

SEARCH ME?

by John M. Burkoff*

A law enforcement officer, uniformed, armed, and deadly serious, approaches you and asks if he can search you or your clothing or purse or briefcase or backpack or body or car or trunk or computer or apartment or house or airplane. The officer doesn't tell you why he wants to conduct the search. In fact, he doesn't tell you much of anything at all, except to ask if he can search you. And you likely respond, as many, if not most people do, by saying "Okay, search me."¹ So, the officer conducts the search and let's say he finds something significant. Maybe it's a baggie of marijuana, a vial of cocaine, narcotics paraphernalia, child pornography, stolen property, a concealed weapon, or some other evidence of criminal activity.

What happens then? Simple enough—the evidence is held to be admissible against you (and maybe other people as well) to prove the commission of a crime. Assuming the officer did not possess a search warrant or act with probable cause under exigent circumstances to otherwise justify the search, the evidence is admissible against you on the legal basis of your putative consent to the search. The courts might even call this episode a "classic consensual encounter."²

Really? Is that what it was? A "classic consensual encounter?" *Really?*

Well, my opinion, it was classic maybe. Hey, classic *probably* at least in the sense that most courts will almost inevitably conclude in these circumstances that it was a lawful consent search. But, regardless of what a court might subsequently conclude, was a search of this sort *really* consensual? *Really and truly?*

Before making the argument that a situation such as the one described above may well *not* be *really* consensual, let me paint the appropriate legal backdrop for you by sketching the prevailing federal constitutional law on the subject of consent searches. Frankly, this is not a very difficult task as the law relating to consent searches is not all that complicated. We're not talking brain surgery here. In essence, there are five basic Fourth Amendment doctrinal points relating to consent searches to bear in mind.

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1. See Dateline NBC, *What Is a Consent Search? Debate Continues Over Police Justification for the Type of Search Based on a Hunch, Rather Than Probable Cause*, April 9, 2004, <http://www.msnbc.msn.com/id/4703573/> ("[I]f an officer has a hunch, and suspects the motorist is involved in a crime, he may ask if he can conduct a search. This is known as a consent search. A driver has the choice to refuse the request, though criminologists say people rarely do.")

2. See *INS v. Delgado*, 466 U.S. 210, 221 (1984) (holding that "[r]espondents may only litigate what happened to them, and our review of their description of the encounters with the INS agents satisfies us that the encounters were classic consensual encounters rather than Fourth Amendment seizures").

First, at least in theory, any search made by a law enforcement officer in the absence of a search warrant is deemed to be presumptively unreasonable under the Fourth Amendment. This principle of constitutional law is, sensibly enough, termed the warrant requirement. As the Supreme Court has made the point repeatedly:

In a long line of cases, this Court has stressed that “searches conducted outside the judicial process, . . . are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.” . . . [I]n all cases outside the exceptions to the warrant requirement the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the “persons, houses, papers and effects” of the citizen.³

Although the Supreme Court and lower courts have reaffirmed many times this doctrinal point, judges do not really act as if they believe there is a warrant requirement—not *really*—certainly not any more than they act as if they believe that most consent searches are really consensual. As one criminal procedure casebook makes the point:

Despite the fact that the warrant requirement is such a firm theoretical

fixture of Fourth Amendment law, the truth of the matter is that, in actual practice, the number of searches justified under one of the “few specifically established and well delineated exceptions” to the warrant requirement far outnumber the number of searches actually undertaken with a warrant. In short, while only a relatively few exceptions to the warrant requirement exist, *most* searches fall within these exceptional categories. As a result, a more useful and practical way to view this rule of law is to use the following rule of practice, even if it puts the cart before the horse: *If a search is not justified by one of the warrant requirement “exceptions,” then a search warrant must be obtained.*⁴

The second basic Fourth Amendment doctrinal point relating to consent searches to bear in mind is that a lawful consent to search made by a person who is (or whose places or possessions are) to be searched is one of those “few specifically established and well-delineated exceptions” to the warrant

3. *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); *see United States v. Drayton*, 536 U.S. 194, 206 (2002); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *see also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (“Except in certain well-defined circumstances, a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.”).

4. RUSSELL L. WEAVER, LESLIE W. ABRAMSON, RONALD BACIGAL, JOHN M. BURKOFF, CATHERINE HANCOCK, DONALD E. LIVELY & JANET C. HOEFFEL, *CRIMINAL PROCEDURE: CASES, PROBLEMS AND EXERCISES* 111 (3d ed. 2007).

requirement just described. As the Supreme Court has made this point clearly and cogently:

It is well settled under the Fourth and Fourteenth Amendments that a

search conducted without a warrant issued upon probable cause is “*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.” It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.⁵

Third, the Supreme Court has advised us that the appropriate test to assess whether or not a person’s consent to search is constitutional under the Fourth Amendment is whether the consenting party gave that consent “freely and voluntarily.”⁶ More specifically, the Court stated in the notable case of *Schneckloth v. Bustamonte* that “[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.”⁷

Fourth, the standard for determining whether a supposed consenting party has in fact freely and voluntarily tendered consent to search is to evaluate the purported consent under the “totality of the circumstances.”⁸ More specifically, the *Schneckloth* Court held that “the question whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.”⁹ As Professor Wayne LaFave has pointed out, this

5. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (quoting *Katz*, 389 U.S. at 357; *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Chambers v. Maroney*, 399 U.S. 42, 51 (1975); *Davis v. United States*, 328 U.S. 582, 593-94 (1946); *Zap v. United States*, 328 U.S. 624, 630 (1946) (holding that Fourth Amendment “rights may be waived”)); see also *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *California v. Acevedo*, 500 U.S. 565, 580 (1991) (“It remains a ‘cardinal principle that searches ‘conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’” (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978))).

6. *Schneckloth*, 412 U.S. at 222.

7. *Id.* (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)); see also *Johnson v. United States*, 333 U.S. 10, 13 (1948) (consent was not given when entry by officers was demanded); *Amos v. United States*, 255 U.S. 313, 317 (1921) (actual consent did not exist because there was implied coercion).

8. See, e.g., *United States v. Drayton*, 536 U.S. 194, 207 (2002). The *Drayton* Court reaffirmed: “[T]his Court’s decisions [do not] suggest that . . . a presumption of invalidity attaches if a citizen consented without explicit notification that he or she was free to refuse to cooperate. Instead, the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning.

Id. See also *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (“The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and ‘[v]oluntariness is a question of fact to be determined from all the circumstances.’” (quoting *Schneckloth*, 412 U.S. at 248-49)).

9. *Schneckloth*, 412 U.S. at 227.

standard is not novel in this setting; it is in fact “the traditional voluntariness test, used for many years in assessing [the lawfulness of] confessions.”¹⁰

Factors that various courts have considered in assessing the voluntariness of a questioned or questionable consent to search under this totality of the circumstances test include:

the suspect’s age, education, intelligence, and English proficiency; the suspect’s level of intoxication; his experience with the criminal justice system; . . . whether he had been informed of his rights[;] . . . the length of detention; whether officers employed tactics such as prolonged or repeated questioning or physical abuse; and whether officers made threats or misrepresentations, displayed weapons, confronted the suspect in large numbers, or retained the suspect’s property.¹¹

Moreover, another factor in making the assessment of voluntariness, but, significantly, not a dispositive factor, is whether the individual whose consent was sought was actually informed of his or her right *not* to consent to the search. As the Court once again made the point more than three decades ago in *Schneckloth*,

while knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent [N]either this Court’s prior cases, nor the traditional definition of “voluntariness” requires proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search.¹²

More recently, the Court has reaffirmed that it “has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search.”¹³ Of course, states can require under their own state constitutions, as some states have, that individuals consenting to searches know that they have a right not to consent, but that is not a federal constitutional requirement.¹⁴

10. WAYNE LAFAVE, 4 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 110 (4th ed. 2004).

11. Brian A. Sutherland, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors That Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. REV. 2192, 2198 (2006).

12. *Schneckloth*, 412 U.S. at 227, 234.

13. *United States v. Drayton*, 536 U.S. 194, 206 (2002); *see also* *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (rejecting the argument that a consent was not valid “unless the defendant knew he had a right to refuse”).

14. *See, e.g., State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975). The court in *Johnson* concluded: Under Art. I, par. 7 of our State Constitution the validity of a consent to a search, even in a non-custodial situation, must be measured in terms of waiver; i.e., where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent.

Fifth and finally, a tendered consent has not been proffered freely and voluntarily by a supposed consenting party if the party gives it in response to a law enforcement officer's "claim of authority" to search. As the Supreme Court held in *Bumper v. North Carolina*, "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."¹⁵

The bottom line with respect to these basic Fourth Amendment doctrinal points is this: A person's consent is a perfectly lawful and constitutional basis for a law enforcement officer's search, provided, however, that the consent has been freely and voluntarily tendered under the totality of the circumstances and that it is not the product of the consenting party's acquiescence to a law enforcement officer's claim of authority.

Now, back to the hypothetical consent search from the beginning of this Essay. A police officer stops you and asks to search you and you are carrying narcotics on your person. Nonetheless, you agree to be searched. Was that a "consent search?" Was it *really* consensual under prevailing law—was the consent offered "freely and voluntarily" considering the totality of the circumstances?

Really, how hard a question is that? *Really?* In my view, it is not very hard. A search like the one described above, in all likelihood, would not at all

Id.; see also *State v. Ferrier*, 960 P.2d 927, 934 (Wash. 1998). The *Ferrier* court held:

While we recognize that a home dweller should be permitted to voluntarily consent to a search of his or her home, the waiver of the right to require production of a warrant must, in the final analysis, be the product of an informed decision. We, therefore, adopt the following rule: that when police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.

Id. The Washington Supreme Court later limited its holding in *Ferrier* to situations in which police officers seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant. See *State v. Williams*, 11 P.3d 714, 720 (Wash. 2000). The *Williams* court held:

We recognize that law enforcement officers need to enter people's homes in order to provide their valuable services for the community on a daily basis. We do not find it prudent or necessary to extend *Ferrier* to require that police advise citizens of their right to refuse entry every time a police officer enters their home. Police officers are oftentimes invited into homes for investigative purposes, including inspection of break-ins, vandalism, and other routine responses. We do not find a constitutional requirement that a police officer read a warning each time the officer enters a home to exercise that investigative duty. To apply the *Ferrier* rule in these situations would unnecessarily hamper a police officer's ability to investigate complaints and assist the citizenry. Instead, we limit the requirement of a warning to situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant.

Id.

15. *E.g.*, *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (citations omitted).

be consensual. Not *really* consensual. It's not consensual in the sense that the putative consenting party (you in my hypothetical) did not "freely and voluntarily," in the Supreme Court's words, waive the constitutional right not to accede to a search without a search warrant.

I mean, think about this scenario for just one second. Don't use any of the fancy reasoning and analysis that you learned in law school. Just use some plain-old, ordinary, run-of-the-mill common sense. How much of an idiot—how stupid, moronic, imbecilic—would a person carrying a gram of crack cocaine stashed in her underwear, for example, have to be to *really* consent—"freely and voluntarily"—to being searched by a police officer, knowing full well that such a search would result inevitably in the discovery of the cocaine and a subsequent arrest?¹⁶ As the District of Columbia Circuit Court of Appeals observed more than fifty years ago in a case involving supposed consent by a person to search the room where he had stashed his marijuana, "no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered."¹⁷ Exactly. That's all I am saying.

So why would a person apparently consent to a search when he or she is not really consenting? I don't have to tell you the answer to that question, do I? You know the answer without being told, don't you?

A police officer is standing right smack in front of you "asking" you for your consent to a search—a police officer, mind you, an imposing authority figure, an agent of the state. Using your common sense again, do you really think that most people really expect that they actually have the right in that situation *not* to accede to a simple "request" of this sort, even in the absence of any overt signs of actual physical coercion, such as a threat or a drawn gun? If your answer is in the negative, if you believe that most people expect that they do *not* have "the right" to refuse a request of this sort, then that answer comports—unsurprisingly—with exactly what a mountain of psychological research says. As Professor Janice Nadler has made the point:

[E]mpirical studies over the last several decades on the social psychology of compliance, conformity, social influence, and politeness have all converged on a single conclusion: the extent to which people feel free to refuse to comply is extremely limited under situationally induced pressures.

....

Even worse, the existing empirical evidence also suggests that observers outside of the situation systematically overestimate the extent to which citizens in police encounters feel free to refuse.¹⁸

16. Note that I'm not calling *you* stupid here. I've shifted the hypothetical to someone else carrying cocaine and consenting to a search, largely in order to spare your feelings! You're welcome.

17. *Higgins v. United States*, 209 F.2d 819, 820 (D.C. Cir. 1954).

18. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155-56 (reviewing studies); see also Dorothy Kagehiro, *Psycholegal Research on the Fourth*

Professor LaFave has added, more cogently, that “various psychology experiments have confirmed [that] ‘well-established psychological principles refute the idea that the mere presence or absence of physical coercion determines whether an actor’s decision [to consent to a search] is voluntary.’”¹⁹

Indeed, even if a police officer asking someone for consent to search really and truly believes that he or she is acting as noncoercively as possible—making a simple request with which a person need not comply—it is altogether possible that the person to whom such a request is directed would nonetheless perceive such an interaction with a police officer as a demand rather than a request.

Professor Nadler has described the import of the psychological research on point:

The context of discourse is crucial in the understanding of it; this is

especially true when the speaker is making a request. Perceived coercion is determined by the speaker’s authority and the speaker’s language working together. Because authorities such as police officers direct the actions of others, the listener is likely to conclude that an utterance is in fact a directive, or an order to be followed. For example, citizens generally do not interpret “Can I please see your license and registration?” as spoken by a police officer as a genuine request; it is a command, and everyone understands this. Furthermore, certain contextual features are taken as cues as to the overall understanding of an event. Importantly, authority figures do not need to employ highly face-threatening language to achieve their goal. In fact, a polite request is usually perceived by the listener as being face-maintaining because the listener understands that coercion may be used. Thus, a police officer who says, “Do you mind if I search your bags?” is perceived as being more face-sensitive than one who says, “I am going to search your bags”; at the same time, the listener in both situations realizes he or she must comply with the message. Thus, because a police officer is perceived as an authority, he need not rely on coercive statements to achieve a goal—his role is adequate, and a polite request can increase face-sensitivity without reducing coercive power. . . . Because people perceive discourse originating from an authority to be coercive regardless of assertive linguistic cues, authority figures need not use highly face-threatening language—part of that burden is carried by the badge and gun. When discourse is framed as a suggestion (rather than imperative), and when the listener believes that he or she must

Amendment, PSYCHOL. SCI., May 1990, at 187, 188 (“[U]ndesired invasions of privacy are possible[] because governmental agents and citizens may disagree as to what constitutes a ‘voluntary’ consent.”).

19. LAFAVE, *supra* note 10, at 111 (quoting Adrian Barrio, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory Into the Supreme Court’s Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 218 (1997)).

comply anyway (due to the authority of the speaker), the suggestion is taken as a sign that the authority is being sensitive to face.²⁰

Professor Peter Tiersma has added, to similar effect, that:

The true meaning of an utterance can differ drastically from its literal,

word-for-word interpretation. If A says to B, “Would you like to go to the movies?” B will generally interpret this as a question. But now imagine that B is A’s seven-year-old son and that the question is “Would you like to wash the dishes?” Though still phrased as a question, the utterance is in reality a command. In the former usage this utterance has the ‘force’ of a question, while in the latter it has the ‘force’ of a command.²¹

Justice Douglas, dissenting in the *Schneckloth* decision, recognized this problem years ago, quoting approvingly from the Court of Appeals decision in that case that “[u]nder many circumstances a reasonable person might read an officer’s “May I” as the courteous expression of a demand backed by force of law.”²²

But, even given all of the psychological research and various linguistic interpretations, a subset of people exists, theoretically at least, who are not being coerced—expressly or implicitly—by an officer asking to search them. For example, it is likely true that a significant percentage of the people walking around carrying narcotics on their persons are not the sort of people (like most of us) who are intimidated by authority figures.²³ Indeed, if these people weren’t so uncowed by authority, *ipso facto*, one might suppose that they would not be carrying narcotics in their underwear in the first place.

Furthermore, assumedly, a smaller percentage of this same subset of uncowed, albeit criminal, souls may also honestly believe (accurately or not) that the law enforcement officer who has stopped them is only requesting, not demanding, to search them. Accordingly, this cohort of individuals, uncowed by definition, would most certainly have the perfect right to consent to a search of their persons which would subsequently turn up the narcotics that could be used to convict them and send them to jail. These individuals are the sort of people that the D.C. Circuit decision, quoted above, deemed to be

20. Nadler, *supra* note 18, at 188-89 (citations omitted).

21. Peter Meijes Tiersma, Comment, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189, 194 (1986).

22. *Schneckloth v. Bustamonte*, 412 U.S. 218, 275-76 (1973) (Douglas, J., dissenting) (quoting *Bustamonte v. Schneckloth*, 448 F.2d 699, 701 (9th Cir. 1971)).

23. See Tracey Maclin, *The Decline of the Right of Locomotion: The First Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1306 (1990) (“The point is not [only] that very few persons will have the moxie to assert their fourth amendment rights . . . , although we know that most will not. It is whether citizens in a free society should be forced to challenge the police in order to enjoy [their rights].”).

“insane,” but I, not much more charitably, will simply refer to them as “stupid.”²⁴

Indeed, for these purposes, I will grant you *arguendo* that there are an incredible number of just plain stupid—if not moronic and imbecilic—people in this world, and in this country. For example, I have not actually seen any of the *Jackass* movies, but I have heard enough about these films and the unbelievably stupid and dangerous stunts the self-styled “jackasses” perform in them to get the picture. I have also heard about the scores of people who have stupidly imitated these life-threatening stunts, sometimes with tragic, if unsurprising, results.²⁵ So, just on the basis of the *Jackass* movies alone, I am willing to concede that some significant number of stupid people exist. Further, I am willing to concede that that population may well include a handful of people carrying drugs on their body who are nonetheless so sufficiently stupid that they might actually agree to permit a police officer to strip search them without any regard to the inevitable, dire consequences. You know, “whatever, dude.”²⁶

Indeed, the fact that these stupid people exist might well be viewed as a good thing, at least from a law enforcement perspective. As the New Jersey Supreme Court has made the point in the pre-*Jackass* era, “[i]t is consonant with good morals, and the Constitution, to exploit a criminal’s ignorance or stupidity in the detectional process.”²⁷

24. See, e.g., *supra* note 17 and accompanying text.

25. See Wendy Ruderman & Christine Olley, *Headfirst Out the Window: ‘Jackass’ Imitator Critical*, PHILA. DAILY NEWS, Jan. 4, 2007, Local 03. The authors report:

“JACKASS Number Two,” the wildly raunchy movie featuring stupid-human tricks, opens with a don’t-try-this-at-home disclaimer.

Tragically, 11-year-old Wallison Costa didn’t heed the warning.

The Northeast Philadelphia boy remained hospitalized in critical condition yesterday, one day after he leaped from a second-story window and fell 10 feet, landing on his head.

The boy got the idea after watching the 2006 movie in which “Jackass” prankster Bam Margera hurls himself through a window to avoid being gored by a horde of angry bulls, police and friends said.

.....

Costa’s feet got tangled in television cable wires strung along the back of the red-brick rowhouse. The boy briefly dangled upside down before falling headfirst toward the concrete below, according to the renter, Leison Gouveia, 25, who said he was asleep in an adjoining bedroom at the time.

“They watched the movie ‘Jackass’ and then they tried everything they watched on TV,” said Gouveia, who said he learned of the incident from Bruno.

.....

The boy’s jump follows a spate of cases around the globe in which kids were hurt or fatally injured after imitating stunts by “Jackass” stars. The lead pranksters in the movie are Johnny Knoxville and Margera, a daredevil skateboarder from West Chester.

Id.

26. See, e.g., Urban Dictionary, <http://www.urbandictionary.com/define.php?term=whatever+dude> (last visited May 15, 2007) (explaining the term “whatever, dude” in terms too scatological to be included here).

27. *State v. McKnight*, 243 A.2d 240, 250-51 (N.J. 1968)

Furthermore, aside from the jackasses who are, perhaps, *res ipsa* examples of stupidity, there is another group of drug-carrying individuals who might, narcotics-on-board notwithstanding, still consent to a police officer's request to search their bodies, their places, or their possessions despite the all-but-inevitably grievous consequences to themselves and their families. I'll call this second group the "tactical optimists."

You know these people. Most law school students have likely come across hordes of tactical optimists. These are the types of people who might say to themselves, "Okay, this cop has just asked me if he can search me. If I say 'no,' then he's going to be even more suspicious of me, and he'll probably search me anyway. If I say 'yes,' then he won't be suspicious any more because I'm being *so* cooperative, and then maybe —just maybe—he won't really search me after all because I've made it clear by my consent that I must be above suspicion." The California Supreme Court aptly described just such tactical behavior in a decision in which it held the consent search of a defendant's home, resulting in the recovery of a stolen television set, was perfectly lawful:

Defendant next asserts there was "no rational or logical reason" for him

to agree to the search because he knew it would disclose incriminating evidence, i.e., the stolen television set. . . . Contrary to defendant's implication, there may be a number of "rational reasons" for a suspect to consent to a search even though he knows the premises contain evidence that can be used against him: for example, he may wish to appear cooperative in order to throw the police off the scent or at least to lull them into conducting a superficial search; he may believe the evidence is of such a nature or in such a location that it is likely to be overlooked; he may be persuaded that if the evidence is nevertheless discovered he will be successful in explaining its presence or denying any knowledge of it; he may intend to lay the groundwork for ingratiating himself with the prosecuting authorities or the courts; or he may simply be convinced that the game is up and further dissembling is futile.²⁸

Professor Sherry Colb has offered a similar explanation for such behavior:

The reason that many suspects consent is that they mistakenly believe

one of three things to be true: that they do not have the right to say no; that the officer will not take no for an answer; or that if they do say no, then their refusal will itself give the officer probable cause to search. In short, they believe the search will happen one way or another, and things will go more easily if they just comply, rather than putting up a fight.²⁹

28. *People v. James*, 561 P.2d 1135, 1143 (Cal. 1997).

29. Sherry F. Colb, *A Proposed Moratorium on Highway Consent Searches: One Way To Fight*

But, to the extent that any such tactical optimists are acceding to a search on the hope and a prayer that their cooperation will influence the police officer to relent and love them instead, let me tell you a little “secret” about this misguided strategy. You might want to write this down: It’s not going to work.

Oh, it’s true perhaps that the occasional smile on a pretty face might dissuade a police officer from issuing a traffic ticket, or so we’re told.³⁰ You may not be surprised to be informed that I do not know this from any personal experience.³¹ But, no cop who wants to and who has asked for and who has just been given permission to search is going to desist simply *because* he’s been given permission to search. That’s just not going to happen.

Less anecdotally, consider, for example, the results of a recent research study that anonymously surveyed 122 Florida State University undergraduates and 34 law enforcement officers.³² The survey assessed the students’ and the officers’ differing opinions on how free a driver is to leave the scene after refusing an officer’s request to search the driver’s car. The results do not come as a surprise:

The students and law enforcement officers showed a large amount of

significant differences in their understanding of the consequences of a refusal to consent to a search request. The only consequences that did not show a significant difference were “officer will give the vehicle a quick search anyway,” and “officer will give driver a warning.” A vast majority of students believed that an officer will only give a vehicle a cursory search if the driver consents to the search quickly (90.2%) and will search the vehicle

Racial Profiling, FINDLAW (Aug. 15, 2001), <http://writ.corporate.findlaw.com/colb/20010815.html>.

30. See, e.g., Elizabeth Snead, *The Beauty of Symmetry*, USA WEEKEND, June 1, 2003, http://www.usaweekend.com/03_issues/030601/030601symmetry.html. Elizabeth Snead stated:

Beauty not only sells—it pays off. Beautiful babies get more attention from parents and teachers. Good-looking guys get more dates than average ones. Pretty women get out of traffic tickets and into exclusive clubs. The list of pluses for being one of the “beautiful people” goes on and on.

Id.; cf. Anne Murphy Paul, *Judging by Appearances—Attractive Defendants More Likely To Be Perceived As Credible, Gain Acquittal*, PSYCHOL. TODAY, Nov.-Dec. 1997, available at http://www.findarticles.com/p/articles/mi_m1175/is_n6_v30/ai_19979984. Anne Paul stated:

Blindfolded, balancing her scales, Justice issues her subjects a solemn promise: No peeking. Her real life representatives, however, are not always quite so scrupulous. Psychologists have persuasively demonstrated that attractive defendants are perceived as more credible, are acquitted more often, and receive lighter sentences than their less appealing counterparts. But judges and juries can be swayed by more than just a pretty face: the clothing defendants wear, the jewelry they display, the way they style their hair, can sometimes mean the difference between doing time and going free.

Id.

31. See Homepage of John M. Burkoff, <http://www.law.pitt.edu/burkoff/index.html> (last visited May 15, 2007) (showing a grim, unflattering picture of the author).

32. See Benjamin Cole, *Voluntary Surrender of Constitutionally Guaranteed Rights: A Citizen’s View of the 4th Amendment As It Applies to Vehicle Searches* (June 1, 2004) (unpublished undergraduate honors in psychology thesis, Florida State Univ., available at <http://dscholarship.lib.fsu.edu/undergrad/10>).

thoroughly if consent is withheld initially (91.0%), although this sentiment is ordinarily untrue. Officers will generally search a vehicle thoroughly regardless of the time it takes the motorist to consent.³³

Look, police officers aren't dummies. If you really believe the faux-cooperative tactic will work with them, then I've got a bridge to sell you. It connects Manhattan with Brooklyn. Nice view.³⁴ As previously discussed, effective police work often involves trying to make suspected criminals say and do things that are against their interest.³⁵ Police officers know that. Professor Daniel Williams has gone so far as to argue approvingly that "the search target's disadvantages of ignorance, fear, and resignation are accepted as vulnerabilities we expect law enforcement to exploit to good effect."³⁶

As accurate a statement of prevailing practice as this contention may be, it certainly does not reflect the Supreme Court's express expectations. Indeed, the majority in *Schneckloth* spent page after page of its analytical discussion trying to make the exact opposite point—that there was "no reason to believe, under circumstances such as are present here, that the response to a policeman's question is presumptively coerced."³⁷ Justice Marshall, dissenting in *Schneckloth*, agreed with Professor Williams' argument, although he made the point disapprovingly, warning that:

I must conclude with some reluctance that when the [majority] speaks

of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. Of course it would be "practical" for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights

33. *Id.* at 30.

34. See Google Maps, <http://maps.google.com/maps?ll=40.706344,-73.997439&q=40.706344,-73.997439&spn=0.015,0.025&t=h> (last visited May 15, 2007) (showing a satellite view of the Brooklyn Bridge); see also Wikipedia, Brooklyn Bridge, http://en.wikipedia.org/wiki/Brooklyn_Bridge (last visited May 15, 2007) ("References to 'selling the Brooklyn Bridge' abound in American culture, sometimes as examples of rural gullibility but more often in connection with an idea that strains credulity. For example, 'If you believe that, I have a wonderful bargain for you'"); Jim Lampos & Michaelle Pearson, Brooklynisms, <http://www.lampos.com/brooklyn.htm> (last visited May 15, 2007) (defining the terms "Illiewhacker" and "Illy" as "[t]he kinda guy who's always trying to sell you the Brooklyn Bridge").

35. See *supra* text accompanying notes 27-29.

36. Daniel Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69, 80 (2007).

37. *Schneckloth v. Bustamonte*, 412 U.S. 218, 247 (1973). The *Schneckloth* Court made it clear that it accepted the proposition that:

[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

Id. at 228.

of innocent people also go by the board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.³⁸

In any event, whether desirable or not, Professor LaFave has recounted the bottom line here, namely that “[t]he police understand that [courts almost never find consents to be bad] and thus have increasingly come to rely upon purported ‘consents’ as the basis upon which wholesale searches are undertaken without probable cause and upon no or minimal suspicion.”³⁹ This is not inside information, by the way. Police officers are quite open about it. “‘We definitely tell [our officers] to try to talk their way into a search,’ said Lt. Mike Nagurny of the Pennsylvania State Police bureau of drug law enforcement.”⁴⁰

Obtaining an individual’s consent to search makes life easier for police officers, at least in the short run. They don’t have to bother to go and get a warrant, for example. They don’t have to go through the taxing process of assessing the existence or absence of other relevant exceptions to the warrant requirement. In short, a good consent (begging the question, of course, of when a consent is or should be *truly* good) spares the officer a lot of work.⁴¹

Indeed, as one forensic evidence website points out:

Small wonder that police would prefer to conduct searches with the

consent of the suspect. Consent, after all, operates as a waiver of one’s Fourth Amendment rights. Consent dispenses with, not only the need to have probable cause justifying the search, but it also dispenses with the need to have a warrant. It simplifies law enforcement to a considerable degree.⁴²

38. *Id.* at 288 (Marshall, J., dissenting).

39. LAFAVE, *supra* note 10, at 4; *see also* Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U.L. REV. 79, 128 (1998) (“Consent is probably the most frequently cited basis to justify an intrusion into [F]ourth [A]mendment protected rights of privacy and property.”).

40. Kate Shatzkin & Joe Hallinan, *Highway Dragnets Seek Drug Couriers—Police Stop Many Cars for Searches*, SEATTLE TIMES, Sept. 3, 1992, at B6.

41. Of course, saving law enforcement officers some effort is not a significant factor in the constitutional calculus. *See Johnson v. United States*, 333 U.S. 10, 15 (1948). As the Court in *Johnson* warned:

No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement.

Id.

42. ForensicEvidence.com, *The Validity of Consent Searches: Can Consent be Predicated on Non-Verbal Conduct?*, <http://forensic-evidence.com/site/Police/nonverbalconsent.html> (last visited May 15, 2007).

Unsurprisingly then, Professor Ric Simmons advises us, as a result of these incentives to use the consent justification, “[o]ver 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.”⁴³

Moreover, as another commentator has pointed out:

Even if the police do have probable cause to search, requesting a suspect’s permission before searching may insulate the resulting seizure from meaningful judicial review [T]he police may perceive the consent search alternative as the surest method of reducing the chances of the evidence being suppressed at trial. Consent searches also may be attractive as a logistical matter, especially when obtaining a warrant would be time-consuming or otherwise impractical.⁴⁴

As I’ve said before, what I’m telling you here about the standard-issue law enforcement behavior is not a closely-held secret. Law enforcement strategies—some of them highly successful, some of them not—are often premised upon just this realization. Consider, for example, the Consent-to-Search Program used for years by the St. Louis Police Department.⁴⁵ From September 1993 to August 1999, St. Louis police officers knocked on the doors of homes in high-crime areas in St. Louis and simply asked the parents of high-risk youths who lived there for permission to search their homes to look for guns that their children may have hidden. The police officers decided which homes to approach, most often on the basis of uncorroborated “tips” from neighbors. A federal study reported that 98% of the parents approached seemingly consented to the search of their homes under this program.⁴⁶ At least in the initial phase of the operation of the St. Louis program, the officers actually discovered guns in half of the homes searched. In fact, the officers seized an average of three guns per household.

Despite these positive results in removing guns from open circulation, however, whether this program actually “worked” in the long run remains an open question. After the St. Louis program, two program evaluators posed several simple but fundamentally important questions:

How do adolescents react to having their possessions and facilities searched by the police? How many object vehemently, either out of fear that the police

43. Ric Simmons, *Not “Voluntary” But Still Reasonable: A New Paradigm for Understanding the Consent Search Doctrine*, 80 IND. L.J. 773, 773 (2005) (citation omitted).

44. Adrian J. Barrio, Note, *Rethinking Schneekloth v. Bustamonte: Incorporating Obedience Theory Into the Supreme Court’s Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 220-21 (1997) (footnotes omitted).

45. NATIONAL INSTITUTE OF JUSTICE, REDUCING GUN VIOLENCE: THE ST. LOUIS CONSENT-TO-SEARCH PROGRAM 1-2 (Nov. 2004), available at <http://www.ncjrs.gov/pdffiles1/nij/191332.pdf>.

46. *Id.* at 8.

might find a gun, or out of anger that they will not? Do some move out of the house, drop out of school, join a gang, retaliate against parents or peers who consent to a search?⁴⁷

Frankly, we just don't know the answers to these questions. And more important for present purposes, whether or not the consents seemingly garnered in this St. Louis program were *really* consensual in a legal and a factual sense is still open to debate.⁴⁸

Unsurprisingly, some critics in St. Louis during the pendency of this program vigorously “question[ed] the possibility of receiving ‘real’ consent to search from someone standing face-to-face with two police officers.”⁴⁹ Indeed, obtaining consents to search in this fashion—based only upon uncorroborated tips and police officers’ suspicions—cannot help but to raise questions as well about the possibility that such Fourth Amendment intrusions were in fact based, at least in some discernable measure, upon discriminatory profiling of these “high-risk youth” and their impoverished neighborhoods. Consent searches which are undertaken largely upon the basis of an individual’s race, class, or ethnicity have increasingly become a major social and political concern in the United States, and rightfully so.⁵⁰

In any event, racism and other forms of discriminatory animus in the selection of targets for requested consent searches are not the principal subject with which I am concerned right now. I am simply contending that, even controlling for the *Jackass*-type stupid people and the ineffective tactical optimists, *most* people who actually have evidence of crime on their persons or in their possessions or in their homes are not really—“freely and

47. See Richard Rosenfeld & Scott H. Decker, *Consent to Search and Seize: Evaluating an Innovative Youth Firearm Suppression Program*, 59 LAW & CONTEMP. PROBS., 197, 218 (1996).

48. See *id.* at 204.

49. *Id.* (footnote omitted).

50. See, e.g., David A. Harris, “Driving While Black” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997). Professor Harris has observed:

[I]f past practice is any indication, [police officers] will use the traffic code to stop a hugely disproportionate number of African-Americans and Hispanics. We know this because it is exactly what has been happening. . . . In fact, the stopping of black drivers, just to see what officers can find, has become so common in some places that this practice has its own name: African-Americans sometimes say they have been stopped for the offense of “driving while black.”

Id.; see also Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies in Racial Profiling*, 74 TUL. L. REV. 1409, 1411 (2000) (“[T]he officer making a profiled stop requests consent from the motorist to search his car . . . even though the officer has no articulable suspicion that the search will reveal anything . . .”); cf. Guillermo X. Garcia, *No Cause? Consent Searches Debated*, SAN ANTONIO EXPRESS-NEWS, Apr. 13, 2005, at 4A, available at http://www.mysanantonio.com/news/metro/stories/MYSA041305.4A.lege_senate_cops.1d0abd05f.html (“Searching a vehicle without probable cause after stopping it for a minor traffic violation either is a police intimidation tactic or a valuable law enforcement tool, depending on who was talking to a Senate panel Tuesday.”).

voluntarily,” as the law supposedly requires—consenting to searches of their bodies, their places, or their things.

I am far from alone in making this hardly earth-shattering contention, by the way. Professor Marcy Strauss has concluded, for example, that “[m]ost people don’t willingly consent to police searches. Yet, absent extraordinary circumstances, chances are that a court nonetheless will conclude that the consent was valid and the evidence admissible under the Fourth Amendment.”⁵¹ Professor Nadler has similarly commented that:

[I]t is remarkable that the “totality of the circumstances” standard has nearly always led the Court to the conclusion that a reasonable person would feel free to refuse the police request to search. Fourth Amendment consent jurisprudence is now at a point where the Court’s reasoning must struggle against scientific findings about compliance [T]he Court’s Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort—a mere device for attaining the desired legal consequence.⁵²

And Professor Craig Bradley has rather more graphically made the point when he observed that “[c]onsent searches are the black hole into which Fourth Amendment rights are swallowed up and disappear.”⁵³

Of course, I’ve put my thumb on the scale a bit in the way that I’ve laid out this argument thus far. The fact that putative consenters with evidence of crime on their persons might not actually be so stupid as to really consent to a search does not mean *ipso facto* that putative consenters who have *not* stashed dope in their underwear, purse, or behind their ear, are not really consenting when they appear to agree to a search. Or, put another way, for someone who has absolutely nothing to hide, “freely and voluntarily” acceding to a law enforcement officer’s request to search is not necessarily irrational or stupid. Indeed, this sort of “innocent-person focus” is precisely the approach the Supreme Court used in *Florida v. Bostick* to decide whether a consent to a search was improper.⁵⁴ The Court concluded that “[w]e . . . reject . . . Bostick’s argument that . . . no reasonable person would freely consent to a search of luggage that he or she knows contains drugs. This argument cannot prevail because the ‘reasonable person’ test presupposes an *innocent* person.”⁵⁵

51. See Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY, 211, 212 (2001) (footnote omitted).

52. Nadler, *supra* note 18, at 156.

53. Craig M. Bradley, *The Court’s Curious Consent Search Doctrine*, TRIAL, Oct. 2002, at 72, available at <http://www.atla.org/publications/trial/0210/sct.aspx>.

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

55. *Id.* at 437-38.

Presumably—indeed, hopefully, for all of our sakes—many, if not most, innocent persons would want to cooperate with legitimate and reasonable requests to assist a law enforcement officer. As the Court declared in its *Miranda* decision in 1966, “[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.”⁵⁶ And, as the Court has reiterated much more recently:

In a society based on law, the concept of agreement and consent should

be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.⁵⁷

Moreover and more pragmatically, it is easy to imagine that many, if not most, innocent persons might appreciate the opportunity to demonstrate their innocence. They may want to try to prove that any suspicions a law enforcement officer might have about them are entirely unfounded by agreeing to a request to search.

But even if we assume that many people who do not have drugs or other evidence of crime secreted on their persons might possess rational and civic-minded reasons to agree to be searched, that assumption does not mean that those persons have *in fact* truly—“freely and voluntarily”—consented to be searched. Certainly, some perfectly rational (and fairly obvious) reasons exist why someone who has done absolutely nothing wrong and has nothing at all to hide might nonetheless still *not* want to agree to be searched, despite a generally cooperative and civic-minded nature. Most significant among these reasons is the embarrassment that is often the natural byproduct of a law enforcement officer’s intrusion into an individual’s privacy. As Professor Thomas Davies pointed out, there is no question but that a search pursuant to “consent amounts to a citizen’s surrender of an expectation of privacy and an exposure of an otherwise private interest.”⁵⁸

Indeed, it should probably go without saying that an embarrassing invasion of one’s expectation of privacy and other private interests is inherent in the search of a person’s body, particularly in a strip or body cavity search. In fact, to simply call that procedure “embarrassing” is an obvious understatement. Depending upon the scope, duration, and intrusiveness of the search, and the gender, technique, location, and professionalism of the

56. *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966).

57. *United States v. Drayton*, 536 U.S. 194, 207 (2002).

58. Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 28 (1991).

searcher, something far beyond mere embarrassment might well result—humiliation perhaps or even lasting psychological trauma. And it is also true that the embarrassment or worse that might result from a search is not limited to such intimate bodily intrusions. A search of a person's possessions or places also runs the risk of the discovery, exposure, and handling of perfectly lawful and noncriminal items, which are nonetheless highly private and personal, like tampons, sexual aids, or prosthetics. Similarly, the discovery by searching strangers of highly private or personal items like contraceptive devices, medications, pregnancy tests, adult diapers, inappropriate clothing, or inappropriate reading or viewing material can be extremely embarrassing to the "owner."⁵⁹

Furthermore, even aside from the embarrassing intrusion into one's privacy that might result from a search, there is, of course, the additional, if not more significant, issue of delay and inconvenience. Who in the world would actually want to wait on the side of the road, for example, detained in the middle of a trip to grandma's house, the grocery store, work, or school while police officers pawed through the contents of her car, clothes, or personal belongings and, in essence, her personal life? Who in the world would actually want to delay her return from vacation in Jamaica to be taken to a hospital to have her abdomen x-rayed by law enforcement authorities who are acting without any articulable suspicion other than their stereotypic image of Jamaica as a drug haven?⁶⁰

Accordingly, if it is in fact true, as I have contended, that there are a significant number of people who the courts are routinely deeming to have waived an important constitutional right "freely and voluntarily"—whether these people have actually committed a crime or not, whether they are carrying criminal contraband or not—and that finding is simply untrue as a factual matter, then this is a serious problem. As Professor Nadler has reasoned, for example:

When people perceive the legal system to be unjust, the diminished respect for the legal system that follows can potentially destabilize the law-abiding behavior of ordinary people. Because people have reasons for obeying the law that are apart from the threat of sanctions, obedience to law is vulnerable to diminished respect produced by perceptions of injustice [W]hen

59. By "inappropriate" I mean simply to include items that are not criminal to possess, but the possession of which is nonetheless intended by the possessor not to be a matter of public knowledge because of the fear of the negative reactions of others to such possession, e.g., the clothing of a secret fetishist or cross-dresser.

60. See *Kaniff v. United States*, 351 F.3d 780, 789-90 (7th Cir. 2003). The *Kaniff* court held that the trial court had not committed clear error in finding that Kaniff consented freely and voluntarily to be x-rayed at a hospital on these facts. "The conspicuous absence from the record of a consent form with Kaniff's signature makes it harder—but not impossible—to prove consent." *Id.* The x-ray revealed nothing incriminating.

people perceive the law as unjust, they are less likely to comply with legal rules governing everyday behavior.⁶¹

Of what value is the rule of law if it is ignored by the courts in actual application? That is precisely the problem that exists today, in my opinion. Reviewing courts are frequently treating searches that were not *really* consensual as if they were actually consensual.⁶² Indeed, some of these misguided judicial decisions stretch one's credulity to the breaking point. The First Circuit Court of Appeals, for example, has gone so far as to find that a person's supposed consent to a search was voluntary although he "consented" while seven or eight law enforcement officers held him at gunpoint!⁶³ The court conceded "the inherently unnerving effect of having numerous officers arrive at one's door with guns drawn," but despite that commonsensical observation, the court nonetheless observed that the defendant "was no 'newcomer' to law-enforcement encounters[,] . . . [having] been convicted of at least eighteen prior offenses and arrested on at least eight previous occasions."⁶⁴ As a result, the court presumed his consent was valid since he was "'less likely than most to be intimidated by the agents' show of force."⁶⁵

Consent at gunpoint *was* voluntary? *Really? Come on!* Despite its patent implausibility, however, other state and federal courts have reached precisely the same conclusion as the First Circuit in similar circumstances.⁶⁶

61. Nadler, *supra* note 18, at 218-19 (footnotes omitted); *see also* Sutherland, *supra* note 11, at 2200 ("A court undermines public trust in the judicial system when it says it is doing one thing (finding voluntariness) but does another . . .").

62. *See, e.g., Kaniff*, 351 F.3d at 789-90. Of course, not every court finds supposed (but highly improbable) consent searches to actually be consensual. *See, e.g., Johnson v. State*, 613 So.2d 554, 555 (Fla. Dist. Ct. App. 1993) (holding that "appellants as reasonable persons would not have understood their consent to patdown searches would encompass strip searches on the side of the roadway of an interstate highway"). But such decisions are relatively few and far between.

63. *United States v. Barnett*, 989 F.2d 546, 554-56 (1st Cir. 1993).

64. *Id.* at 556.

65. *Id.* (quoting *United States v. Cepulonis*, 530 F.2d 238, 244 (1st Cir. 1976)).

66. *See, e.g., United States v. Perea*, 374 F. Supp. 2d 961, 977-79 (D.N.M. 2005) (holding a consent to search voluntary when officers handcuffed the defendant after surrounding him by five law enforcement officers with guns drawn and spotlights shone on his face); *United States v. Hernandez*, 341 F. Supp. 2d 1030, 1034-35 (N.D. Ill. 2004) (holding a consent to search voluntary when the defendant was surrounded by numerous law enforcement officers who had their guns pointed at him, despite the fact that the district court "found that the two policemen who testified at the [suppression] hearing as well as DEA agent Williams were not entirely truthful with respect to the circumstances surrounding Mr. Hernandez' arrest and detention"); *Manzi v. State*, 56 S.W.3d 710, 716-18 (Tex. App.—Houston [14th Dist.] 2001), *aff'd on other grounds*, 88 S.W.3d 240 (Tex. Crim. App. 2002) (holding a consent to search voluntary when three armed officers arrested the defendant at gunpoint, handcuffed him, and told him that his girlfriend would be arrested if he did not consent); *Commonwealth v. Paredes-Rosaria*, 700 A.2d 1296, 1300 (Pa. Super. Ct. 1997) (holding a consent to search voluntary when the defendant was surrounded by eleven law enforcement officers, one or two of whom had their guns drawn).

But see United States v. Chan-Jimenez, 125 F.3d 1324, 1327 (9th Cir. 1997). The *Chan-Jimenez* court sensibly found:

Drawing a weapon is certainly an unequivocal show of authority by a police officer We

Now, I'm not arguing that the judges reaching these conclusions are doing so because they are dumb or incompetent. Nor am I arguing that they are conspirators in some far-flung ideological conspiracy. I do contend, however, that many of these judges don't really believe—not for one second—that the so-called “consent searches” described above are *really* “consensual,” at least not in the sense that they are *really*, freely, and voluntarily tendered, although few judges come right out and say that directly. But, indirectly—well, that is another story. Consider the tongue-in-cheek comments of one Eighth Circuit Court of Appeals judge about a supposed, but highly improbable, consent search:

The police officers' saccharine account of the events of September 3, 1993, ironically leaves a bitter aftertaste. Rarely, if ever, have I encountered a case in which the police conduct was so mild-mannered and the suspect so acquiescent. The “fact” that Heath would so willingly consent to the search of his motel room and, more specifically, the shoe box, which he knew contained drugs and drug paraphernalia, is surprising, to say the least.⁶⁷

Or consider these painfully diplomatic comments made by a First Circuit Court of Appeals judge:

Without further explanation as to why [the police officer's] testimony with respect to consent is sufficient to meet the government's burden, despite the improbability of [the officer's] story, the indications that [the officer] was an unreliable witness in other respects, and the fact that extrinsic evidence tends to call into question his testimony, we would have a “definite and firm

agree with [the defendant] that Officer Price's request for permission to search the truck with one hand resting on his gun was implicitly coercive. An officer's keeping his hand on his weapon throughout a colloquy with a suspect is clearly distinguishable from our decisions finding voluntary consent where an officer simply possessed a weapon.

Id.

67. *United States v. Heath*, 58 F.3d 1271, 1276 (8th Cir. 1995) (McMillian, J., concurring); *see also* *People v. Jones*, 545 N.E.2d 1332, 1352-53 (Ill. App. Ct. 1989) (Pincham, J., dissenting from the holding that consent was voluntary). Justice Pincham argued:

[T]he record is abundantly and unequivocally clear that the defendant refused to give his voluntary consent to Officer Kolman to search his bag and that he only relented after being told by Officer Kolman that the police would retain his bag. What should have been manifestly clear to Officer Kolman was that the defendant's “cooperation” with Officer Kolman had ceased and that . . . the defendant should not have been further “detained even momentarily without reasonable objective grounds for doing so.” Officer Kolman should have and must have realized her constitutional obligations and duties at that point—after all, she was a policewoman with 13 years of considerable and wide-ranging experience especially in the enforcement of the controlled substances statutes. What Officer Kolman did, however, was immediately inform the defendant upon learning of his refusal to voluntarily consent to the search of his bag that she and the other officers were going to seize the bag forthwith and submit it to a dog-sniff test by a narcotics unit canine. And it was these statements by Officer Kolman which coerced and induced the defendant to involuntarily submit to the search of his luggage.

Id.

conviction that a mistake has been committed.” . . . We therefore remand to the district court so that it may clarify and amplify the reasons for its factual findings or, perhaps, reconsider its conclusion.⁶⁸

So why do judges routinely find such searches to be consensual, despite their own uneasy reticence and the dictates of plain, old common sense? Let me offer two possible answers to that question. First, there is the issue of what psychologists call “actor-observer bias.” Simply put, judges are arguably not doing a very good job—after the fact and far removed from the scene—of appreciating the *actual* coercive impact of a police officer’s request for consent under these circumstances. As Professor Nadler explained:

Accurately predicting what a reasonable person would do and feel under

a specific set of complex circumstances using one’s intuition alone (as the [Supreme] Court has tried to do . . .) is nearly impossible. This is because, as a general matter, people tend to grossly overestimate the voluntariness of others’ actions. A vast scientific literature has established that although situational forces systematically pull and push behavior, our ability to recognize these forces depends on whether we are explaining our own behavior or someone else’s behavior. As a general matter, people are strongly inclined toward explaining another person’s behavior in terms of internal causes (their intentions and dispositions), while ignoring aspects of the situation that could account for the person’s actions. For this reason, behavior that looks voluntary from the outside can feel constrained by the situation from the perspective of the actor.⁶⁹

A second explanation for why judges routinely find such searches to be consensual is, to my mind, even more persuasive—and much more disturbing. Unfortunately, I believe that judges are holding that these searches are consensual strictly as a matter of what might be called knee-jerk, “result stare decisis.”⁷⁰ That is to say that judges are following the lead of the Supreme Court in the *application* of prevailing consent doctrine, rather than following the consent-search doctrine itself and determining whether such consents have *truly* been tendered “freely and voluntarily,” as the law requires. With respect to the *results* of the Supreme Court review in this area, as Professor Bradley has pointed out, “voluntariness is the test of a valid consent to search, but . . . the Court has *never* struck down a consent as involuntary.”⁷¹ *Never!*

68. United States v. Forbes, 181 F.3d 1, 8 (1st Cir. 1999).

69. Nadler, *supra* note 18, at 168-69 (footnotes omitted).

70. See Barrio, *supra* note 44, at 218 (“In fairness, *Schneckloth* was motivated not by the wilful ignorance of psychology but by stare decisis.”).

71. Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 Miss. L.J. 339, 340 n.5 (2006) (emphasis added); see also Nadler, *supra* note 18, at 172; cf. Florida v. Royer, 460 U.S. 491, 507 (1983) (finding a consent to search unconstitutional as the fruits of an unconstitutional detention).

Oh, occasionally, some Justices have candidly conceded that consent could not possibly have existed in the case before them, but they were not in the majority. Consider, for example, Justice Souter's dissenting comments, joined by Justices Stevens and Ginsburg, in *United States v. Drayton*, involving a supposedly consensual encounter on a bus:

It is very hard to imagine that either Brown or Drayton would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether. No reasonable passenger could have believed that, only an uncomprehending one.

....

In any event, . . . [applying the] totality of circumstances test, and . . . ask[ing] whether a passenger would reasonably have felt free to end his encounter with the three officers by saying no and ignoring them thereafter[, i]n my view the answer is clear.⁷²

Indeed, unsurprisingly given the preceding discussion, a recent statistical analysis of the factors that actually predict suppression in federal court rulings in consent cases concluded that “the voluntariness factors enumerated by the Supreme Court and [federal] circuit courts do not constrain or predict district court decisionmaking in close cases [T]he best explanation for this result is that courts find consent voluntary if the evidence does not show police misconduct.”⁷³ More specifically, the study concluded further that:

The sample data suggest that the factor most likely to invalidate consent is a Fourth Amendment violation by the police (i.e., [.] illegal entry or seizure of the defendant). Threats are also likely to invalidate consent. Searches of the home receive slightly more protection than searches of other locations. A difference in first language between the officer and the suspect has little effect, nor does the defendant's written consent to search. A display of weapons and placement of the suspect in custody each had little or no effect. The nominating party of the judge and the status of the judge as a former prosecutor each had slight or no correlation with the denial of the motion to suppress.

....

Where the court finds that a Fourth Amendment violation preceded an officer's request to search, it is highly likely to find any subsequent consent involuntary or otherwise tainted.

....

72. *United States v. Drayton*, 536 U.S. 194, 212-13 (2002) (Souter, J., dissenting) (emphasis added).

73. Sutherland, *supra* note 11, at 2195.

The same factors that cause an encounter to become an illegal seizure tend to render subsequent consent involuntary as well.

....

Consent is likely to be involuntary where the court finds that a police officer's request to search was accompanied by threats.

....

On balance, evidence recovered from the home is more likely to be suppressed than evidence recovered from other locations.⁷⁴

In short, these survey findings suggest strongly that, contrary to what the Supreme Court actually tells us, in reality, "voluntariness is . . . a legal fiction."⁷⁵ This conclusion comes as no real surprise, of course, to those who follow appellate and suppression courts' consent-law decisions closely. As Professor Simmons has observed:

It is an open secret that the subjectivity requirement of *Schneckloth* is

dead. In other words, although *Schneckloth* specifically instructed courts to consider whether a particular defendant meant to consent by examining the defendant's educational background, intelligence, and knowledge of his rights, recent cases at every level have considered only objective criteria, such as the location of the search, the language used in making the request, and the behavior of the police officer.

....

In short, a consent to search is "voluntary" if the police have not used "coercive" tactics in obtaining the consent. . . .⁷⁶

Further, as Professor Bradley has more cogently explained, the bottom line is that, "if the police don't misbehave and don't suggest that consent is required, then it's OK. This is a far cry from the requirement in *Schneckloth* that the prosecution prove the defendant's consent was voluntary."⁷⁷

All of that said, maybe—just maybe—there is a ray of hope that the application of the consent law doctrine may begin to truly reflect the *actual*

74. *Id.* at 2214-15, 2216, 2218, 2219 (footnote omitted). The author continued:

Factors relating to the individual traits of the defendant received relatively little discussion in the district courts' rulings Of the 48 decisions that did discuss the defendant's age, intelligence, education, level of intoxication, experience with the criminal justice system, or in rare cases, the defendant's cultural expectations of police officers, 42 held that the subjective experience of the defendant weighed in favor of the government and a finding of voluntariness. The remaining six decisions held that the defendant's subjective state or capabilities rendered him incapable of consent and granted the motion to suppress.

Id. at 2215 (footnote omitted).

75. *Id.* at 2225.

76. Simmons, *supra* note 43, at 779, 785 (footnotes omitted); *see also* Strauss, *supra* note 51, at 212 (footnote omitted) ("Only if the police behave with some extreme degree of coercion beyond that inherent in the police-citizen confrontation will a court vitiate the consent.").

77. Bradley, *supra* note 71, at 72.

voluntariness—or involuntariness—of the questioned consents that come before the courts. The reason for this guarded optimism is that the Supreme Court in *Georgia v. Randolph* has recently considered and held dispositive—perhaps for the first time—the *actual* expectations that ordinary individuals have when being asked to consent to a search.⁷⁸ To be sure, both the circumstances and the specific questions that arose in *Randolph* were different from those being considered herein. In *Randolph*, the police asked two individuals to consent to a search of premises over which they each had common authority. One of them consented to the search, while the other, Scott Randolph, refused vociferously. But, while the setting was different, the basis for the Court’s conclusion in *Randolph* that the search was not consensual is, arguably, equally applicable to searches like those discussed herein—consent searches that do not involve issues of questionable third-party consent.

The facts in *Randolph*, handed down in 2006, were as follows: In May 2001, defendant, Scott Randolph, and his wife, Janet, separated. She left their home in Americus, Georgia, to stay with her parents in Canada and took their son with her. Two months later, Janet returned to the Americus house with their son. The Court noted that the record did not reveal why she returned, although Scott argued that the suppression court record established that “she arrived at the house to collect her remaining belongings and return to Canada.”⁷⁹

In any event, on July 6, Janet called the police and complained that after a domestic dispute, Scott had taken their son away without her permission. When police officers arrived at the house, she told them Scott used cocaine and that his addiction had caused them financial troubles. She mentioned their marital problems and explained that she had only recently returned to the house after staying several weeks with her parents. Shortly after the police arrived, Scott returned and explained to the officers that he had taken their son to a neighbor’s house because he was concerned that Janet might take him out of the country again. Scott flatly denied using cocaine and countered that it was in fact Janet, not him, who abused both drugs and alcohol.

One of the officers, Sergeant Murray then went with Janet to the neighbor’s house to reclaim their son, and when they returned, Janet not only renewed her complaints about Scott’s drug use but also volunteered that there were “items of drug evidence” in the house.⁸⁰ Sergeant Murray then asked Scott for permission to search the house, and Scott unequivocally refused.

The sergeant then asked Janet for her consent to search the house, which she readily gave. Janet led the officer into a bedroom that she identified as

78. See *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515 (2006).

79. Brief for the Respondent at 1-2, *Randolph*, 126 S. Ct. 1515, (No. 04-1067), 2005 WL 2176630.

80. *Id.* at 1519 (quoting Brief for Petitioner at 3, *Randolph*, 126 S. Ct. 1515, (No. 04-1067), 2005 WL 1429275).

Scott's, where the sergeant found a section of a drinking straw with a powdery residue on it that he suspected was cocaine. Sergeant Murray then left the house, retrieved an evidence bag from his car, and called the district attorney's office, which instructed him to stop the search and to apply for a search warrant. When the sergeant returned to the house, Janet informed him that she was withdrawing her consent. Sergeant Murray nonetheless seized the straw, a business card, and some white residue he had seen upstairs and took it to the police station, along with both Scott and Janet. After obtaining a search warrant, officers returned to the house, searched it, seized twenty-five "drug-related items," on the basis of which, Scott was indicted for possession of cocaine.⁸¹

Scott moved to suppress the drug-related evidence as the product (or fruits) of a warrantless search that was unauthorized by his express refusal despite his wife's consent. The trial court denied his motion and ruled that Janet had common authority to consent. The Georgia Court of Appeals subsequently reversed this ruling,⁸² and the Georgia Supreme Court affirmed the decision primarily because "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search."⁸³

Ultimately, a 5-4 majority of the Supreme Court, in an opinion by Justice Souter, affirmed the Georgia Supreme Court. Most significantly for present purposes, the *Randolph* majority made the foundational point that "[t]he constant element in assessing Fourth Amendment reasonableness in . . . consent cases . . . is the great significance given to widely shared social expectations."⁸⁴

Indeed, the Court concluded more specifically that such "widely shared social expectations" dictated that the objection of an occupant who is actually present at the scene of a search must be respected, even though another person with common authority over the premises has consented at the same time. As Justice Souter explained for the majority:

To begin with, it is fair to say that a caller standing at the door of shared

premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, "stay out." Without some very good reason, no sensible person would go inside under those conditions. Fear for the safety of the occupant issuing the invitation, or of someone else inside, would be thought to justify entry, but

81. Brief for Petitioner at 4, *Randolph*, 126 S. Ct. 1515 (No. 04-1067), 2005 WL 1429275.

82. *State v. Randolph*, 590 S.E.2d 834 (2003).

83. *State v. Randolph*, 604 S.E.2d 835, 836 (2004).

84. *Randolph*, 126 S. Ct. at 1521.

the justification then would be the personal risk, the threats to life or limb, not the disputed invitation.

The visitor's reticence without some such good reason would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority In sum, there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.⁸⁵

The *Randolph* majority added that the obvious social good—the discovery of evidence of crime—that may well result from a search pursuant to only one co-occupant's consent to a police officer's request to search is not an unimportant consideration. But, more important, in the Court's view, such an interest in crime control did not outweigh Randolph's constitutional right not to have his privacy invaded by the State in this fashion—without a warrant, without his consent, and without the existence of some other applicable exception to the warrant requirement.⁸⁶

85. *Id.* at 1522-23 (footnote omitted). Chief Justice Roberts, in dissent, disagreed strongly with this analysis of the appropriate "social expectations" at play in such a situation:

The fact is that a wide variety of differing social situations can readily be imagined, giving rise to quite different social expectations. A relative or good friend of one of two feuding roommates might well enter the apartment over the objection of the other roommate. The reason the invitee appeared at the door also affects expectations: A guest who came to celebrate an occupant's birthday, or one who had traveled some distance for a particular reason, might not readily turn away simply because of a roommate's objection. The nature of the place itself is also pertinent: Invitees may react one way if the feuding roommates share one room, differently if there are common areas from which the objecting roommate could readily be expected to absent himself. Altering the numbers might well change the social expectations: Invitees might enter if two of three co-occupants encourage them to do so, over one dissenter.

The possible scenarios are limitless, and slight variations in the fact pattern yield vastly different expectations about whether the invitee might be expected to enter or to go away. Such shifting expectations are not a promising foundation on which to ground a constitutional rule, particularly because the majority has no support for its basic assumption—that an invited guest encountering two disagreeing co-occupants would flee—beyond a hunch about how people would typically act in an atypical situation.

Id. at 1532 (Roberts, C. J., dissenting).

The Chief Justice also disagreed that the particular "social expectations" at issue in *Randolph* even involved the right to privacy which is at the core of the Fourth Amendment:

Whatever social expectation the majority seeks to protect, it is not one of privacy. The very predicate giving rise to the question in cases of shared information, papers, containers, or places is that privacy has been shared with another. Our common social expectations may well be that the other person will not, in turn, share what we have shared with them with another—including the police—but that is the risk we take in sharing.

Id. at 1533 (Roberts, C. J., dissenting).

86. *Id.* at 1524.

The Court made this latter point forcefully, opining candidly that:

Yes, we recognize the consenting tenant's interest as a citizen in bringing criminal activity to light And we understand a co-tenant's legitimate self-interest in siding with the police to deflect suspicion raised by sharing quarters with a criminal.

But society can often have the benefit of these interests without relying on a theory of consent that ignores an inhabitant's refusal to allow a warrantless search.⁸⁷

Moreover, as the Court ruled, even more to the point for present purposes, “[a] generalized interest in expedient law enforcement cannot, without more, justify a warrantless search.”⁸⁸

The *Randolph* majority was well aware of the fact that requiring that purportedly consensual searches be genuinely consensual searches means—sometimes, at least—that evidence of criminal wrongdoing that might otherwise be discovered through such a search might never come to the attention of the authorities through other means. Justice Souter acknowledged:

that alternatives to disputed consent will not always open the door to search for evidence that the police suspect is inside. The consenting tenant may simply not disclose enough information, or information factual enough, to add up to a showing of probable cause, and there may be no exigency to justify fast action. But nothing in social custom or its reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident's objection.⁸⁹

In short, to the recent *Randolph* majority, the key determinant of the unconstitutionality of the ultimately not-so-consensual search in that case—its “unreasonableness” in Fourth Amendment terms—was the “widely shared social expectations” or “common understanding” that we have with respect to our right to keep law enforcement officers who are acting without a warrant

87. *Id.* (citations omitted). The Court continued, observing that “[t]he co-tenant acting on his own initiative may be able to deliver evidence to the police, . . . and can tell the police what he knows, for use before a magistrate in getting a warrant.” *Id.* (citation omitted).

88. *Id.* at 1524, n.5. The Court supported this ruling with the following citations: *See Mincey* [v. Arizona, 437 U.S. 385], at 393, [(1978)] (“[T]he privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law”); *Coolidge v. New Hampshire*, 403 U.S. 443, 481 . . . (1971) (“The warrant requirement . . . is not an inconvenience to be somehow ‘weighed’ against the claims of police efficiency”).

Id.

89. *Id.* at 1526.

(or pursuant to some other exception to the warrant requirement) out of our private areas.

Similarly, in evaluating purported consent searches that do not involve any question of shared occupancy of premises or third-party permissions, after the *Randolph* decision, a person's consent to search should not be deemed to be "freely and voluntarily" tendered to a law enforcement officer unless our "widely shared social expectations" make evident that the supposedly consenting party was in fact—*really and truly*, not fictively or constructively—voluntarily foregoing his or her constitutional entitlement not to consent. Moreover, doesn't it (or shouldn't it) go without saying that no one (at least no one who hasn't read this Essay) would expect a court to treat a consent to a search that was *not really* freely and voluntarily given as if it were in fact freely and voluntarily given?

Or, more to the point perhaps, it appears to me that, after the *Randolph* decision, it is appropriate to assess, in the Supreme Court's words, the "widely shared social expectations" and the "common understanding" that ordinary people have about their privacy in their person, places, or possessions when they are simply asked by a police officer to consent to a search without any further explanation.

Indeed, an inquiry of this sort would, hopefully, have the salubrious effect of bringing to center stage, in the assessment of the voluntariness of consents to search, the all-important notion of common sense. In saying that, what I mean is that a focus upon the "widely shared social expectations" and the "common understanding" of ordinary people in the application of Fourth Amendment doctrine—reasonableness—relating to the waiver of the right not to be searched, should, and hopefully, now will, result in analysis that *actually* reflects the real, common sense expectations of the persons whose consent to a search has been sought, just as in *Randolph*.

That reality, as previously discussed, is that a significant number of people exist—whether or not they have actually committed a crime, whether or not they are carrying criminal contraband on their persons—who our courts have deemed to have waived an important constitutional right "freely and voluntarily," and such a finding is—simply put a fiction; it is patently untrue as a factual matter.⁹⁰ Such consents are, as I and many academics but too few

90. See, e.g., Nadler, *supra* note 18, at 156-57. Professor Nadler has concluded similarly:

The direction the Court has taken in this area is likely to lead to several unwelcome consequences. First, the fiction of consent in Fourth Amendment jurisprudence has led to suspicionless searches of many thousands of innocent citizens who "consent" to searches under coercive circumstances Second, the Court's repeated insistence that citizens feel free to refuse law enforcement officers' requests to search creates a confusing standard for lower courts, because it is unclear in new cases how to weigh the "totality of the circumstances" if the "correct" result is virtually always that the encounter and search were consensual. Incorporation of empirical findings on compliance and social influence into Fourth Amendment consent jurisprudence would help to dispel the "air of unreality" that characterizes current doctrine.

judges have argued, often inherently and sometimes patently coercive; that is, unless and until the person whose consent law enforcement seeks is at the very least made aware of—or is found to already have been aware of—his or her right to decline the request.

Of course, the *Randolph* majority did not expressly overrule the Supreme Court's seminal *Schneckloth* decision. And to the extent *Schneckloth* survives, it would appear that a person asked to consent to a search still does not have to be warned—in *Miranda* fashion, at least—that a right to withhold consent to a search exists. However, a good warning of that nature is nonetheless “sound practice,” as Justice Stevens took pains to point out in *Randolph*.⁹¹ Such a warning of the right to decline the request serves to ensure its legitimacy. Courts do recognize that fact. As Professor LaFave points out, “proof by the prosecution that the consenting party was warned of his rights or that he was aware of his rights is often a significant factor leading to a finding that the consent was voluntary.”⁹²

But the *Schneckloth* Court majority did more than simply reject the notion that a warning is required in these consent-search cases. The Court added:

While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.

. . . .

. . . [N]either this Court's prior cases, nor the traditional definition of ‘voluntariness’ requires proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search.⁹³

Does *that* particular holding survive *Randolph*? Does a person asked to consent to a search still not need to have knowledge of the right to refuse consent?

In my view, the answer to this question is “no.” It seems to me that today's common sense—our “widely shared social expectations” and “common understanding”—about just how ordinary, reasonable people respond to police “requests” of this sort has changed. Or, more accurately perhaps, our knowledge about the nature of such common understandings has changed in light of the substantial body of psychological research on this subject.

Id.

91. See *Randolph*, 126 S. Ct. at 1528 (Stevens, J., concurring). “To be sure that the waiver is voluntary, it is sound practice—a practice some Justices of this Court thought necessary to make the waiver voluntary—for the officer to advise the occupant of that right.” *Id.*

92. LAFAVE, *supra* note 10, at 115 (footnotes omitted).

93. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 234 (1973).

Today, we, if not yet most judges, recognize the truth of the matter, namely that most people do *not* expect that they have “the right not to accede a police officer’s request that a search be authorized.”⁹⁴ In contrast, thirty-four years ago the *Schneckloth* Court believed that “[t]here is no reason to believe . . . that the response to a policeman’s question is presumptively coerced.”⁹⁵ Hence, the *Schneckloth* majority concluded as follows:

While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a “voluntary” consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.⁹⁶

In contrast, what the *Randolph* Court has told us more recently is that law enforcement’s “need for such searches” does *not* necessarily outweigh our desire to assure the genuineness of consents:

Yes, we recognize the consenting tenant’s interest as a citizen in bringing criminal activity to light And we understand a co-tenant’s legitimate self-interest in siding with the police to deflect suspicion raised by sharing quarters with a criminal.

But society can often have the benefit of these interests without relying on a theory of consent that ignores an inhabitant’s refusal to allow a warrantless search.

A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search.⁹⁷

Moreover, the *Schneckloth* majority indicated its overriding concern that “[i]n situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may

94. As noted previously, some courts have already reached this conclusion. See, e.g., *State v. Ferrier*, 960 P.2d 927 (1998):

[W]e believe that the great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search. In this context, Ferrier’s testimony, which was supported by the officers, that she was afraid and nervous seems totally reasonable. Indeed, we are not surprised that, as noted earlier, an officer testified that virtually everyone confronted by a knock and talk accedes to the request to permit a search of their home.

Id.

95. *Schneckloth*, 412 U.S. at 247.

96. *Id.* at 227.

97. *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 1524, 1524 n.5 (2006) (citations omitted).

be the only means of obtaining important and reliable evidence.”⁹⁸ Contrast that sentiment with *Randolph*, once again, in which the more recent majority of the Court clearly and expressly rejected that very same proposition, holding instead that:

[W]e know, of course, that alternatives to disputed consent will not always open the door to search for evidence that the police suspect is inside. The consenting tenant may simply not disclose enough information, or information factual enough, to add up to a showing of probable cause, and there may be no exigency to justify fast action. But nothing in social custom or its reflection in private law argues for placing a higher value on delving into private premises to search for evidence in the face of disputed consent, than on requiring clear justification before the government searches private living quarters over a resident’s objection.⁹⁹

To the extent then that the *Schneckloth* Court supposed that a generalized interest in expedient law enforcement could outweigh its own stated concern that searches be truly freely and voluntarily made, that earlier Court’s view of social custom—our common understanding and shared social expectations—is simply outdated. More to the point, that view is no longer controlling or precedential after the *Randolph* decision. Accordingly, although the *Schneckloth* majority expressly held to the contrary, it would appear today that, at the very least, our shared social expectations would be—our common sense would tell us—that one needs to be aware of the existence of the important constitutional right not to accede to a request to be searched by a police officer before one can surrender it.¹⁰⁰

I’m not suggesting that such awareness of the existence of that right means that any putative consenting party must also be (or be made) aware of every aspect of the significance of such a request and the decision to accede to it. It appears to me that common sense (*viz.*, widely shared social expectations) should dictate that police officers who seek to search someone strictly upon the legal basis of that person’s consent should *not* be required to provide that person with a full and complete appreciation of *all* of the various

98. *Schneckloth*, 412 U.S. at 227.

99. *Randolph*, 126 S. Ct. at 1526.

100. In dissent in *Schneckloth*, Justices Brennan and Marshall made this exact point, a few decades ahead of their time. *Schneckloth*, 412 U.S. at 277 (Brennan, J., dissenting). Justice Brennan complained: “It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence.” *Id.* Justice Marshall lamented:

I would have thought that the capacity to choose necessarily depends upon knowledge that there is a choice to be made. But today the Court reaches the curious result that one can choose to relinquish a constitutional right—the right to be free of unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search. I cannot agree”

Id. at 277 (Marshall, J., dissenting) (footnote omitted).

consequences that might, or might not, flow from such a waiver. The police officer, frankly, would not even be in a position to know all of these consequences. Rather, the officer should be required instead simply to take care to reasonably ensure that the person whose consent is being sought understands that the right not to consent to a search exists, whether or not the officer delivers a warning to that effect and even though the person may not know the specific consequences of his or her decision.

A requirement of this sort is not onerous. Indeed, the Supreme Court in *Iowa v. Tovar*, handed down in 2004, crafted the following, rather similar, test for use in assessing whether or not criminal defendants have “knowingly and intelligently” waived their Sixth Amendment right to counsel in tendering a guilty plea pro se:

[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it We [have] similarly observed [that “i]f [the defendant] . . . lacked a full and complete appreciation of all of the consequences flowing from his waiver, it does not defeat the State’s showing that the information it provided to him satisfied the constitutional minimum.”]¹⁰¹

Moreover, it is certainly *not* true that assuring that people are aware of their rights means *ipso facto* they will assert them. Waivers of *Miranda* rights are commonplace, for example, and those occur only after the recitation of the now familiar, detailed warnings by a police officer.¹⁰² Indeed, as Professor Bradley points out, even if the Court were to reject *Schneckloth* entirely and require that people asked to consent to a search be informed expressly of their right not to consent, there would be two possible consequences:

First, suspects would not believe the advisory and would consent anyway, feeling that refusal would be fruitless and would only make matters worse But at least the government would have taken reasonable steps toward ensuring voluntariness.

101. *Iowa v. Tovar*, 541 U.S. 77, 92 (2004) (quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Patterson v. Illinois*, 487 U.S. 285, 294 (1988)).

102. See, e.g., Anemona Hartocollis, *Remain Silent? Some in Custody Spell It All Out*, N.Y. TIMES, Jan. 5, 2007, at A1. As the author recounts:

For many people, the urge to explain, if not to confess, is as urgent as it was for Raskolnikov in “Crime and Punishment.”

. . . .

“Everybody talks,” said Daniel J. Castleman, chief of investigations for the Manhattan district attorney. “Almost nobody doesn’t talk. And the reason for that is that people think they can either talk their way out of it or mitigate the crime. It’s human nature.”

Id.

The other possibility is that suspects would heed the advisory and refuse consent, and the evidence would be lost. But this is simply a consequence of the police lacking probable cause to search in the first place.¹⁰³

Again, as the Supreme Court made absolutely clear in *Randolph*, “[a] generalized interest in expedient law enforcement cannot, without more, justify a warrantless search.”¹⁰⁴

Granted, recognition that a consent to search has not been freely and voluntarily tendered unless the consenting party is actually aware (whether or not he or she has been expressly warned) of the right not to consent would require trial courts, on occasion, to engage in a highly fact-intensive type of adjudication. But, how much more fact-intensive would it need to be than the current, more-theoretical-than-real voluntariness test? Indeed, to the extent that a police officer’s actual warning to someone being asked to consent to a search of his or her right to decline the invitation would more often than not be dispositive of the issue of consent, a test that created some significant incentive for law enforcement officers to actually apprise people formally of their constitutional entitlements would likely be far easier to apply than the current, hypocritical state of prevailing law in which “voluntariness” is presumably assessed . . . but not really.

Of course, people will retain their God-given right to make civic-minded or stupid (or, at least, inculpatory) decisions to permit such searches, and as previously discussed, rational reasons exist for even the most culpable of us to cooperate with the police despite the risks we may run through such cooperation. In fact, as Professor Bradley has observed, “[i]f [people asked to consent to searches] are truly glad to cooperate in such police endeavors, they will do so even when informed that they don’t have to. This would ensure that they are cooperating freely rather than acceding to police pressure.”¹⁰⁵

To the extent the *Randolph* Court’s reiteration or recasting of Fourth Amendment consent doctrine now obligates the police—and the courts—to pay heed to our widely shared social expectations about when the Government should be able to invade our private spaces in the absence of probable cause and a search warrant or some other exception to the warrant requirement, a recasting of the consent search doctrine to square its theory with its actual application cannot fail but to be a positive development for all of us.

Is this an overoptimistic pipe dream? Will this actually happen? Search me.

103. Bradley, *supra* note 71, at 74.

104. *Randolph*, 126 S. Ct. at 1524 n.5.

105. Bradley, *supra* note 71, at 72.