.S. 344, 348 (1990).

49. *United States v. Grayson*, 438 U.S. 41, 45–55 (1978).

throughout the trial.⁵⁰ Nevertheless, it is constitutionally permissible for the prosecutor to argue for an adverse inference—specifically that the defendant has tailored his or her testimony to conform to that of other witnesses—from the defendant’s exercise of both of these constitutional rights.⁵¹

The fact is that the “Constitution [does not] forbid[] every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.”⁵² The *Griffin* constitutional penalty theory simply does not extend to every circumstance in which the government, by evidence or argument, suggests that an adverse inference be drawn against a defendant for the exercise of a constitutional right.⁵³ Before one can conclude that burdening the exercise of a constitutional right is itself constitutionally proscribed, the “threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.”⁵⁴

It is here that the uncritical extension of the *Griffin* constitutional penalty theory to the Fourth Amendment context is too facile. This is so because the policies behind the relevant portions of the Fifth and Fourth Amendments are quite distinct.⁵⁵ The ultimate harm that the Fifth Amendment is designed to prevent is incrimination.⁵⁶ By contrast, the

50. *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *Lewis v. United States*, 146 U.S. 370 (1892).

51. *Portuondo v. Agard*, 529 U.S. 61, 74–75 (2000). Such an argument by the prosecutor, says the Court, neither violates the specific Fifth and Sixth Amendment rights nor is it fundamentally unfair so as to offend Due Process, even though the defendant is actually required to be present throughout the trial. *Id.*

52. *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973).

53. *See Portuondo*, 529 U.S. at 65–71; Brett H. McGurk, *Prosecutorial Comment on a Defendant’s Presence at Trial: Will Griffin Play in a Sixth Amendment Arena*, 31 UWLA L. REV. 207, 238 (2000).

54. *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) (quoting *Chaffin*, 412 U.S. at 32 (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971))).

55. *See Uviller*, *supra* note 1, at 68. *See also Fisher v. United States*, 425 U.S. 391, 409 (1976) (noting that a rule prohibiting the compulsory production of private papers has no foundation in Fourth Amendment seizure doctrines and analyzing the rule under Fifth Amendment self-incrimination prohibitions).

56. *See, e.g., United States v. McNatt*, 931 F.2d 251, 256 (4th Cir. 1991). The relevant text of the amendment states “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. More specifically, then, a valid Fifth Amendment privilege requires three things. First, there must be some government compulsion. *See, e.g., Fisher*, 425 U.S. at 397. Second, the evidence compelled must be testimonial. *See id.* at 408. Consequently, no privilege exists for the compelled production of even incriminating nontestimonial evidence such as clothing fit, *Holt v. United States*, 218 U.S. 245, 252–53 (1910), blood samples, *Schmerber v. California*, 384 U.S. 757, 765 (1966), lineups, *United States v. Wade*, 388 U.S. 218, 221–23 (1967), handwriting exemplars, *Gilbert v. California*, 388 U.S. 263, 265–67 (1967), and voice exemplars, *United States v. Dionisio*, 410 U.S. 1, 5–7 (1973). Third, the compelled testimonial evidence must be self-incriminating, meaning both that

Fourth Amendment protects privacy.⁵⁷ Therefore, if the consequence of adverse inference evidence or commentary upon the exercise of a Fifth Amendment right is to incriminate the defendant, there is, at least as a threshold matter, some impairment of the very right protected by the Fifth Amendment. On the other hand, if the government were to introduce at trial evidence of the defendant's refusal to consent to a search to prove consciousness of guilt, the defendant perhaps will have suffered the undesirable consequence of some incremental incrimination, but the defendant's privacy—the policy behind the Fourth Amendment—will not have suffered directly at all.

Of course, this does not mean that the privacy of citizens might not suffer indirectly. Even if the government conducts no search when its request for consent to do so is refused, a defendant might choose to consent to a search solely to avoid the evidentiary use of any refusal to consent to establish guilt at trial. A few courts and commentators have suggested that this indirect consequence—the influence on the decision to consent to search—is sufficient to render the admission of “refusal to consent” evidence constitutionally infirm.⁵⁸

As has been demonstrated,⁵⁹ however, simply to point out that rights are burdened does not lead to the conclusion that such burdens are constitutionally significant.⁶⁰ The speculative conclusion that a citizen will consent to a search that he or she would otherwise resist solely to avoid evidentiary implications at a possible future trial seems too attenuated to meet the Court's test in practice. What troubled the Court in *Griffin* was that the adverse inference argument would incriminate the defendant directly. Nothing in *Griffin* suggests that the Court was concerned about

the evidence could “furnish a link in the chain of evidence needed to prosecute,” *Hoffman v. United States*, 341 U.S. 479, 486 (1951), and that the incriminating consequences would fall upon the person claiming the privilege rather than upon some other person, *Hale v. Henkel*, 201 U.S. 43, 69–70 (1906). A grant of immunity removes the privilege because it renders the compelled testimony nonincriminating, thus removing the third requirement for the application of the privilege. *Kastigar v. United States*, 406 U.S. 441, 448 (1972); *Brown v. Walker*, 161 U.S. 591, 603–04 (1896).

57. *Fisher*, 425 U.S. at 400–01; *McNatt*, 931 F.2d at 256. The Fourth Amendment itself specifies that its intention is to safeguard “[t]he right of the people to be secure . . . against unreasonable searches and seizures.” U.S. CONST. amend. IV.

58. See *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978); *Elson v. State*, 659 P.2d 1195, 1198–99 (Alaska 1983); *Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979); *Commonwealth v. Welch*, 585 A.2d 517, 518 (Pa. Super. Ct. 1991); *Powell v. State*, 660 S.W.2d 842, 845 (Tex. Ct. App. 1983). See also *United States v. Alexander*, 835 F.2d 1406, 1409 n.3 (11th Cir. 1988) (disclaiming any consideration of the refusal to consent in the finding of probable cause for a vehicle search); *Laser*, *supra* note 18, at 1177–79.

59. See *supra* notes 35–54 and accompanying text.

60. *McGurk*, *supra* note 53, at 237.

the possibility that defendants would be so fearful of adverse inference arguments that they would waive their Fifth Amendment privileges and testify solely to avoid such consequences. This type of indirect burden seems much more analogous to the burdens the Court has found constitutionally acceptable, even though such burdens might very well chill defendants from electing to exercise their constitutional rights to proceed to trial,⁶¹ to testify,⁶² and to be present throughout the trial.⁶³

But what if the “refusal to consent” evidence is used, not to advance the government’s claim at trial that the defendant is guilty, but rather to establish probable cause for a search or reasonable suspicion for a stop or a frisk? Assuming that a search, stop, or frisk occurs, has not the exercise of the right to refuse consent “impair[ed] to an appreciable extent”⁶⁴ the defendant’s privacy, the very right involved in the exercise of one’s Fourth Amendment right?

Certainly some courts have thought so. We are told that the inclusion of “refusal to consent” evidence in determining the presence of probable cause or reasonable suspicion would mean that “there would be no circumstances under which officers could not search,”⁶⁵ that “police could command citizens to stop with impunity and without any basis for any suspicion whatsoever, and then could make a lawful stop as soon as the citizen declined to heed the original unlawful command,”⁶⁶ that “a police officer would be entitled to frisk a citizen regardless whether he refuses or consents to a search request,”⁶⁷ and that “police officers could manufacture reasonable suspicion in virtually every case.”⁶⁸

Before we run for cover, let me say at the outset on this point that, despite the several judicial impersonations of Chicken Little, the admission

61. See *supra* notes 35–40 and accompanying text.

62. See *supra* notes 41–49 and accompanying text.

63. See *supra* notes 50–51 and accompanying text. Moreover, even if it is assumed an individual provided consent only to avoid what that individual perceived as the more onerous consequences of refusal, it is doubtful the Supreme Court would regard that fact as constitutionally significant. A consent to search is not involuntary merely because the consenting individual was not advised of, or perhaps did not realize, his right to refuse consent. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 227–34 (1973).

64. See *supra* note 54 and accompanying text.

65. *State v. Gilmour*, 901 P.2d 894, 896 (Or. Ct. App. 1995).

66. *United States v. Turner*, 815 F. Supp. 1332, 1341 (N.D. Cal. 1993).

67. *United States v. Edmonds*, 948 F. Supp. 562, 566 (E.D. Va. 1996), *aff’d*, 149 F.3d 1171 (4th Cir. 1998).

68. *State v. Slavin*, 944 S.W.2d 314, 319 (Mo. Ct. App. 1997). For other examples of expressions of similar concerns, see *United States v. Hunnicutt*, 135 F.3d 1345, 1350–51 (10th Cir. 1998); *State v. Gibbs*, 31 N.W.2d 143, 147 (Wis. 1948).

of “refusal to consent” evidence would trigger no such Fourth Amendment apocalypse. First of all, a police officer would have to already have reasonable suspicion before he or she could “command citizens to stop.”⁶⁹ Second, it is very clear that, while an officer may approach a citizen and request information or cooperation, the citizen’s refusal to comply cannot, by itself, rise to the level of reasonable suspicion or to the higher level of probable cause.⁷⁰ Consequently, consideration of “refusal to consent” evidence could never move a police officer from a zero starting point to the level of probable cause, or even to the level of reasonable suspicion.

The only circumstance in which consideration of “refusal to consent” evidence might impact the legal viability of a search or seizure is if, independent of the refusal to consent to search, the officer possessed other information placing the officer’s degree of suspicion below the level of reasonable suspicion or probable cause, as the case may be, and the incremental value of the refusal to consent enabled the officer to reach the requisite threshold.⁷¹ But several factors discount the significance of this scenario as possible grounds for extending the *Griffin* constitutional penalty theory to the Fourth Amendment.

First of all, for the “refusal to consent” evidence to advance the ball over the goal line and, in combination with other evidence, supply the government with the requisite probable cause or reasonable suspicion for a Fourth Amendment intrusion, the “refusal to consent” evidence must be relevant, i.e., it must actually be indicative to some degree of the presence of criminal activity. Yet, many courts that insist that consideration of “refusal to consent” evidence would negatively impact Fourth Amendment rights also insist that “refusal to consent” evidence is completely irrelevant on the question of suspicion of criminal activity.⁷² As I have suggested from the outset, I believe the courts are substantially correct when they exclude such evidence as irrelevant. But for that very reason, there is no logical argument that the question of the admissibility of “refusal to consent” evidence presents such dire consequences as to dictate the

69. See *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (“It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

70. See *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *Florida v. Royer*, 460 U.S. 491, 497–98 (1983).

71. See *State v. Zelinske*, 779 P.2d 971, 975 (N.M. Ct. App. 1989) (noting that withdrawal of consent along with other factors still would not support probable cause for the search).

72. See, e.g., *United States v. Prescott*, 581 F.2d 1343, 1351–52 (9th Cir. 1978); *Zelinske*, 779 P.2d at 975 (N.M. Ct. App. 1989); *Commonwealth v. Welch*, 585 A.2d 517, 519–20 (Pa. Super. Ct. 1991).

importation of the *Griffin* constitutional penalty theory into this Fourth Amendment issue.

Second, in addition to the different policy goals discussed above,⁷³ there is a further distinction between the Fourth and Fifth Amendments that must be considered. Once it is established that the necessary components of the Fifth Amendment privilege—compelled testimonial self-incrimination—are present, the privilege is “unqualified,”⁷⁴ meaning that it can not be overcome no matter how compelling the government’s evidence that truthful testimony by the defendant would be inculpatory. It represents such a substantial opposition to the process of compelled testimonial self-incrimination that it fundamentally, although not exclusively, protects precisely those who are likely to be guilty of criminal conduct.

The Fourth Amendment is certainly not so absolute. The citizen’s privacy interest does not trump the government’s desire to intrude to discover and seize evidence in all circumstances.⁷⁵ Searches and seizures are generally permitted when there exists probable cause.⁷⁶ The Fourth Amendment strikes “a balance so that when the state’s reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified.”⁷⁷ To this extent, the Fourth Amendment is actually designed to segregate contraband items from noncontraband items. One has a constitutionally protected privacy interest only in the latter; any privacy interest in the former is protected only to the extent that, viewed prospectively, it cannot be distinguished from the latter.⁷⁸

The significance of this distinction between the Fifth and Fourth Amendments is demonstrated when a refusal to consent to a search is truly probative of criminal activity. It is not very difficult to muster constitutional righteousness as a rationale for excluding what was of little or no relevance in any event. But suppose a refusal to consent occurs in

73. See *supra* notes 55–57 and accompanying text.

74. See *State v. Henderson*, 510 S.W.2d 813, 822 (Mo. Ct. App. 1974) (stating the Fifth Amendment’s right against self incrimination is unqualified).

75. See *id.*; Uviller, *supra* note 1, at 38–39.

76. See *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). In some circumstances, a warrant is also required. This additional requirement, however, simply substitutes a judicial officer in place of a law enforcement officer as the decisionmaker. Probable cause remains the usual governing standard.

77. *Fisher v. United States*, 425 U.S. 391, 400 (1976).

78. This is the explanation for the Court’s treatment of narcotics dog sniffs as exempt from any Fourth Amendment requirements for searches. *United States v. Place*, 462 U.S. 696, 707 (1983). The “sniff discloses only the presence or absence of narcotics, a contraband item” and “does not expose noncontraband items.” *Id.* Thus, even without probable cause, narcotics dog sniffs do not intrude upon any privacy interest protected by the Fourth Amendment. *Id.*

circumstances in which the implication of an illicit motive is both overwhelming and without any plausible alternative. In this exceptional hypothetical setting, where is the Fourth Amendment violation in making evidentiary use of the refusal to consent? No Fourth Amendment wrong occurred in requesting consent.⁷⁹ Further, if the refusal to consent truly does supply the officers with probable cause, for example, how is a constitutional provision that protects privacy only in the absence of probable cause violated by using the “refusal to consent” evidence?

Suppose police officers have good reason to believe that someone among a large number of persons in a large auditorium has committed a theft of an expensive piece of jewelry. The police request permission to search all persons for the jewelry before they depart the auditorium. Everyone but Jones consents. Everyone but Jones is searched. No jewelry is found. The investigation thus focuses on Jones alone, and the police eventually discover that Jones later sold the stolen jewelry. Is the government’s case to be dismissed because it was all premised upon Jones’ refusal to consent to a search? It is true here that no warrant was obtained and no judicial officer was involved in the case prior to trial, but the Fourth Amendment is obviously not limited to judicial actions. It is also true that no search of the defendant or his property was predicated upon his refusal to consent. Nonetheless, the state’s entire case developed, to Jones’ demise, as a consequence of Jones’ exercise of the Fourth Amendment right to refuse consent. Notwithstanding this fact, surely no constitutional right of Jones has been violated in this instance. The fact that Jones suffered negative consequences from the refusal to consent is constitutionally inconsequential. No Fourth Amendment violation occurred because no search or seizure took place without the requisite level of cause.

Suppose we change the Jones scenario just a bit. Suppose that Jones becomes the target of a police investigation solely because of the refusal to consent to a search. This police investigation of Jones leads to the discovery that Jones sold the stolen jewelry at a pawn shop and was given a receipt for the jewelry. Suppose also that, based upon an affidavit recounting the information acquired from the pawn shop concerning the jewelry and the receipt, the police are able to obtain a search warrant for Jones’ residence and discover the incriminating receipt when executing that warrant. Is the receipt seized pursuant to the search warrant to be excluded

79. See *Florida v. Bostick*, 501 U.S. 429, 435 (1991); *Florida v. Royer*, 460 U.S. 491, 501 (1983).

because it was ultimately acquired as a result of the defendant's refusal to consent? I would think not. Again, this seems to be immune from constitutional attack, and again the reason is because the defendant's privacy was not compromised on less than what the Fourth Amendment requires.

Is there really any distinction between either of these hypothetical scenarios and one in which the court is asked to take into consideration, in ruling on the presence of probable cause, the fact that the defendant refused consent to search, *assuming that the refusal to consent is truly indicative of probable cause*? To the extent that courts nevertheless routinely and conclusorily announce that the Fourth Amendment prohibits consideration of "refusal to consent" evidence, it would seem that there is either an insufficient appreciation of the distinction between the unqualified Fifth Amendment right to avoid self-incrimination and the qualified Fourth Amendment right to privacy, or that there is an assumption that such evidence is always irrelevant anyway.⁸⁰

IV. REFUSAL WITHOUT THE RIGHT

The text of the Fourth Amendment does not speak to the introduction of evidence, and it certainly does not speak to the introduction of "refusal to consent" evidence. Instead, it tells us that we have a right to be free

80. A variation of the *Griffin* constitutional penalty theory advanced by one court is the analogue to *Simmons v. United States*, 390 U.S. 377 (1968). In *Simmons*, an armed bank robbery prosecution, police had seized a suitcase containing items taken in the bank robbery from a third-party residence. *Id.* at 380. In order to establish the legal standing necessary to move to suppress the contents of the suitcase, the defendant testified to facts indicating that the suitcase was his. *See id.* at 381. The motion to suppress was denied. *Id.* At trial, the prosecution introduced the defendant's suppression hearing testimony linking the defendant to the suitcase and its contents. *See id.* The Court held it was error to allow the defendant's suppression hearing testimony to be introduced at trial. *See id.* at 389-94. The Court reasoned otherwise defendants would be deterred from challenging illegal searches. *See id.* at 392-93.

In *United States v. Thame*, 846 F.2d 200 (3d Cir. 1988), the court ruled it was improper to permit evidence and argument that the defendant had refused consent to search a bag because he knew it contained cocaine. *Id.* at 205-07. In the course of its opinion, the court reasoned that to rule otherwise would undermine *Simmons*. *See id.* at 207. The comparison is unconvincing.

Simmons is premised on the notion that we do not wish to deter the prosecution of motions to suppress. If such a deterrence existed, then the exclusionary rule remedy would be compromised, law enforcement officers would themselves be less deterred from conducting illegal searches and seizures, and the Fourth Amendment rights of all citizens could ultimately suffer.

In *Thame*, by contrast, there was no illegal search or seizure. There was no undesirable police conduct. There was nothing to deter and nothing to suppress in order to deter. There simply was nothing that parallels the *Simmons* Court's desire to insure that the vehicle for promoting constitutional police behavior remains unhampered.

from “unreasonable searches and seizures.”⁸¹ If courts nevertheless persist in the notion that the reason for excluding “refusal to consent” evidence is that the admission of such evidence violates the Fourth Amendment, even in the absence of any actual search or seizure, then the “right” envisioned must be derivative of some textual right in the Fourth Amendment itself. In other words, any Fourth Amendment privilege that attaches to a refusal to consent to a search must presumably be premised on the fact that the citizen possessed a Fourth Amendment right to refuse to submit to a search, that is, the search itself would have been unlawful under the Fourth Amendment without such consent.

However, what if that were not the case? Suppose that the police do have a valid search warrant, or probable cause coupled with circumstances excusing the absence of a search warrant. Suppose further that the defendant futilely refuses to allow the search, and that the prosecution seeks to introduce evidence of that refusal to show the defendant’s knowledge of, or connection to, the incriminating evidence found when the search was lawfully conducted over the defendant’s objection. A few courts have ruled, or at least promised to rule, that, even under these circumstances, the defendant’s rights under the Fourth Amendment are violated by the introduction of “refusal to consent” evidence.⁸² The basis for these decisions continues to be the constitutional penalty theory, that is, that no adverse consequence can attach to the exercise of a constitutional right.⁸³

81. U.S. CONST. amend. IV.

82. See *Elson v. Alaska*, 659 P.2d 1195, 1199 (Alaska 1983) (defendant refused to submit to lawful search incident to lawful arrest); *Clark v. State*, 704 P.2d 799, 806 (Alaska Ct. App. 1985) (defendant refused to unlock footlocker during lawful execution of search warrant); *People v. Keener*, 195 Cal. Rptr. 733, 736 (Ct. App. 1983) (holding defendant’s refusal to consent to warrantless entry is not evidence of a crime); *Commonwealth v. Tillery*, 611 A.2d 1245, 1250 (Pa. Super. Ct. 1992) (defendant refused to consent to search of car where police already had probable cause required for warrantless search of automobile); *Commonwealth v. Welch*, 585 A.2d 517, 520 (Pa. Super. Ct. 1991) (“The integrity of a constitutional protection simply cannot be preserved if the invocation or assertion of the right can be used as evidence suggesting guilt.”); *Powell v. State*, 660 S.W.2d 842, 845 (Tex. Ct. App. 1983) (defendant refused to permit inspection of package for which police possessed valid search warrant).

83. For example, in *Powell*, 660 S.W.2d at 845, the court reasoned “[t]he invocation of constitutional rights such as . . . freedom from unreasonable searches may not be relied upon as evidence of guilt.” In *Welch*, the court concluded:

[T]he same reasoning [as that which applies when an individual refuses to consent to what would otherwise be an unlawful search] would apply even if the individual asserting the right had a mistaken belief that they were protected by a constitutional provision or were extended a right or protection when, in fact, they were not. The integrity of a constitutional protection simply cannot be preserved if the invocation or assertion of the right can be used as evidence suggesting guilt.

Welch, 585 A.2d at 520.

But what “right” is it to which an adverse consequence is attached? The Fourth Amendment protects only against *unreasonable* searches and seizures. A search conducted upon probable cause and a warrant (or some substitute for the requirement of a warrant) is not an unreasonable search. There simply is no “right” to avoid such a search. Therefore, refusal to consent to such a search has absolutely no constitutional significance regarding the reasonableness of the subsequent search, and is not an invocation of any right whatsoever.

Consider the law surrounding drunk driving. All, or virtually all, states have enacted so-called “implied consent” laws to combat drunk driving.⁸⁴ These statutes generally permit police officers to conduct breath, blood, or urine tests on drivers to detect the presence of alcohol under specified circumstances.⁸⁵ If a driver covered by the statute refuses to submit to the chemical test for alcohol, there can be criminal and civil penalties for the refusal itself,⁸⁶ including driver’s license revocation or suspension.⁸⁷ Most importantly for our purpose, most such statutes provide that evidence of refusal to submit to such tests is admissible in prosecutions for driving while intoxicated.⁸⁸

Extraction of breath, blood or urine under these statutes is a search or seizure within the governance of the Fourth Amendment.⁸⁹ In that respect, the statutes are commonly referred to as “implied consent” laws because many have been enacted, explicitly or otherwise, on the notion that, in return for the privilege of driving on the roads of a state, the driver is assumed to have consented to submit to the chemical alcohol tests.⁹⁰

Of course, no such consent has actually occurred. Aside from proceeding with the fundamental task of driving, the driver has done

84. Matthew J. Dougherty, Casenote, *Hays v. City of Jacksonville*, 518 So.2d 892 (Ala. Crim. App. 1987), 19 CUMB. L. REV. 177, 177 & n.3 (1988) (citing implied consent statutes in effect in 1988 for “all fifty states and the District of Columbia”).

85. Elizabeth F. Rubin, Comment, *Trying to Be Reasonable About Drunk Driving: Individualized Suspicion and the Fourth Amendment*, 62 U. CIN. L. REV. 1105, 1106 (1994).

86. Joseph F. Stanton, *SJC Steers off Course: DUI Breath Test Refusals Inadmissible*, 28 NEW ENG. L. REV. 1169, 1170 & n.7 (1994).

87. *Id.* at 1170 n.7.

88. *Id.* at 1170.

89. *Schmerber v. California*, 384 U.S. 757, 767–68 (1966); *United States v. Phillips*, 976 F.2d 739 (9th Cir. 1992) (unpublished table decision), *text* at 1992 WL 231124, at **3; Rubin, *supra* note 85, at 1106.

90. Dougherty, *supra* note 84, at 177.

nothing that could be said to be a truly voluntary consent to a search,⁹¹ the prerequisite for an effective consent under the Fourth Amendment.⁹² If conditioning a basic life activity upon a legislatively mandated consent to search were permitted by the Fourth Amendment, the right to privacy safeguarded by the Fourth Amendment would be reduced to a matter of legislative grace.⁹³ These so-called “implied consent” statutes pass constitutional muster under the Fourth Amendment, not because there is anything like constitutionally sufficient consent, but because they meet the basic Fourth Amendment requirement of reasonableness.⁹⁴ Unremarkably, then, “implied consent” statutes generally require probable cause that drivers have been driving while intoxicated before drivers may be subjected to the operation of these provisions.⁹⁵

What follows from this scheme, properly executed, is that a driver who refuses to consent to the chemical alcohol test has no constitutional right to do so, there being probable cause and the exigency of dissipating blood-alcohol levels excusing the requirement of a warrant. When prosecutors seek to implement these statutes by introducing evidence of refusal to consent to the chemical alcohol tests, courts are confronted with the question of whether a constitutionally ineffective refusal to consent is privileged.

The United States Supreme Court has addressed this issue in precisely this context. In *South Dakota v. Neville*,⁹⁶ Fifth Amendment and Due Process challenges were levied against a South Dakota statute permitting admission of a defendant’s refusal to submit to a blood-alcohol test in a prosecution for driving while intoxicated.⁹⁷ While the specific challenges did not include a *Griffin* constitutional penalty theory claim, the Court nevertheless preempted such a contention. The Court reasoned that, “[u]nlike the defendant’s situation in *Griffin*, a person suspected of drunk

91. Cf. *People v. Younger*, 42 N.W.2d 120, 122–23 (Mich. 1950) (addressing the argument that those who hunt and fish have waived their rights under the state constitution to be free from unreasonable searches and asserting that any such waiver would not be voluntary).

92. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

93. See *Younger*, 42 N.W.2d at 125 (observing that “the state may not impose upon the permission to take wild life the condition that the state be allowed to invade the constitutional rights of the individual”).

94. Cf. *id.* at 124.

95. Rubin, *supra* note 85, at 1106–07.

96. 459 U.S. 553 (1983).

97. *Id.* at 560.

driving has no constitutional right to refuse to take a blood-alcohol test. The specific rule of *Griffin* is thus inapplicable.”⁹⁸

Notwithstanding *Neville*, a few courts have persisted in the notion that an unprivileged refusal to consent is itself privileged, while at the same time struggling to avoid invalidating their implied consent laws.⁹⁹ In order to do so, however, the courts have either shifted their analysis from a constitutional penalty theory to a focus upon an evidentiary balance of relevance and unfair prejudice¹⁰⁰ or relied upon meaningless distinctions.¹⁰¹

The end result is that, without a constitutionally effective right to block a search or seizure by refusing consent, the refusal of consent is constitutionally irrelevant. There can be no derivative constitutional right to bar evidence of an invocation of something that itself is not a constitutional right.¹⁰²

98. *Id.* at 560 n.10. *See also* State v. Gefre, 903 P.2d 386, 390 (Or. Ct. App. 1995) (stating defendant had no constitutional right to refuse to take a breath test and therefore admission of defendant’s refusal to submit to one did not implicate defendant’s constitutional rights).

99. *See* United States v. Phillips, 976 F.2d 739 (9th Cir. 1992) (unpublished table decision), *text at* 1992 WL 231124, at **3; Srala v. Anchorage, 765 P.2d 103, 105 (Alaska Ct. App. 1988); Burnett v. Anchorage, 678 P.2d 1364, 1369–70 (Alaska Ct. App. 1984).

100. In *Burnett*, for example, the court pointed out that, unlike an ordinary “refusal to consent” situation, refusal to submit to a breathalyzer test was extremely probative and not unfairly prejudicial. *Burnett*, 678 P.2d at 1369–70.

101. *Phillips* provides one example, in a prosecution for manslaughter and assault for the death and injuries suffered by passengers in a vehicle driven by the intoxicated defendant, the court held it was error to admit at trial the defendant’s refusal to submit to a blood alcohol test, distinguishing *Neville* on the ground Phillips had not yet been formally arrested when she refused the test. *Phillips*, 1992 WL 231124, at **3.

102. *See* United States v. Hearst, 563 F.2d 1331, 1339 (9th Cir. 1977) (holding no Fifth Amendment violation for jury to witness defendant refusing to answer questions on mistaken claim of Fifth Amendment privilege).

H. Richard Uviller has made a strong practical argument to the contrary on this point. He reasons that a citizen who does not know whether the police authority to search is valid until later judicial determination can only preserve that option by refusing to consent to the search. *See* Uviller, *supra* note 1, at 49–50. Therefore “[a] person’s right to decline consent is not inconsistent with the government’s authority to override such disinclination, by force if necessary.” *Id.* at 49. But even Uviller does not suggest that this “right” originates in the Fourth Amendment itself. Instead, he suggests that the fundamental unfairness of admitting “refusal to consent” evidence means it is Due Process that constitutionally proscribes such a practice. *Id.* at 40, 55–56. At least one court has reached the same conclusion, albeit in a different context. *See* State v. Palenkas, 933 P.2d 1269, 1278 (Ariz. Ct. App. 1996) (holding even though defendant had no constitutional right to counsel at time defendant refused to cooperate until able to consult, introduction of evidence of such refusal to cooperate violated Due Process), *amended by* 1 CA-CR 95-0752, 1996 Ariz. App. LEXIS 267 (Dec. 19, 1996).

There is nothing intrinsically flawed about this Due Process theory, especially because Due Process is so nonspecific. But it certainly appears that this Due Process theory is completely inconsistent with the Court’s approach to this area. The very point of Uviller’s 1990 article was to suggest that the Court had failed to properly resolve related issues in *South Dakota v. Neville*, 459 U.S. 553 (1983). Uviller, *supra* note 1, *passim*. Moreover, the Court has made it clear that Due Process is

It does not follow from this that evidence of a refusal to consent to search is necessarily admissible. It is my thesis that such evidence is ordinarily excludable under the rules of evidence. If, however, courts are steadfast in the view that this is a constitutional issue, then in any circumstance in which the defendant has no constitutional right to prevent a search, the courts might be led to the inverse non sequitur that “refusal to consent” evidence is *necessarily* admissible in such cases. Indeed, several courts have so indicated.¹⁰³ But by doing so, courts are rigidly committing themselves to a result bearing no necessary relationship to the probative value of the refusal to consent.

V. INCONSISTENT APPLICATION

Although most of the courts that have addressed the question of the admissibility of “refusal to consent” evidence purport to subscribe to the constitutional penalty theory, the results do not always represent true conversion. In many cases, evidence which ought to be excluded under a true constitutional rule nevertheless finds its way to the trier of fact. But rather than acknowledge that what has taken place is the weighing of probative value and other concerns appropriately considered under the rules of evidence, courts often struggle, sometimes unpersuasively and often inconsistently, to exempt certain situations from a *Griffin*-type rule of purported constitutional magnitude.

1. FAIR RESPONSE

In *United States v. McNatt*,¹⁰⁴ the court permitted the government to introduce evidence of the defendant’s refusal to allow police officers to search his truck to rebut the defendant’s theory that the police had planted

not a viable constitutional basis for arguing that a right specified elsewhere in the Constitution has been burdened. See *Portuondo v. Agard*, 529 U.S. 61, 74 (2000); *Graham v. Connor*, 490 U.S. 386, 395 (1989). Finally, the Court has specifically held that Due Process is not violated by the introduction of adverse-inference evidence of the defendant’s election of a specific constitutional right. See, e.g., *Portuondo*, 529 U.S. at 74–76; *Fletcher v. Weir*, 455 U.S. 603, 607 (1982); *Jenkins v. Anderson*, 447 U.S. 231, 238–40 (1980).

103. E.g., *United States v. Rapanos*, 115 F.3d 367, 371–74 (6th Cir. 1997) (holding because officers, at time defendant refused request to search, could have searched without defendant’s consent, defendant enjoyed no constitutional right to refuse consent and thus no error in admitting evidence of refusal to consent). See also *Phillips*, 1992 WL 231124, at **3 (improper to draw adverse inference only where underlying right to refuse, but where government can compel search, no Fourth Amendment right to refuse); *Anable v. Ford*, 653 F. Supp. 22, 36 (W.D. Ark.) (“[R]efusal to consent to a search cannot lead to an inference of guilt unless the search is initially authorized by the Fourth Amendment.”), *modified*, 663 F. Supp. 149 (1985).

104. 931 F.2d 251 (4th Cir. 1991).

drugs in the truck.¹⁰⁵ While the defense position in this case certainly increased the significance of any evidence tending to demonstrate that the defendant was fearful of a search because he knew drugs would be discovered, it is not at all clear why this evidentiary fact should alter the outcome under a constitutional penalty theory analysis. For example, in *State v. Wilson*,¹⁰⁶ following defense elicitation of testimony from a police officer that the defendant had cooperated at the time of his arrest, the prosecution elicited further testimony from the same witness that the defendant had refused to allow a search of his vehicle.¹⁰⁷ The government argued that this “refusal to consent” evidence was a fair response to the claim that the defendant had been cooperative.¹⁰⁸ The court disagreed, stating that, “[a]s a matter of law, . . . the valid exercise of a constitutional right, standing alone,” cannot be “defined as ‘uncooperative.’”¹⁰⁹ *McNatt*’s failure to adhere to the strict constitutional penalty theory analysis used in *Wilson* suggests, at least on the facts in *McNatt*, that the special relevance of “refusal to consent” evidence in the “fair response” scenario trumps the supposed constitutional rule.

2. DOMINION AND CONTROL

In *United States v. Dozal*,¹¹⁰ the government introduced evidence of the defendant’s refusal to consent to a search of portions of an apartment under his exclusive control.¹¹¹ While acknowledging that refusal to consent to a search cannot be used to support reasonable suspicion and that “asking a jury to draw adverse inferences from such a refusal may be impermissible,”¹¹² the court nevertheless permitted the admission of the “refusal to consent” evidence in the case. The court was convinced “that the contested statements were introduced, not to impute guilty knowledge to Mr. Dozal, but for the proper purpose of establishing dominion and control over the premises where a large part of the cocaine was found.”¹¹³

105. *Id.* at 256–57. *See also* *United States v. Turner*, 39 M.J. 259, 262 (C.M.A. 1994) (recognizing relevance of comment on accused’s Fourth and Fifth Amendment rights when comment is an invited response to a matter first raised by the defense).

106. 914 P.2d 1346 (Ariz. Ct. App. 1996).

107. *Id.* at 1350.

108. *Id.*

109. *Id.* at 1351 (citation omitted).

110. 173 F.3d 787 (10th Cir. 1999).

111. *Id.* at 791–92.

112. *Id.* at 794.

113. *Id.*

Whether *Dozal* was decided correctly or incorrectly, it cannot be explained as a constitutional decision. If the defendant truly possessed a constitutional right to avoid the introduction of “refusal to consent” evidence, such a right could not be overcome by an adjustment in the government’s theory of relevance. Whether introduced to show consciousness of guilt or dominion and control, the government was permitted to establish guilt, at least in part, from the refusal to consent to a search. The constitutional penalty theory presumably does not allow either inference to be drawn. The only plausible rationale for *Dozal* is that the shift in the government’s theory of relevance altered, in the court’s view, the balance of relevance and unfair prejudice controlling the question of admissibility.

3. LIMITED OR WITHDRAWN CONSENT

The scope of a search conducted pursuant to consent is limited by the scope of the consent itself.¹¹⁴ Furthermore, an individual who consents to a search has a right to withdraw that consent, thereby making any continuation of the search violative of the Fourth Amendment (unless there are grounds other than consent legitimizing the search).¹¹⁵ One would expect, then, that under a constitutional penalty theory, evidence of withdrawn consent would not be admissible. Although several courts have so reasoned,¹¹⁶ there is by no means any consensus on this point. Several courts have held that the withdrawal of previously conferred consent, or the selective provision of consent, may be properly considered as evidence of criminal conduct.¹¹⁷ This selective allowance of evidence of limited or

114. *United States v. Gay*, 774 F.2d 368, 377 (10th Cir. 1985). *See also Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (noting that a suspect may delimit the scope of the search to which he consents).

115. *See United States v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986); *Mason v. Pulliam*, 557 F.2d 426, 429 (5th Cir. 1977).

116. *See Kames v. Skrutski*, 62 F.3d 485, 495–96 (3d Cir. 1995); *United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993); *United States v. Thame*, 846 F.2d 200, 205–07 (3d Cir. 1988); *State v. Hayes*, 51 S.W.3d 190, 194 (Mo. Ct. App. 2001); *State v. Chronister*, 526 N.W.2d 98, 105 (Neb. Ct. App. 1995); *Garcia v. State*, 712 P.2d 1375, 1376 (N.M. 1986).

117. *See United States v. Withers*, 972 F.2d 837, 843 (7th Cir. 1992) (holding defendant’s consent to search purse but refusal to consent to search garment bag was properly considered on the question of reasonable suspicion); *United States v. Taxacher*, 902 F.2d 867, 873 (11th Cir. 1990) (finding defendant’s withdrawal of consent to search vehicle when search focused upon particular container was properly considered in determining good faith belief in probable cause for warrant); *People v. Robertson*, 49 Cal. Rptr. 345, 348 (Dist. Ct. App. 1966) (holding defendant’s withdrawal of consent to search hotel room when police located bag was properly considered in determining probable cause); *People v. Kendall*, 28 Cal. Rptr. 53, 55–56 (Dist. Ct. App. 1963) (holding individual’s decision to withdraw consent to search at behest of defendant showed individual’s complicity and guilty knowledge, justifying arrest of individual); *Schmidt v. State*, 372 S.E.2d 440, 444 (Ga. Ct. App. 1998)

withdrawn consent cannot be explained on constitutional grounds. As indicated above, a citizen is on no less solid constitutional ground when rescinding previously granted consent to search than when refusing consent to search completely.¹¹⁸ In both cases, the defendant's exercise of a constitutional right has been used to draw adverse inferences against the defendant. The distinction can only be explained, again, by the court's perception of the relatively greater probative value of withdrawn or limited, as opposed to refused, consent. Correctly or not, the courts that have admitted evidence of selectively granted or withdrawn consent quite apparently perceive this as significantly probative of criminal conduct.

4. FORM OF REFUSAL

A few courts have suggested that, while the refusal to consent to a search is constitutionally off limits, the form of that refusal may not be so privileged.¹¹⁹ For example, in *United States v. Batti*,¹²⁰ the defendant, when asked for permission to search his bag, instead of merely declining, "picked up the bag, put his arms through the handles, clutched the bag toward his body, and stepped a couple o[f] paces away from" the agent.¹²¹ The court reasoned that, although it would have impermissibly penalized the defendant's exercise of his constitutional right to consider his refusal to consent, it was permissible to consider "the manner in which he refused consent" in concluding that there existed reasonable suspicion.¹²²

And in *United States v. Carter*,¹²³ a detective asked the defendant for permission to look in the defendant's tote bag and the defendant agreed.¹²⁴ When the detective removed a paper bag from the tote bag, the defendant snatched the paper bag away from the detective, announced that it contained food and that the defendant would show the detective, reached

(Beasley, J., concurring) (holding selective consent may legitimately be considered in determining probable cause); *State v. Henderson*, 510 S.W.2d 813, 818-19, 822 (Mo. Ct. App. 1974) (holding defendant's withdrawal of consent to search apartment when police focused upon particular bedroom was properly considered in determining probable cause).

118. See *supra* notes 114-15 and accompanying text.

119. See *e.g.*, *United States v. Hyppolite*, 65 F.3d 1151, 1158 (4th Cir. 1995); *United States v. Wilson*, 953 F.2d 116, 126 (4th Cir. 1991) (expressing wariness about "allowing the exercise of the unequivocal right to ignore the police to be grafted onto the 'reasonable suspicion' analysis" but noting an unwillingness "to rule that the form of a denial can never be included as a factor to be considered in determining whether an investigative stop was justified").

120. No. 91-10318, 1992 U.S. App. LEXIS 4934 (9th Cir. Mar. 17, 1992).

121. *Id.* at *5.

122. *Id.* at *6 n.1 (citations omitted).

123. 985 F.2d 1095 (D.C. Cir. 1993).

124. *Id.* at 1096.

into the paper bag, felt around, withdrew his empty hand and rolled up the paper bag.¹²⁵ When the detective asked if the defendant did not wish the detective to look in the bag, the defendant acknowledged that the detective was right.¹²⁶ The court first enlisted itself among the followers of the Fourth Amendment constitutional penalty theory, stating that it would be improper to consider the defendant's withdrawal of his consent in determining whether the detective thereafter possessed reasonable suspicion to continue the investigation.¹²⁷ However, the court also ruled that the defendant's "offer to show the detective the contents of his bag and his peculiar way of retracting that offer gave rise to a reasonable suspicion that he was concealing drugs in his bag."¹²⁸

Once again, it is simply not possible to square these decisions in any persuasive way with a constitution-based rationale. If the Fourth Amendment, or even Due Process, prohibits any evidentiary use of refusal to consent to a search, how can that right disappear depending on the manner in which it is asserted? Are the defendants in *Batti* and *Carter* without the usual constitutional protections because of their excessive enthusiasm in the assertion of their rights? Certainly the implication in both cases is that these defendants would have enjoyed freedom from any adverse inferences if they had simply not wanted their privacy so intensely.

Once again, it should be readily apparent that the constitutional window dressing is but a transparent façade concealing a purely evidentiary analysis. If the *Batti* and *Carter* courts were correct, it is simply because the behavior of the defendants was especially probative of criminal conduct in a way that a less "peculiar" refusal to consent to a search is not.

125. *Id.*

126. *Id.*

127. *See id.* at 1097.

128. *Id.* The court also denied that it was allowing the police to base reasonable suspicion on the manner in which a person withdraws consent. The court claimed that the defendant had already withdrawn his consent when he retook the bag, and that therefore nothing the defendant did thereafter constituted the privileged exercise of his constitutional right to refuse and withdraw his consent. *See id.* at 1097 n.*. This suggestion does not appear to comport with the court's own recitation of the facts, which specify that it was the entire sequence of events that conveyed to the officer that the defendant had finally decided not to cooperate in the disclosure of the contents of the paper bag. Moreover, the hair-splitting in which the court engages hardly seems worthy of something supposedly so important as an exercise of a constitutional right. If the defendant had responded to the request for permission to search the tote bag by saying, "No, I do not want you to look in there," would everything said by the defendant after the word "no" be admissible on the theory that the refusal to consent to the search was already accomplished by the word "no"?

5. BELLIGERENCE

Although one court has ruled that an individual's "argumentative and difficult" demeanor in declining consent to search cannot be considered in determining reasonable suspicion,¹²⁹ several courts have held otherwise. Thus, a defendant's "extreme reaction" in becoming "very agitated and upset" in declining a request to search his house could be considered in determining probable cause.¹³⁰ The fact that a defendant "emphatically" did not want officers to seize and search an item could also be considered in determining probable cause.¹³¹ And the fact that the defendant "became angry about a possible search of the car" was properly considered as supporting reasonable suspicion.¹³²

As it is difficult to conceive that a constitutional right is lost by rudeness, these results do not seem to be faithful to the constitutional penalty theory. Rather, they suggest that the overreaction by the actors refusing consent to search is simply especially relevant to a conclusion that the motive for refusal is to avoid detection of evidence of a crime.

6. LYING

If the form of a defendant's refusal to consent to search includes lying to the police about the contents of the targeted area, is the lie itself a component of the assertion of a Fourth Amendment right and thus inadmissible?

In *State v. Gressel*,¹³³ the defendant refused a request to submit to a full search, but, shortly thereafter, during a lawful frisk for weapons, the officer felt a soft object in the defendant's pocket.¹³⁴ The officer inquired what the object was, and the defendant responded that it was "[n]othing."¹³⁵ The officer seized the item from the defendant's pocket and found that it was marijuana.¹³⁶ In ruling that the officer lacked probable cause, the court concluded that, not only could the defendant's refusal to consent not be considered in the calculus of probable cause, but so too the false statement was off limits. The court "view[ed] defendant's response to

129. *Kames v. Skrutski*, 62 F.3d 485, 495-96 (3d Cir. 1995).

130. *State v. Green*, 540 N.W.2d 649, 655-56 (Iowa 1995).

131. *See United States v. Fuentes*, 105 F.3d 487, 490 (9th Cir. 1997).

132. *State v. Humphrey*, 937 P.2d 137, 142 (Utah Ct. App. 1997).

133. 554 P.2d 1014 (Or. 1976) (en banc).

134. *Id.* at 1015.

135. *Id.*

136. *Id.*

the inquiry concerning the contents of his pockets as merely an unsophisticated attempt to assert his right of privacy.”¹³⁷

By contrast, in *United States v. Prescott*,¹³⁸ federal and state agents, armed with a search warrant, followed a controlled delivery of stolen credit cards to a suspect’s apartment.¹³⁹ Finding the suspect’s apartment unoccupied and padlocked from the outside, the agents went to the defendant’s apartment on the same floor of the building, inquiring as to the suspect’s whereabouts and requesting consent to search the defendant’s apartment.¹⁴⁰ The defendant not only refused consent to search her apartment, but also denied both that the suspect was in her apartment and that she even knew the suspect.¹⁴¹ In fact, the suspect, as well as the stolen credit cards, were in the defendant’s apartment, and the defendant was convicted as an accessory after the fact.¹⁴² The Ninth Circuit, while ruling that evidence of the defendant’s refusal to consent to the search was inadmissible, also concluded that evidence of the defendant’s prevarications in the process were not so privileged and could properly be considered.¹⁴³

One might struggle to distinguish these two cases from one another and argue that both are consistent with the constitutional penalty theory. One might also side with one or the other on the supposedly constitutional question of whether lying is within the scope of asserting one’s Fourth Amendment right to refuse consent. I would suggest, however, that the former strategy is not terribly convincing and that the latter approach is no more satisfactory than the efforts of some courts to escape the consequences of the constitutional penalty theory by drawing a constitutional distinction between the form of refusal and the refusal itself.¹⁴⁴ It is far more genuine to acknowledge that the *Prescott* court simply found the defendant’s lies in that case to be overwhelmingly probative on the question of the defendant’s guilt of the crime of accessory after the fact for concealing the original suspect from the police. And while it is less clear that the *Gressel* court was not merely slavishly obedient to its constitutional rule, it is certainly plausible that the *Gressel*

137. *Id.* at 1016 (citation omitted).

138. 581 F.2d 1343 (9th Cir. 1978).

139. *Id.* at 1346.

140. *Id.*

141. *Id.* at 1346–47.

142. *Id.*

143. *See id.* at 1353.

144. *See supra* notes 119–32 and accompanying text.

court actually found the defendant's lie in that case not to be terribly probative of criminal conduct.

7. PHYSICAL RESISTANCE

What if the form of the defendant's refusal to consent or acquiesce to a search is physical rather than verbal? In *State v. Brown*,¹⁴⁵ during a lawful search of the defendant's residence, the police recovered three sets of car keys from a pants pocket and placed them on a bed.¹⁴⁶ The defendant grabbed the sets of keys and "clutched them in his fist."¹⁴⁷ When the officer asked the defendant to return the keys, the defendant placed two sets of keys on the bed, apparently attempting to conceal the third set in his hand.¹⁴⁸ Wise to the deception, the officer told the defendant to produce the third set of keys, at which point the defendant became "excited and belligerent."¹⁴⁹ The officer rewarded the defendant with handcuffs, physically removed the keys from the defendant's hand, used the keys to search the defendant's automobile, and discovered stolen property.¹⁵⁰

The court held that there existed no reasonable grounds to search the car.¹⁵¹ Along the way, the court echoed the familiar refrain that refusal to consent to a search cannot be considered as evidence supporting probable cause for a search.¹⁵² The court reasoned that this prohibition extended to the defendant's behavior as well. Even if the defendant was trying to hide the keys, it "could amount to no more than a manifestation of his desire not to have his cars searched. . . . Defendant's action in grabbing the keys and secreting them could be nothing more than a clumsy effort to assert his right to privacy"¹⁵³

Well, if it truly is the Constitution that proscribes the admission of "refusal to consent" evidence, then the *Brown* conclusion is virtually irresistible. Surely the constitutional penalty theory does not permit the sanctioning of a constitutional right merely because the assertion is nonverbal.

145. 825 P.2d 282 (Or. Ct. App. 1992).

146. *Id.* at 283.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.* at 284-85.

152. *See id.*

153. *Id.* at 285.

But how far does this principle extend? Suppose, for example, that in response to a police request to a consent to search, a suspect were to seize the officer's gun and then shoot and kill the officer? Is this "nothing more than a clumsy effort to assert [a] right to . . . privacy[?]"¹⁵⁴ In a prosecution for murder of the police officer, would any court indulge the argument that the Fourth Amendment constitutional penalty theory prohibits the admission of any evidence of the killer's conduct?

Because I suspect that all would agree that the answer to this question is "no," the more interesting question is "why not?" There might be very good pragmatic reasons for distinguishing the hypothetical murder scenario from *Brown*. And one certainly could articulate an arbitrary rule that would produce different results in the two cases. But does the constitutional penalty theory itself allow for a distinction between *Brown* and the murder hypothetical scenario on any sound theoretical principle?

Perhaps it is with a wary eye on this slippery slope that most courts that have addressed the issue have not been willing to extend the Fourth Amendment constitutional penalty theory to barring physical evidence of resistance to a search.¹⁵⁵ How have these courts managed to reach such results without confessing abdication of the constitutional penalty theory? The rationales have demonstrated more imagination than analysis.

For example, in *People v. Turner*, detectives in plain clothes journeyed to the address at which the complainant claimed that she had been sexually assaulted.¹⁵⁶ They knocked on the door, the defendant answered, one of the detectives said he was a police officer and the "defendant immediately slammed the door shut,"¹⁵⁷ all of which was recounted to the jury as evidence of the defendant's consciousness of guilt. The defendant, relying on *Griffin*, argued that this was an unconstitutional penalty imposed upon his withholding of consent to search.¹⁵⁸ Rejecting the defendant's argument as "farfetched," the court merely pointed out that the detective had not actually requested to search the premises.¹⁵⁹

154. *Id.*

155. *See* *United States v. Taxacher*, 902 F.2d 867, 873 (11th Cir. 1990) (concluding it was permissible to consider, in support of good faith belief in probable cause, that the defendant revoked his consent to search by "nearly clos[ing] the trunk of the vehicle on the officer's head"); *People v. Turner*, 730 P.2d 333, 335 (Colo. Ct. App. 1986) (holding evidence defendant slammed door shut when callers identified themselves as police officers properly admitted at trial).

156. *Turner*, 730 P.2d at 335.

157. *Id.*

158. *Id.*

159. *Id.*

The *Turner* court's Houdini-like escape from the constitutional penalty theory is unimpressive. The Fourth Amendment permits a citizen not only to refuse to consent to a search, but, in the absence of probable cause or reasonable suspicion, also to refuse to respond at all to a police officer.¹⁶⁰ So whether *Turner* told the police to go away, gently shut the door or sent splinters flying with an emphatic slam, he was, knowingly or not, exercising his Fourth Amendment prerogative. And if the constitutional penalty theory is truly appropriate in the Fourth Amendment context, admitting evidence of that election cannot be justified on the immaterial fortuity that the police had not explicitly requested consent to search.

*Elson v. State*¹⁶¹ is even more mystifying, for its illogic requires no external reference. *Elson*, the reader will probably not recall, is the decision of the Alaska Supreme Court that ruled it unconstitutional to allow evidence of a defendant's refusal to consent to a search even when the defendant has no right to avoid the search. In *Elson*, the defendant attempted to block a valid search incident to a lawful arrest.¹⁶² Had *Elson* merely refused to consent to a search that did not require his consent, no evidence of his refusal would have plagued him at his trial in Alaska. But *Elson* did not simply protest verbally; he grabbed the officer's hand in a futile effort to frustrate the search that did not require his permission.¹⁶³ This, said the court, required it to "consider the question whether there is a constitutional right to physically resist a search."¹⁶⁴ Finding that "a private citizen may not use force to resist a peaceful search,"¹⁶⁵ the court easily concluded that "the admission of testimony concerning *Elson's* resistance did not violate his constitutional rights."¹⁶⁶

The explicit premise underlying the *Elson* court's conclusion regarding physical resistance is that a defendant is only constitutionally entitled to avoid evidence of resisting a search if he is constitutionally entitled to engage in such resistance in the first place. How is it, then, that in the same opinion, the *Elson* court finds that the Constitution immunizes verbal resistance even when the Constitution renders such resistance ineffective to block the search? Viewed from the opposite shore, if a

160. See *Florida v. Royer*, 460 U.S. 491, 497-98 (1983); *In re D.J.*, 532 A.2d 138, 141-42 (D.C. 1987).

161. 659 P.2d 1195 (Alaska 1983).

162. *Id.* at 1199. See *supra* notes 82-83 and accompanying text.

163. *Id.* at 1196.

164. *Id.* at 1199.

165. *Id.* at 1200.

166. *Id.* at 1201.

mistaken verbal assertion of Fourth Amendment rights is privileged under the constitutional penalty theory, why is a physical assertion of Fourth Amendment rights not privileged only because it is mistaken?

Notwithstanding the *Elson* court's preference for categorical constitutional rules, drawing an inflexible line between verbal and physical resistance is unsatisfactory. Why should an obscene gesture be admissible but the same message delivered verbally excluded? Or does this line of reasoning require even finer, and more elusive, distinctions among certain types of physical resistance? Grabbing a police officer's hand is fair game. How about touching it without squeezing? How about placing one's hand between the hand of the officer and the item to be searched?

The *Turner* and *Elson* courts do struggle to maintain allegiance to the constitutional penalty theory, as imported into Fourth Amendment jurisprudence, while at the same time avoiding the unacceptable consequences of allowing that theory to immunize violent physical resistance. The problem is that they have boxed themselves into an analytical framework of constitutional absolutes. Initially, the constitutional penalty theory does not really permit the disparate treatment of physical resistance, especially if mistaken verbal resistance is immunized. Secondly, even if the constitutional penalty theory could account for the *Elson* distinction, the uniformity it produces within each of the two categories of verbal and physical resistance is, in many cases, either undesirable or nonsensical or both.

If the *Turner* and *Elson* courts could simply have freed themselves from their self-inflicted constitutional shackles, they could have arrived at their desired destinations easily, genuinely, and without fear of unanticipated future factual variations. It is unremarkable that the *Turner* court would find it unusually and substantially probative of the defendant's consciousness of guilt of a sexual assault alleged to have been committed in his residence a short time before that he freely opened the door to persons apparently not the police, but then slammed the door shut only after learning that they were in fact the police but before learning from them the purpose of their visit. Perhaps less compelling, but not unreasonable, would have been the *Elson* court's conclusion that grabbing an officer's hand to abort a search following a lawful arrest was probative of criminal concealment in a way that a mere refusal to consent is not.

8. FLIGHT

Although flight from police officers is generally held to be insufficient, by itself, to constitute probable cause or reasonable suspicion,¹⁶⁷ evidence of flight is generally admitted to show consciousness of guilt in determining reasonable suspicion, probable cause, or guilt itself.¹⁶⁸ How can this practice be reconciled with a Fourth Amendment constitutional penalty theory? In the absence of probable cause or reasonable suspicion, a citizen enjoys a Fourth Amendment right to simply walk away from a police officer, even an inquiring police officer.¹⁶⁹ Presumably, then, the constitutional penalty theory would proscribe any evidence of, or adverse inference from, such a constitutionally protected departure. And flight is just such a departure, albeit often accomplished with some dispatch.

Some courts fail to perceive, or at least acknowledge, the difficulty in squaring admission of evidence of flight with the constitutional penalty theory.¹⁷⁰ Others find themselves in the rather silly posture of resolving a supposedly constitutional question by reference to the speed with which the defendant accomplished such removal from the police. Thus, it has been held that walking away “at a crisp pace” is an assertion of a constitutional right that cannot draw an adverse evidentiary inference,¹⁷¹ but that “walk[ing] rapidly away” is flight properly considered as evidence supporting probable cause to arrest.¹⁷²

167. See e.g., *United States v. Robinson*, 6 M.J. 109, 111 (C.M.A. 1979). *But see* *United States v. Jones*, 973 F.2d 928, 931 (D.C. Cir. 1992) (“Jones’s flight and failure to obey Brennan’s order to stop supplied the necessary articulable suspicion. A suspect is ‘free to leave’ a non-seizure interview, but when he does so by abruptly bolting after having consented to talk, the officers are free to draw the natural conclusions.” (citations omitted)), *aff’d en banc*, 997 F.2d 1475 (D.C. Cir. 1993).

168. See *United States v. Fuentes*, 105 F.3d 487, 489–90 (9th Cir. 1997); *Jones*, 973 F.2d at 931; *Robinson*, 6 M.J. at 111; *In re D.J.*, 532 A.2d at 141 (D.C. 1987); *State v. Butler*, 641 P.2d 655, 657 (Or. Ct. App. 1982).

169. *Florida v. Royer*, 460 U.S. 491, 497–98 (1983); *In re D.J.*, 532 A.2d at 141–42.

170. For example, in *State v. Butler*, the court ruled that probable cause to arrest was established, in part, because “when [the defendant] saw the police in the area, he and his companion fled.” *Butler*, 641 P.2d at 657. Without any indication of incompatibility, the court noted on the same page of the same opinion that “undoubtedly the assertion of a constitutional right cannot form part of the basis for a finding of probable cause.” *Id.* at 657 n.1.

171. *Brown v. United States*, 590 A.2d 1008, 1011, 1020 (D.C. 1991). In *Brown*, in response to an inquiry from an approaching police officer, the defendant “turned and began to walk away at a crisp pace.” *Id.* at 1011. The court refused to attach “substantial importance” to this behavior in determining reasonable suspicion for a subsequent *Terry* stop, because to do so “would improperly penalize Brown for the exercise of his constitutional rights.” *Id.* at 1019. Distinguishing cases that have considered flight as evidence supporting reasonable suspicion, the court noted “Brown did not run. There was no ‘flight.’” *Id.*

172. *Sands v. State*, 414 So.2d 611, 612, 617 (Fla. Dist. Ct. App. 1982).

The fact of the matter is that a citizen does not assert his desire to be free of the police more profoundly by walking, as opposed to running, away from an officer. If anything, the opposite is more likely true. Consequently, evidentiary use of flight, at any speed, cannot be comfortably accommodated under a Fourth Amendment constitutional penalty theory. Yet many courts, despite professed devotion to a Fourth Amendment constitutional penalty theory, appear to be unwilling to forego consideration of evidence of flight, at least when it is truly probative of consciousness of guilt.

That, of course, is the key. It must be truly probative, which brings us back to our theme. Stripped of constitutional window dressing, these “flight” cases can by and large be made comprehensible if one refocuses on what is truly taking place: an assessment of the relevance of proffered evidence. How much more authentic it would be if this process took place on the surface as well as beneath it.

Consider, for example, *In re D.J.*,¹⁷³ in which case the issue was the existence (or not) of reasonable suspicion. There, the defendant was standing near the curb when an unmarked police car entered the street.¹⁷⁴ The defendant made eye contact with one of the officers in the car and then walked in the opposite direction from that in which the car was proceeding.¹⁷⁵ When the police car then backed up to where the defendant was walking, the defendant reversed his direction and headed in the opposite direction.¹⁷⁶ The police car then pulled forward to where the defendant was walking, and again the defendant reversed his direction.¹⁷⁷ When a police officer got out of the car and started walking toward the defendant, the defendant “began to run,” only to encounter other officers.¹⁷⁸

In concluding that these events did not provide the police with reasonable suspicion for a seizure,¹⁷⁹ the court acknowledged that “flight from authority—implying consciousness of guilt—may be considered

173. 532 A.2d 138 (D.C. 1987).

174. *Id.* at 139.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. The court determined a Fourth Amendment “seizure occurred, at the latest, when [the police officer] began to chase D.J. on foot.” *Id.* at 140. This, however, is no longer good law. In *California v. Hodari D.*, 499 U.S. 621, 626 (1991), the Supreme Court determined a Fourth Amendment seizure does not occur until there is “either physical force . . . or, where that is absent, *submission* to the assertion of authority.”

among other factors justifying a *Terry* seizure.”¹⁸⁰ But, the court cautioned, “the circumstances of the suspect’s efforts to avoid the police must be such as ‘permit[] a rational conclusion that flight indicated a consciousness of guilt[.]’”¹⁸¹ Given the facts that the police were in plainclothes, were in an unmarked car, and that the defendant did not immediately attempt to run away, the defendant’s conduct was “ambiguous” and might have been “inspired by any number of innocent reasons,” including “a desire not to talk to the police.”¹⁸²

One may or may not agree with the resolution of the particular question presented in *In re D.J.* For our purposes, that is quite beside the point. More important is the focus of the court in resolving the issue. Unencumbered by constitutional inventions that might require consideration of the defendant’s running but disallow consideration of his walking, the court undertook a perceptive examination of whether the defendant’s behavior really allowed the conclusion that it was motivated by consciousness of guilt. Had the question been one of admissibility of such evidence at trial to prove guilt, the court’s analysis suggests that such evidence would have been excluded, not because of any constitutional penalty theory, but simply because it was not relevant.

VI. AN EVIDENTIARY APPROACH

The theory that it is the Constitution that renders evidence of refusal to consent inadmissible is problematic. The problems are many and severe. Based as it is on an extension of the *Griffin* constitutional penalty theory into the Fourth Amendment arena, it is flawed both in theory as well as in practice.

Fundamentally, the Fourth Amendment constitutional penalty theory is grounded on the inaccurate premise that no negative consequences can be attached to the exercise of a constitutional right.¹⁸³ It is also analytically underinclusive. It cannot command, or even account for, the exclusion of evidence in any case in which the defendant suffers only a greater chance of conviction, but no loss of privacy.¹⁸⁴ It also fails to provide any sound rationale for the exclusion of “refusal to consent” evidence in any case in

180. *In re D.J.*, 532 A.2d at 141 (emphasis omitted) (quoting *United States v. Johnson*, 496 A.2d 592, 597 (D.C. 1985) (citation omitted)).

181. *Id.* (quoting *Lawrence v. United States*, 509 A.2d 614, 618 (D.C. Cir. 1986) (Newman, J., dissenting)).

182. *Id.* at 141–42.

183. See *supra* notes 34–54 and accompanying text.

184. See *supra* notes 55–63 and accompanying text.

which the challenged search cannot be constitutionally impeded by withholding consent.¹⁸⁵ In the Fourth Amendment context, the constitutional penalty theory is also overinclusive to the extent that it immunizes refusals to consent to all searches while the Fourth Amendment only provides protection from those searches that are unreasonable.¹⁸⁶

A resolution of the question of admissibility of “refusal to consent” evidence based upon ordinary rules of evidence encounters none of these difficulties. In measuring the probative value of a defendant’s refusal to consent to a search, and balancing that value against the potential for unfair prejudice, the inquiry is primarily focussed upon the existence and strength of the inference of motive to conceal evidence of criminal activity. The ability to exclude evidence on this ground depends not at all on whether the defendant’s refusal was actually constitutionally sufficient to thwart the search, nor does it depend on whether any privacy interest of the defendant will be actually compromised by the admission of “refusal to consent” evidence. In that respect, ironically, a “rules of evidence”-based principle may be a more promising vehicle for exclusion in many circumstances than the constitutional penalty theory.

Perhaps most importantly, a “rules of evidence” approach is simply more honest. Notwithstanding the plethora of courts that claim to worship at the altar of the constitutional penalty theory, the fact is that, in practice, many of them are closet “rules of evidence” disciples. A Fourth Amendment constitutional penalty theory approach should produce a constitutional absolute, oblivious to the form of the refusal to consent, that is, whether it is accomplished politely or belligerently, verbally or physically, honestly or dishonestly, immediately or belatedly, or by walking or running. As we have seen, however, many courts are unwilling to enforce the constitutional penalty theory in the Fourth Amendment area in such absolute terms.¹⁸⁷ For many courts, the constitutional penalty theory is a fine rule when it excludes evidence of little or no relevance. But when the circumstances present the legal equivalent of the question, “will you love me when I am old and gray,” many courts emerge as fickle mates of the constitutional penalty theory. When the constitutional penalty theory demands that extremely probative evidence be excluded, many courts are unwilling to do so. Rather than acknowledge that they are admitting the evidence because, based upon the particular facts presented, the probative value of the “refusal to consent” evidence outweighs any danger of unfair

185. See *supra* notes 81–103 and accompanying text.

186. See *supra* notes 65–80 and accompanying text.

187. See *supra* notes 104–82 and accompanying text.

prejudice, many courts have invented categorical exceptions to the constitutional penalty theory. These exceptions, such as dominion and control,¹⁸⁸ withdrawn consent,¹⁸⁹ manner of refusal,¹⁹⁰ physical resistance,¹⁹¹ and flight (as long as it is swift),¹⁹² bear no relationship whatsoever to the constitutional penalty theory, although they often have everything to do with a “rules of evidence”-based model. Moreover, these categorical exceptions may prove to be unsatisfactory—if they have not already done so—because, like the constitutional penalty theory itself, they represent inflexible rules that cannot possibly anticipate the myriad factual circumstances to which they might thereafter apply.

A “rules of evidence”-based approach offers this additional advantage: it is inherently flexible. Now it may be that very flexibility that is a little unnerving. Knowing that the desired result is contained in the Constitution provides a level of security against the foolish jurist with which a “rules of evidence”-based model cannot hope to compete. But not all good ideas are in the Constitution, and not all bad ideas are prohibited by that document. Human enterprise cannot ever be exempt from human fallibility. And the danger of excessive rulemaking is that the rule becomes an end and not just a means to an end. In the context of “refusal to consent” evidence, a few judicial decisions appear to have exalted either the constitutional penalty theory or one of its categorical exceptions over sound decisionmaking in the particular case. A “rules of evidence”-based approach to the problem would both enable and compel courts to address the particular circumstances in the cases before them without straightjacketing themselves with categorical imperatives that may not fit the next case to come along.

How would a “rules of evidence”-based approach work? Well, one has to start with what I believe is an indisputable truism: people value their privacy for reasons other than the concealment of criminal activity. The person who tells a police officer that no, that officer cannot look in his bag, car or home has said nothing probative of criminal concealment. Maybe he wishes to conceal embarrassing—but legal—items. Maybe he does not have the time to indulge the officer. The point is simply that, considered in isolation of all other circumstances, a refusal to consent to a search does not meet the evidentiary test of relevance. On its face, evidence of a

188. See *supra* notes 110–13 and accompanying text.

189. See *supra* notes 114–18 and accompanying text.

190. See *supra* notes 119–44 and accompanying text.

191. See *supra* notes 145–66 and accompanying text.

192. See *supra* notes 167–82 and accompanying text.

refusal to consent does not render it “more probable or less probable than it would be without the evidence”¹⁹³ that criminal activity is afoot or that the place to be searched contains evidence of criminal activity.

Moreover, even to the extent that the circumstances suggest some trivial reason to believe that the refusal to consent is motivated by criminal concealment, the evidence ought to be excluded ordinarily. As long as an innocent explanation for the refusal seems reasonably plausible, the jury should not be invited to speculate on what would have been discovered. Nor should the citizen be forced to reveal the very private, but innocent, matter in order to avoid prejudicial speculation. The rules of evidence speak to this by authorizing the exclusion of even relevant evidence on the grounds of “unfair prejudice, confusion of the issues, or misleading the jury.”¹⁹⁴

What the question will come down to in many cases is how strong is the inference of consciousness of guilt. This in turn requires an assessment of how singular that inference is. When other, innocent explanations for the refusal to consent are equally plausible, one would expect the evidence to be excluded. But when the only reasonable explanation for the refusal is criminal concealment, the evidence ought ordinarily to be admitted.¹⁹⁵

VII. THE THREE QUESTIONS

Because a “rules of evidence”-based approach is contextual, it is impossible to detail the results expected under its regime. I did, however, begin this Article by raising three specific hypothetical questions and I promised to return to these questions with suggested answers at the conclusion of this article. So here we are,¹⁹⁶ and here are my answers.

193. FED. R. EVID. 401.

194. *Id.* at 403. In this respect, a “rules of evidence”-based approach should allow courts to be relatively more liberal in allowing “refusal to consent” evidence in the absence of a jury. In a hearing on a motion to suppress, for example, a court could hear “refusal to consent” evidence when the circumstances make the call on admissibility a close one, and then give such evidence whatever little weight it might deserve. I would expect courts to be more cautious about inviting juries to speculate on consciousness of guilt under the same circumstances.

195. For this reason, even independent of the statutory mandate of “implied consent” laws, I would expect evidence of refusal to submit to chemical alcohol tests ordinarily to be admissible. In the absence of some unusual sensitivity to the test, the imposition of the test itself is trivial. It is ordinarily not the case that one has a legitimate, noncriminal privacy interest in the alcohol content in one’s breath or blood. Because probable cause is ordinarily a prerequisite to the test, the driver is presumably already under arrest and therefore the time necessary to implement the test is not an interference with the driver’s agenda. Ordinarily, the implication that one refuses to consent to the test solely to avoid evidence of intoxication is very strong.

196. Those of you who skipped forward for the answers have already been here and are now gone.

1. *May the court consider the defendant's withdrawal of his consent to search in determining whether the police had probable cause to continue the search into the shoebox? No.*

There are several factors that arguably distinguish this scenario from a routine, innocuous refusal to consent. First, our driver defendant initially consented to a search of the car and then specifically of the trunk, only to withdraw his consent when the officer's attention was focused upon the shoebox. Second, the driver physically resisted, snatching the shoebox from the officer's possession. Third, the driver exhibited anger and screamed at the officer in the course of withdrawing consent.

All of these atypical facts indicate that the driver had both a particular and an intense opposition to a search of the shoebox. They tell us nothing about the contents of the shoebox. Perhaps the shoebox contained items the revelation of which would have produced much embarrassment. Maybe the extent of the search had exhausted the driver's patience. In the absence of some good reason to believe that the driver's concern was avoidance of detection of contraband as opposed to some noncriminal items, the driver's conduct is not indicative of consciousness of guilt and is not relevant to the issue of probable cause.

2. *May the jury consider the driver's same withdrawal of consent as evidence of the driver's guilt of the charged crimes? No.*

Essentially, both the answer and the explanation here are identical to those given in response to the first question. In addition, the court should be incrementally more concerned here that the jury not be invited to speculate on the driver's motive.¹⁹⁷

3. *May the codefendant's refusal to consent to a search of his person for the bullet be admitted into evidence to show consciousness of guilt? Yes.*

Some readers may recognize the hypothetical fact pattern—in which the police seek to retrieve a bullet from the defendant's body in order to match it ballistically to a gun fired at the crime perpetrator—as similar to *Winston v. Lee*,¹⁹⁸ although there are important factual differences,¹⁹⁹ and

197. See *supra* note 194.

198. 470 U.S. 753 (1985). In *Lee*, the Court upheld Lee's Fourth Amendment challenge to a court order compelling him to submit to surgery to remove a bullet that the state hoped could be linked to a gun used by a shopkeeper to wound his assailant during an attempted armed robbery. *Id.* at 767.

199. Most notably, unlike our hypothetical patient, Lee was not advised medically to have the bullet removed. In fact, there existed some good medical reasons in *Lee* for not surgically removing the bullet. *Id.* at 757.

Lee did not address the admissibility of the defendant's refusal to consent.²⁰⁰ In this scenario, where the intrusion could not reveal any potentially embarrassing private materials secreted by the patient, where medical wisdom suggests that the bullet be removed, and where the patient's refusal is preceded by learning that the police wish to acquire the bullet, the conclusion that the patient's refusal is motivated by a desire to frustrate discovery of evidence of criminal involvement is quite compelling. Absent some credible indication of some religious or peculiar individual sensitivity to the proposed medical procedure, the "refusal to consent" seems clearly relevant and ought to be admitted.

VII. CONCLUSION

Notwithstanding some misguided case law to the contrary, there is no constitutional right to avoid the introduction of evidence of refusal to consent to a search. In most circumstances, such evidence is inadmissible because it is either irrelevant or insufficiently relevant to overcome its unfairly prejudicial impact. Only when the circumstances point to a singular motive of criminal concealment for the refusal to consent should such evidence be admitted.

200. In *Rougeau v. State*, 738 S.W.2d 651 (Tex. Ct. App. 1987), on facts very similar to our hypothetical, the defendant's treating physician was permitted to testify that, contrary to medical advice, the defendant elected not to have a bullet removed. *Id.* at 663-65. The defendant challenged both the admissibility of this evidence and the subsequent argument by the prosecutor that the defendant's refusal indicated consciousness of guilt. *Id.* at 663. However, the defendant's unsuccessful argument was that the refusal conveyed to the physician was the product of improper custodial interrogation. *Id.* at 665. The defendant advanced neither a Fourth Amendment nor an evidentiary objection. *See id.*

In *Curry v. State*, 458 S.E.2d 385 (Ga. Ct. App. 1995), the court did find error, albeit harmless, in the admission into evidence of the defendant's resistance to the surgical removal of a potentially incriminating bullet. *Id.* at 387. There, however, the "defendant's physician testified that the bullet was buried deep within the muscle of his patient's left leg; that the projectile was close to vital bodily components; that there was no medical reason to remove the bullet and that the procedure required to retrieve the evidence posed an unnecessary risk to defendant's health, including the possibility of infection and paralysis." *Id.*

