

The Good and Bad News About Consent Searches in the Supreme Court

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I. INTRODUCTION

I suspect that many law students (and quite a few lawyers) find the Supreme Court's consent search doctrine both straightforward and bewildering at the same time. The easy part is that the Court has stated that consent searches are permissible when a person "voluntarily" consents to the search. And whether a person's consent is voluntary simply depends on *all* of the facts of the case. Thus, when judging whether police properly obtained a person's consent to search, law students need not learn any multi-prong or multi-factored balancing tests. Nor, when examining a consent search scenario, must law students consider whether the police had probable cause or reasonable suspicion for their actions. Consent searches can go forward with no evidence of criminality. A hunch will do. And an officer's reason for requesting consent—whether it be motivated by bias, or because he or she wanted to practice his or her technique at obtaining consent from motorists or bus passengers—does not undermine the validity of any consent given by a person.

Similarly, law students need not worry that they have forgotten (or never learned) what the Framers thought about consent searches. I am sure that many law students are quite grateful that consent search cases have not triggered the Justices' new-found concern that their holdings in Fourth Amendment cases be consistent with the Framers' thinking about the amendment. Although the Court's most recent consent search case, *Georgia v. Randolph*,¹ prompted a little spat between Justices Stevens and Scalia over how the Framers would have settled the dispute in that case,² none of the other Justices showed any inclination to seek out the Framers' views on consent searches. Furthermore, prior to *Randolph*, none of the Justices, including Justices Scalia and Thomas, the Court's strongest supporters of originalism in constitutional decision-making, have suggested that history matters when deciding whether a challenged consent search violates the Fourth Amendment.

On the other hand, there is a surreal quality about the Court's consent search jurisprudence.³ Professor Marcy Strauss nicely summarized the reaction of her

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1. 547 U.S. 103 (2006).

2. See *id.* at 123-25 (Stevens, J. concurring); *id.* at 142-45 (Scalia, J., dissenting).

3. In a dissenting opinion, Justice Souter nicely described this phenomenon when he stated there was "an air of unreality about the Court's explanation that bus passengers consent to searches of their luggage to

law students after reading a typical consent search case: “Every year, I witness the same mass incredulity. Why, one hundred criminal procedure students jointly wonder, would someone ‘voluntarily’ consent to allow a police officer to search the trunk of his car, knowing that massive amounts of cocaine are easily visible there?”⁴ I imagine that many law students indeed find it “absurd” that a person “voluntarily consented to a search when surrounded by police at close quarters, especially if the defendants knew (as they must have) that giving the consent would ultimately result in serious criminal charges being filed against them.”⁵ Furthermore, law students understand what everyone else knows: a police “request” to search a bag or automobile is understood by most persons as a “command.” As the late H. Richard Uviller has described, a police request for consent, “however gently phrased, is likely to be taken by even the toughest citizen as a command. Refusal of requested ‘permission’ is thought by most of us to risk unpleasant, though unknown, consequences.”⁶ A majority of the Justices on the Supreme Court, however, reject this reality and continue to decide cases with the view that people have a genuine choice when police request consent to search.

‘enhanc[e] their own safety and the safety of those around them.’” *United States v. Drayton*, 536 U.S. 194, 208 (2002) (Souter, J., dissenting).

4. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 211 (2001).

5. Ric Simmons, *Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 774 (2005). Cf. John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1114 (2007) (“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?”); Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69, 89 (2007) (“After all, what maddens us about the voluntariness locution in consent-search cases is precisely the unreality of it—most anyone would feel coerced by the sorts of police encounters that are described everyday in our courthouses.”); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 128 (1998) (“It is inherently improbable that criminal suspects voluntarily would consent to the discovery of the very evidence necessary to seal their legal demise.”).

6. H. RICHARD UVILLER, *TEMPERED ZEAL* 81 (1988). Professor Uviller was echoing what Professor Caleb Foote had recognized many years ago, namely, that “what on their face are merely words of request take on color from the officer’s uniform, badge, gun and demeanor.” Caleb Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. CRIM. L., CRIMINOLOGY & POL. SCI. 402, 403 (1960). More recently, Illya Lichtenberg has reached similar conclusions regarding a police “request” for a consent search. According to Lichtenberg, “there tends to be agreement among most social scientists that when a police officer gives an order, command, or makes a request he expects compliance.” See Illya D. Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry Into the “Consensual” Police-Citizen Encounter* 124 (Oct. 1999) (Ph.D. dissertation, Rutgers University) (on file with the *McGeorge Law Review*). Lichtenberg also believes that:

[C]ertain inferences about police expectations from citizens, and citizen expectations from police are reasonable. First, a request for consent to search cannot be significantly different from other police requests. An asymmetrical power relationship in the police-citizen encounter appears to exist. Police officers have all the power and may not hesitate to use coercive means, whether implied or explicit, to maintain this asymmetrical power relationship. A refusal to consent to a search is a clear challenge to the officer and the officer may exert his power to achieve compliance. If the policeman did not want to search, why would he have asked?

Id. at 137-38.

Another bewildering aspect of the law of consent searches is exactly where such searches belong in the Court's Fourth Amendment framework. "The precise basis for the consent doctrine has never been made explicit, and thus there is some dispute whether the consent doctrine is actually an exception to the warrant requirement."⁷ Judges and academic commentators have proffered at least three different doctrinal foundations for consent searches.⁸ Traditionally, consent searches have been seen as an exception to the warrant and probable cause requirements. This is the approach taken in *Schneckloth v. Bustamonte*, the Court's seminal consent search case.⁹ A second theory contends that a consent search, technically speaking, is not a "search" under the Fourth Amendment because the subject has relinquished his or her right to be protected by the amendment. Justice Thurgood Marshall appeared to endorse this view when he noted that "consent searches are permitted, not because such an exception to the requirements of probable cause and warrant is essential to proper law enforcement, but because we permit our citizens to choose whether or not they wish to exercise their constitutional rights."¹⁰ Finally, a third view adopts the position that whether a challenged consent search is valid depends on whether the police conduct is "reasonable" under the Fourth Amendment. Justice Scalia adopted this view in his opinion for the Court in *Illinois v. Rodriguez*, a third-party consent search case.¹¹ And this is also the position taken in *United States v.*

7. Strauss, *supra* note 4, at 216 n.11; see also 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, 26 (1991) ("A number of early Supreme Court decisions treated consent intrusions as constitutional without explicitly spelling out a theory of consent.").

8. See Strauss, *supra* note 4, at 216 n.11 (listing three theories explaining the doctrinal basis for consent searches); see also George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 544 (2003) (noting that the Court has offered the "waiver" and "reasonableness" theories, but "has settled on [reasonableness as the] justification for the consent search doctrine").

9. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." (citing *Davis v. United States*, 328 U.S. 582, 593-94 (1946); *Zap v. United States*, 328 U.S. 624, 630 (1946))). Interestingly, at the Court's conference discussing *Bustamonte*, Justice Stewart, the author of *Bustamonte*, took the position that "[i]f there is consent, the Fourth Amendment does not apply at all." THE SUPREME COURT IN CONFERENCE (1940-1985), at 456 (Del Dickson ed., 2001). Prior to *Bustamonte*, the Court's early consent cases, including *Davis*, simply assumed that consent searches were valid and did not identify a doctrinal basis for consent searches. See *infra* notes 52-71 and accompanying text.

10. *Bustamonte*, 412 U.S. at 283 (Marshall, J., dissenting); see also Davies, *supra* note 7, at 28. According to Professor Thomas Davies,

[C]onsent amounts to a citizen's surrender of an expectation of privacy and an exposure of an otherwise private interest. Under this concept, the sole focus of inquiry is whether a person whose privacy interest was at stake (a person with authority over the premises) actually gave permission for an intrusion. If such a person gave consent, the Fourth Amendment's reasonableness standard is rendered inapplicable. If no such person gave consent, the protections of the Fourth Amendment apply in full.

Id. at 28 (footnotes omitted).

11. *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) ("What [the defendant] is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'"); see also *id.* at 187 ("[W]hat is at issue when a claim of

Drayton, which held that bus passengers need not be informed of their right to refuse cooperation when police seek permission to search their bodies or luggage.¹²

While courts and scholars have divergent views on the doctrinal basis for consent searches, there is no disagreement that police prefer consent searches to other types of investigative techniques. In fact, as Professors Joshua Dressler and Alan Michaels tell us in their popular treatise on criminal procedure, consent searches “are a dominant—perhaps *the* dominant—type of lawful warrantless search.”¹³ And many law professors share their view that “there are few areas of Fourth Amendment jurisprudence of greater practical significance than consent searches.”¹⁴ But the police penchant to rely on consent searches raises another problem: the tension between, on the one hand, the police preference for and the Court’s zeal to approve consent searches,¹⁵ and, on the other hand, the Court’s commitment to the so-called warrant requirement.

apparent consent is raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*.”). In *Georgia v. Randolph*, 547 U.S. 103 (2006), like *Rodriguez*, another third-party consent case, Chief Justice Roberts seemed to endorse both the second and third doctrinal basis for consent searches. He stated that a “warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it. Co-occupants have ‘assumed the risk that one of their number might permit [a] common area to be searched.’” *Id.* at 128 (Roberts, C.J., dissenting); *see also id.* at 137 (“[T]he more reasonable approach is to adopt a rule acknowledging that shared living space entails a limited yielding of privacy to others, and that the law historically permits those to whom we have yielded our privacy to in turn cooperate with the government. Such a rule flows more naturally from our cases concerning Fourth Amendment reasonableness and is logically grounded in the concept of privacy underlying that Amendment.”).

12. *United States v. Drayton*, 536 U.S. 194, 206-07 (2002). In an interesting and provocative article, Professor Daniel Williams contends that “reasonableness” has been the focus of the Court’s analysis in consent cases since at least *Bustamonte*. Williams, *supra* note 5. Williams argues that despite statements to the contrary in his opinion, the *Bustamonte* Court never “actually embraced” the concept of voluntariness. *See id.* at 92-93.

Metaphysical notions like voluntariness have always been mere lexical paraphernalia of the actual inquiry into police methods we accept as legitimate crime-fighting tools. What happened in *Bustamonte* and all of the other consent-search cases is what happened in *Rodriguez*: the Court evaluated a civilian-police encounter and inquired into whether the crime-fighting methodology was minimally acceptable. The Court might dress up the analysis with evocative metaphysical notions, but only naiveté or the desire to erect a straw-man critique prevents one from seeing that the Court purports to do nothing more, and nothing less, than assess reasonableness.

Id. (footnote omitted).

13. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 16.01, at 261 (4th ed. 2006). *Cf.* Simmons, *supra* note 5, at 773 (“Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.”); Burkoff, *supra* note 5, at 1121 (noting that police are “quite open about” their willingness to pursue consent as a means of executing suspicionless searches).

14. DRESSLER & MICHAELS, *supra* note 13, § 16.01, at 261; *see, e.g.*, Strauss, *supra* note 4, at 214; Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 209-10 & n.193.

15. Professor Wayne LaFave understates the Court’s attitude toward consent searches when he notes that “[t]he practice of making searches by consent is not a disfavored one.” 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1, at 5 (4th ed. 2004). Similarly, Professor Janice Nadler has commented that the Court’s attitude “appears to be that consent searches ought to be encouraged (or at least not discouraged) because they reinforce the rule of law.” Nadler, *supra* note 14, at 210; *see also* Morgan Cloud, *Ignorance and Democracy*, 39 TEX. TECH. L. REV. 1143, 1143 (2007) (“[C]ontemporary Fourth

It is an understatement to say that law enforcement officials highly favor consent searches. A non-exhaustive list of the reasons for this preference would include the fact that consent searches are easy.¹⁶ In most jurisdictions, a request for consent need not be based upon any suspicion of criminal conduct. Also, consent searches do not entail the administrative hassles, time, and risks associated with obtaining and executing a judicial warrant. From a strategic standpoint, police view consent searches “as the ‘safest’ course of action in terms of minimizing the risk” of having criminal evidence excluded at a suppression hearing.¹⁷ Furthermore, a consent search may provide the police authority and discretion to conduct an open-ended search with virtually no limits. As Professor Wayne LaFave explains, a consent search has the “added benefit, at least when the consenting party does not carefully condition or qualify his consent, that the search pursuant to consent may often be of a somewhat broader scope than would be possible under a search warrant.”¹⁸ Finally, consent searches are popular because they allow police to exercise their discretion and power in contexts that affect literally hundreds of thousands of persons where the target is unlikely to say “no” to a request for a consent search. The fact that most persons subjected to consent searches are innocent of criminal conduct is constitutionally irrelevant.¹⁹ This aspect of consent searches is most pronounced when police request consent

Amendment doctrine governing consent searches accepts—even encourages—ignorance among the people about their constitutional rights.”).

16. See, e.g., RICHARD VAN DUIZEND, L. PAUL SUTTON & CHARLOTTE A. CARTER, *THE SEARCH WARRANT PROCESS* 68-69 (1984) (“[L]istening to some law enforcement officers would lead to the conclusion that consent is the easiest thing in the world to obtain.”); see *cf. id.* at 19 (quoting a police detective saying: “Actually, there are a lot of warrants that are not sought because of the hassle. . . . I don’t think you can forgo a case because of the hassle of a search warrant, but you can . . . work some other method. If I can get consent [to search], I’m gonna do it.” This detective suggested that as many as 98 percent of the searches were by consent.).

17. LAFAVE, *supra* note 15, § 8.1, at 4-5; see also Strauss, *supra* note 4, at 259 (“[E]ven if the police have probable cause to search, and even if procuring a warrant would not be onerous, an officer may elect to obtain consent because it increases the likelihood that the search would be deemed valid.”). *Cf.* LAWRENCE P. TIFFANY, DONALD M. MCINTYRE, JR. & DANIEL L. ROTENBERG, *DETECTION OF CRIME* 159 (1967) (“In the routine case, police are likely to rely on the consent search to save the time and avoid the difficulty involved in going through the rather elaborate procedure required to obtain a search warrant.”).

18. LAFAVE, *supra* note 15, § 8.1, at 5.

19. *Cf.* Strauss, *supra* note 4, at 214 (“Although precise figures detailing the number of searches conducted pursuant to consent are not—and probably can never be—available, there is no dispute that these type of searches affect tens of thousands, if not hundreds of thousands, of people every year. And recent decisions by the Supreme Court endorsing suspicionless drug interdictions and pretextual automobile stops will only magnify the problem.” (footnotes omitted)); Nadler, *supra* note 14, at 209 (“[T]he small amount of scattered evidence that exists suggests that the absolute number of consent searches is quite high, as is the proportion of consent searches of all searches conducted.”). Professor Nadler also notes that “[t]he vast majority of people subjected to consent searches are innocent.” *Id.* at 210. A recently released federal study, based on interviews conducted by the Census Bureau of persons who had contact with the police, found that “[m]ore than half (57.6%) of all searches conducted [by the police during traffic stops] in 2005 were by consent.” MATTHEW R. DUROSE, ERICA L. SMITH & PATRICK A. LANGAN, U.S. DEP’T JUST., *CONTACTS BETWEEN POLICE AND THE PUBLIC*, 2005, at 6 (2007), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp05.pdf> (on file with the *McGeorge Law Review*). The study found that in “11.6% of searches conducted during a traffic stop in 2005, police found drugs, an illegal weapon, open containers of alcohol, or other illegal items.” *Id.* at 7.

from motorists during routine traffic stops or from passengers traveling on interstate buses and trains.²⁰ Motorists stopped for traffic offenses and passengers on interstate buses and trains are the classic examples of a “captured audience.”

The last reason explaining why police prefer consent searches highlights the tension between consent searches and the warrant requirement. The warrant requirement was designed primarily to interpose a neutral magistrate’s judgment between the law enforcement officer zealously ferreting out crime and the privacy and personal security of individual citizens.²¹ During the heyday of the warrant requirement, the Court repeatedly insisted “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.”²² To be sure, even the Warren Court, and later the Burger Court, was willing to recognize that consent searches were an exception to the warrant requirement. But the justifications announced for consent searches in *Schneckloth v. Bustamonte*²³ were neither convincing nor compelling. Moreover, those justifications undermine the rationale behind the warrant requirement.

Justice Stewart’s opinion for the Court in *Bustamonte* ruled that police must be permitted to pursue consent searches, even without informing a person of his right to refuse a consent search and without any showing that the person had knowledge of his right to deny consent.²⁴ The Court insisted that there was a “legitimate [societal] need for [consent] searches” and that in certain cases a consent search “may be the only means of obtaining important and reliable evidence.”²⁵ Justice Stewart’s premise that society has a legitimate need for consent searches—while holding “at least surface appeal”²⁶—certainly proves very little for Fourth Amendment purposes. As Stewart recognized in many other search and seizure cases:

[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who

20. Nadler, *supra* note 14, at 209-10 & n.193 (“There is no reliable estimate for the number of consent searches conducted in any given year nationwide (or even statewide). In some cases, police officers have testified that they ask for consent to search every motorist they stop. In one city, it was estimated anecdotally that 98% of the searches were consent searches.” (citations omitted)).

21. See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

22. *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted).

23. 412 U.S. 218 (1973).

24. *Id.* at 227-34, 248-49.

25. *Id.* at 227.

26. Strauss, *supra* note 4, at 260 (“[E]ven in the absence of empirical evidence, the argument [that law enforcement interests are advanced by consent searches] holds at least surface appeal.”).

wrote the Bill of Rights that the 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.²⁷

Justice Stewart's related concern, that in certain cases a consent search may be the "only" means to obtain criminal evidence, was a naked assumption without empirical support.²⁸ Today, there is anecdotal as well as empirical evidence suggesting that consent searches are not particularly effective,²⁹ and as a political matter, the popularity of consent searches seems to be declining.³⁰

27. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (citation omitted).

28. See Daniel L. Rotenberg, *An Essay On Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 190 (1991) (criticizing Justice Stewart's analysis on this point and noting that "[a]necdotal evidence and a brief survey of several police departments suggest that the consent search tactic is used innovatively, extensively, occasionally, or perhaps not all"); Strauss, *supra* note 4, at 260-61 (noting that Stewart's arguments supporting the police need for consent searches have not been "empirically validated" and explaining that "there is strong reason to believe that crime control would not unduly suffer were the police no longer able to obtain consent to search."); LAFAVE, *supra* note 15, § 8.1, at 12 (questioning Justice Stewart's premise that there is a compelling need for consent searches: "It is to be strongly doubted . . . whether this is the case.").

29. For example, a report from the New Jersey Attorney General's Office concluded that "most consent searches [conducted by state troopers] do not result in a positive finding" of criminal activity, even with a requirement that there be reasonable suspicion of criminality before requesting permission to search. RONALD SUSSWEIN ET AL., N.J. OFFICE ATT'Y GEN., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 28 (1999), http://www.state.nj.us/lps/intm_419.pdf (on file with the *McGeorge Law Review*). The report further explained that the "positive" findings disclosed by state police empirical data concerning consent searches were "somewhat misleading, since a positive result is recorded if the search led to any arrest or seizure of contraband without considering the seriousness of the charge or the type, quantity, or value of contraband that was discovered. Based upon anecdotal reports, most arrests are for less serious offenses, and major seizures of significant drug shipments are correspondingly rare." *Id.* at 36-37. Finally, this report also found "that minority motorists were disproportionately subject to consent searches." *Id.* at 30. This negative view of consent searches was reaffirmed by Dr. James J. Fyfe, a criminal justice professor and former New York City police lieutenant. Dr. Fyfe testified to the New Jersey Senate Judiciary Committee that

consent searches should be ended, because they pose a real threat to Fourth Amendment rights and because they are not an efficient law enforcement tool. He said consent searches were always suspect He said waivers of the Fourth Amendment are valid only when they are made voluntarily and intelligently, and police managers should be skeptical of police officers who say they found drugs in a motorist's trunk after they were given consent to search. He believed far more credible are the accounts of individuals who were subject to consent searches and who said they did not know they could refuse the search and were told that if they did not consent, they would be detained while the trooper obtained a warrant[.]

REPORT OF THE NEW JERSEY SENATE JUDICIARY COMMITTEE'S INVESTIGATION OF RACIAL PROFILING AND THE NEW JERSEY STATE POLICE 79 (2001), <http://www.njleg.state.nj.us/RacialProfiling/sjufinal.pdf> (on file with the *McGeorge Law Review*).

30. Public opposition to consent searches has typically arisen as part of a political movement against police racial profiling of motorists. See Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187, 2187-88 (2006) [hereinafter *The Fourth Amendment and Antidilution*] ("Hawaii, Minnesota, New Jersey, and Rhode Island banned the use of consent searches 'after controversies about racial profiling,' and the California Highway Patrol voluntarily adopted a policy prohibiting its officers from requesting consent searches from motorists." (footnote omitted)); Scott Henson, "Strange Coalition" Backs Consent Search Ban, Apr. 13, 2005, <http://gritsforbreakfast.blogspot.com/2005/04/strange-coalition-backs-consent-search.html> (on file with the *McGeorge Law Review*) (describing coalition between the American Civil Liberties Union and the National Rifle Association in

Concededly, Justice Stewart did not hide the policy choices that motivated his decision to allow consent searches, and reasonable persons can disagree over his hardheaded concerns about the need for consent searches. But, as Professors Dressler and Michaels correctly observe, Justice Stewart's "pragmatic explanation" justifying consent searches, "although candid, is conceptually weak if there *really* is a constitutional warrant requirement."³¹

From the perspective of the individual, a major problem with consent searches as authorized in *Bustamonte* is that police are given unfettered discretion to pursue consent without informing an individual of his right to say no and telling the individual that refusal will be respected by the police. Another significant problem with consent searches is that in the typical case, where the police seek consent from a motorist stopped for a traffic violation or from a passenger sitting on a bus, the confrontation between the police and the citizen is not an "arm's length" encounter. These factors are relevant to Fourth Amendment analysis because the amendment is concerned with checking police discretionary power. The Court once explained that "[s]ecurity against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."³² If that statement remains accurate, consent searches, as currently executed by most police officers, threaten the security protected by the Fourth Amendment. If, as the Court has said on numerous occasions, the purpose of the Fourth Amendment and the warrant requirement is to establish a judicial framework, rather than an officer-in-the-field process, for deciding "[w]hen the right of privacy must reasonably yield to the right of search,"³³ then consent searches, as currently practiced in much of the nation, seem at odds with the purpose of the warrant requirement.

supporting a ban on consent searches in Texas during traffic stops). A group of public interest organizations in Texas subsequently produced reports calling for a ban on consent searches during traffic stops. *See, e.g.*, DWIGHT STEWARD & MOLLY TOTMAN, DON'T MIND IF I TAKE A LOOK, DO YA?: AN EXAMINATION OF CONSENT SEARCHES AND CONTRABAND HIT RATES AT TEXAS TRAFFIC STOPS (2005), http://www.criminaljusticecoalition.org/files/userfiles/racial_profiling/racial_profiling_report_2005.pdf (on file with the *McGeorge Law Review*). The report, relying on statistics generated by Texas law enforcement agencies, found that "2 out of 3 law enforcement agencies reported consent searching Blacks or Latinos at higher rates than Anglos following a traffic stop" and that the "contraband hit rates from consent searches does not indicate that these searches are proving fruitful," suggesting that "consent searches not only yield high racial disparities, but that they are likely an ineffective and inefficient use of law enforcement resources." *Id.* at 7.

31. DRESSLER & MICHAELS, *supra* note 13, § 16.01, at 262.

32. *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

33. *See, e.g.*, *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."). As Justice Douglas has explained, authorizing police to proceed with consent searches "circumvent[s]" the warrant requirement in three ways:

First, [police] avoid submitting to a magistrate's independent assessment of probable cause. Second, [police] are spared the necessity of making a record, in the form of an affidavit sworn prior to the search, that guards against the possibility that an *ex post facto* justification will be based upon what the search turns up. Finally, to the extent the police use . . . a boilerplate consent form, they are relieved of the particularity requirement of the warrant.

Section II of this article describes how the law of consent searches developed before *Bustamonte* was decided. Section III focuses on *Bustamonte*. Specifically, this section analyzes the emergence of *Bustamonte*'s "voluntariness" test for judging the validity of consent searches, highlights the spoken and unspoken premises that influenced the result in *Bustamonte*, and outlines *Bustamonte*'s continuing relevance in the Burger and Rehnquist Courts. Section IV of the article examines *United States v. Drayton* and explains why a cryptic passage in that opinion provides important clues on the Court's current understanding of consent under the Fourth Amendment. Section V discusses *Georgia v. Randolph* and the "good" news about consent searches—both explicit and implicit—inherent in the majority opinion. Finally, Section VI comments on how the tacit concerns that explain the result in *Randolph* can be applied in future consent search cases.

II. THE EVOLUTION OF THE LAW OF CONSENT SEARCHES

As I hope to demonstrate, the Court's recent ruling in *Georgia v. Randolph*³⁴ may signal an important change in the Court's consent search jurisprudence and has the potential to alter the way the Justices approach future consent search cases. To be sure, it will be possible to confine *Randolph*—a case involving third-party consent—to its unique facts in future cases. Thus, one can be understandably skeptical about *Randolph*'s potential to revise the Court's view of consent in traffic stop or bus interdiction cases. But *Bustamonte* itself shows that consent search cases are not decided in a doctrinal vacuum. *Bustamonte* rejected a "waiver" model for measuring the validity of a consent search in the traffic stop context, in part, because such an approach was "thoroughly inconsistent" with the Court's earlier decisions approving third-party consent searches in very different contexts.³⁵ Thus, while the facts of third-party consent cases and traffic stop consent cases often differ dramatically, doctrinal concerns in one category of cases can sometimes affect another category of cases.³⁶ But before explaining why *Randolph* may signal a change in the way the Court approaches consent searches, it is important to understand how the law of consent searches has evolved to its current status.

Gentile v. United States, 419 U.S. 979, 982 (1974) (memorandum disposition denying certiorari) (Douglas, J., dissenting).

34. 547 U.S. 103 (2006).

35. Schneckloth v. Bustamonte, 412 U.S. 218, 245-46 (1973).

36. Williams, *supra* note 5, at 73 n.16 ("Although third-party consent-search cases are relatively rare, they are doctrinally significant because of how their existence shapes the consent-search analysis."). Cf. Peter Goldberger, *Consent, Expectations of Privacy, and the Meaning of "Searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319, 326 (1984) (noting the overlap in the Court's Fourth Amendment cases where "the concept of expectation of privacy—and its constituent [sic] element assumption of risk—may be used in one case to determine whether a search occurred, and in another case to determine whether there was consent").

A. Early Explanations of Why Consent Searches are Reasonable

The Court's initial explanations reconciling consent searches with the Fourth Amendment were tentative and, at times, murky.³⁷ Indeed, in *Amos v. United States*,³⁸ which is sometimes cited as one of the Court's first cases raising issues of consent under the Fourth Amendment,³⁹ the Court never used the term "consent" in its opinion. In *Amos*, federal officers arrived at the home of the defendant where they were met by his wife.⁴⁰ They informed the wife that they were federal officers and had come to search the premises for violations of the revenue laws.⁴¹ The officers had no warrant.⁴² The wife provided the officers access to the home and a "store" that was located within the curtilage of the home.⁴³ The search revealed illegal whiskey.⁴⁴

The Court held that the search violated Amos' Fourth Amendment rights because the officers lacked a warrant.⁴⁵ Apart from any issue of consent, the Court ruled that the failure to obtain a warrant made the search unreasonable.⁴⁶ In one short paragraph, the Court summarily rejected the government's contention

37. Cf. Davies, *supra* note 7, at 26 (noting that early Court rulings did not expressly spell out a theory of consent and that some "pre-Burger Court decisions that did explain consent typically described it as a waiver").

38. 255 U.S. 313 (1921).

39. See, e.g., Thomas, *supra* note 8, at 545 (noting that the Court's first rulings regarding consent searches "assumed that waiver" was the proper standard for measuring consent and citing to *Amos* as "the earliest of the Court's Fourth Amendment cases raising 'consent'"). *Amos* was decided on the same day that the Court decided *Gouled v. United States*, 255 U.S. 298 (1921). In *Gouled*, a government informant, who was a friend of Gouled, went to Gouled's office to gather information about an alleged conspiracy to defraud the government. *Id.* at 304. The informant, "pretending to make a friendly call," obtained admission to Gouled's office and "in [Gouled's] absence, without warrant of any character, seized and carried away several documents," one of which was later admitted at Gouled's prosecution for fraud. *Id.* The Court upheld Gouled's Fourth Amendment claim. See *id.* at 305-06. Although the government argued that Gouled had consented to the informant's entry, the Court did not address that issue. Instead, the Court focused on the "search and seizure subsequently and secretly made in [Gouled's] absence." *Id.* at 306. For a more detailed explanation on *Gouled* and its impact on covert intrusions by government informants and spies, see Tracey Maclin, *Informants and the Fourth Amendment*, 74 WASH. U. L.Q. 573 (1996).

40. *Amos*, 255 U.S. at 315.

41. *Id.*

42. *Id.*

43. *Id.* at 314-15.

44. *Id.* at 315.

45. *Id.* at 315-17.

46. *Id.* at 315-16. The Court explained that its holding in *Gouled* dictated this result. *Id.* at 316. *Gouled* ruled that warrantless searches were unreasonable. See *Gouled*, 255 U.S. at 308 ("Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them,—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter."); see also Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 592 (1996) (explaining that *Gouled* required, as a threshold matter, that a search or seizure of a home or office satisfy the procedural safeguards contained in the Warrant Clause: "Searches and seizures conducted pursuant to warrants satisfying the requirements of probable cause, particularity, and an oath, were defined as not unreasonable, and therefore not unconstitutional. The absence of a valid warrant, however, meant that a search or seizure was both unreasonable and unconstitutional.").

that Amos' rights had been "waived" when his wife gave the agents access to the home.⁴⁷ While the Court left open the question "whether it is possible for a wife, in the absence of her husband, . . . to waive his constitutional rights," there was no need to address that issue in *Amos* because it was "perfectly clear that under the implied coercion here presented, no such waiver was intended or effected."⁴⁸

The holding in *Amos* rested on the principle that warrantless searches were unreasonable searches. The Court's brief response to the government's argument suggested, but did not definitively determine, that the Court was inclined to view consent as requiring an intentional waiver of one's right.⁴⁹ Importantly, however, *Amos* followed the principle, dating back to at least 1914 when the Court decided *Weeks v. United States*,⁵⁰ that warrantless searches by government officers violated the Fourth Amendment.⁵¹

The Court's next important discussion of consent occurred twenty-five years after *Amos* was decided. In 1946, the Court decided *Davis v. United States*⁵² and planted the seeds for the "voluntariness" test that would eventually be embraced in *Schneekloth v. Bustamonte*. Davis was the owner of a gasoline station and was suspected of dealing in black market gasoline.⁵³ After purchasing gas without the necessary gasoline ration stamps, federal agents arrested an attendant, and then arrested Davis when he returned to the station.⁵⁴ While questioning Davis, the agents demanded access to a locked room where Davis kept his records.⁵⁵ Davis, at first, refused access to the room but eventually relented, according to his testimony, "because the agents threatened to break down the door if he did not."⁵⁶ After Davis opened the door, he gave the agents gasoline coupons that had been stored in a filing cabinet.⁵⁷ These coupons were used to convict him at trial.⁵⁸

47. *Amos*, 255 U.S. at 317.

48. *Id.*

49. See Thomas, *supra* note 8, at 545 ("It is impossible to read this paragraph [in *Amos*] as based on a theory other than waiver.").

50. 232 U.S. 383 (1914).

51. See *id.* at 393 (stating that federal law enforcement officers "could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution"); see also Cloud *supra* note 46, at 590 (explaining that in the early part of the twentieth century the Court took the view that:

Searches and seizures of property thus were subject to both procedural and substantive limitations. All intrusions had to satisfy the procedural rules. The substantive restrictions, however, established a hierarchical order based upon the nature of the property. Private papers sat at the top, immune from seizure unless they were stolen, contraband, or criminal instrumentalities. Property fitting into one of those categories lay at the bottom of the substantive hierarchy. Government could seize these items because it had a recognized property or possessory interest in them. And no matter where property fell in this pecking order, its physical location was relevant.)

52. 328 U.S. 582 (1946).

53. *Id.* at 585

54. *Id.*

55. *Id.* at 586.

56. *Id.*

57. *Id.*

58. See *id.* at 587.

The agents, not surprisingly, offered a different version of the facts. One agent testified that he told Davis that he would have to open the door to the locked room.⁵⁹ The agent denied, however, threatening to break open the door.⁶⁰ While questioning continued between Davis and the agents, Davis observed another agent attempting to gain access to the locked room.⁶¹ According to one of the agents, Davis then said, “He don’t need to do that. I will open the damned door.”⁶² The district court credited the agents’ version of the facts and found that Davis “had consented to the search and seizure and that his consent was voluntary.”⁶³ The Court of Appeals affirmed Davis’ conviction but did not address and expressed some doubt regarding the district court’s ruling that Davis’ consent to the search was “voluntary.”⁶⁴

In an opinion that many today might find startling in light of its author, Justice Douglas ruled that the agents had not violated Davis’ Fourth Amendment rights.⁶⁵ Justice Douglas began by noting that the Court’s prior cases defining the scope of “reasonable” searches and seizures were not controlling because they dealt with the seizure of private papers.⁶⁶ The search of Davis’ office involved “gasoline ration coupons which never became the private property of the holder but remained at all times the property of the Government and subject to inspection and recall by it.”⁶⁷ Justice Douglas explained that where government officers seek to inspect “*public* documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where *private* papers are sought.”⁶⁸ When someone doing business with the government, as was Davis, “is persuaded by argument that it is his duty to surrender [public documents] and he hands them over, duress and coercion will

59. *Id.* at 586.

60. *Id.*

61. *Id.* at 586-87.

62. *Id.*

63. *Id.* at 587.

64. *Id.* Specifically, the Court of Appeals observed that “Davis must have known, under arrest as he was, that the officers were not likely to stand very long upon ceremony, but in one way or another, would enter the office.” *United States v. Davis*, 151 F.2d 140, 142 (2d Cir. 1945).

65. *See id.* at 593-94. According to one biographer of Douglas, in 1946, “Douglas was no civil libertarian” in the view of his fellow Justices. BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 236 (2003).

66. *See Davis*, 582 U.S. at 587-88.

67. *Id.* at 588. Justice Douglas relied upon *Wilson v. United States*, 221 U.S. 361 (1911), for the principle that the Fourth Amendment recognizes a distinction between the seizure of *private* papers or documents and *public* property in the custody of a citizen. *Id.* at 589. *Wilson*, however, concerned whether a corporate officer, who held corporate documents, could resist a subpoena *duces tecum* issued to a corporation on the grounds that producing the documents would incriminate him. *See id.* at 367-71. The *Wilson* Court rejected the officer’s Fifth Amendment claim. *See id.* at 377-86. *Wilson*’s discussion of the Fourth Amendment was limited to explaining that the subpoena “was definite and reasonable in its requirements, and it was not open to the objection” that it was overbroad or unreasonable in its demand for documents. *Id.* at 376. There was no discussion of the concept of consent in *Wilson*.

68. *Davis*, 328 U.S. at 593.

not be so readily implied as where private papers are involved.”⁶⁹ Douglas also noted that because the search and seizure occurred in a business location, rather than a home, “[t]he strict test of consent, designed to protect an accused against production of incriminating evidence, has no place here.”⁷⁰ Ultimately, Justice Douglas concluded that, “as a matter of law,” the district court’s finding that Davis had consented to the search and seizure of the coupons was not “erroneous.”⁷¹

Justice Douglas’ opinion in *Davis* is noteworthy on several counts.⁷² The most remarkable aspect of his opinion, however, is its departure from precedent concerning the reasonableness of warrantless searches of homes and offices. *Davis* makes almost no effort to reconcile the concept of consent with the principle that warrantless searches were unreasonable and at odds with the underlying of the purposes of the Fourth Amendment. As already noted, during the early part of the twentieth century, the Court considered warrantless searches of homes and offices unreasonable searches.⁷³ By the time that *Davis* was decided, the Court and individual Justices had issued several opinions outlining the purpose behind the amendment. Foremost among those opinions were *Weeks v. United States*⁷⁴ and Justice Brandeis’ dissent in *Olmstead v. United States*,⁷⁵

69. *Id.*

70. *Id.*

71. *Id.*

72. Justice Douglas’ opinion should make one pause because of its many omissions. For example, not only does Douglas not define the meaning of consent, he never explains what he meant by the phrase the “strict test of consent,” *id.*, a standard that he concludes is not applicable to the search of Davis’ store. Similarly, Douglas does not explain why government officers are given greater leeway to use duress and coercion when seeking public documents. *See id.* Nor does he explain why consent is a narrower concept when governmental agents seek consent to search a business, rather than a home. Justice Douglas also does not explain why the concept of consent under the Fourth Amendment is tied to the Fifth Amendment privilege against self-incrimination. *See id.* (“The custodian in this situation is not protected against the production of incriminating documents. The strict test of consent, designed to protect an accused against production of incriminating evidence, has no place here.”). As Justice Frankfurter notes in his dissent in *Davis*, the majority “derives voluntariness from the fact that what the officers compelled Davis to give up were ration coupons.” *Id.* at 600 (Frankfurter, J., dissenting). As Frankfurter correctly notes, the majority’s understanding of voluntariness is at odds with the common understanding of that term. *See id.* (“[T]he law has always meant by ‘voluntary’ what everybody else means by it.”). Surely, the Court of Appeals had the better argument when they expressed doubt regarding the district court’s finding that Davis had voluntarily consent to the search of the locked room: “Davis must have known, under arrest as he was, that the officers were not likely to stand very long upon ceremony, but in one way or another, would enter the office.” *United States v. Davis*, 151 F.2d 140, 142 (2d Cir. 1945). Finally, Justice Douglas never explains why the legal concept of “voluntariness” in this context turns on “the nature of the quest, instead of on the nature of the response of the person in control of the sought documents.” *Davis*, 328 U.S. at 600 (Frankfurter, J., dissenting).

73. *See supra* note 51 and accompanying text.

74. 232 U.S. 383 (1914). Professor Morgan Cloud has explained that although *Weeks* is better known among modern lawyers and scholars as the leading case adopting the exclusionary rule for federal cases, *Weeks* also established a significant “building block to the interpretative theory emphasizing the Warrant Clause” as the touchstone for determining the constitutionality of governmental searches and seizures. Cloud, *supra* note 46, at 587.

75. 277 U.S. 438 (1928).

which provided a theoretical foundation for a broad construction of the amendment as a bulwark against unjustified governmental intrusions. Brandeis famously noted that the Fourth Amendment conferred a “right to be let alone” from governmental intrusions upon the “privacy of the individual.”⁷⁶ Brandeis also noted,

[u]njustified search and seizure violates the Fourth Amendment, whatever the character of the paper; whether the paper when taken by the federal officers was in the home, in an office or elsewhere; whether the taking was effected by force, by fraud, or in the orderly process of a court’s procedure.⁷⁷

The Court’s other opinions preceding *Davis* also explain why warrantless searches were inconsistent with the amendment’s purpose. In *Weeks v. United States* the Court explained that the Fourth Amendment was designed to put law enforcement officers “under limitations and restraints as to the exercise of [their] power and authority,” especially in light of “[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures.”⁷⁸ To promote this goal, warrantless searches of homes and offices were disfavored. Accordingly, in *United States v. Lefkowitz* the Court stated—fourteen years before *Davis* was decided—that “the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests.”⁷⁹

Justice Douglas’ opinion in *Davis* never explains why consent searches in general, or the specific search of Davis’ office, which Douglas concedes did not satisfy the “strict test of consent,”⁸⁰ were consistent with underlying purpose of the Fourth Amendment. Nor does Justice Douglas attempt to reconcile his ruling that the warrantless search of Davis’ office was constitutional with the established principle that warrantless searches of homes and offices are constitutionally unreasonable.⁸¹ These omissions are even more troubling after

76. *Id.* at 478 (Brandeis, J., dissenting).

77. *Id.* at 477-78 (footnotes omitted).

78. *Weeks*, 232 U.S. at 392.

79. *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

80. *Davis v. United States*, 328 U.S. 582, 593 (1946).

81. When *Davis* was decided, there was no dispute that business offices were protected by the Fourth Amendment. *See, e.g.,* *Gouled v. United States*, 255 U.S. 298 (1921); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (“[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures.”); *Boyd v. United States*, 116 U.S. 616 (1886). In a companion case to *Davis*, *Zap v. United States*, 328 U.S. 624 (1946), also authored by Justice Douglas, the Court upheld a warrantless examination of Zap’s business records and a warrantless seizure of a check that was used to convict Zap of defrauding the government related to a contract with the Navy Department, notwithstanding Zap’s protest against this intrusion. In *Zap*, Justice Douglas relied on *Davis* for the proposition that the law of searches and seizures “is

reading Justice Frankfurter's dissent in *Davis*. As Frankfurter observed, if the point of having judges issue warrants is to confine the scope of the subsequent search, "[i]t cannot be that the Constitution meant to make it legally advantageous not to have a warrant, so that the police may roam freely and have the courts retrospectively hold that the search that was made was 'reasonable,' reasonableness being judged from the point of view of obtaining relevant evidence."⁸² Such a discretionary and unsupervised police intrusion "was precisely what the Fourth Amendment was meant to stop."⁸³

B. *The Rationale of Third-Party Consent Searches*

Davis marked the Court's first tentative steps to explain why consent searches were consistent with the Fourth Amendment. Another important phase in the development of the law of consent searches is the Court's treatment of third-party consent searches during the time period between *Davis* and the landmark ruling in *Schneckloth v. Bustamonte*. As was the case in *Davis*, the constitutional theory supporting third-party consent searches is not obvious from the opinions of the Court.⁸⁴ While detailed analysis is not forthcoming from the Court, the Court's silence on one point is significant and revealing. In the third-party consent cases, the Court does not announce a per se rule barring third-party consent searches. Such a rule could have been defended on the basis that such searches do not involve exigent circumstances excusing the procuring of a warrant. More importantly, a per se ban on third-party consent searches was supported by several precedents in the early part of the twentieth century in which the Court held that warrantless searches of homes and offices were unreasonable searches. Finally, a prohibition on third-party consent searches would have been arguably more in line with the Framers' underlying purposes for the amendment, which was to control discretionary searches by law

the product of the interplay of the Fourth and Fifth Amendments." *Zap*, 328 U.S. at 628. He explained that "those rights may be waived," and that *Zap*, "in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.* While Justice Douglas conceded *Zap*'s contract with the Navy Department did not authorize the seizure of the check, he nonetheless found that "[t]hrough consent to the inspection did not include consent to the taking of the check, there was no wrongdoing in the method by which the incriminating evidence was obtained." *Id.* at 630.

82. *Davis*, 328 U.S. at 595 (Frankfurter, J., dissenting).

83. *Id.*

84. See LAFAVE, *supra* note 15, § 8.3(a), at 143 ("In the relatively few third party consent cases which have reached the Court, the theoretical underpinnings of such consent have not been the subject of close or detailed analysis."). In one of the first cases to address the merits of a third-party consent search, *Chapman v. United States*, 365 U.S. 610 (1961), Justice Frankfurter remarked that "[t]he course of true law pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth." *Id.* at 618 (Frankfurter, J., concurring). He further noted that the *Chapman* opinion "is hardly calculated . . . to contribute clarification." *Id.* Justice Clark's dissent provided stronger criticism. He observed that the Court's search and seizure doctrine "[f]or some years now . . . has been muddy, but today the Court makes it a quagmire." *Id.* at 622 (Clark, J., dissenting).

enforcement officers. Somewhat ironically, Justice Douglas, the author of *Davis*, would subsequently adopt this position notwithstanding his opinion in *Davis*. But by the time that Justice Douglas had come to this view in 1974, the requirements of the Warrant Clause had ceased to have any application to consent searches.

*Chapman v. United States*⁸⁵ was one of the first cases to address the merits of a third-party consent search. In *Chapman*, the defendant's landlord told the police to enter the defendant's home when the landlord and the police detected a "strong odor of 'whiskey mash' coming from the house."⁸⁶ After entering, the police found "a complete and sizable distillery and 1,300 gallons of mash located in the living room."⁸⁷ The government later argued that the landlord's authority justified the warrantless search, but the Court rejected that claim.⁸⁸ The Court emphasized, *inter alia*, that acceptance of this argument would reduce the Fourth Amendment "to a nullity" and leave tenants' Fourth Amendment rights "secure only in the discretion of [landlords]."⁸⁹ While *Chapman* was somewhat vague about the basis for its holding, perhaps purposefully so,⁹⁰ in *Stoner v. California*,⁹¹ the Court appeared to provide some clarity regarding third-party consent searches. *Stoner* involved a search of the defendant's hotel room after a hotel desk clerk gave police permission to enter the room and used a hotel key to open the door for the police.⁹² The state contended the search was reasonable because it was conducted with the consent of the hotel clerk.⁹³ The Court disagreed.⁹⁴

85. 365 U.S. 610 (1961).

86. *Id.* at 612.

87. *Id.*

88. *See id.* at 617.

89. *Id.*

90. In his dissent, Justice Clark emphatically declared that "'Chapman was a tenant no more!' [A Georgia] statute provided for the forfeiture of his lease at his lessor's option when he began making whiskey on the premises." *Id.* at 621 (Clark, J., dissenting). Thus, the search was reasonable, as Georgia law provided the landlord with a right of entry beyond that of mere discretion. *See id.* at 620-21. Justice Clark also found the police officers' decision to forego a warrant reasonable because they would be unable to procure a warrant on Sunday, and the court record showed "complete reliance by the officers on [the landlord's] direction to enter the house." *Id.* at 622. According to Justice Clark, "[i]t is the duty of this Court to lay down those rules with such clarity and understanding that [the police] may be able to follow them. For some years now the field has been muddy, but today the Court makes it a quagmire. . . . It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases." *Id.* at 622-23. As Professor LaFave observes, "*Chapman* tells us little about what the theoretical basis of third party consent is." LAFAVE, *supra*, note 15, § 8.3(a), at 144. Moreover, the lack of clarity in *Chapman* may have stemmed from the debate among the Justices regarding the warrant requirement. *Compare Chapman*, 365 U.S. at 618-19 (Frankfurter, J., concurring) (joining the Court's judgment on the basis that the "reasonableness" of a search turns in large measure on whether a judicial warrant authorized the search), *with id.* at 619-623 (Clark, J., dissenting) (Fourth Amendment only bars "unreasonable" searches, and the police reliance on the landlord's authorization to enter Chapman's home was a reasonable basis for the search).

91. 376 U.S. 483 (1964).

92. *See id.* at 485.

93. *Id.* at 487-88.

94. *Id.* at 488.

Justice Stewart's analysis in *Stoner* is still the subject of debate.⁹⁵ He stated that there was no substance to the state's claim that the police had a reasonable basis for believing that the hotel clerk had the authority to consent to the search of Stoner's room.⁹⁶ There was no substance to this claim because the Court's rulings "make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or unrealistic doctrines of 'apparent authority.'"⁹⁷ Justice Stewart emphasized that it was Stoner's "constitutional right which was at stake here, and not the night clerk's nor the hotel's."⁹⁸ Accordingly, "[i]t was a right . . . which only [Stoner] could waive by word or deed, either directly or through an agent."⁹⁹ Finally, although the hotel clerk had explicitly consented to the search, "there [was] nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by [Stoner] to permit the police to search [his] room."¹⁰⁰

Some have argued that *Stoner*'s logic establishes "that only a person whose own right is implicated can possess authority to consent."¹⁰¹ Others contend that "the rationale of *Stoner* was ambiguous—and perhaps deliberately so" on the issue of whether the police could reasonably rely upon a third party's permission to search another's premises.¹⁰² Ultimately, the Rehnquist Court would embrace the latter view and conclude that "a warrantless entry is valid when based upon

95. Compare *Illinois v. Rodriguez*, 497 U.S. 177, 187-88 (1990) ("[T]he rationale of *Stoner* was ambiguous—and perhaps deliberately so."), with *id.* at 194-95 n.1 (Marshall, J., dissenting) ("*Stoner* itself is clear, however; today's majority manufactures the ambiguity.").

96. *Id.*

97. *Stoner*, 376 U.S. at 488.

98. *Id.* at 489.

99. *Id.*

100. *Id.*

101. Davies, *supra* note 7, at 30. Justice Marshall also adopts this position. See *Rodriguez*, 497 U.S. at 194-95 n.1 (Marshall, J., dissenting).

"Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" The full sentence thus unambiguously confirms that *Stoner* rejected any reliance on apparent authority doctrines.

Nor did the *Stoner* Court leave open the door for a police officer to rely on a reasonable but mistaken belief in a third party's authority to consent when it remarked that "there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room."

Id. (quoting *Stoner*, 376 U.S. at 488-89 (citation omitted)).

102. *Rodriguez*, 497 U.S. at 188. In his majority opinion, Justice Scalia found the *Stoner* holding—"the rights protected by the Fourth Amendment are not to be eroded . . . by unrealistic doctrines of 'apparent authority,'" *id.* at 187 (quoting *Stoner*, 376 U.S. at 488)—ambiguous, insofar as it was not clear "whether the word 'unrealistic' is descriptive or limiting—that is, whether we were condemning as unrealistic all reliance upon apparent authority, or whether we were condemning only such reliance upon apparent authority as is unrealistic." *Id.* Moreover, *Stoner* was ambiguous as to whether the police officers' reliance on the hotel clerk's consent was unreasonable as "a matter of law, or because the facts could not possibly support it." *Id.* Under Scalia's view, "a reasonable reading of [*Stoner*], and perhaps a preferable one," is not that reliance on a third party's consent is unreasonable as a matter of law, but that the factual circumstances of the consent in *Stoner* made such reliance unreasonable. *Id.* at 188.

the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so.”¹⁰³

The next important third-party consent case after *Stoner* was *Frazier v. Cupp*, although it might not have seemed so when it was decided in 1969.¹⁰⁴ During the course of a murder investigation focused on Frazier and his cousin Rawls, police arrested Rawls and obtained his consent to search a duffel bag owned by Frazier, which was being used jointly by Frazier and Rawls and had been left in Rawls’ bedroom.¹⁰⁵ Although never mentioned in the Court’s opinion, at the time of the search, the police were looking for evidence against Rawls, and there was no basis for suspecting that the search was aimed at discovering incriminating evidence against Frazier.¹⁰⁶ The search of the duffel bag, however, revealed clothing belonging to Frazier, which was seized and admitted against Frazier at trial.¹⁰⁷ Frazier later contended that Rawls only had permission to use one compartment of the bag and no authority to consent to a search of other compartments.¹⁰⁸ Speaking for the Court, Justice Marshall “quickly” dismissed this argument in one cursory paragraph. Refusing to address the “metaphysical subtleties” inherent in Frazier’s claim that Rawls had no authority to consent to a search of the entire duffel bag, the Court easily concluded that because Frazier allowed Rawls to use the bag and had left it in Rawls’ home, Frazier had “assumed the risk” that Rawls would let the police search it.¹⁰⁹

Although not discussed in *Frazier*, there is an unresolved tension between *Frazier*’s “assumption of risk” logic and *Stoner*’s apparent rationale that “only the defendant or his agent could give effective consent” to a search.¹¹⁰ Professor

103. *Id.* at 179, 188-89.

104. *Frazier v. Cupp*, 394 U.S. 731 (1969). In between *Stoner* and *Frazier*, the Court decided *Bumper v. North Carolina*, 391 U.S. 543 (1968). The issue in *Bumper* was whether a search of a home could be justified on the basis of consent when such consent was given only after the police asserted that they possessed a warrant. *Id.* at 548. The Court held that “there can be no consent under such circumstances.” *Id.* *Bumper* explained that the state’s burden to prove consent cannot be satisfied when the facts indicated “no more than acquiescence to a claim of lawful authority.” *Id.* at 548-49. When a police officer “claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.” *Id.* at 550.

105. *Frazier*, 394 U.S. at 740.

106. See *Gladden v. Frazier*, 388 F.2d 777, 783 (9th Cir. 1968) (explaining that the police “asked Rawls if they could have his clothing. . . . They did not know that the bag did not belong to Rawls until they opened it and found Frazier’s clothing in it.”); see also *State v. Frazier*, 418 P.2d 841, 843 (Or. 1966) (“The search was made with the consent of Jerry Rawls. This was not a general hunt for evidence of any kind; the bag was opened for the specific purpose of obtaining the clothing of Rawls and with his permission. . . . While it is true that at the time of Rawls’ arrest [Frazier] was a definite suspect and in detention, there is nothing in the record to disclose that the officers knew that the bag itself might be the property of anyone other than Rawls until the bag was opened and its contents noted.”).

107. *Frazier*, 394 U.S. at 740.

108. *Id.*

109. *Id.*

110. LAFAVE, *supra* note 15, § 8.3(a), at 146-47.

LaFave provides the correct solution to this conflict when he notes that *Frazier* is not “the typical third party consent case, where the police solicit the consent of *A* in order to search an area in which *B* has a privacy interest for the express purpose of finding evidence against *B*.”¹¹¹ Put differently, the police in *Frazier* “did not perceive the situation as involving a third party consent” search.¹¹² The main problem with this solution, however, is that the Court would not read *Frazier* the way LaFave read *Frazier*. Actions speak louder than words, and the Court’s actions soon indicated that *Frazier*’s assumption of risk theory would be applied broadly and extend to the typical third-party consent search case where the police seek the permission of *A* to invade the privacy of *B*.

Without acknowledging the tension between *Frazier* and *Stoner*, *United States v. Matlock*¹¹³ demonstrated that a majority of the Justices accepted “assumption of risk” analysis as a sufficient doctrinal justification for third-party consent searches. At the same time, the Court also signaled rejection of *Stoner*’s suspect-focused analysis, which had indicated, if not held, that only the individual whose Fourth Amendment rights were at stake could consent to a search. In *Matlock*, law enforcement officers arrested Matlock for bank robbery in the front yard of his home.¹¹⁴ While Matlock was restrained in a police vehicle and without asking for his consent to search his room, several officers went to the front door of the house, where they were admitted to the home by a Mrs. Gayle Graff.¹¹⁵ “The officers told [Graff] they were looking for money and a gun and asked if they could search the house.”¹¹⁶ Graff gave the officers permission to search the house, including a bedroom “which she said was jointly occupied by Matlock and herself.”¹¹⁷ The search revealed incriminating evidence that the government sought to admit at Matlock’s trial.¹¹⁸

Decided less than a year after the ruling in *Schneekloth v. Bustamonte*, *Matlock* explained that cases like *Frazier* established that when the state seeks to rely on voluntary consent to justify a search, “it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.”¹¹⁹ The

111. *Id.* at 147.

112. *Id.*

113. 415 U.S. 164 (1974).

114. *Id.* at 166.

115. *Id.* at 166, 179.

116. *Id.* at 166.

117. *Id.*

118. The lower courts upheld exclusion of the evidence on hearsay grounds. The Court, however, reversed. After finding that a third party who possessed authority over premises could consent to a search targeting a co-occupant, *id.* at 171, the Court also found that the government had sustained its burden of proving that Mrs. Graff’s out-of-court statements were legally sufficient to warrant admitting the incriminating evidence found in the police search. *Id.* at 177.

119. *Id.* at 171.

Court then elaborated in a footnote that the phrase “common authority” did not turn on property law concepts,

[B]ut rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection *in his own right* and that the others have *assumed the risk* that one of their number might permit the common area to be searched.¹²⁰

Put differently, *Matlock* upheld third-party consent searches on two independent grounds, either of which was sufficient to make a search constitutionally reasonable against a person who had legal standing to object to the search but had not been asked for his or her consent. Those grounds were that the third party could authorize the search “in his own right,” or that the defendant had “assumed the risk” that a co-occupant would allow the search.¹²¹

While *Matlock* resolved the tension between *Frazier* and *Stoner* by embracing assumption of risk analysis, the Court’s solution raised some troublesome questions about the principled logic of the Court’s third-party consent analysis. As Professor LaFave wondered:

If *A* and *B* jointly occupy certain premises, why is it (and when is it) that *A*’s “own right” to permit a search must prevail over *B*’s right of privacy in those premises? And to what extent may it truly be said that *B*’s expectation of privacy in a certain place has been destroyed simply because *A* enjoys equal property rights in that place?¹²²

Thirty years later, a sharply divided Court in *Georgia v. Randolph* attempted to answer, albeit not convincingly in the minds of some, some of Professor LaFave’s questions.

A final comment about *Matlock* is worth mentioning. In a lone dissent, Justice Douglas concluded that the failure to obtain a warrant, when there was time to do so, made the search of *Matlock*’s home constitutionally unreasonable.¹²³ Interestingly, Douglas reached this result by relying on the same reasoning that Justice Frankfurter had proffered in his dissent from Justice Douglas’ majority opinion in *Davis*. In *Davis*, Justice Frankfurter discussed the history of the Fourth Amendment and the Framers’ intent to control the

120. *Id.* at n.7 (emphasis added).

121. *Matlock*’s rationale only applied when the target of the search was *absent* when the police sought consent from a third party. *See id.* at 170 (noting that recent rulings indicate “that the consent of one who possesses common authority over premises or effects is valid as against the *absent*, nonconsenting person with whom that authority is shared” (emphasis added)).

122. LAFAVE, *supra* note 15, § 8.3(a), at 149.

123. *See Matlock*, 415 U.S. at 178-88 (Douglas, J., dissenting).

discretionary search and seizure powers of law enforcement officers.¹²⁴ Frankfurter also cited Court precedents that had established that warrantless searches of homes and offices were unreasonable searches.¹²⁵ In his *Matlock* dissent, Douglas returned to the same themes advanced by Frankfurter in his *Davis* dissent.

For example, Douglas asserted that “[t]he judicial scrutiny provided by the second clause of the Amendment is essential to effectuating the Amendment, and if, under that clause a warrant could have been obtained but was not, the ensuing search is ‘unreasonable’ under the Amendment.”¹²⁶ To support this assertion, Douglas dropped a long footnote discussing the history of oppressive search and seizure practices in the colonies. He pointed to the actions of members of the First Congress who revised the Fourth Amendment’s text, according to Douglas, to “strengthen the Amendment, not to license later judicial efforts to undercut the warrant requirement.”¹²⁷ He also argued that the Court’s precedents in the mid-twentieth century had “held that only the gravest of circumstances could excuse the failure to secure a properly issued search warrant.”¹²⁸ Ultimately, Justice Douglas condemned the search of Matlock’s home, notwithstanding his girlfriend’s permission, because her consent “provide[d] a sorry and wholly inadequate substitute for the protections which inhere in a judicially granted warrant.”¹²⁹ He was unwilling to accept the principle “that a search conducted without a warrant can give more authority than a search conducted with a warrant.”¹³⁰ That result was at odds with the history and underlying purposes of the Amendment because “the Framers of the Amendment did not abolish the hated general warrants only to impose another oppressive regime on the people.”¹³¹ To put it mildly, there was a “dramatic evolution in Douglas’s thinking”¹³² on the Fourth Amendment since his decision in *Davis*.

124. *Davis v. United States*, 328 U.S. 582, 603-05 (1946) (Frankfurter, J., dissenting).

125. *Id.* at 606-09.

126. *Matlock*, 415 U.S. at 180 (Douglas, J., dissenting).

127. *Id.* at 180-83 n.1 (emphasis added).

128. *Id.* at 183.

129. *Id.* at 187.

130. *Id.* This statement by Douglas echoed Justice Frankfurter’s earlier statement wherein he observed: “It cannot be that the Constitution meant to make it legally advantageous not to have a warrant, so that the police may roam freely and have the courts retrospectively hold that the search that was made was ‘reasonable,’ reasonableness being judged from the point of view of obtaining relevant evidence.” *Davis v. United States*, 328 U.S. 582, 595 (1946) (Frankfurter, J., dissenting).

131. *Matlock*, 415 U.S. at 188 (Douglas, J., dissenting). *Cf. Davis*, 328 U.S. at 595 (Frankfurter, J., dissenting) (opining that *post facto* judicial determinations that a warrantless search was reasonable “was precisely what the Fourth Amendment was meant to stop”).

132. MURPHY, *supra* note 65, at 313.

III. THE IMPACT OF *SCHNECKLOTH V. BUSTAMONTE* AND
EXPLAINING ITS UNSPOKEN PREMISES

*Schneckloth v. Bustamonte*¹³³ is considered the Court's seminal search case for good reason. But *Bustamonte* has also been the target of severe and continued criticism. *Bustamonte* involved an ordinary traffic stop.¹³⁴ After learning that the driver had no license, an officer was told by one of the passengers that he possessed a license and that his brother owned the vehicle. The officer then requested consent to search the car from that passenger. The passenger gave consent and "actually helped in the search of the car, by opening the trunk and glove compartment."¹³⁵ The search revealed stolen checks that were later used to convict Bustamonte, another passenger. After the California state courts upheld the conviction, the Ninth Circuit ruled that because consent constituted a waiver of one's Fourth Amendment rights, the state had to show more than an absence of coercion.¹³⁶ Under the Ninth Circuit's reasoning, the state also had to prove that consent was knowingly provided and could be freely refused.¹³⁷

A. *The Emergence of the Voluntariness Test*

Bustamonte was an important case because it gave the Court an opportunity to clarify the law of consent, and, perhaps, develop a new way of analyzing consent searches.¹³⁸ To begin with, there was no controlling precedent to guide the Court. As discussed above, prior to *Bustamonte*, the Court had not reached a consensus on how consent searches should be resolved, particularly in cases where police discover incriminating evidence against the person who gave consent.¹³⁹ The holding in *Davis* certainly was not considered to be controlling

133. 412 U.S. 218 (1973).

134. *See id.* at 220.

135. *Bustamonte*, 412 U.S. at 220.

136. *Id.* at 220-22; *see also* *Bustamonte v. Schneckloth*, 448 F.2d 699, 700-01 (9th Cir. 1971).

137. *Bustamonte*, 412 U.S. at 221-22; *Bustamonte*, 448 F.2d at 700.

138. *Cf.* Strauss, *supra* note 4, at 216 ("[I]t was not until 1973, in *Schneckloth v. Bustamonte*, that the Supreme Court clearly articulated the requirements for a voluntary consent search consistent with the Fourth Amendment." (footnote omitted)); *see also* *Bustamonte*, 412 U.S. at 279 n.5 (Marshall, J., dissenting) (after distinguishing *Davis* and *Zap*, noting that there are "no cases decided by th[e] Court explicitly upholding a search based on the consent of the defendant").

139. Technically speaking, *Bustamonte* was *not* a case where the police discovered incriminating evidence against the person who provided consent, because Bustamonte did not give consent to search the car he was riding in. *See Bustamonte*, 412 U.S. at 220. Today, someone in Bustamonte's shoes might not have standing to contest a police search of an automobile pursuant to consent. *See Rakas v. Illinois*, 439 U.S. 128, 148-49 (1978) (ruling that "passengers *qua* passengers" have no expectation of privacy—in other words, no "standing" to assert a Fourth Amendment interest—in "the trunk of an automobile, [the glove compartment, or area underneath the seat of an automobile because] these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy"). Indeed, "the *Bustamonte* Court could have used an analysis akin to that in *Rakas* and found that no search affecting Bustamonte had occurred. Under that approach, the *Bustamonte* Court would not have reached the question of consent." Goldberger, *supra* note 36, at 328 (footnote omitted).

by either the parties or the Justices. The briefs in *Bustamonte* virtually ignored *Davis*.¹⁴⁰ And other than a couple of insignificant citations, Justice Stewart's main discussion of *Davis* in his thirty-one page majority opinion is contained in a single paragraph.¹⁴¹ That paragraph cites *Davis* to refute the lower court's conclusion that proof of knowledge of the right to refuse consent is a precondition to showing a voluntary consent.¹⁴² *Davis*, according to *Bustamonte*, stood for the proposition that the judiciary must consider all the circumstances to determine whether consent was coerced or not.¹⁴³ Nor were the third-party consent cases determinative in *Bustamonte*. In fact, Stewart conceded the issue at stake in *Bustamonte* was "what constitutes a valid consent, not *who* can consent."¹⁴⁴ Tellingly, the holdings in the third-party consent search cases were cited near the end of Stewart's opinion to bolster the previously determined conclusion that a knowing waiver was not required to prove valid consent under the Fourth Amendment.¹⁴⁵

Although the Court was writing on a clean slate, it was obvious that the *Bustamonte* majority had reached a pre-determined outcome. The Court's framing of the issue signaled the desired result. According to Justice Stewart, "the precise question" raised in *Bustamonte* was "what must the prosecution prove to demonstrate that a consent was 'voluntarily' given."¹⁴⁶ But as Professor LaFave has explained, framing the issue this way is "grossly misleading" and determines the outcome all at once.¹⁴⁷ Justice Stewart's framing of the issue is deceptive because, as LaFave observes, the facts raised at least two questions: whether one's Fourth Amendment rights could be lost "through coercion only,"

140. The State's opening brief cited *Davis* one time for the insignificant point that the Court considers consent to be a question of fact. Brief for the Petitioner at 12, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (No. 71-732). The defendant's brief never cited *Davis*. See Brief for Respondent, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (No. 71-732). Nor was *Davis* discussed during oral argument. See Transcript of Oral Argument, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (No. 71-732).

141. See *Bustamonte*, 412 U.S. at 233.

142. See *id.* at 232-33.

143. *Bustamonte*, 412 U.S. at 233. Justice Marshall's dissent in *Bustamonte*, however, suggested that *Davis*' specific holding was no longer valid law. He noted that central to the result in *Davis* was that the items seized were governmental property, temporarily in *Davis*' possession. *Id.* at 279 n.4 (Marshall, J., dissenting). Because the search involved government property, the *Davis* Court concluded that "permissible limits of persuasion are not so narrow as where *private* papers are sought." *Davis v. United States*, 328 U.S. 582, 593 (1946). Marshall argued that the distinction between governmental property and other types of evidentiary items, so far as the Fourth Amendment was concerned, was eliminated in *Warden v. Hayden*, 387 U.S. 294 (1967). See *Bustamonte*, 412 U.S. at 279 n.4 (Marshall, J., dissenting); see also Rotenberg, *supra* note 28, at 176 n.9 ("Although consent can be said to be a factor in the Court's analysis in [*Davis* and *Zap*], the fact that 'businesses were being inspected' seems to be a larger factor. Neither case defines consent for constitutional purposes.").

144. *Bustamonte*, 412 U.S. at 246 n.34 (emphasis added). Justice Stewart did observe, however, that "the constitutional validity of third-party consents demonstrates the fundamentally different nature of a consent search from the waiver of a trial right." *Id.*

145. See *id.*, 412 U.S. at 245-46.

146. *Id.* at 223.

147. LAFAVE, *supra* note 15, § 8.1(a), at 12.

or whether one's Fourth Amendment rights could also be lost "by *unknowing surrender*."¹⁴⁸ These are separate inquiries. But Justice Stewart focuses only on the coercion question.¹⁴⁹ Equally telling that the Court had reached a pre-determined result is the Court's use of a "voluntariness" standard to determine the constitutional validity of a consent search.¹⁵⁰ Justice Stewart never bothered explaining why he would "import[] into the consent search area the traditional 'voluntariness' test, which proved so ineffective and unworkable in the confession field that it was largely superseded by the new requirements of *Miranda v. Arizona*."¹⁵¹

Moreover, Justice Stewart never considers, let alone addresses, the argument that the search in *Bustamonte* conflicted with the Fourth Amendment's warrant and probable cause requirements. To be sure, in dicta, the Court had assumed prior to *Bustamonte* that consent was a valid exception to the warrant requirement.¹⁵² And counsel for *Bustamonte* conceded during oral argument that "consent searches are permissible under the Constitution."¹⁵³ But in the next breath, he also pointed out that the search in *Bustamonte* occurred "even though there [was] no warrant, no probable cause, no one ha[d] been questioned about any specific crime, no one [was] under arrest," there was no threat to police safety, and there was not "even the remotest effort made to determine if [the person providing consent] had any notion at all of his right to resist the search."¹⁵⁴ Granted, the search at issue intruded upon the privacy of an automobile, not a private home, which may have lessened the intrusive nature of the search in the minds of some of the Justices. But, two years earlier, Justice Stewart himself warned that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."¹⁵⁵ In any event,

148. *Id.* As Professor LaFave elaborates

The Court actually had before it the question of whether Fourth Amendment rights were to be protected from loss through coercion only or also protected from loss by unknowing surrender. These are two different matters; a person might surrender his privacy in full knowledge of his Fourth Amendment rights but yet in response to overwhelming police pressure, or might give up his privacy without the slightest pressure but because of unawareness of his right to decline a police request to search. Yet, to speak only of voluntariness is immediately to focus on the problem of coercion.

Id.

149. *See Bustamonte*, 412 U.S. at 223-29.

150. *Id.*

151. LAFAVE, *supra* note 15, § 8.2, at 51 (footnote omitted).

152. Justice Stewart implied as much in *Katz*. *See Katz v. United States*, 389 U.S. 347, 357-58 & n.22 (1967) ("[T]he mandate of the [Fourth] Amendment requires adherence to judicial processes," and "[a] search to which an individual consents meets Fourth Amendment requirements." (citing *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *Zap v. United States*, 328 U.S. 624 (1946))).

153. Transcript of Oral Argument at 24, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (No. 71-732); *see also id.* at 49 (defense counsel assuming that a person can make a voluntary decision to let the police search his home or car, but stating "my position is that it can only be done if you are aware of your right to say no").

154. *Id.* at 25.

155. *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971) (plurality opinion). Tellingly, there is no suggestion in *Bustamonte* that the result in that case would have been different had the consent search been directed at a home.

there was no indication that the Court was inclined to assess the constitutionality of a consent search by examining whether the traditional protections embodied in the Fourth Amendment had been satisfied.

In sum, the procedural safeguards that the Court had mandated in the early twentieth century to ensure that a search was reasonable were no longer part of the discussion in 1973 when the Court analyzed the reasonableness of the search in *Bustamonte*. And even assuming that consent was a valid exception to the warrant and probable cause requirements, Justice Stewart's own conception of the scope of a valid exception was not discussed in *Bustamonte*. Two years before he authored the Court's opinion in *Bustamonte*, Stewart wrote that searches conducted without judicial approval "are *per se* unreasonable"—subject to a few exceptions.¹⁵⁶ Those exceptions, Stewart explained, "are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'"¹⁵⁷ The consent exception envisioned and eventually constructed by the *Bustamonte* Court, however, was not "carefully drawn," was not designed to protect officer safety, and was not required by any exigency that made a search imperative under the circumstances.

By focusing his analysis on whether a challenged consent search was the result of coercion or not, and ignoring the Fourth Amendment's traditional safeguards and his own formulation of the scope of a valid exception to the amendment, Justice Stewart could announce a holding in *Bustamonte* that appeared straightforward and easily applied by lower court judges and police officers. *Bustamonte* ruled that when the state defends a search on the basis of consent, it has the burden of proving that the consent was voluntary.¹⁵⁸ "Voluntariness is a question of fact to be determined from all the circumstances and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."¹⁵⁹ In another part of his opinion, Justice Stewart explained that "voluntariness" permitted consideration of subjective factors specific to the person giving consent, including, for example, "evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights."¹⁶⁰

156. *Id.* at 454-55.

157. *Id.* at 455 (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)). A year before *Bustamonte* was decided, the Court stated that exceptions to the warrant requirement "are few in number and carefully delineated," and that, "in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction." *United States v. U.S. Dist. Court*, 407 U.S. 297, 318 (1972) (citations omitted).

158. *Schneekloth v. Bustamonte*, 412 U.S. 218, 222, 248 (1973).

159. *Id.* at 248-49.

160. *Id.* at 248.

B. *The Unspoken Premises that Influenced the Bustamonte Court*

Bustamonte's holding was widely criticized when it was announced.¹⁶¹ The ruling is still harshly criticized today.¹⁶² Rather than repeat this criticism, much of which I find convincing, at this stage in the still evolving development of the law of consent, it may be more helpful to identify the concerns and mode of thinking that affected the *Bustamonte* Court. Looking back, some of the concerns that influenced the *Bustamonte* Court were not openly discussed in Justice Stewart's majority opinion. As I hope to demonstrate, the unspoken premises that motivated the *Bustamonte* Court continue to impact the analysis and rulings of the current Justices. This section attempts to identify some of these concerns.

In *Bustamonte*, the Ninth Circuit ruled that to prove valid consent, the state had to show both an absence of coercion and that the subject knew he could refuse consent.¹⁶³ As understood by the *Bustamonte* majority, the Ninth Circuit had formulated a rigid rule that consent could not be established "solely from the absence of coercion and a verbal expression of assent."¹⁶⁴ Several factors prompted the Court to reject this rule.

First, Justice Stewart never indulged, let alone accepted, the Ninth Circuit's view 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."¹⁶⁵ Indeed, *Bustamonte* appeared to adopt the opposite conclusion: an

161. See LAFAVE, *supra* note 15, § 8.1(a), at 11 n.28 (providing citations).

162. For a sampling of the criticism, see, for example, LAFAVE, *supra* note 15, § 8.1(a), at 12-15; Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1467-76 (2000); James A. Adams, *Search and Seizure as Seen by Supreme Court Justices: Are They Serious or Is This Just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413, 446-49 (1993); Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person"*, 36 HOW. L.J. 239, 244-45 (1993); Adrian J. Barrio, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory Into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215; Rotenberg, *supra* note 28; Strauss, *supra* note 4; Thomas, *supra* note 8, at 545-46. A recent symposium of the Texas Tech Law Review contained four articles by Professors John M. Burkoff, Morgan Cloud, Christo Lassiter, and Russell L. Weaver discussing the Court's consent search doctrine. See Symposium, *Citizen Ignorance, Police Deception, and the Constitution*, 39 TEX. TECH. L. REV. 1109, 1109-1206 (2007). None of these articles had a kind or positive word about *Bustamonte*. See, e.g., Burkoff, *supra* note 5, at 1113-32; Cloud, *supra* note 15, at 1148-58; Christo Lassiter, *Consent to Search by Ignorant People*, 39 TEX. TECH. L. REV. 1171, 1176 (2007) ("No choice is made by one who is ignorant of the right of refusal of consent. Without knowledge or intelligence concerning options, there can be no choice among options. Without knowledge and intelligence, a choice can be made without physical violence or threat of violence; however, one could argue that such a choice is not, and cannot, truly be, voluntary."); Russell L. Weaver, *The Myth of "Consent"*, 39 TEX. TECH. L. REV. 1195, 1198 (2007) ("From the standpoint of constitutional doctrine, it is difficult to justify the [*Bustamonte*] holding or to understand how a suspect can waive an important constitutional right without knowledge of its existence.").

163. *Bustamonte v. Schneckloth*, 448 F.2d 699, 700 (9th Cir. 1971) (determining consent, court must "determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld" (quoting *Cipres v. United States*, 343 F.2d 95, 97 (9th Cir. 1965))).

164. *Bustamonte*, 412 U.S. at 222.

165. *Bustamonte*, 448 F.2d at 701. Although Justice Stewart never bothered to reply to this conclusion,

officer's requesting consent indicates that the subject has the ability to refuse. Because Justice Stewart viewed a request for consent as non-coercive, he never challenged the state's contention that "the very fact that consent is given carries the implication that an alternative of refusal existed."¹⁶⁶ Essentially, the state was asking the Court to embrace the following proposition: A person's conduct or verbal assent following an officer's request for consent was sufficient to demonstrate, without more, a prima facie case of consent. Once a prima facie case was shown, the burden was on the defendant to show something unusual about the police questioning that made the consent coerced or some other overt act of police coercion.¹⁶⁷ If no evidence of overt coercion was present, then a request for consent and verbal assent or conduct manifesting acquiescence, standing alone, could prove valid consent as a matter of law.¹⁶⁸ In effect, the state was asking the Court to reject the Ninth Circuit's per se rule and substitute in its place another bright-line rule.

Concededly, the state's claim was never cited in Justice Stewart's opinion; thus there is no definitive proof that the *Bustamonte* majority embraced the state's position. Even so, Stewart was known as a justice who "paid careful attention to briefs and oral argument."¹⁶⁹ Moreover, although Justice Stewart never expressly cited the prosecution's argument that a request for consent carries the implication that a right of refusal exists, he was undoubtedly aware of the Ninth Circuit's ruling in *Bustamonte*. That ruling specifically rejected the California state courts' understanding of consent, which approved the principle

both Justice Douglas and Justice Marshall endorsed this view. See *Bustamonte*, 412 U.S. at 275-76 (Douglas, J., dissenting); *id.* at 288-89 (Marshall, J., dissenting) (agreeing with the Ninth Circuit's statement and further noting that in most cases "consent is ordinarily given as acquiescence in an implicit claim of authority to search").

166. Transcript of Oral Argument at 11, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (No. 71-732); see also *id.* at 12:

QUESTION: As I understand your brief, your argument in part was that the very fact of a request by the officer gave—amounted to an inference, an indication that the request could be denied.

MR. GRANUCCI: Yes, that's right, Mr. Chief Justice. And the Ninth Circuit discounted that by saying that verbal assent is not enough.

167. *Cf. id.* at 51-52:

QUESTION: So you're saying that on the evidence in this record there was a prima facie case for consent?

MR. GRANUCCI: Yes.

...

QUESTION: And as long as the officer asks, and he consents then at least the burden of going forward with the evidence shifts?

MR. GRANUCCI: I think that's right, Your Honor. Although I would say this, that if you had guns or something like that, that's—

QUESTION: Well, obviously.

...

MR. GRANUCCI: . . . Verbal expression of permission to search. Then you look for no implied assertion of authority, and of course no overt coercion.

168. See *id.*

169. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 262 (1994).

that “the mere request for consent carries with it an implication that consent may be withheld and that knowledge of this implication may be inferred from assent.”¹⁷⁰ Perhaps, in the eyes of a majority of the Justices, the state’s submission that requesting consent carries with it the implication that an alternative of refusal existed was so intuitively correct there was no need to reference or address the claim. Whatever the case, looking back, it seems the *Bustamonte* majority agreed with the state’s position that an officer’s request for consent and verbal assent was enough to place, if not the legal burden, a tacit burden on the defendant to offer other evidence proving an invalid consent. In fact, that was the conclusion mandated by *Bustamonte*’s judgment when, rather than remanding the case to the Ninth Circuit so that it could apply the “voluntariness” test newly announced by the Court, Justice Stewart determined that under the facts presented, there was no reason to believe that the response to the police request for consent was “presumptively coerced.”¹⁷¹

The second and perhaps most important factor that influenced the result in *Bustamonte* was the Court’s determination not to create another *Miranda*.¹⁷² The contrast in judicial perspective between *Miranda* and *Bustamonte* is striking. In the aftermath of *Escobedo v. Illinois*,¹⁷³ the Court was poised to issue a major announcement on the constitutionality of police interrogation practices.¹⁷⁴ As *Miranda* demonstrated, a majority of the Court believed that interrogation practices, as then existed, were manipulative and coercive of the suspect, and, thus, threatened core values embodied in the Fifth Amendment’s Self-Incrimination Clause.¹⁷⁵ These concerns produced *Miranda*, which ruled that persons subjected to custodial interrogation by the police must be informed of

170. *Bustamonte*, 448 F. 2d at 700; see also *People v. Bustamonte*, 76 Cal. Rptr. 17, 20 (Ct. App. 1969) (explaining the basic premise of California law on consent: “When permission is sought from a person of ordinary intelligence the very fact that consent is given . . . carries the implication that the alternative of a refusal existed.” (quoting *People v. MacIntosh*, 70 Cal. Rptr. 667, 670 (1968))).

171. *Schneckloth v. Bustamonte*, 412 U.S. 218, 247 (1973) (“There is no reason to believe, under circumstances such as are present here, that the response to a policeman’s question is presumptively coerced . . .”).

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

173. 378 U.S. 478 (1964) (holding that *Escobedo*’s confession, taken during a police interrogation session while he was under arrest and after he had requested and been denied access to his lawyer, violated the Sixth Amendment’s right to counsel and was inadmissible at *Escobedo*’s trial).

174. See LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 87-88 (1983) (describing the “legal quagmire” created by *Escobedo*, and the collection of certiorari petitions that presented *Escobedo* issues). Cf. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME* 55-64 (A.E. Dick Howard ed., 1965) (describing the easy questions arising from *Escobedo*, which “most state courts are mulling,” and the hard questions, which courts “are unlikely to reach”); *Developments in the Law: Confessions*, 79 HARV. L. REV. 935, 1001 (1966) (noting post-*Escobedo* federal appeals court rulings interpreting *Escobedo* as merely “reworking” the voluntariness test for determining the admissibility of confessions, despite the fact that the *Escobedo* Court refused to address the voluntariness issue and the “explicit sixth amendment foundation” of *Escobedo*’s holding).

175. See *Miranda*, 384 U.S. at 445-58.

their right to remain silent and right to have counsel present.¹⁷⁶ Under *Miranda*, custodial interrogation may not occur unless the suspect specifically waives his or her rights to remain silent and the presence of counsel.¹⁷⁷

Seven years later, when the constitutionality of consent searches was addressed, a majority of the Justices held no skepticism toward consent searches. There was no angst or anger about consent searches similar to the feelings that bothered the majority in *Miranda* regarding incommunicado police interrogation. Consent searches were good, not bad.¹⁷⁸ And certainly the *Bustamonte* Court felt no need, let alone urgency, to level the playing-field between officer and suspect as the *Miranda* Court had attempted to do when it mandated its famous warnings. To the contrary, the Court repeatedly emphasized that “the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.”¹⁷⁹ This perspective, when combined with the previous discussed factor that the *Bustamonte* majority believed that the typical police request for consent was not coercive, made it easy to reject extending *Miranda*’s logic to consent searches. In fact, Justice Stewart likened a request for a consent search to a police officer’s questioning of a pedestrian or witness who is knowledgeable about the facts surrounding a crime.¹⁸⁰ This type of non-custodial questioning does not trigger *Miranda* warnings, and Stewart pointed out that *Miranda* itself stated that “[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.”¹⁸¹ Justice Stewart characterized *Miranda*-type warnings in this context as “artificial restrictions” that would jeopardize “the basic validity” of consent searches.¹⁸²

176. *Id.* at 467-72.

177. *Id.* at 475.

178. *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973) (noting the “basic validity” of consent searches and the “continuing validity of consent searches”).

179. *Id.* at 243.

180. *Id.* at 231-32.

181. *Id.* at 232 (quoting *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966)).

182. *Id.* at 229. Justice Stewart’s determination not to create another *Miranda* certainly impacted his thinking on consent searches specifically and the Fourth Amendment generally. Justice Stewart opined that the typical consent search was the equivalent of a judicially authorized search. Thus, he stated “[t]he actual conduct of [a consent] search may be precisely the same as if the police had obtained a warrant.” *Bustamonte*, 412 U.S. at 243. Of course, far from being the equivalent of a judicially authorized search, assent to a consent search gives the police the authority and discretion to perform an open-ended search with virtually no limits. *See* accompanying text *supra* notes 18-20. The irony here is that Stewart has traditionally been considered a strong proponent of the warrant requirement. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (plurality opinion) (“[T]he most basic constitutional rule . . . is 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 *Katz v. United States*, 389 U.S. 347, 357 (1967))); *id.* at 481; H. Richard Uviller, *Reasonability and the Fourth Amendment: A (Belated) Farewell to Justice Potter Stewart*, 25 CRIM. L. BULL. 29, 33 n.14 (1989) (“I suggest only that in the seminal 1960’s, Stewart led the contingent that found in the Fourth Amendment a preference for searches and seizures by warrant.”).

Finally, the *Bustamonte* Court must have believed that its ruling provided sufficient means to identify actual instances of unlawful consent and would not allow police to coerce consent or take advantage of vulnerable persons. Although not stated as such, *Bustamonte*'s "voluntariness" standard was actually a balancing test.¹⁸³ Part of that balancing test permitted consideration of "the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice."¹⁸⁴ Thus, the Court explained that the "voluntariness" test allowed for consideration of the "characteristics of the accused."¹⁸⁵ It also required "the most careful scrutiny" of police conduct.¹⁸⁶ Lastly, the Court emphasized the narrow scope of its holding. Three times Justice Stewart stated that the Court's holding only applied to persons "not in custody."¹⁸⁷

In sum, important premises, some of which were unspoken, provided the foundation for *Bustamonte*. Identifying these viewpoints may help us better understand the origins of *Bustamonte*'s holding. Not surprisingly, a few of the premises that supported *Bustamonte* continue to impact the development of the law of consent searches. But the modern Court's willingness to follow *Bustamonte*'s logic and holding has been uneven and unpredictable. In fact, the modern Justices have abandoned significant aspects of *Bustamonte*.

C. *The Declining Significance of Bustamonte and the Rise of a "Reasonableness" Model for Judging Consent Searches*

Bustamonte's legacy with the modern Court has been interesting to observe. In some cases, both the Burger and Rehnquist Courts have upheld consent searches in scenarios considerably more coercive than the facts in *Bustamonte* and justified these rulings as being dictated by *Bustamonte*. In other cases, it is evident that the Court has discarded *Bustamonte*'s voluntariness test and substituted a standard of review that affords considerable deference to police efforts to obtain a person's consent.

183. Justice Stewart acknowledged that there was no ready definition for the concept of "voluntariness." See *Bustamonte*, 412 U.S. at 224 (quoting Justice Frankfurter's observation that "[t]he notion of 'voluntariness' is itself an amphibian"). Justice Stewart then explained that "'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning of a suspect." *Id.* at 224-25; see also Strauss, *supra* note 4, at 217 ("[T]he Court . . . decided to base its definition of voluntariness on a consideration of the competing policy considerations. That is, the Court held that the meaning of voluntary consent must reflect a balance between the conflicting interests involved in police searches.").

184. *Bustamonte*, 412 U.S. at 225.

185. See *id.* at 226.

186. *Id.* at 229. The Court stated, "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questionings, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches." *Id.*

187. *Id.* at 248; see also *id.* at 240-41 n.29, 247 & n.36.

Some of the post-*Bustamonte* rulings reveal that the modern Court has transformed *Bustamonte* from its self-described narrow, fact-specific holding to a ruling that adopts a presumption of valid consent whenever the police ask for consent and there is assent, even in contexts that differ dramatically from the scenario involved in *Bustamonte*. Consider the results in *United States v. Watson*¹⁸⁸ and *Ohio v. Robinette*.¹⁸⁹ Both of these cases reveal that *Bustamonte*'s "narrow" holding posed no bar against extending that ruling to scenarios involving significantly more police pressure. As noted above, *Bustamonte* emphasized that its holding did not apply to the situation where police sought consent from a person in police custody.¹⁹⁰ The *Bustamonte* Court not only acknowledged "the heightened possibilities for coercion when the 'consent' to search was given by a person in custody,"¹⁹¹ it specifically relied upon the distinction between custodial and non-custodial police questioning for its holding.¹⁹² Despite this significant limitation on the scope of *Bustamonte*'s holding, *Watson* and *Robinette* read *Bustamonte* as if that restriction never existed.

In *United States v. Watson*, the Ninth Circuit ruled that Watson's arrest was unconstitutional because federal law enforcement officers had failed to secure an arrest warrant during a time period when they had probable cause to arrest Watson.¹⁹³ The Ninth Circuit also ruled that Watson's consent to search his car, given to the officer shortly after his arrest but without knowledge of his right to withhold consent, was illegally obtained.¹⁹⁴ The Court, in an opinion written by Justice White, reversed the Ninth Circuit on both issues.¹⁹⁵ Most of Justice White's opinion is devoted to answering the question of whether the Fourth Amendment requires a warrant for a public arrest, even when the police have time to secure a warrant.¹⁹⁶ After answering that question in the negative, White turned to the consent issue, which had not been addressed in any detail by the

188. 423 U.S. 411 (1976).

189. 519 U.S. 33 (1996).

190. See *supra* note 187 and accompanying text.

191. *Bustamonte*, 412 U.S. at 240 n.29.

192. *Id.* at 247.

In this case, there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite. There is no reason to believe, under circumstances such as are present here, that the response to a policeman's question is presumptively coerced; and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person's response.

Id. (footnote omitted)).

193. *United States v. Watson*, 504 F.2d 849, 852 (9th Cir. 1974).

194. *Id.* at 852-53.

195. *United States v. Watson*, 423 U.S. 411, 414-15, 423-25 (1976).

196. See *id.* at 414-24.

court below, nor “thoroughly briefed” by the parties.¹⁹⁷ Namely, what standard should apply to determine the validity of a search that is authorized by the consent of a person in lawful police custody.

Justice White quickly resolved this issue, making it appear as if *Bustamonte* had already decided the question. He observed that there was no evidence of overt or subtle coercion against Watson “proved or claimed.”¹⁹⁸ Nor was custody by itself sufficient to show coerced consent.¹⁹⁹ According to Justice White, the absence of evidence that Watson knew of his right to refuse consent, albeit a factor to consider, was not controlling under *Bustamonte*.²⁰⁰ Finally, Justice White stated that despite being given *Miranda* warnings and told that “the results of the search of his car could be used against him,” Watson still consented.²⁰¹ Put another way, an officer’s request to search and a suspect’s assent indicates that refusal was considered and rejected. This was enough to establish consent as a matter of law. A contrary result, White asserted, would be inconsistent with *Bustamonte*’s voluntariness standard.²⁰²

In *Robinette*, the Court framed the issue as “whether the Fourth Amendment requires that a lawfully seized defendant be advised that he is ‘free to go’ before his consent will be recognized as voluntary.”²⁰³ A unanimous Court concluded that no such advice was necessary to obtain a valid consent.²⁰⁴ As in *Watson*, the *Robinette* Court addressed the consent issue as if *Bustamonte* had already decided the merits. In summary fashion, *Robinette* explained that *Bustamonte* had already rejected adopting any per se rules for determining the validity of a consent search.²⁰⁵ Likewise, *Robinette* noted that just as *Bustamonte* had concluded that it was impractical to have police provide warnings before obtaining consent, “so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent search may be deemed voluntary.”²⁰⁶

Watson and *Robinette* show that the Court is quick to extend, without much analysis, *Bustamonte*’s holding to scenarios involving significant police coercion. The request for consent in *Watson* occurred while the defendant was under

197. *Id.* at 456 (Marshall, J., dissenting).

198. *Id.* at 424 (majority opinion).

199. *Id.* at 424-25. Although Justice White relied on *Bustamonte*, he did not pause to acknowledge that the *Bustamonte* Court considered consent obtained from a person in custody to be a very significant (and apparently troubling) factor, so much so that the Court reserved judgment on the issue. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 240-41 n.29, 247 n.36 (1973).

200. *Watson*, 423 U.S. at 424.

201. *Id.* at 425.

202. *Id.*

203. *Ohio v. Robinette*, 519 U.S. 33, 35 (1996).

204. *Id.* at 35.

205. *Id.* at 39.

206. *Id.* at 39-40.

arrest.²⁰⁷ Both *Miranda* and *Bustamonte* expressly recognized that there is a constitutional difference between custodial and non-custodial police questioning. In *Watson*, Justice White brushes aside this difference by asserting that “the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search.”²⁰⁸ Justice White’s assertion is misleading for two reasons. First, *Watson*’s consent claim was *not* based on the fact of custody alone. The consent in *Watson* was the product of custody *and* police questioning. *Miranda* held that custodial interrogation is presumed to be inherently coercive. If interrogation of a suspect in custody is coercive, “it is not easy to see why it is not likewise [coercive] with respect to the solicitation of consent to search from one in custody.”²⁰⁹ Second, the thrust of *Watson*’s consent claim was not that custody by itself had been, or was then, sufficient to show coercion. Rather, his claim raised the question whether custody is enough to justify applying a different rule than the one announced in *Bustamonte*. The fears raised in *Bustamonte* against requiring the police to provide warnings disappear once the suspect is in custody.²¹⁰ More importantly, custody changes the dynamics of the police-citizen encounter to favor the police, as *Bustamonte* recognized.²¹¹ These differences, however, were neither acknowledged nor addressed by the *Watson* majority.

Robinette raises similar concerns about the Court extending *Bustamonte*’s holding without serious analysis, although the case is closer to *Bustamonte* than *Watson*. *Robinette*, like *Bustamonte*, involved the detention of a motorist for a traffic stop; factually, the cases were similar. What made *Robinette* different from *Bustamonte* was not the facts, but legal doctrine. The Court’s own caselaw, as it developed since *Bustamonte*, recognized that the exchange between officer and citizen during a traffic stop was not an “arm’s length” meeting. Justice Stewart’s opinion in *Bustamonte* analogized a request for a consent search to an

207. *Watson*, 423 U.S. at 413.

208. *Id.* at 424.

209. LAFAVE, *supra* note 15, § 8.2(i), at 113. Of course, the provision of *Miranda* warnings to *Watson* is of no consequence because those warnings did not inform *Watson* of his Fourth Amendment right to withhold consent to search his car. A specific Fourth Amendment warning that a suspect in custody has a right to withhold consent and that refusal will be respected by the police “may serve to fortify the accused against the coercion inherent in the custodial setting.” *Gentile v. United States*, 419 U.S. 979, 981 (1974) (Douglas, J., dissenting).

210. *See Gentile*, 419 U.S. at 981-82 (Douglas, J., dissenting) (citation omitted):

[*Bustamonte*] believed that warning the subject of his right to refuse [consent] would be “impractical” under the “informal and unstructured conditions” of a roadside search. Yet the circumstances under which an arrestee in police custody meets with his captors are hardly “unstructured.” When a suspect is in custody the situation is in control of the police. The pace of events will not somehow deny them an opportunity to give a warning, as the [*Bustamonte*] Court apparently feared would happen in noncustodial settings. Moreover, the custodial setting will permit easy documentation of both the giving of a warning and the arrestee’s response.

211. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 247 (1973) (“In this case, there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place.”).

officer questioning a pedestrian who is not in police custody or otherwise subject to seizure by the police.²¹² After *Bustamonte*, however, the Court ruled that whenever police stop a motorist in transit, a seizure has occurred under the Fourth Amendment. Stopping a vehicle and detaining and questioning its occupants is a seizure, “even though the purpose of the stop is limited and the resulting detention quite brief.”²¹³ Moreover, the Court stated that a traffic stop can involve an “unsettling show of authority” and often generates “substantial anxiety”²¹⁴ even for the innocent motorist. Seven years after *Bustamonte* was decided, even Justice Stewart recognized that “[s]topping or diverting an automobile in transit . . . is materially more intrusive than a question put to a passing pedestrian.”²¹⁵ In another case, the Court recognized that “[c]ertainly few motorists would feel free to either disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.”²¹⁶ Accordingly, the Court ruled that motorists arrested for misdemeanor offenses are in “custody” for purposes of *Miranda* and are entitled to warnings before being questioned by the police.²¹⁷

The Court’s cases decided between *Bustamonte* and *Robinette* also recognized that police officers have substantial discretion when deciding which motorists to stop and how each stop will be resolved.²¹⁸ The typical motorist is aware of this discretionary authority, which, of course, adds to the tension of the ordinary traffic stop. Because an officer might abuse his or her authority either in deciding which motorists to stop or how those stops will be resolved, the Court has imposed constitutional rules for motorist detentions that are not applicable to police-pedestrian encounters. Furthermore, the motorist seized in a traffic stop is not positioned to know the lawful limits of the officer’s authority, nor the extent of his or her own right to leave or terminate the seizure. All of these Fourth Amendment concerns, developed subsequent to *Bustamonte*, prompted the Ohio Supreme Court to rule that before police request consent to search from a motorist who was previously subject to seizure, the police must inform the motorist that they are free to leave.²¹⁹ Notwithstanding this altered legal landscape, the *Robinette* Court saw no difference between the consent issue presented in *Bustamonte* and the issue raised in *Robinette*.

212. *Id.*

213. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

214. *Id.* at 657.

215. *United States v. Mendenhall*, 446 U.S. 544, 556-57 (1980) (plurality opinion).

216. *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984).

217. *Id.* at 429, 434.

218. *See, e.g., Prouse*, 440 U.S. at 659, 661 (noting that “[v]ehicle stops for traffic violations occur countless times each day,” and every motorist is subject to a “multitude of applicable traffic and equipment regulations”—rules which are not applicable to pedestrians—that give police substantial discretion on deciding which motorists to stop).

219. *See State v. Robinette*, 653 N.E.2d 695, 699 (Ohio 1995).

While *Watson* and *Robinette* indicate that the modern Court is still willing to utilize aspects of *Bustamonte* to encourage consent searches, other rulings show that the Court will ignore *Bustamonte*'s voluntariness test and employ an objective, "reasonableness" standard that provides great deference, if not outright encouragement, to consent searches. For example, *Florida v. Jimeno*²²⁰ and *United States v. Drayton*,²²¹ discussed below in Section IV of this article, demonstrate that the Court has eliminated any consideration of a suspect's subjective characteristics when determining whether the police acted lawfully when obtaining consent and when deciding the scope of a suspect's consent.²²² Indeed, *Jimeno* best illustrates the modern Court's abandonment of *Bustamonte*'s "voluntariness" test and its substitution of a "reasonableness" test that considers only objective facts or criteria.²²³

Specifically, *Jimeno* concerned the scope of a person's consent when they give police permission to search the interior of their automobile. Jimeno had been stopped for a traffic violation.²²⁴ The officer told Jimeno that he suspected that drugs were in the vehicle and asked for consent to search the vehicle.²²⁵ Although the officer informed Jimeno that he did not have to provide consent, the officer also informed Jimeno that if he did not provide consent, the officer would seek a warrant to search the car.²²⁶ After Jimeno gave permission to search the vehicle, the officer opened a brown paper bag that was laying on the floorboard and found cocaine inside.²²⁷ The trial court found that Jimeno's "mere consent to search the car did not carry with it specific consent to open the bag and examine its contents."²²⁸ Despite this finding, Chief Justice Rehnquist explained that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"²²⁹ Thus, even when the question concerns what a suspect intended

220. 500 U.S. 248 (1991).

221. 536 U.S. 194 (2002).

222. In two post-*Bustamonte* cases, *Watson* and *United States v. Mendenhall*, 446 U.S. 544 (1980), the Court did discuss the defendant's subjective characteristics in determining whether the consent provided to the police was voluntary. See *United States v. Watson*, 423 U.S. 411, 424-25 (1976); *Mendenhall*, 446 U.S. at 558-59 (plurality opinion).

223. See *Jimeno*, 500 U.S. at 249-51.

224. *Id.* at 249.

225. *Id.*

226. See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064 n.175 (1995) (citing Brief for the United States as Amicus Curiae at 3, *Florida v. Jimeno*, 500 U.S. 248 (1991) (No. 90-622)). Chief Justice Rehnquist's opinion in *Jimeno* never mentions the officer's statement to seek a warrant if Jimeno refused to provide consent. See *Jimeno*, 500 U.S. at 249-50.

227. *Jimeno*, 500 U.S. at 249-50.

228. *Id.* at 250.

229. *Id.* at 251.

when he gave consent to search, the suspect's subjective characteristics or state of mind are constitutionally irrelevant.²³⁰

Watson, *Robinette*, and *Jimeno* demonstrate at least two things about how the Court approaches consent searches. One, despite what Justice Stewart said about the narrow scope of *Bustamonte*'s holding, the modern Court has extended that holding to contexts involving significantly greater degrees of police pressure than involved in *Bustamonte*. Two, the Court continues to adhere to *Bustamonte*'s unstated premise that a police request for consent indicates that the subject has the capacity to refuse. When the latter rule is combined with the fact that the Court no longer considers the subjective characteristics or intent of the defendant when deciding the validity of a challenged consent search, the upshot of the Court's rulings is that unless a person can show some extraordinary circumstance surrounding his or her encounter with the police, consent will invariably be deemed valid, whether the target is subject to police custody or not.

The lower courts have gotten the message and rarely consider subjective traits of the suspect when analyzing consent cases.²³¹ As several legal scholars have acknowledged, "the subjectivity requirement of [*Bustamonte*] is dead."²³²

230. As Professor Stuntz has explained, if a genuine "reasonable person" standard was applied in *Jimeno*,

it is hard to imagine anyone concluding that the search . . . was consensual. A uniformed, armed police officer had just stopped Jimeno's car and told him he was suspected of drug trafficking. Not many people would say "no" to the police under those circumstances. After all, Jimeno was "consenting" to a search that he knew would uncover a kilogram of cocaine. Either he was crazy or, more plausibly, he assumed he had no choice. As the Court's decision suggests, the real standard applied in cases of this sort is not the "reasonable person" test that courts cite but rather a kind of *Jeopardy* rule: if the officer puts his command in the form of a question, consent is deemed voluntary and the evidence comes in.

Stuntz, *supra* note 226, at 1063-64 (footnote omitted).

231. See Strauss, *supra* note 4, at 222-27. Professor Strauss read every published consent search case, federal and state, over a three year period. She "discovered only a handful of cases—out of hundreds of decisions—in which the court analyzed the suspect's particular subjective factors." *Id.* at 222. This research led to the conclusion "that consent searches are upheld except in extreme cases that almost always focus not on subjective factors of the suspect, but on the behavior of the police." *Id.* at 227; see also Brian A. Sutherland, Note, *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 (2006). Sutherland found that the "factors associated with the individual traits and subjective state of mind of the defendant were seldom discussed in the trial court opinions and thus are poor predictors of the outcome of the suppression ruling." *Id.* at 2195. Sutherland's statistical analysis reached the conclusion that, although *Bustamonte* requires a totality of the circumstances approach to judging the voluntariness of consent,

in practice courts will find consent voluntary in the absence of police misconduct. The statistical evidence . . . shows that factors related to police misconduct—such as illegal entries, illegal seizures, and threats—are correlated with courts' final determinations of suppression motions. At the same time, acts that are considered coercive but may be necessary to police work—such as placing the suspect in some form of custody or unholstering firearms—lack meaningful correlation.

Id. at 2225.

232. Simmons, *supra* note 5, at 779; see also DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 32-33 (1999) (describing a law student's paper reviewing all cases involving consent searches decided by the United States Court of Appeals for the District of Columbia Circuit: "In most of the cases, the courts did not even discuss the subjective factors that [*Bustamonte*] said would be

Rather than considering the subjective traits or state of mind of the person providing consent, the Court has openly moved to a “reasonableness” model that determines the validity of a consent search by simply asking whether the search was reasonable. And the “reasonableness” the Court has in mind is the objective conduct of the police. As Justice Scalia put it in *Illinois v. Rodriguez*, a third-party consent case, what the Fourth Amendment assures “is not that no government search of [a person’s] house will occur unless he consents; but that no search will occur that is ‘unreasonable.’”²³³

IV. THE IMPORTANCE OF ASSERTING FOURTH AMENDMENT RIGHTS:
UNITED STATES V. DRAYTON AND JUSTICE KENNEDY’S
CONCEPTION OF A VALID CONSENT SEARCH

The next important case that explains the modern Court’s approach to consent search cases is *United States v. Drayton*.²³⁴ *Drayton* held that police need not advise bus passengers of their right to refuse cooperation when seeking consent to search their possessions and bodies.²³⁵ In many ways, *Drayton*, decided in 2002, was a replay of *Florida v. Bostick*, which over a decade earlier adopted the constitutional rule that bus passengers feel free to terminate a police

relevant in determining voluntariness”; rather than “focusing on the subjective characteristics of the defendant, courts generally focus on the conduct of the police.”); Strauss, *supra* note 4, at 221-22 (“Although the Supreme Court in [*Bustamonte*] suggested that a defendant could try to invalidate the consent to search based on numerous subjective factors relating to the suspect’s mental state or character, it is a rare case in which the court actually analyzes any of these factors. Even more rare is the case where the court finds them determinative and excludes the evidence.”); *The Fourth Amendment and Antidilution*, *supra* note 30, at 2193 (stating that lower courts have rejected “the subjective inquiry into an individual’s knowledge [of the right to refuse consent] and susceptibility to coercion”).

233. *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) (citation omitted); see Williams, *supra* note 5, at 74 (persuasively explaining that the defendant in *Rodriguez* “never ‘voluntarily’ consent to the search [of his home] and never voluntarily authorized his former girlfriend to consent to a search”). In another part of his article, Professor Williams notes that *Florida v. Royer*, 460 U.S. 491 (1983), *United States v. Mendenhall*, and *Drayton*

show quite clearly . . . that the power to withhold consent is governed by objective considerations, particularly the observable conduct of the law-enforcement agents; the particulars of the search target’s mental and emotional states are irrelevant, except in the very limited sense that such particulars might bring a different shade to how the Court reacts to the events leading up to the act of consent.

Id. at 86. Indeed, Professor Williams contends that the Court has always employed a reasonableness test for judging the constitutional validity of consent searches:

What happened in *Bustamonte* and all of the other consent-search cases is what happened in *Rodriguez*: the Court evaluated a civilian-police encounter and inquired into whether the crime-fighting methodology was minimally acceptable. The Court might dress up the analysis with evocative metaphysical notions, but only naïveté or the desire to erect a straw-man critique prevents one from seeing that the Court purports to do nothing more, and nothing less, than assess reasonableness.

Id. at 92-93 (footnote omitted).

234. 536 U.S. 194 (2002).

235. *Id.* at 206-07.

encounter when officers request to see their identification and seek consent to search their luggage.²³⁶ *Bostick* has been a much criticized opinion,²³⁷ but that criticism did not deter the *Drayton* majority from expanding the authority given the police in *Bostick*. The *Bostick* Court had only decided that a bus passenger had not been seized as a per se matter when police asked to see his ticket and identification, and requested consent to search his luggage after informing him of his right to refuse.²³⁸ Unlike *Bostick*, *Drayton* involved both whether the defendants had been seized and whether their consent to search their bags had been voluntarily obtained.

The pertinent facts in *Drayton* were the following: After all the passengers had reboarded a bus during a scheduled stop, the driver left the bus and three police officers boarded the bus.²³⁹ One officer knelt on the driver's seat; a second officer stood at the rear of the bus; and the third officer approached and questioned individual passengers about their travel plans, "sought to match passengers with luggage in the overhead racks," and asked individual passengers for consent to search their luggage for narcotics and illegal weapons.²⁴⁰ This officer did not inform passengers of their right to refuse a consent search.²⁴¹

Writing for the majority in *Drayton*, Justice Kennedy ruled that the defendants, Drayton and Brown, companions on the bus, had not been seized when the officer questioned them about narcotics and illegal weapons while they were seated.²⁴² Kennedy also held that the defendants validly consented to have their bodies searched, including the areas around their upper thighs, even though they were not informed of their right to refuse.²⁴³ Specifically, Drayton's consent occurred after officers discovered narcotics on Brown and arrested him. The third officer then turned to Drayton and said, "Mind if I check you?"²⁴⁴ Without a verbal response, Drayton lifted his hands above his legs, which allowed the officer to pat down his legs and detect narcotics concealed underneath his pants near his upper thigh.²⁴⁵

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

237. See, e.g., Bruce A. Green, "Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term, 70 N.C. L. REV. 373, 396-400 (1992); Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729, 745-53; Tracey Maclin, *Justice Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 800-12 (1992).

238. See *Bostick*, 501 U.S. at 431-32, 437-40.

239. *Drayton*, 536 U.S. at 197.

240. *Id.* at 197-99.

241. *Id.* at 198. As Professor Nadler observed, "the officers had essentially commandeered the bus. From the passengers' perspective, the message was clear that the bus was going nowhere until the officers were satisfied that they had received cooperation." Nadler, *supra* note 14, at 177.

242. *Drayton*, 536 U.S. at 203-06.

243. *Id.* at 206-07.

244. *Id.* at 199.

245. *Id.* As noted in the text, when *Drayton* came to the Court, it involved two separate issues—whether the defendants had been seized and whether their consent was voluntary—which, prior to *Drayton*, required the

In a crucial passage, Justice Kennedy explained the Court's current understanding of consent under the Fourth Amendment:

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.*²⁴⁶

This cryptic passage speaks volumes about the Court's view of consent searches. Without expressly saying so, Justice Kennedy embraced *Bustamonte's* premise that when police request consent to search, the *request itself* carries the implication that an alternative of refusal exists. Put another way, when police ask for consent, citizens understand that they have the right to refuse. And if they do not want to be searched, it is their responsibility to know and assert their rights and tell the police to leave them alone.²⁴⁷

What supports my analysis of this passage? Consider Justice Kennedy's comments and questions during oral argument in *Drayton*: First, Kennedy asked the government's lawyer, Deputy Solicitor General Larry Thompson,

Would it be appropriate in your view for this Court to write an opinion in which we say that citizens have certain obligations to know their rights and to assert their rights? That's what makes for a strong democracy And people have a certain obligation to assert their rights. If they don't want to be searched, they say I don't want to be searched. Should we write that in an opinion?²⁴⁸

When questioning counsel for the defendants, Kennedy asked, "An American citizen has to protect his rights once in a while. That's—that's a very bad

consideration of two separate legal standards. To resolve the seizure issue, the applicable legal test asked whether a reasonable person would have felt free to leave or terminate the encounter with the police. To resolve the consent issue, *Bustamonte's* voluntariness test was the applicable legal test. As Professor Nadler explains,

in *Drayton* the Court implicitly adopted the same "free to refuse/terminate" test for deciding voluntariness of consent to search that has been used since *Bostick* for deciding the seizure question. These two questions—seizure and voluntariness of search—have essentially merged in *Bostick* and *Drayton*. The [*Bustamonte*] Court's emphasis on balancing order and liberty has receded into the background. The test is now stated in much more definite terms: free to refuse or terminate.

Nadler, *supra* note 14, at 162.

246. *Drayton*, 536 U.S. at 207 (emphasis added).

247. Professor Nadler has read this passage in a slightly different manner. She comments that *Drayton* "decided, seemingly as a matter of law, that when a police officer asks a citizen for consent to search, and the citizen responds positively, such consent is voluntary. 'When this exchange takes place, it dispels inferences of coercion.'" Nadler, *supra* note 14, at 179 (quoting *Drayton*, 536 U.S. at 207).

248. Transcript of Oral Argument at 10, *United States v. Drayton*, 536 U.S. 194 (2002) (No. 01-631).

thing?”²⁴⁹ After defense counsel responded that requiring the citizen to assert his rights improperly shifts the burden from the government to prove that the encounter is consensual and that the consent given is voluntary, Kennedy replied:

The question is whether or not the Government also has the burden to educate citizens as to their rights in every encounter, whether or not there isn't some obligation on the part of the citizen to know and to exercise his rights or her rights.²⁵⁰

Finally, after complaining about the fact-specific nature of the defendants' analysis of Fourth Amendment law, Justice Kennedy observed to defense counsel:

It—it seems to me this world you're creating for us is—is not strong for the Constitution. It seems to me a strong world is when officers respect people's rights and—and people know what their rights are and—and assert their rights. [And say to the police,] I don't want to be searched. . . . I don't want to be searched. Leave me alone.²⁵¹

After the oral argument, when it came time to write the opinion in *Drayton*, Justice Kennedy concluded that “[i]t reinforces the rule of law” for the police to ask for consent and “for the citizen to advise the police of his or her wishes.”²⁵² When this exchange occurs, Kennedy held—in what appeared to be a per se rule—there is no coercion and the consent is valid as a matter of law.²⁵³ It is constitutionally irrelevant to Justice Kennedy and the rest of the *Drayton* majority that the police do not advise citizens of their right to say “no” and never tell citizens that if they say “no,” the police will respect that refusal. Furthermore, Kennedy's analysis *assumes* that police will respect a person's refusal to cooperate in these circumstances, move on to another passenger when they encounter resistance to their request, and not continue questioning or otherwise seek to change the person's mind about cooperating with the police. And finally, Justice Kennedy's analysis also *assumes* that the typical bus passenger knows that police will respect and yield to his refusal to cooperate, and that the typical passenger will not think that unless they cooperate with the police negative consequences may come their way.

Of course, Justice Kennedy's conclusions regarding the legal expertise and ability of bus passengers to know and assert their Fourth Amendment rights when confronted by armed police officers in the narrow confines of a bus are not based on any empirical data. One could say, as Professor Nadler comments, that

249. *Id.* at 34.

250. *Id.* at 35.

251. *Id.* at 44.

252. *Drayton*, 536 U.S. at 207.

253. See Nadler, *supra* note 14, at 179.

Kennedy’s conclusions are “only intuitive reflections on [his and the other Justices’] own experience and about the imagined experience of other citizens.”²⁵⁴ Whether this is true or not, I do not know. But I do agree with Professor Nadler’s general observation that the “unstated concern” in *Drayton* is “that the police be permitted to engage in suspicionless seizures and consentless searches so long as they avoid abusive or overly coercive tactics.”²⁵⁵ In the final analysis, “*Drayton* is at bottom based on a judgment about the reasonableness of police conduct under the circumstances,”²⁵⁶ and there is no reference to, let alone consideration of, “the [subjective] characteristics of the accused,”²⁵⁷ as required by *Bustamonte*’s totality test. Instead, Justice Kennedy explained that the consent was voluntary because when the officer requested permission to search the defendants’ persons, “he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse.”²⁵⁸

V. *GEORGIA V. RANDOLPH*: THE GOOD NEWS ABOUT CONSENT SEARCHES?

This article is entitled, “The Good and Bad News About Consent Searches in the Supreme Court.” So far, my analysis has highlighted the *bad* aspects of the Court’s consent search jurisprudence—at least from a civil libertarian’s perspective. (From a police perspective, the above discussion must sound pretty good.) If you have read this far, you may be wondering when I will get to the *good* news. That is where *Georgia v. Randolph* comes in.

254. *Id.* at 165. My understanding of how people, particularly poor and black, react to a police “request” was confirmed by a recent article in the *New York Times*. See Solomon Moore, *Reporting While Black*, N.Y. TIMES, Sept. 30, 2007, § 4. In that article, a black reporter for the *New York Times* describes what happened to him while he is talking at midnight with about a dozen other black men on a street in Salisbury, North Carolina. Three police vehicles appear on the scene. The officers exited their vehicles and the reporter was ordered toward a tall white officer. Without a question from the officer, or provocation from the men, the reporter’s face is shoved down on a police cruiser and the reporter is handcuffed “so tightly that [his] fingertips tingled.” *Id.* The police search the reporter’s wallet, discover his corporation identification card and learn that there are no outstanding warrants for the reporter’s arrest. Eventually, “the handcuffs were unlocked and [the] wallet returned without apology or explanation beyond [the police] implication that [someone] approaching young black men on a public sidewalk was somehow flouting the law.” *Id.* The reporter angrily protested to the police that ““This is America,”” and informed them that he had ““a right to talk to anyone I like, wherever I like.”” *Id.* Needless to say, none of those protests persuaded the police that they had done anything illegal or wrong. After the police left, one of the black men told the reporter: ““Man, you know what would have happened to one of us if we talked to them that way? . . . We’d be in jail right now.”” *Id.* This man’s comment epitomizes my understanding of why many people cooperate with police “requests”—the fear of police reprisal if they don’t. *Cf.* Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1014 (2002) (arguing that a racial minority’s refusal to agree to a consent search “can racially aggravate or intensify [a police] encounter, increasing the person of color’s vulnerability to physical violence, arrest, or both”).

255. *Id.* at 163.

256. *Id.*; see also Simmons, *supra* note 5, at 780 (explaining that *Drayton* “applied a purely objective test”).

257. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

258. *United States v. Drayton*, 536 U.S. 194, 206 (2002) (emphasis added).

Randolph involved a typical fact scenario: Randolph's wife called the police during a domestic dispute with her husband.²⁵⁹ When the police arrived, the wife told them Randolph used cocaine.²⁶⁰ Randolph, a lawyer, denied the accusation but refused to allow the police to search the marital home.²⁶¹ The police then asked and obtained permission from the wife to search the home.²⁶² It goes without saying that drugs were found and Randolph was charged with drug possession. The trial court denied Randolph's motion to exclude the drugs, but the Court of Appeals of Georgia reversed because it found that the search of Randolph's home violated the Fourth Amendment.²⁶³ The Georgia Supreme Court affirmed the appellate court's ruling, concluding that "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."²⁶⁴

Counsel for Randolph faced a difficult task when the Court decided to review his client's case. Every federal appellate court and all but two state courts had ruled against defendants raising similar Fourth Amendment claims.²⁶⁵ The reason why was simple enough. In two previous rulings, the Court held that the Fourth Amendment permits a warrantless search of a home when police obtain the consent of an occupant who shares, or is reasonably believed to share, authority over the premises in common with the target of the search. In the first case, noted earlier, *United States v. Matlock* upheld a search of Matlock's bedroom after the police obtained consent from Matlock's live-in girlfriend while Matlock was conveniently seated in a police cruiser parked at the curb, handcuffed, and under arrest.²⁶⁶ *Matlock* upheld third-party consent searches on two independent grounds. One, the third party could authorize the search "in his [or her] own right."²⁶⁷ The second basis was that the defendant had "assumed the risk" that a joint occupant would allow the search.²⁶⁸

The second ruling that posed problems for Randolph was *Illinois v. Rodriguez*.²⁶⁹ In *Rodriguez*, a woman, Gail Fischer, summoned the police to her

259. *Georgia v. Randolph*, 547 U.S. 103, 107 (2006).

260. *Id.*

261. *Id.*

262. *Id.*

263. *See Randolph v. State*, 590 S.E.2d 834 (Ga. Ct. App. 2003).

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

265. *Randolph*, 547 U.S. at 108-09 n.1. In addition to the Georgia's Supreme Court's holding in *Randolph*, only Wisconsin required all present co-occupants' consent for a valid search. *See State v. Leach*, 782 P.2d 1035, 1040 (Wisc. 1989) (explaining that police may rely upon a third party's consent to search premises; "[h]owever, should the cohabitant be present and able to object [to the police entry], the police must also obtain the cohabitant's consent").

266. *Id.* at 166-67, 169, 179.

267. *Id.* at 171 n.7.

268. *Matlock*, 415 U.S. at 171 n.7.

269. 497 U.S. 177 (1990).

mother's home after she claimed that Rodriguez had assaulted her.²⁷⁰ Fischer led the police to Rodriguez's home and opened the door with a key she possessed.²⁷¹ Rodriguez was unaware of the police entry because he was upstairs asleep.²⁷² Police found narcotics inside the home and arrested Rodriguez. It was later determined that Fischer had not lived in the apartment for several weeks and that she had no legal authority to consent to an entry.²⁷³ That fact did not bother the Court. Writing for a majority of six Justices that included Justice Kennedy, Justice Scalia reversed the state court ruling, which had held that the search violated Rodriguez's Fourth Amendment rights.²⁷⁴

Relying on a "reasonableness" model, Scalia explained that a warrantless search is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe possesses common authority over the premises, but who in fact lacks lawful authority to allow a search.²⁷⁵ According to Scalia, the Fourth Amendment's reasonableness requirement does not demand that the police always be correct in their factual determinations, but rather that they always be reasonable.²⁷⁶ Thus, Justice Scalia remanded the case to the Illinois courts to determine whether the officers reasonably believed that Fischer had the authority to consent to a search of Rodriguez' home.²⁷⁷

When Randolph's case arrived at the Court, the only difference between his case and *Matlock* and *Rodriguez* was that Randolph had denied police consent to enter. But that fact hardly provided a principled basis to distinguish *Matlock* and *Rodriguez*.

As the deputy solicitor general noted during oral argument, it would be very odd to say that Matlock relinquished his rights when he was arrested, taken to a police car, and never asked for consent, or that Rodriguez relinquished his right by falling asleep in his own home.²⁷⁸

270. *Id.* at 179.

271. *Id.* at 179-80.

272. *See id.*

273. *Id.*

274. *Id.* at 180, 189.

275. *Id.* at 186, 188.

276. *Id.* at 186.

277. *Id.* at 189-90.

278. Transcript of Oral Argument at 27-28, *Georgia v. Randolph*, 547 U.S. 103 (2006) (No. 04-1067): JUSTICE O'CONNOR: . . . If the co-inhabitant is not there, he relinquishes whatever right he had to object. But if the co-inhabitant is there, and says no, what's the matter with giving effect to that?

MR. DREEBEN: I think it's very odd to say that, in *Matlock*, the right was relinquished, when Matlock was arrested and taken to a police car and was never asked for consent, or that Rodriguez relinquished his right by falling asleep in his own apartment. . . . [Randolph's argument] would treat her consent as 100 percent valid when he's asleep or absent, no matter how much we know he would object, and it would treat it as zero when he's on the scene and vocalizes an objection. And I think that that would protect Fourth Amendment rights only by happenstance

Id.

Indeed, Justice Souter accurately captured the essence of the government's claim when he told counsel for Randolph that

[i]t is clear that Matlock, had he known what was going on . . . would have objected [to the search]. [Thus], if we accept your argument that the presence of the person there expressing an objection is what makes the difference, then *Matlock* and *Rodriguez* become almost silly cases. They are . . . cases that rest upon an assumption that is clearly contrary to fact.²⁷⁹

When viewed from this perspective, Randolph's claim was based not on a principled notion of privacy but rather, as Chief Justice Roberts would later explain in his dissent, on the good luck or happenstance of a homeowner who just happens to be present and objects to a search when the police arrive.²⁸⁰

Despite the common sense basis of the government's position, Randolph earned the magic number in the Supreme Court—five. In a fact-specific ruling, five justices held that a “warrantless search of a shared dwelling for evidence over the express refusal of consent by a *physically present* resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.”²⁸¹ Chief Justice Roberts and Justices Scalia and Thomas dissented.²⁸² (Justice Alito did not participate in the decision.)

What explains the result in *Randolph*, particularly in light of the Court's earlier rulings in *Matlock* and *Rodriguez*? First, I think, Justice Souter's opinion for the Court in *Randolph* is a determined effort to provide a new mode of thinking about consent searches. In recent years, Justice Souter has occasionally shown a willingness to devise new approaches to Fourth Amendment issues and forgo conventional forms of analysis where he believes that such analysis is mistaken. For example, in a little noticed dissent in *Illinois v. Caballes*, Justice Souter urged the Court to discard its traditional view that a dog-sniff is not a search within the meaning of the Fourth Amendment.²⁸³ Similarly, in his dissent in *Drayton* he remarked there was “an air of unreality about the Court's explanation that bus passengers consent to searches of their luggage to enhance

279. *Id.* at 46-47.

280. *Georgia v. Randolph*, 547 U.S. 103, 137 (2006) (Roberts, C.J., dissenting) (“[T]hat the rule is so random in its application confirms that it bears no real relation to the privacy protected by the Fourth Amendment. What the majority's rule protects is not so much privacy as the good luck of a co-owner who just happens to be present at the door when the police arrive.”).

281. *Id.* at 120 (emphasis added).

282. *Id.* at 127 (Roberts, C.J., dissenting); *Id.* at 142 (Scalia, J., dissenting); *Id.* at 145 (Thomas, J., dissenting).

283. *Illinois v. Caballes*, 543 U.S. 405, 411-14 (2005) (Souter, J., dissenting) (“[T]he government's use of a trained narcotics dog functions as a limited search to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area. And given the fallibility of the dog, the sniff is the first step in a process that may disclose ‘intimate details’ without revealing contraband . . .”).

their own safety and the safety of [other passengers].”²⁸⁴ And he directly challenged the legal fiction that bus passengers would reasonably feel free to ignore or resist police questioning or think that they had nothing to lose if they refused to cooperate with the police.²⁸⁵

In *Randolph*, Justice Souter seems to have concluded that “assumption of risk” theory—which had been the controlling legal model for resolving third-party consent search cases—was an unprincipled norm for resolving the difficult constitutional issues presented in *Randolph*. As mentioned earlier, when risk analysis is applied to the facts in *Randolph*, two pointed issues are left unanswered. First, “why is it (and when is it) that *A*’s ‘own right’ to permit a search must prevail over *B*’s right of privacy in those premises?”²⁸⁶ Second, “to what extent may it truly be said that *B*’s expectation of privacy in a certain place has been destroyed simply because *A* enjoys equal property rights in that place?”²⁸⁷ (Of course, if you resolve these questions in favor of *B*, a third question surfaces: If *A* wants to admit the police, why does *B* have more of a right to keep the police out than *B* has to admit them?)²⁸⁸ For Chief Justice Roberts, these questions were not difficult: According to the Chief Justice, the Court’s precedents made plain that whenever we share space with another person, we assume the risk that the other person might consent to a search of the shared area.²⁸⁹ Justice Souter rejected that answer because it undermined the centuries of special protection for the privacy of the home.²⁹⁰

Rather than rely on “assumption of risk” analysis, Justice Souter looked to what he called “widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules.”²⁹¹ When common societal expectations were considered, Souter concluded there was no norm that recognized that a co-occupant has a right or authority to prevail over the wishes of another occupant who objects to inviting outsiders into their home.²⁹² Because there is “no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another,” the co-tenant’s decision to allow police access “adds nothing” to the

284. *United States v. Drayton*, 536 U.S. 194, 208 (Souter, J., dissenting) (quotations omitted).

285. *Id.* at 212.

286. LAFAVE, *supra* note 15, § 8.3(a), at 149.

287. *Id.*

288. See Transcript of Oral Argument at 36, *Georgia v. Randolph*, 547 U.S. 103 (No. 04-1067).

289. *Randolph*, 547 U.S. at 128 (Roberts, C.J., dissenting) (“If an individual shares information, papers, or places with another, he assumes the risk that the other person will in turn share access to that information or those papers or places with the government. And just as an individual who has shared illegal plans or incriminating documents with another cannot interpose an objection when that other person turns the information over to the government, just because the individual happens to be present at the time, so too someone who shares a place with another cannot interpose an objection when that person decides to grant access to the police, simply because the objecting individual happens to be present.”).

290. *Id.* at 115 & n.4 (majority opinion).

291. *Id.* at 111 (citation omitted).

292. *Id.* at 114.

government's side of the balancing scale for determining the reasonableness of a police search.²⁹³ On the opposite side is the "centuries-old principle of respect for the privacy of the home."²⁹⁴ In the final analysis, Justice Souter concluded that the balancing process tilted in favor of *Randolph* because disputed permission for a police entry is no match against the special protection afforded the privacy of the home.²⁹⁵

Before describing the second, and I believe more interesting, reason for the result in *Randolph*, a few things should be said about the majority's opinion. Although I applaud Justice Souter's determination to find a principled mode of analysis for analyzing third-party consent searches, I doubt that the social expectations concept will be applied in a principled manner or will offer meaningful protection to Fourth Amendment interests in future cases. Fourth Amendment scholars across the political spectrum agree that the expectations of privacy model has not generated principled results when it has been used to determine whether police activity constitutes a search or whether a person has standing to challenge a search.²⁹⁶ And although a majority of the Court has not

293. *Id.* at 114-15.

294. *Id.* at 115 (quotations and citation omitted).

295. *Id.* at 115-16 ("Disputed permission is thus no match for [the special protection for the privacy of the home under] the Fourth Amendment, and the State's other countervailing claims do not add up to outweigh it."). Justice Souter emphasized that the result in *Randolph* had "no bearing on the capacity of the police to protect domestic [violence] victims." *Id.* at 118. Souter then asserted what appeared to be new legal authority for the police to enter a private dwelling:

No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have *good reason* to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected.

Id. (emphasis added). Professor Craig Bradley contends that this statement is a new rule created by the majority concerning the authority of the police to enter a home to protect the safety of another person. According to Bradley:

This is a new rule, but a sensible one. The Court has never addressed the issue of what standard of proof is required to enter a dwelling or other structure to protect an occupant from violence. In general, exigent circumstance entries, to catch a fleeing felon or to protect evidence from destruction, require probable cause. But surely the Court is correct to apply the more lenient *Terry*-type standard of evidence when the police are acting to protect themselves or others, though it announces this new rule in a very off-handed way.

CRAIG BRADLEY, *CRIMINAL PROCEDURE: RECENT CASES ANALYZED* 82-83 (2007) (citations omitted). Whether or not Justice Souter intended to announce a new, expansive authority for the police to enter private homes, he does clearly state that the right of the police to enter a home to protect a domestic violence victim "has nothing to do with the question in this case, whether a search with the consent of one co-tenant is good against another, standing at the door and expressly refusing consent." *Randolph*, 547 U.S. at 119.

296. Legal scholarship criticizing *Katz*'s expectation of privacy test is pervasive. See, e.g., Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 339 (1998) ("[T]he Court's expectation of privacy analysis has many flaws. It has no textual support in the language of the amendment. It accordingly leaves the fluid concept of privacy to the vagaries of shifting Court majorities, which are able to manipulate the concept to either expand or contract the meaning of the word at will." (footnotes omitted)); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment*

deemed the social expectations concept a failure, one case, *Minnesota v. Carter*,²⁹⁷ illustrates that expectations theory often produces confusing law and scant protection for individual privacy.

The central issue in *Carter* was whether social guests have expectations of privacy while staying in their host's apartment.²⁹⁸ A majority of the Justices held that the defendants did not have an expectation of privacy; thus an officer's viewing of the defendants engaging in illegal activity through a drawn window blind did not violate the Fourth Amendment.²⁹⁹ Chief Justice Rehnquist's opinion explained that "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not."³⁰⁰ According to the Chief Justice, the defendants in *Carter* were "obviously somewhere in between" these two poles.³⁰¹ Ultimately, Rehnquist found that the defendants in *Carter* were not entitled to constitutional protection because they were present in the home for only a few hours to conduct a business transaction, they had no previous relationship with the host, and no facts suggested "a degree of acceptance into the household" similar to the situation involving an overnight guest.³⁰²

Theory, 41 UCLA L. REV. 199, 252-53 (1993) (stating that the expectations of privacy analysis "has produced only an amorphous formula that allows the Justices to treat the fourth amendment as an instrument for achieving social goals approved by shifting majorities on the Court"); Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119 (2002) (identifying the two implicit "moves" inherent in the expectations of privacy test); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727, 774 (1993) (tentative empirical research indicates that the Court's "conclusions about the scope of the Fourth Amendment are often not in tune with commonly held attitudes about police investigative techniques"). In a recent article, Professor David Sklansky has observed that "[a]mong scholars *Katz* is widely viewed as something of a failure." David Alan Sklansky, "One Train May Hide Another": *Katz*, *Stonewall*, and the Secret Subtext of *Criminal Procedure*, 41 U.C. DAVIS L. REV (forthcoming 2008) (manuscript at 6, on file with the *McGeorge Law Review*); see also Clancy, *supra*, at 339 n.234 (listing legal scholarship criticizing *Katz*). Professor Sklansky best summarizes the failure of the expectations of privacy concept:

At best, the "reasonable expectation of privacy" test has seemed fraudulent—a flashy, modern-sounding way to dress up results that are really driven by the property-based reasoning set forth in *Olmstead* [*v. United States*, 277 U.S. 438 (1928)] and nominally rejected in *Katz*. At worst, *Katz* traded the relatively firm footholds of the *Olmstead* test for a loosey-goosey, unreliable focus on expectations of privacy that "society is prepared to recognize as 'reasonable.'" Indeed to many observers, on and off the Court, the *Katz* test has come to seem wholly circular: an expectation of privacy is reasonable if the Court is willing to protect it.

Sklansky, *supra*, at 6 (footnotes omitted).

297. 525 U.S. 83 (1998). Speaking for himself and Justice Thomas, Justice Scalia has reached this conclusion. See *id.* at 97 (Scalia, J., concurring) (calling the expectations of privacy rule a "self-indulgent test" that has "no plausible foundation in the text of the Fourth Amendment").

298. See *id.* at 83 (majority opinion).

299. *Id.* at 85, 91.

300. *Id.* at 90.

301. *Id.* at 91.

302. *Id.* at 90-91.

Interestingly, Justice Kennedy, who provided the crucial fifth vote in *Carter*, stated that he joined the plurality's opinion because its reasoning was consistent with his "view that almost all social guests have a legitimate expectation of privacy."³⁰³ Yet there was nothing in the Chief Justice's opinion supporting the claim that "almost all social guests" have a legitimate expectation of privacy while in the home of a third party. Furthermore, Kennedy also asserted that Justice Ginsburg's dissent "must be correct that reasonable expectations of the owner are shared, to some extent, by the guest," which meant, according to Kennedy, that, "as a general rule, social guests will have an expectation of privacy in their host's home."³⁰⁴ Notwithstanding these statements, Kennedy concluded that the defendants in *Carter* were not entitled to constitutional protection.³⁰⁵ Unfortunately, neither Justice Kennedy's concurrence nor any of the other opinions in *Carter* explain what facts a social guest or visitor must prove to show that he is entitled to Fourth Amendment protection when in the home of his host.

If the result and reasoning of *Carter* is an indication of the how the Court will apply social expectations theory to future third-party consent search cases, we should not expect principled results. *Randolph*'s holding will probably be confined to its unique facts, and in future cases the Court will rule that the social expectations that protected *Randolph*'s home will not protect his car or luggage. Already, there is evidence that the *Randolph* majority is uncomfortable with *Randolph*'s alignment with prior cases. The Court admits that it is "drawing a fine line" between the result in *Randolph* and the results in *Matlock* and *Rodriguez* but insists that the "formalism is justified."³⁰⁶ But why is the formalism justified? The fine line drawing and formalism cannot be justified because of "the centuries of special protection for the privacy of the home."³⁰⁷ Weren't the homes of *Matlock* and *Rodriguez* also entitled to "the centuries of special protection for the privacy of the home?" The fine line drawing and formalism cannot be justified to provide clarity for the police. Wasn't there an easily administered rule available for *Matlock* and *Rodriguez*? Justice Souter suggested one during oral argument: "the only consent that will suffice will be the consent of the person against whom you expect to use any evidence found."³⁰⁸ As Souter observed, this too is an "[e]asy clear line."³⁰⁹ Finally, if the

303. *Id.* at 99 (Kennedy, J., concurring).

304. *Id.* at 101-02.

305. Justice Kennedy explained that the defendants had a "fleeting and insubstantial connection" to the host's home because they used the home simply as a convenient processing station, there was no evidence that they had engaged in confidential communications with the host or had been at the home previously, they left before their arrest, and the lower court had found that they could not be characterized as the host's "guests." *Id.* at 102.

306. *Georgia v. Randolph*, 547 U.S. 103, 121 (2006).

307. *See id.* at 115 n.4.

308. Transcript of Oral Argument, at 47-48, *Georgia v. Randolph*, 547 U.S. 103 (2006) (No. 04-1067). Of course, another easily administered rule could have been applied in *Matlock* and *Rodriguez*, namely, because

formalism is justified only because Randolph was present and objected to the search, then Chief Justice Roberts is right to criticize the result in *Randolph* as unprincipled.³¹⁰

In light of these considerations, *Randolph*'s protection will probably extend only to the few individuals lucky enough to be present when the police arrive at their homes and knowledgeable enough to refuse when police seek permission to enter their homes.³¹¹ Of course, police officers will also know how to evade *Randolph*'s protections. In a post-*Randolph* world, an absent suspect's refusal to give consent will not be the final word when the police can obtain the consent of the suspect's co-occupant.³¹² And if necessary, the police can always remove or

the police lacked a search warrant and because there were no exigent circumstances justifying a warrantless entry, the search was illegal because the consent of a third party provides a "wholly inadequate substitute for the protections which inhere in a judicially granted warrant." *United States v. Matlock*, 415 U.S. 164, 187 (1974) (Douglas, J., dissenting).

309. Transcript of Oral Argument at 48, *Georgia v. Randolph*, 547 U.S. 103 (2006) (No. 04-1067).

310. *Randolph*, 547 U.S. at 136-37 (Roberts, C.J., dissenting) ("What the majority's rule protects is not so much privacy as the good luck of a co-owner who just happens to be present at the door when the police arrive. . . . We should not embrace a rule at the outset that its *sponsors* appreciate will result in drawing fine, formalistic lines."). Professor LaFave rightly notes that the dissenters' criticism "loses some of its bite when it is considered that those dissenters were not arguing for a broader rule, but rather for no rule at all beyond that in *Matlock*." LAFAVE, *supra* note 15, § 8.3, at 20 (Supp. 2007).

311. Some academic commentators see *Randolph* as an extremely narrow holding. *See, e.g.*, BRADLEY, *supra* note 295, at 81 (explaining that the *Randolph* majority "went out of its way to stress the narrowness of its opinion" and Justice Breyer repeated those points in his concurrence); David A. Moran, *The End of the Exclusionary Rule. Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 291-93 (noting that *Randolph* is "far too fact-bound and narrow to count as a truly important Fourth Amendment case" and will apply to "only a tiny handful of cases every year"); Andrew Fiske, *Disputed-Consent Searches: An Uncharacteristic Step Toward Reinforcing Defendants' Privacy Rights*, 84 DENV. U. L. REV. 721, 736 (2006) (same). Similarly, some courts see *Randolph*'s holding as narrow. *See, e.g.*, *Donald v. State*, 903 A.2d 315 (Del. 2006). In *Donald*, police arrested the defendant's boyfriend whose probation required that he submit to warrantless searches of his home. *Id.* at 317-18. Police then went to the home shared by defendant and her boyfriend and announced they were conducting an administrative search of the home. *Id.* at 318. The defendant did not object to the search, which revealed illegal narcotics and drug paraphernalia. *Id.* The Delaware Supreme Court upheld the search and explained that *Randolph* supported its ruling. According to the court, under *Randolph*, "police are not required to take affirmative steps to seek consent from a potentially objecting co-tenant, even when present." *Id.* at 321. Here, the defendant "could have prevented the search of her home without a warrant by expressly objecting to it," but "[s]he did not." *Id.*

Notwithstanding cases like *Donald*, Professor Burkoff believes that *Randolph*'s social expectation theory has a greater potential to impact consent search law. *See* Burkoff, *supra* note 5, at 1131-32, 1135-40. According to Professor Burkoff, *Randolph*'s logic extends beyond third-party consent searches and even overrules *Bustamonte*'s conclusion that the community's generalized interest in effective law enforcement outweighs the individual's interest in being informed of his right to refuse a police request for a consent search. *See id.* at 1139. Specifically, Burkoff states that "although the [*Bustamonte*] majority expressly held to the contrary, it would appear [after *Randolph*] 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." *Id.* While I certainly agree with Professor Burkoff's view that common sense dictates that most people need to be informed of their right to refuse a police request for a consent search to be deemed constitutional, for the reasons stated in the text of this article, I doubt that *Randolph*'s social expectations concept will mandate a change in the law of consent searches.

312. *See, e.g.*, *United States v. Reed*, No. 3:06-CR-75 RM, 2006 WL 2252515, at *3 (N.D. Ind. Aug. 3,

arrest a suspect before seeking the co-occupant's consent. To be sure, Justice Souter indicated that efforts to avoid *Randolph*'s holding might invalidate an otherwise proper third-party consent if there is "evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection."³¹³ But even this exception provides marginal security to someone who would object to a police search of his home. The protection granted in this exception "does not cover a case like *Matlock*, where the potential objector was removed from the premises but not 'from the entrance.'"³¹⁴ The nuance in this caveat will escape most police officers, and, perhaps, a few judges. Finally, even if a judge is willing to consider the motives behind a police decision to remove a suspect from the scene (of course, cases like *Whren v. United States*³¹⁵ instruct judges that the subjective motivations of the police are rarely relevant to Fourth Amendment issues), the judge will then be confronted with a series of questions that are likely to be resolved in favor of the police.³¹⁶

The above analysis suggests that the good news that *Randolph* proclaims about third-party consent searches is not likely to last very long. At the same time, there is another feature of *Randolph* that may prove more enduring than the social expectations concept that provides the nominal foundation for the ruling. The second, and more important, explanation for the result in *Randolph* is Justice Kennedy's vote. At first glance, Kennedy's decision to join Justice Souter's

2006) (stating that, although defendant refused to provide consent to search his residence while under arrest at the police station, police went to his home and obtained consent to search the home from his girlfriend who lived with the defendant). The search of the home was valid under *Randolph* because the defendant "wasn't present at the house to deny the police permission to enter." *Id.* at *10. One commentator disagrees with this narrow reading of *Randolph*. See Renee E. Williams, Note, *Third Party Consent Searches After Georgia v. Randolph: Dueling Approaches to the Dueling Roommates*, 87 B.U. L. REV. 937 (2007). Indeed, this commentator, like Professor Burkoff, believes that *Randolph* "signal[s] a potential change in the direction of Fourth Amendment jurisprudence in favor of giving more protection to defendants' privacy rights." *Id.* at 952. In a thoughtful analysis of *Randolph* and the lower court cases decided in its wake, Williams contends:

Matlock, *Rodriguez*, and *Randolph* can all be reconciled under [the social expectations] principle, as it simply can not be objectively reasonable under any societal understanding to enter shared premises based on the consent of one co-occupant when the police officer knows that another co-occupant has expressly refused to give consent. The physical presence of the objecting co-occupant has no substantial bearing on the interests that the social expectations test is meant to protect, and thus the broad view of *Randolph* represents the correct approach to the dueling roommate situation."

Id. at 967-68.

313. *Randolph*, 547 U.S. at 121.

314. LAFAVE, *supra* note 15, § 8.3, at 20 (Supp. 2007) (emphasis added).

315. 517 U.S. 806 (1996).

316. For example, *Randolph* is critical of removing the suspect "for the sake of avoiding a possible objection," *Randolph*, 547 U.S. at 121, which suggests that removing or arresting the suspect for questioning or some other reason like safety, or simply arresting and removing the suspect because the police have probable cause, is permissible and does not invalidate a subsequent consent provided by a third party. Furthermore, even in cases where the defendant proves he was removed "for the sake of avoiding a possible objection," a judge must still decide whether the bad-faith of the police "automatically nullif[ies] the consent of the third party, or must some judgment [be] made about whether the removed defendant would otherwise have objected" to the subsequent search. LAFAVE, *supra* note 15, § 8.3, at 21 (Supp. 2007).

opinion is perplexing. After all, Kennedy joined the *Rodriguez* majority, approving a third-party consent search in a context where the third party *lacked* the legal authority to allow a search. By contrast, in *Randolph*, the wife *clearly* possessed the legal right to authorize a police entry into the marital home. And when the reasonableness model announced in *Rodriguez* is applied to the facts in *Randolph*, it is obvious that the police acted properly (and “reasonably”) when they relied upon the wife’s authority to enter the home. Moreover, and generally speaking, Justice Kennedy has not been a strong advocate for Fourth Amendment rights. Even in cases where Kennedy ends up agreeing with arguments proposed by the defense, as he did in *Minnesota v. Carter*,³¹⁷ Justice Kennedy usually finds a way to vote in favor of the government, as he also did in *Carter*.

In any event, Kennedy’s vote in *Randolph* was extremely important.³¹⁸ Kennedy provided the fifth, and probably decisive, vote by joining the so-called “liberal” justices. Had he voted with the conservative justices, as he normally does, the Court would have split 4-4. Or, had he joined the conservatives, he might have convinced Justice Breyer to go along with him to form a majority voting for the government, as occurred in *Drayton*, where Breyer abandoned the liberals and voted with the conservatives to rule that the defendants had validly consented to the searches in that case.³¹⁹

I suspect that agreement with Justice Souter’s social expectations concept was not the motivating force behind Justice Kennedy’s vote in *Randolph*. The basis for Kennedy’s vote, although unacknowledged, is more clear-cut. Recall Justice Kennedy’s comments during the oral argument in *Drayton*. There, he emphasized that “citizens have certain obligations to *know their rights* and to *assert their rights* That’s what makes for a strong democracy. The law lives in the consciousness of the people. And people have a certain obligation to assert their rights.”³²⁰ And recall Kennedy’s other remark that “It seems to me a strong

317. See *Minnesota v. Carter*, 525 U.S. 83, 99-103 (1998) (Kennedy, J., concurring).

318. In the October Term 2005, the Term in which *Randolph* was decided, Justice Kennedy was in the majority on nine of the twelve 5-4 split decisions. See *Statistics for the Supreme Court’s October Term 2005*, 75 U.S.L.Wk. 3029, 3029 (July 18, 2006). The importance of Justice Kennedy’s vote in 5-4 rulings was more evident in the next Term. See *Statistics for the Supreme Court’s October Term 2006*, 76 U.S.L.Wk. 3052, 3052 (Aug. 7, 2007) (reporting that in the October Term 2006, Justice Kennedy “voted with the majority in all 24 of the Court’s 5-4 decisions”).

319. A close reading of Justice Breyer’s concurrence in *Randolph* and the content of his questions during oral argument suggest that his vote for *Randolph* was, at best, a cautious one, and that he could have been persuaded to join the conservative Justices to vote for the state. See *Randolph*, 547 U.S. at 125 (Breyer, J., concurring) (“If Fourth Amendment law forced us to choose between two bright-line rules, (1) a rule that always found one tenant’s consent sufficient to justify a search without a warrant and (2) a rule that never did, I believe we should choose the first. That is because, as THE CHIEF JUSTICE’S dissent points out, a rule permitting such searches can serve important law enforcement needs (for example, in domestic abuse cases), and the consenting party’s joint tenancy diminishes the objecting party’s reasonable expectation of privacy.”); see also *id.* at 126 (“I stress the totality of the circumstances, however, because, were the circumstances to change significantly, so should the result. The Court’s opinion does not apply where the objector is not present ‘and object[ing].’”).

320. Transcript of Oral Argument at 10, *United States v. Drayton*, 536 U.S. 194 (No. 01-631) (emphasis

world is when *officers respect people's rights* and—and people know what their rights are and—and assert their rights [and say to the police] I don't want to be searched. . . . I don't want to be searched. Leave me alone."³²¹

Well, Randolph not only knew his rights, he expressly asserted his rights by refusing police access to his home. Moreover, the police did not respect his assertion. Instead, they ignored Randolph's refusal and gained access to his home by obtaining consent from his wife. These facts, I believe, were determinative for Justice Kennedy and explain his vote in *Randolph*, notwithstanding his previous decision to join the *Rodriguez* majority. To be sure, Justice Kennedy does not provide any evidence in the form of a concurring opinion to support my thesis, and his questions during oral argument in *Randolph* did not pursue this line of reasoning. Nevertheless, the tone and logic of his questions during the oral arguments in *Drayton* and his opinion in that case, which emphasized that "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."³²² Both suggest that an individual's assertion of his rights is extremely important to Justice Kennedy's conception of the scope of the Fourth Amendment's protection regarding consent searches. Otherwise, Justice Kennedy's vote in *Randolph* is difficult to reconcile with his vote in *Rodriguez*.

VI. *RANDOLPH'S* IMPACT ON FUTURE CONSENT CASES

Section I of this article began by suggesting that *Randolph* might signal an important change in the Court's consent search doctrine. The new approach that *Randolph* may initiate, however, is unlikely to be instigated by Justice Souter's adoption of the social expectations test. Rather, any change in the law of consent searches prompted by *Randolph* is likely to reflect Justice Kennedy's concerns about citizens asserting their Fourth Amendment rights and police respecting those assertions. But before describing how Justice Kennedy's concerns can be applied to future cases, I need to explain why my proposal is so modest notwithstanding all of the troublesome aspects of consent searches described in this article.

First, there are strong arguments supporting banning consent searches completely. Professor Marcy Strauss has taken this position, and I concur with her conclusions that, generally speaking, consent searches are not an effective law enforcement technique and that most consent searches are corrosive of Fourth Amendment rights.³²³ I also agree with the judgment of Professor Christo Lassiter that the notion of motorists voluntarily consenting to searches of their vehicles after being subject to police interrogation during a traffic stop is a legal

added).

321. *Id.* at 44 (emphasis added).

322. *Drayton*, 536 U.S. at 207.

323. *See* Strauss, *supra* note 4, at 258-72.

fiction that ought to be eliminated.³²⁴ Strategically speaking, however, the current Court will never ban consent searches. Thus, although I agree with many of Professor Strauss' and Professor Lassiter's conclusions, their proposals to ban consent searches are not—at this point in time—a strategic solution to the problems associated with consent searches.

Second, requiring warnings and a statement that police will respect and comply with a person's refusal to allow a consent search would help alleviate some of the coercive aspects of consent searches. But, as with an outright ban, the current Court will not interpret the Fourth Amendment to require warnings no matter what empirical evidence reveals about an individual's perceptions and ability to assert his rights during police-citizen encounters. When I refer to empirical evidence, I have in mind the data on consent searches presented in Illya Licentenberg's dissertation.³²⁵ For example, his empirical research revealed that motorists in Ohio consent to searches of their automobiles during traffic stops "for one primary reason: fear of reprisal if they refused."³²⁶ His data also revealed that motorists were "unaware of their legal right to refuse,"³²⁷ believed that "refusals [to allow searches] are futile,"³²⁸ "fear[ed] police reprisal or added inconvenience from a refusal,"³²⁹ and "[a]lmost none of the subjects [surveyed] felt that the officer would honor their decision to refuse."³³⁰ In other words, most motorists believed that "the search [would] be conducted with or without their consent."³³¹

Instead of banning consent searches or calling for *Miranda*-like warnings, both of which would be beneficial, my suggestion is a more modest proposal that is consistent with Justice Kennedy's tacit concerns in *Randolph* and *Drayton*. Under current Fourth Amendment law, if a person is asked by the police to provide consent, but refuses, the voluntariness test of *Bustamonte* does not prevent the police from continuing to seek consent.³³² To be sure, an earlier refusal is a factor that is sometimes considered by the courts,³³³ but it does not

324. See Lassiter, *supra* note 5. I also agree with Professor George Thomas' observations that the Court's consent search doctrine "is an acid that has eaten away the Fourth Amendment," Thomas, *supra* note 8, at 541, and that it is "coherent, if not inevitable, to conclude that searches produced largely by acquiescence to police authority are simply not reasonable searches." *Id.* at 549. Accordingly, Professor Thomas has proposed that "outside the context of public safety requests for consent, the Fourth Amendment should be interpreted so that a search based solely on consent is not a reasonable search. In effect, . . . consent should be ignored as a basis for a search except when it protects the public safety." *Id.* at 557.

325. See Lichtenberg, *supra* note 6.

326. *Id.* at 250.

327. *Id.*

328. *Id.* at 275.

329. *Id.*

330. *Id.*

331. *Id.*

332. See LAFAYE, *supra* note 15, § 8.2(f), at 97 ("It would appear that under the voluntariness test there is no absolute bar upon continuing to seek consent in the face of the prior refusal.")

333. *Id.* § 8.2(f), at 98 ("[I]t would seem that the suspect's earlier refusal to give consent is a factor

trigger a per se rule against continued requests for consent. Similarly, a person's subsequent refusal to sign a consent form does *not* operate to make a *prior* oral consent invalid.³³⁴ More importantly, many courts have upheld consent searches in contexts where a person initially refuses and the police then indicate that he will obtain a warrant to authorize a search or explain that other types of police procedures will ensue—such as arresting or detaining the person because of his refusal.³³⁵ Put differently, existing law on consent searches “does not preclude the police from trying to ‘persuade’ the suspect to consent.”³³⁶ Not only are the police not required to take “no” as the final answer, but current law “does not preclude the police from ‘wearing down’ the suspect to obtain consent.”³³⁷

I propose that whenever a person objects or refuses to provide consent, as Randolph did, that refusal should bar further attempts by the police to seek consent. Furthermore, a refusal to sign a written consent form should also operate retroactively to invalidate an earlier oral consent. If the person says no or refuses to sign a written consent form, then, as a matter of Fourth Amendment law, police should be barred from continuing to seek permission to search or explaining that alternative police procedures will ensue as result of the person's assertion of his rights.³³⁸ In other words, my proposal is similar to the rule that already applies in the police interrogation context under *Miranda* and its

which is properly taken into account as a part of the ‘totality of the circumstances’ in judging the later consent under the [*Bustamonte*] formula.”)

334. *Id.* § 8.2(f), at 99 (“The claim that the subsequent refusal to sign a consent form operates to make the prior oral consent a nullity has been rather summarily rejected by the courts, as has the broader claim that a written consent is essential to establishment of a valid consensual search.” (footnotes omitted)).

335. *See, e.g., State v. Livingston*, 897 A.2d 977, 984 (N.H. 2006) (finding the defendant's consent to search his car voluntary). Defendant's initial refusal to allow the search

was accompanied by a statement indicating that he thought that he had no other options available to him. [The officer] informed the defendant that he could continue to refuse to consent to a search of the vehicle as well as explained the alternative procedures that would ensue should the defendant choose to do so. Therefore, in response to his own inquiry, the defendant was informed that his refusal to consent to a search of his vehicle would result in a canine sniff search of the vehicle's exterior, which, if positive, would lead to [the officer] applying for a warrant to search the vehicle.

Id.; *State v. Watkins*, 610 S.E.2d 746, 751 (N.C. Ct. App. 2005) (concluding that the defendant's girlfriend's consent to search the defendant's shed located near the defendant's home was voluntary). Although the girlfriend initially refused to consent, she gave the police “a key to the shed after they told her they would get a warrant and tear down the door.” *Watkins*, 610 S.E.2d. at 750.

336. Strauss, *supra* note 4, at 250-51.

337. *Id.* at 251.

338. Professor Steven L. Chanenson has previously urged a similar rule, as a matter of police policy, rather than as a constitutional requirement, against police efforts to obtain consent after a person has refused. Steven L. Chanenson, *Get the Facts Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 468 (2004) (arguing that “repeated questioning and pressure presents a troubling problem” and that “police departments should prohibit repeated requests for consent to search after the citizen has refused”). Although Professor Chanenson does not propose the adoption of any per se rules when citizens refuse a consent search, *see id.* (“Consistent with the courts’ treatment of invocations of the right to silence in the custodial interrogation context, the police could ask for consent again, but typically not for several hours.”), he does acknowledge that “in stereotypical traffic stops, saying ‘no’ would mean ‘no’ forever because the motorist will drive away.” *Id.*

progeny. Whenever a suspect asks to speak with a lawyer, under *Edwards v. Arizona*, the police are barred from further questioning until counsel has been provided unless the suspect evinces a desire to discuss the investigation.³³⁹ The per se rule announced in *Edwards* was designed to end police badgering, provide guidance to the police, and, most importantly, help suspects who feel uncomfortable dealing with police interrogation by themselves.

A similar per se rule for persons who refuse to allow a consent search would also discourage police badgering of persons, provide guidance to lower courts and police officers who must apply and comply with *Bustamonte*'s open-ended voluntariness test or the reasonableness rule announced in *Drayton*, and, most importantly, protect the Fourth Amendment rights of persons who are uncomfortable dealing with police-citizen encounters and who believe that police officers will not honor their refusal to allow consent searches. As a practical matter, this proposal is also consistent with the legal theory that appears to be motivating Justice Kennedy's thinking on consent searches, namely that people should know their rights and assert them if they do not want police invading their privacy. Thus, if a motorist refuses to allow a consent search during a traffic stop, that objection should end the matter, just as Randolph's refusal was the determining factor in his case. The police should not be allowed to continue seeking consent, or tell the motorist that a drug-sniffing canine will be brought to the scene, or that his or her car will be impounded, or that the police will seek a search warrant. These tactics are designed to undermine the person's initial assertion of his rights. Put succinctly, knowing and *asserting* your rights should have real and important legal consequences, just as it did in *Randolph*.

VII. CONCLUSION

When *Bustamonte* was decided, Justice Marshall complained that the Court had approved "a game of blindman's buff [sic], in which the police always have the upper hand, for the sake of nothing more than the convenience of the police."³⁴⁰ Justice Marshall's concerns were validated when a police detective explained to researchers how obtaining a person's consent to search simply involved making an offer that could not be refused:

[You] tell the guy, "Let me come in and take a look at your house." And he says, "No, I don't want to." And then you tell him, "Then, I'm going to leave Sam here, and he's going to live with you until we come back

339. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) ("[A]n [arrestee] having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.").

340. *Schneckloth v. Bustamonte*, 412 U.S. 218, 289-90 (1973) (Marshall, J., dissenting).

[with a search warrant]. Now we can do it either way.” And very rarely do the people say, “Go get your search warrant, then.”³⁴¹

This anecdote nicely captures how consent occurs in the real world. It also exposes the fictional quality of the Court’s consent search doctrine. Perhaps *Randolph* signals a change in the law. Undoubtedly, *Randolph* and *Drayton* make plain that if people do not want their homes, persons, or belongings searched, they must stand up against the police and assert their rights. I would take these cases one step further: When a person asserts his or her rights and says “no” to the police, the game should be over and police should not be permitted to bluff or coax consent from a person. That is the essence of Justice Kennedy’s opinion in *Drayton* and that view explains his vote in *Randolph*.

341. VAN DUIZEND, SUTTON & CARTER, *supra* note 16, at 69.