



RUTGERS LAW RECORD

The Internet Journal of Rutgers School of Law | Newark

www.lawrecord.com

Volume 36

Emerging Trends in Criminal Procedure

Fall 2009

THE SHORT, UNHAPPY LIFE OF CONSENT SEARCHES IN NEW JERSEY⁺

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The doctrine of consent searches had a peculiar birth and has had, to my mind, an unhappy life. This is perhaps in part because of the odd way consent functions in the Fourth Amendment context. The Fourth Amendment forbids unreasonable searches and seizures, but consider whether it is even a search when a homeowner welcomes police into his house after they have stated their intention to examine the premises. If it is not a search, then consent is properly analyzed as a waiver of the Fourth Amendment. If it is a search, then the issue is whether it is a reasonable one.

Those two quite different conceptions suggest different analytical structures. In 1967, a student note argued that if a consent search is viewed as merely one species of a reasonable search, it might be valid if the consent was voluntarily given.¹ If viewed as a waiver, on the other hand, it would have to be knowing and intelligent as well as voluntary, thus increasing the government's burden of proof.² The note concluded that even if a consent search is viewed as a species of a reasonable search, the underlying consent "should be no less knowing and intelligent

⁺ With apologies to Ernest Hemingway, author of "The Short Happy Life of Francis Macomber." Hemingway's use of "happy" in the title is ironic.

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¹ Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 147 (1967).

² This waiver standard first appears in *Johnson v. Zerbst*, 304 U.S. 458 (1938), in conjunction with the waiver of the right to counsel. It is the standard the Court established in *Miranda v. Arizona*, 384 U.S. 486 (1966), for the waiver of the Fifth Amendment privilege against compelled self incrimination. See also *Barber v. Page*, 390 U.S. 719 (1968) (waiver of right to confront witnesses); *Adams v. U.S. ex rel McCann* 317 U.S. 269 (1942) (waiver of right to jury trial).

than a waiver of fifth amendment rights.”³

In 1973, the United States Supreme Court in *Schneckloth v. Bustamonte* rejected the waiver theory of consent searches.⁴ Along the way, the Court pretended that it had already resolved the issue of how to understand consent in favor of a voluntariness standard.⁵ Two years later, the New Jersey Supreme Court interpreted the state constitution to require waiver.⁶ In 2002, the state Supreme Court put even greater restrictions on the ability of police to use consent to justify searching cars stopped on the road.⁷ Today, the state court appears to be on the verge of further restricting consent as a sole basis to uphold a police search.⁸ The New Jersey Supreme Court might soon require individualized suspicion in every case where the police seek consent from someone in police custody. This is the story that I will briefly sketch in this essay.

By making consent easy to prove, the United States Supreme Court has allowed consent searches to render the Fourth Amendment’s fundamental protections irrelevant in many cases. One detective said that as many as 98% of his searches are consent searches.⁹ While this is probably hyperbole, I have no doubt that police routinely request consent. It also appears, quite counter-intuitively, that guilty suspects often consent to the very search that will turn up evidence against them.

Why suspects would consent to their own “destruction” might seem a mystery, but two hunches about human nature provide insight. A suspect might think that the act of giving consent will persuade the officer that there is nothing to be found and, thus, he will not bother to search. A law school student once gave me this explanation for his consent to a search that turned up the cocaine that he knew he had in his pocket.¹⁰ Second, the suspect probably believes that he has no choice but to consent, and if he refuses he will only annoy the officer who will search anyway.¹¹ Faced seemingly with no choice and the chance to appear innocent, many suspects “give it up” by consenting.

The origin of the consent search doctrine is obscure, but it appears to have evolved from tort law. As courts today deal with an intricate Fourth Amendment doctrine that is enforced by the exclusionary rule, it is easy to forget that one of the earliest purposes of warrants was to shield government officials from tort suits. An early issue courts faced was whether permission of the homeowner was a defense to a tort suit for wrongful entry.¹² In 1814, the North Carolina Supreme Court expressed the rule this way: “Every entry by one, into the dwelling-house of another,

³ Note, *supra* note 1, at 148.

⁴ *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

⁵ *Id.* at 229.

⁶ *See* *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975).

⁷ *See* *State v. Carty*, 790 A.2d 903, 907 (N.J. 2002).

⁸ *See* *State v. Berkemeier*, 888 A.2d 1283 (N.J. 2006).

⁹ RICHARD VAN DRUIZEN, L. PAUL SUTTON & CHARLOTTE A. CARTER, *THE SEARCH WARRANT PROCESS* 19 (1984).

¹⁰ Conversation in 1997 with a student, whose identity I obviously cannot disclose.

¹¹ In 1983, my law firm represented a college student who reported this rationale for consenting to the search of his trunk when he knew it contained cocaine.

against the will of the occupant, is a trespass, unless warranted by such authority in law as will justify the entry.”¹³ Whether the permission that expressed “the will of the occupant” would also comply with the various state constitutional prohibitions of unreasonable searches and seizures appears not to have even arisen in the nineteenth century; thus illustrating the complete union of tort law and the protection of the privacy of the home.

The earliest clear holding that consent satisfied a prohibition against unreasonable searches was in a 1921 Kentucky case, *Banks v. Commonwealth*.¹⁴ The court relied on the 1910 edition of a treatise, on two tort cases, and on dicta in a criminal case.¹⁵ The treatise relied on one of the same tort cases and dicta in a different criminal case.¹⁶ Phrasing the issue as whether it would be “unlawful or incompetent to search premises with the knowledge and permission of the one lawfully in possession thereof,”¹⁷ the Kentucky Court of Appeals concluded that a search with knowledge and permission of the owner “would be stripped of all trespassing and unlawful features, and consequently void of invalidating qualities.”¹⁸ The court went on to state that “[t]he sacredness of the premises and the security of the possession of the owner, which the forbidding constitutional provisions were designed to protect, would not be violated in that case.”¹⁹ As the quote makes clear, the court combined the tort rule and the constitutional rule.²⁰ It also makes clear that the appropriate standard was knowledge and permission.²¹

The kind of knowing permission that would respect the “sacredness of the premises and the security of the possessions of the owner”²² would be akin to an invitation to enter a home for an agreed-upon purpose and thus would be equivalent to waiver. The earliest Supreme Court case to articulate a theory of the Fourth Amendment was *Boyd v. United States*, decided in 1886.²³ While *Boyd*’s holding sheds no light on the consent search question, the opinion lauded a 1765 English case “as one of the permanent monuments of the British Constitution.”²⁴ The law in that

12 See, e.g., *Smith v. Simpson*, 2 Del. Cas. 285 (Del. 1817).

13 *Gardiner v. Neil*, 4 N.C. 104 (1814).

14 *Banks v. Commonwealth*, 227 S.W. 455 (Ky. App. 1921).

15 See *id.* at 457-58 (citing 35 *CYCLOPEDIA OF LAW AND PROCEDURE* 1265 (1910); *State v. Griswold*, 34 A. 1046 (Conn. 1894) (dicta); *McClurg v. Brenton*, 98 N.W. 881 (Iowa 1904) (tort case); *Grim v. Robinson*, 48 N.W. 388 (Neb. 1891) (tort case)).

16 See *id.* at 458, n.5 (citing 35 *CYCLOPEDIA OF LAW AND PROCEDURE* 1265 (1910); *Commonwealth v. Tucker*, 76 N.E. 127, 131 (Mass. 1905) (dicta); *McClurg v. Brenton*, 98 N.W. 881 (Iowa 1904) (tort case)).

17 *Id.* at 457.

18 *Id.*

19 *Id.* at 457-58.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Boyd v. United States*, 116 U.S. 616 (1886).

24 *Id.* at 626 (citing *Entick v. Carrington and Three Other King’s Messengers*, 19 How. St. Tr. 1029 (1765)).

case “as expounded by” Lord Camden, “has been regarded as settled from that time to this.”²⁵ Camden’s language relevant to the waiver/permission issue follows: “No man can set his foot upon my ground without my *license*, but he is liable to an action though the damage be nothing”²⁶ A license is a formal, legal permission that requires agreement between the parties. It is far more than acquiescence to authority.

The United States Supreme Court first recognized the availability of a consent-type argument in a Fourth Amendment case exactly one month after the 1921 Kentucky case.²⁷ In *Amos v. United States*, the Supreme Court cited no authority, and it is unlikely that the Court was aware of the Kentucky case.²⁸ The Court’s discussion was not about knowing permission but about waiver.²⁹ To be sure, the waiver discussion is only dicta because the Court found that the facts could not support a waiver of constitutional rights.³⁰ Here is the Court’s entire discussion of waiver:

The contention that the constitutional rights of defendant were waived when his wife admitted to his home the government officers, who came, without warrant, demanding admission to make search of it under government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected.³¹

It is useful to pause at this point and ask what history tells us about consent searches. First, early courts used permission, waiver, and consent interchangeably, but they meant something much more robust than mere acquiescence to authority. They meant a freely-given invitation to enter a home that was a conscious decision not to rely on the constitutional protection against unreasonable searches and seizures or the tort law that protected the “sacredness of the premises and the security of the possession of the owner.”³²

Two oddball cases that arose during the Second World War undermined the clarity of the *Amos* waiver structure, thus leaving the doctrine for many years cloudy and uncertain.³³ The

²⁵ *Id.*

²⁶ *Id.* at 627 (quoting *Entick*, 19 How. St. Tr. 1029)(emphasis added).

²⁷ See *Amos v. United States*, 255 U.S. 313 (1921).

²⁸ *Id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ *Id.* at 317.

³² *Banks*, 227 S.W. at 457-58.

³³ See *Davis v. United States*, 328 U.S. 582 (1947) (seizure of government-issued coupons from public business); see also *Zap v. United States*, 328 U.S. 624 (1946) (inspection of government contractor’s accounts pursuant to contract not a violation of Fourth or Fifth Amendment), *vacated*, 330 U.S. 800 (1946).

student note that I quoted earlier made plain that the underlying analytical structure of the consent search doctrine was, as late as 1967, unknown.³⁴ The Supreme Court clarified the doctrine six years later in *Schneckloth* in an opinion by Justice Potter Stewart that might charitably be called opaque.³⁵ It failed to analyze in a meaningful way the cases that it relied on as precedents. It also failed to provide a satisfying rationale for rejecting waiver as the relevant standard for measuring consent.

The facts of the case were unremarkable, mirroring thousands of traffic stops every day. A California police officer, “on routine patrol” at 2:40 A.M., stopped a car containing six men.³⁶ The driver, Bustamonte, and the other man in the front seat were Latino (the Court does not reveal the ethnicity of the three men in the back seat).³⁷ The asserted ground for the stop was that a headlight and license plate light were burned out.³⁸ When the driver could not produce a driver’s license, the officer asked if anyone had identification.³⁹ A man named Alcala produced a driver’s license and claimed that the car belonged to his brother.⁴⁰ With all six men standing outside the car, and two additional police officers now on the scene, the officer who initially made the stop asked “if he could search the car.”⁴¹ Alcala replied, “Sure, go ahead.”⁴² The Court quoted the officer saying that the encounter “was all very congenial at this time.”⁴³ It did not stay congenial very long because the police found evidence under the rear seat implicating Bustamonte in a theft from a car wash.⁴⁴

The Court began its analysis by asserting a questionable legal proposition: “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.”⁴⁵ The Court cited only the two World War II cases, because there were no other Supreme Court cases holding evidence admissible under the consent search exception.⁴⁶ One of these cases was vacated upon petition to reconsider the consent search ruling.⁴⁷ None of the dissents criticized the majority for relying on a

34 Note, *supra*, note 1.

35 See *Schneckloth*, 412 U.S. at 223 n.5.

36 *Id.* at 220.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at 219.

46 See *Schneckloth*, 412 U.S. 218 (citing *Davis*, 328 U.S. 582; *Zap*, 328 U.S. 624).

47 See *Schneckloth*, 412 U.S. 218 (citing *Zap*, 328 U.S. 624, *vacated*, 330 U.S. 800, 802 (1946)), on petition to rehear “limited to the question whether books and records relating to the petitioner’s contract with the Navy

case that was no longer good law. One expects more from the United States Supreme Court. The academy has also failed to distinguish itself on this point.⁴⁸

The second case that the Court relied on as establishing the “well-settled” consent search precedent involved the inspection of “public documents at the place of business where they are required to be kept.”⁴⁹ An inspection of government documents kept in a public place is obviously distinguishable from the search and seizure of items that do not belong to the government and are kept hidden from view. Justice Marshall was correct, if perhaps under-stated, when in dissent he said that the majority opinion “mischaracterizes our prior cases involving consent searches.”⁵⁰

Left without a precedent on point, the majority launched into a lengthy, somewhat confused explanation of why a waiver standard would be inappropriate in consent search cases.⁵¹ In sum, the argument is that waiver had so far been required only for rights that attend the trial or that are an “adjunct to the ascertainment of truth.”⁵² While this is true enough, it does not explain *why* waiver should be so limited. The closest the Court came to an explanation is the following, quite remarkable, passage:

[T]he 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.

Those cases that have dealt with the application of the [waiver] rule make clear that it would be next to impossible to apply to a consent search the standard of ‘an intentional relinquishment or abandonment of a known right or privilege.’⁵³

Department were properly admitted as evidence at his trial.”).

48 *Zap v. United States* was cited in 106 law review articles when I searched Westlaw’s law review data base on September 20, 2008. When I added “same sentence” with “vacated,” it appeared 12 times. In all but two of those articles, the writer cited it as controlling law even though the citation showed that it had been vacated! One writer who noted that it was vacated made the specious claim that *Zap* was “vacated on unrelated grounds.” See Katrina Quicker, *Discrimination Preferred to a Science: The Evolution of the Supreme Court’s War on Drugs*, 30 U. TOLEDO L. REV. 677, 697 n.214 (1999). The only writer who understood the problem of relying on a vacated case is Duncan N. Stevens. He noted that *Zap* was vacated, but also noted that courts had cited it “as controlling law many times.” Duncan N. Stevens, *Off the Mapp: Parole Revocation Hearings and the Fourth Amendment*, 89 J. CRIM. L. & CRIMINOLOGY 1047, 1057 n.76 (1999). Thus, to Stevens, *Zap* “appears to remain good law.” *Id.* This is not the place to have a debate about precedent, but the notion that dicta can create precedent seems wrong to me. To be sure, *Schnecko* is now a solid precedent but not one legitimately based on *Zap*.

49 *Davis*, 328 U.S. at 593 (cited in *Schnecko*, 412 U.S. at 219).

50 See *Schnecko*, 412 U.S. at 280 (Marshall, J., dissenting).

51 *Id.* at 242.

52 *Id.* (quoting *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966)).

53 *Id.* at 243.

Thus, because consent searches help catch criminals, and because fewer consent searches could be justified on a waiver standard, the Court was content to require only that the consent be voluntary. The New Jersey Supreme Court was not so willing to put the right against search and seizure into what amounts to second-class citizenship. Two years after *Schneckloth*, the New Jersey court in *State v. Johnson* applied Article I, paragraph 7 of the State Constitution to the consent search question.⁵⁴ The court conceded that the paragraph 7 language was “taken almost verbatim from the Fourth Amendment”⁵⁵ and that the state prohibition of unreasonable searches and seizures “until now has not been held to impose higher or different standards than those called for by the Fourth Amendment.”⁵⁶ But the court claimed “the right to construe our State constitutional provision in accordance with what we conceive to be its plain meaning.”⁵⁷

The state court explicitly rejected *Schneckloth*'s resolution of the consent search question and held that

the validity of a consent to a search, even in a non-custodial situation, must be measured in terms of waiver; I.e., where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent.⁵⁸

The court did not indicate what kind of evidence would be required to meet that burden, though a separate opinion would have required an “express warning to the individual as to his rights.”⁵⁹ The New Jersey State Police subsequently developed a “Consent to Search” form that authorizes the trooper to conduct a complete search of the vehicle or other premises described on the form. The form, which must be signed by the one in possession of the car, states that the individual has been advised of the right to refuse to give consent as well as the right to withdraw consent at any time.⁶⁰

If an individual read the form, she would know of the right to refuse consent. One can legitimately wonder how many drivers stopped on the side of the road would carefully read a document that an officer asked them to sign. Indeed, even if the driver read the form, and understood it, there are reasons to doubt that he would act on that knowledge. Several studies

54 *State v. Johnson*, 346 A.2d 66 (N.J. 1975).

55 *Id.* at 68 n.2.

56 *Id.*

57 *Id.*

58 *Id.* at 68.

59 *Id.* at 76 (Pashman, J., dissenting).

60 *Carty*, 790 A.2d at 907.

show that the *Miranda* warning of the right to remain silent has had little, if any, effect on the rate at which suspects agree to be questioned by police.⁶¹

Thus, it is perhaps not surprising that a quarter century after the state court required knowing consent in *Johnson*, the same court held in *State v. Carty* that even informed consent was inadequate to protect privacy rights when a car has been stopped on the highway and the state police ask for consent to search.⁶² The court held that any detention on the highway longer than necessary to resolve the basis for the traffic stop was an investigatory stop. The United States Supreme Court, in *Terry v. Ohio*, had held that the Fourth Amendment required reasonable suspicion to believe that a crime has been, or is about to be, committed before an officer can make an investigatory stop.⁶³ Accordingly, *Carty* held that a consent search violates the state's analog to the Fourth Amendment unless the officers had, prior to requesting consent, reasonable suspicion that would satisfy *Terry*.⁶⁴ The court also made clear, without explanation, that it made no difference if the request preceded the end of the traffic stop.⁶⁵

The court offered several reasons why consent, by itself, was ineffective to justify the search. First, no meaningful standards govern which cars will be stopped because it is "virtually impossible to drive and not unwittingly commit some infraction of our motor code."⁶⁶ Second, no standards govern the subsequent decision to request consent.⁶⁷ One does not have to be terribly cynical to assume that police are more likely to request consent from young Latinos or young black men. Finally, "where the individual is at the side of the road and confronted by a uniformed officer seeking to search his or her vehicle, it is not a stretch of the imagination to assume that the individual feels compelled to consent."⁶⁸

The "cumulative effect" of these factors led the court in *Carty* to conclude that "we no longer have confidence that a consent search under *Johnson* can be truly voluntary or otherwise reasonable" when a motorist is stopped.⁶⁹ In effect, the New Jersey court rejected the waiver theory it endorsed in *Johnson* and returned to the general question of what makes a consent search reasonable. Unlike *Schneckloth*, which found the answer in voluntariness, the New Jersey Supreme Court required individualized suspicion when police want to search cars that have been stopped.

This is a bold, innovative step. Whether it is a good idea is another question. Moreover, as

61 See, e.g., Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996); George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959 (2004).

62 *Carty*, 790 A.2d at 905.

63 *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

64 *Carty*, 790 A.2d at 905.

65 *Id.*

66 *Id.* at 908.

67 *Id.*

68 *Id.* at 909.

69 *Id.* at 911.

the New Jersey Supreme Court recognizes, it is difficult to draw the line at traffic stops. In 2006, the court opened the door to a broader application of *Carty*. The court contemplated in *State v. Birkenmeier* whether a search of an arrestee's home for drugs, based on his consent, was unconstitutional because the police lacked sufficient individualized suspicion.⁷⁰ The court began the analysis as follows: "Defendant's last objection, that the search of his home was unlawful because the request for consent to search was not preceded by probable cause, remains. We note at the outset that defendant's premise is incorrect: the existence of probable cause is not a condition precedent to a consent search."⁷¹ The court goes on to say that it is reasonable suspicion that *Carty* required, and if *Carty* were extended to homes, the state constitution would require only reasonable suspicion.⁷²

I initially thought that the defendant had sought to ratchet the standard from reasonable suspicion to probable cause.

After doing some digging, though, I discovered that the defendant does not appear to have made any argument about the consent search being flawed because the police lacked reasonable suspicion. It does not appear in the defendant's brief nor was it raised by anyone at the oral argument. I talked to the defendant's lawyer, Mark F. Casazza, and he confirmed that the argument did not originate with him, and he did not recall it being made at the oral argument.⁷³ I then listened to the oral argument a second time. No one mentioned *Carty*. No one asked about defendant's consent to the search of his home. No one mentioned consent at all. The only reason I can think that the New Jersey Supreme Court would raise the issue on its own motion would be to put the bench and bar on notice that it is prepared to extend *Carty*.

It is a mystery why the court would pretend that the defendant raised the issue. The court could simply have said: "The facts here raise another issue that will need to be resolved at some point." The court could have then said what it did in response to the argument that it put in defendant's mouth: "For purposes of this analysis, we assume, explicitly without deciding, that the requirements of *State v. Carty* apply to a request for consent to search something other than a motor vehicle addressed to a party in custody."⁷⁴ The court could afford not to decide the question because it held that the police had probable cause to suspect that drugs were in the home and thus, the defendant could not prevail even if *Carty* applies to searches of homes.

The message here is loud and clear. Given the right case, the New Jersey Supreme Court is going to extend *Carty* to searches of homes and, probably, to all searches where the consent is obtained from a person in custody. I'm not sure how many consent searches are exempted by the limitation to persons in custody. But, *Carty* itself probably renders most consent searches unconstitutional in New Jersey, unless the police have reasonable suspicion. It seems likely that

⁷⁰ *State v. Birkenmeier*, 888 A.2d 1283, 1290 (N.J. 2006).

⁷¹ *Id.*

⁷² *Id.*

⁷³ Telephone Interview with Mark Casazza, Steven J. Carty's defense attorney, Rudnick, Addonizio & Pappa, PC, Hazlet, N.J. (Sep. 29, 2008).

⁷⁴ *Birkenmeier*, 888 A.2d at 1291 n.3.

traffic stops produce by far the largest number of consent requests.

While *Carty* does not offer a theory of the Fourth Amendment to support its reasonable suspicion requirement, I think one is available. It seems to me that, in addition to the waiver and voluntariness understandings of consent, there is a third way to read the Fourth Amendment that is relevant to consent:

Begin with the text of the Fourth Amendment (the state analog follows very closely):

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁷⁵

While the amendment tells us nothing about what makes searches reasonable, it is obvious that a warrant issued according to the requirements of the second clause would make the search reasonable. One of those requirements is probable cause. The other kinds of searches recognized around the time of the founding also required individualized suspicion. One was the search of a person being arrested, for weapons and evidence of stolen goods. This search naturally required sufficient cause to make an arrest.

Another common colonial search was the hated customs inspections. From roughly the middle of the seventeenth century until the Revolution, writs of assistance had been understood to authorize British customs officers “to enter and inspect all houses without any warrant.”⁷⁶ The Fourth Amendment outlawed that type of search. But even before the Fourth Amendment was ratified, Congress in 1789 put limitations on the power of customs officers to search. They had “full power and authority, to enter any ship or vessel, in which they *shall have reason to suspect* any goods or merchandise subject to duty shall be concealed.”⁷⁷

The text of the Fourth Amendment and the early law thus strongly suggest that individualized suspicion was required to justify searches. If individualized suspicion is the irreducible core of the Fourth Amendment, then consent searches might, as a category, be unconstitutional. I return to the question of whether this is the best way to read the Fourth

⁷⁵ U.S. CONST. AMEND. IV.

⁷⁶ William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 759 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Services). Cuddihy concludes that this understanding violated both local law and British law. *Id.*

⁷⁷ Collection Act of 1789, 1 Stat. 24 (1789) (emphasis added).

Amendment. The current federal consent search doctrine allows police to “fish” for consent and then search without regard to suspicion. It obviously permits racial profiling and all sorts of other standard-less judgments. The current federal doctrine reduces the value of detective work and favors police who are good at selling the snake oil that persuades guilty suspects to allow a search. Allowing standard-less consent searches thus puts at greater risk those among us who fit stereotypes about what criminals look like and those who are unable to resist the pressure to say “yes.” All of these are, I think, policy reasons in favor of an individual suspicion requirement for consent searches.

Doctrinally, I demonstrated earlier that *Schneckloth* is not based on a case on point. Moreover, consent is also a doctrinal outlier when compared to other categories of reasonable warrant-less searches. Searches based on exigent circumstances, searches of vehicles, and searches incident to arrest⁷⁸ all require probable cause. Moreover, warrant-less searches in colonial times required some type of individualized suspicion. Even the Court’s modern creation, *Terry v. Ohio*, requires reasonable suspicion for a brief stop and frisk.

On the other side of the ledger is the loss of evidence if police are required to have reasonable suspicion before they can constitutionally make a search. While no data exist of which I am aware, there is simply no doubt that evidence would be lost in many thousands of cases. And there would be another loss as well. Faced with many cases where the police will seek to justify the consent search based on reasonable suspicion, courts will feel tremendous pressure to lower the already-low standard of reasonable suspicion. So, in the end, we might lose a lot of evidence and make a joke of the reasonable suspicion standard.

But maybe I am being too pessimistic. Perhaps police will work harder in New Jersey to develop reasonable suspicion and perhaps courts will hold the State to a meaningful standard of what constitutes reasonable suspicion. One thing is certain: academics can already compare the rate at which evidence is collected during motor vehicle stops in New Jersey and surrounding states. Then we could make a judgment about the costs and benefits of a right against unreasonable searches and seizures that does not permit a suspicion-less search based on consent from a motorist.

Outside the warrant context, the Framers were content to let tort law deter unreasonable searches and tort damages remedy the ones that occurred. The early cases also suggest that waiver or knowing permission operated to render non-tortious the warrant-less entry into a home. Thus, the consent doctrine that is truest to history might be the first New Jersey departure from the federal rule in *State v. Johnson*, where the state court required proof that the one giving consent knew he had a right to refuse. *Johnson*, which involved a search of a home, was true to what the Framers would have expected if they had realized that someday the tort trespass doctrine would merge with the prohibition of unreasonable searches.

Whether to embrace a theory of the Fourth Amendment that has, as its irreducible core,

⁷⁸ I ignore regulatory inspections because they can be viewed as something other than a Fourth Amendment search. See, e.g., *South Dakota v. Opperman*, 428 U.S. 364, 370 (1976) (permitting inventory of vehicle without individualized suspicion and explicitly questioning whether an inventory is even a search).

reasonable suspicion as a requirement is, for me, a difficult question. But New Jersey has already taken a giant step in *Carty* and now appears ready to include more consent searches within its reasonable suspicion rule.