August 10, 2011

Schneckloth v. Bustamonte: History's Unspoken Fourth Amendment Anomaly

Brian Gallini

Schneckloth v. Bustamonte: *History's Unspoken Fourth Amendment Anomaly*

Brian R. Gallini*

The officer walking the beat has numerous tools at her disposal to effectuate a warrantless search.[1] One of the more popular of those tools is the consent search;[2] although no precise data exist on how often consent searches are conducted, one study reports that consent searches and searches incident to arrest are the two most commonly utilized warrantless searches.[3] In that study, one detective estimated that consent serves as the basis for ninety-eight percent of all searches conducted.[4] Police may also request consent even if they do not need it.[5] At no point must an officer advise the citizen that she can refuse consent.[6]

---

* Associate Professor of Law, University of Arkansas-Fayetteville School of Law. The author first thanks Andrea Duvall for her invaluable research assistance in preparing this Article. Second, the author thanks Professors Rick Greenstein, George Thomas, Laurent Sacharoff, Peter Henning, Scott Dodson, and Christopher Slobogin for their helpful comments on prior drafts. Third, the author thanks Camille Forrest and Adam Bailey for their thoughts on how to explore this topic. Fourth, the author thanks the University of Arkansas-Fayetteville School of Law for a summer research grant that provided support for this project. Last, but far from least, the author thanks his wife to whom he owes a substantial debt for her endless patience in discussing this topic.

[1] *See, e.g.*, California v. Acevedo, 500 U.S. 565 (1991) (warrantless automobile search); Maryland v. Buie, 494 U.S. 325 (1990) (protective sweep during execution of arrest warrant); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent searches); United States v. Robinson, 414 U.S. 218 (1973) (search incident to arrest); Chimel v. California 395 U.S. 752 (1969) (same); Terry v. Ohio, 392 U.S. 1 (1969) (stop and frisk premised on reasonable suspicion); Warden v. Hayden, 387 U.S. 294 (1967) (exigent circumstances).

[2] George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1505 (2005) (asserting that consent search "strategy has proved so successful that it has largely replaced other justifications for searching a suspect such as incident to arrest or in a *Terry* stop and frisk").

[3] JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 317 n.1 (4th ed. 2010) (citing RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 21 (1985)).

[4] *Id.*

[5] *E.g.*, Daniel L. Rotenberg, *An Essay on Consent(Less) Police Searches*, 69 WASH. U. L.Q. 175, 190 (1991) (noting that the California Attorney General's office encourages peace officers to always ask for consent, even when they have other authority).

[6] *Schneckloth*, 412 U.S. at 232-33.

With the foregoing in mind, it would indeed be an understatement to suggest that officers rely heavily on consent searches. Academics generally view the Supreme Court's current consent search doctrine with disdain.[7] Courts and academics alike view consent searches difficult to police given the pervasive discretion that officers have in deciding who to ask for consent to search.[8] And, allegations of racism pervade many state police officers' consent search practices.[9]

If academics, courts, and the public appear uniformly skeptical of current consent search *practices*—not, to be clear, the *concept* of consent searches—a simple question arises: how did we get here?

---

[7] *See, e.g.*, George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 541 (2003) ("Consent is an acid that has eaten away the Fourth Amendment."); Rebecca Strauss, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868, 876 (2002) (arguing that "[c]onsent searches come dangerously close to general warrants by giving the searching police officer undue discretion to determine the scope of the search"); Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1, 6 (2001) (contending that "the Fourth Amendment as presently interpreted does almost nothing to protect motorists on the nation's roadways from the enormous intrusion of the routine traffic stop turned consent search").

[8] *E.g.*, State v. Carty, 790 A.2d 903, 908 (N.J. 2002) (noting that the result of officer discretion is that "a substantial number of drivers who travel the roads of this state are at risk of being pulled over and asked by law enforcement officials for consent to search their vehicles"); David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significant of Data Collection*, 66 LAW & CONTEMP. PROB. 71, 91 (2003) ("[C]onsent searches give us an invaluable measure of how police use discretion that is for all practical purposes legally unbounded.").

[9] Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 674 (2000) (discussing allegations of discrimination against the Maryland State Police); *see, e.g.*, Andrew Barksdale, *Fayetteville Police Chief Defends Searches Before City Council*, FAYOBSERVER.COM, June 7, 2011, http://www.fayobserver.com/articles/2011/06/06/1099629?sac= (expressing concern that police in Fayetteville, Arkansas, are disproportionately asking black drivers for consent to search); Will Guzzardi, *ACLU: Illinois State Police Show Racial Bias in Traffic Stops*, HUFFPOST CHICAGO, June 7, 2011, http://www.huffingtonpost.com/2011/06/07/aclu-illinois-state-polic_n_872586.html ("Years of public data show that a practice called a 'consent search,' where officers ask to search a car despite having insufficient legal evidence for the search, disproportionately targets minority drivers."); *More Footage of Alleged SFPD Misconduct Aired*, FOXRENO.COM, May 27, 2011, http://www.foxreno.com/news/27929588/detail.html (documenting the falsification by officers of consent by an individual where, in fact, no consent existed).

To answer that question, step back to 1969 when Warren Burger replaced Earl Warren as Chief Justice of the Supreme Court.[10] At that time, many believed Burger's "law and order" background foretold overruling the so-called Warren Court trilogy—*Gideon* (requiring that counsel be appointed for indigent defendants), *Mapp* (extending the exclusionary rule to the states), and *Miranda* (requiring officers to provide warnings to suspects subject to custodial interrogation).[11] That, of course, never happened;[12] a significant handful of important commentators and historians therefore view the Burger Court's criminal procedure decisions as, in a word, anticlimactic.[13] That popular view, however, overlooks the Burger Court's crowning—but unspoken—anti-*Miranda* achievement: *Schneckloth v. Bustamonte*.[14] *Schneckloth* remarkably made clear that warning citizens of their constitutional rights had no place outside the context of custodial interrogation—where the vast majority of society spends its life.[15]

Admittedly, the scholarship assessing the merits of *Schneckloth* is pervasive.[16] A casual overview of scholarship considering the

---

[10] BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 313 (1993).

[11] *Id.* at 331.

[12] In retrospect, Justice Marshall expressed confusion about Chief Justice Burger's personality and the fact that *Miranda* was not overruled. JUAN WILLIAMS, THURGOOD MARSHALL: AN AMERICAN REVOLUTIONARY 375 (1998). He said, in recalling the Chief, "I can tell you this . . . [t]here were enough votes here to get rid of the *Miranda* rules. And Burger wouldn't let it go through. He just hung it up." *Id.*

[13] *See, e.g.*, SCHWARTZ, *supra* note 10, at 331 ("It can, indeed, be said that no important Warren Court decision was overruled during the Burger tenure."); Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 68 (V. Blasi ed. 1983) (discussing *two* versions of the Burger Court, only one of which seemed to desire "gutt[ing]" the Warren Court's decisions). And, although *Miranda* was not expressly overruled, a significant handful of Burger Court decisions so drastically limited *Miranda's* applicability and thereby tacitly overruled at least significant portions of the decision. *See* note 160, *infra*, and accompanying citations.

[14] 412 U.S. 218 (1973).

[15] *Id*. at 245 n.33.

[16] *See, e.g.*, Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27 (2008); Morgan Cloud, *Ignorance and Democracy*, 39 TEX. TECH. L. REV. 1143 (2007); Christo Lassiter, *Consent to Search by Ignorant People*, 39 TEX. TECH L. REV. 1171, 1172 (2007); Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Jurisprudence*, 82 IND. L.J. 69 (2007); Note, *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search*

opinion reflects thoughtful arguments about why effective warnings to citizens about their Fourth Amendment rights should precede consent searches.[17] Consider also Professor Ric Simmons's well-reasoned article arguing to eliminate *Schneckloth's* voluntariness test altogether.[18] And, by way of final illustrative example, one commentator has persuasively asserted that the Supreme Court's consent jurisprudence has offered almost no guidance on plain view seizures in the context of limited consent searches.[19] Yet, no article has asked a more fundamental question about the *Schneckloth* opinion: why? In particular, what set of circumstances led the Court to conclude that the Fourth Amendment does not require that citizens be informed of their right to refuse consent? And a related question: why did the opinion's author, Justice Stewart, go so far as to assert that

---

Doctrine, 119 HARV. L. REV. 2187 (2006); 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); John F. Decker et al., *Curbing Aggressive Police Tactics during Routine Traffic Stops in Illinois*, 36 LOY. U. CHI. L.J. 819 (2005); David John Housholder, Note, *Reconciling Consent Searches and Fourth Amendment Jurisprudence: Incorporating Privacy into the Test for Valid Consent Searches*, 58 VAND. L. REV. 1279 (2005); Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399 (2004); Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004); Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN'S L.J. 37 (2004); Marcy Strauss, *Criminal Law: Reconstructing Consent*, 92 J. Crim. L. & CRIMINOLOGY 211 (2002); Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1 (2001); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79 (1998); Adrian J. Barrio, Note, *Rethinking* Schneckloth v. Bustamonte: *Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215; 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 (1993).

[17] *E.g.*, Matthew Phillips, *Effective Warnings Before Consent Searches: Practice, Necessary, and Desirable*, 45 AM. CRIM. L. REV. 1185, 1203-10 (2008) (reviewing empirical evidence that significantly undermines the *Schneckloth* Court's contention that warnings would be "thoroughly impractical").

[18] Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 823 (2005) (arguing that a "reasonableness" inquiry should replace the voluntariness test whereby courts undertake an objective inquiry into the conduct of law enforcement).

[19] Michael J. Friedman, Comment, *Another Stab at* Schneckloth: *The Problem of Limited Consent Searches and Plain View Seizures*, 89 J. CRIM. L. & CRIMINOLOGY 313, 331-32 (1998).

administering a right to refuse consent warning would be "thoroughly impractical"?[20]

This Article argues that *Schneckloth* should be overruled in light of dramatic changes in politics and our factual understanding of consent searches, illustrated by three key examples. First, there is no pressure on the modern Supreme Court similar to that present around the fevered post-*Miranda*—and post Warren Court—time of *Schneckloth*. Second, several states have confirmed that the premise underlying *Schneckloth*—administering Fourth Amendment consent warnings would be "thoroughly impractical"[21]—is simply wrong. Finally, post-*Miranda* impact literature confirms that *Miranda* did little to impact confessions; there is analogously good reason to expect that most people would still give consent to search even if previously told they were not required to do so. Accordingly, the Article contends, the *Schneckloth* opinion—issued by a Court packed with four Nixon appointees—was, in hindsight, a predictable backlash to the Warren Court generally and *Miranda* specifically.

Part I tells the fascinating behind-the-scenes historical story of *Schneckloth* and how a majority of the Court concluded that providing citizens with a right to refuse consent warning would be "thoroughly impractical." To do so, Part I considers the social and judicial climates in and around 1973—alongside the departure of Chief Justice Warren—and reviews the Justices' private papers,[22] the Court's exchange of *Schneckloth*-related memoranda, and the parties' briefs and oral arguments.

Part II then considers whether a right to refuse consent warning remains thoroughly impractical—according to the *Schneckloth* Court's concerns—over three decades later. By properly understanding *Schneckloth* in its broader historical context, Part II reveals its truly anomalous nature and similarly reveals why the

[20] *Schneckloth*, 412 U.S. at 231.

[21] As an interesting historical aside, Justice Powell so liked this language that he underlined it in a draft opinion and made notations of emphasis in the margins. First Draft of Schneckloth v. Bustamonte Majority Opinion (April 13, 1973) (on file with Washington & Lee University School of Law, Lewis Powell Papers, Box 151, File, "Bustamonte Folder 10").

[22] Unfortunately, then-Chief Justice Burger is excluded from those whose private papers were evaluated in authoring this article. *Warren E. Burger Collection*, GREGG SWEM LIBRARY: SPECIAL COLLECTIONS RESEARCH CENTER, http://swem.wm.edu/scrc/Burger.cfm (last visited June 9, 2011) ("In accordance with the donor agreement, the Warren E. Burger Papers will be closed to researchers until 2026.").

Court now—not currently burdened by historical circumstances similar to those present in *Schneckloth*—should reconsider whether the Fourth Amendment requires officers to inform citizens of their right to refuse consent.

I.

The seeds for the Court's decision in *Schneckloth* were planted long before the opinion's actual issuance on May 29, 1973.[23] This part explores those historical seeds and, to do so, begins by seeking to answer an overarching question: how did we get to *Schneckloth*? Given the general understanding that the Supreme Court is not immune from public opinion,[24] Section A focuses on the social posture of our country in and around 1973. It likewise explores the Supreme Court's transition—begun in 1969—away from Earl Warren's time as Chief Justice and into Warren Burger's tenure. With that section in mind, Section B explores the *Schneckloth* opinion, its lower court history, and the parties' arguments before the Supreme Court.

A. *Setting the stage for* Schneckloth.

At varying levels, scholars generally agree that what goes on in society outside the hallowed halls of the Supreme Court influences the individual justices.[25] Whether that phenomenon is properly

---

[23] *Schneckloth*, 412 U.S. at 218 (providing the date of decision in the case caption).

[24] Lee Epstein & Andrew D. Martin, *The Judiciary and the Popular Will: Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 280 (2010) (conducting a study on the influence of public opinion on Supreme Court decision-making and concluding "[a]t the least, our results indicate that an association exists between the public's mood and the Court's decisions"); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14 (2009) ("[T]he modern era is one of symbiotic relationship between popular opinion and judicial review."); Norman Dorsen, *How American Judges Interpret the Bill of Rights*, 11 CONST. COMMENTARY 379, 388 (1994) ("[J]udges . . . do not live in a disembodied vacuum, but exist as part of the hard real world where their decisions will be closely reviewed by every segment of society and ultimately redound to each judge's enhanced or impaired reputation.").

[25] THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 161 (1989) ("Typically, the Court disproportionately uses its grants of certiorari to pick out lower court decisions that disagree with public opinion, and then to reverse many inconsistent lower court decisions."); *see, e.g.*, Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence of Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1033 (2004) ("[P]ublic opinion is a powerful influence on the decisions of the Supreme Court[.]"); Paul M. Collins, Jr., *Friends of the Court: Examining the*

called "legal realism"[26] or, more simply, is illustrative of public opinion's influence on Supreme Court decision-making,[27] the point is hopefully clear: the Supreme Court cares about what is happening in the world.[28] This makes some sense given that, on a

---

Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation, 38 LAW & SOC'Y REV. 807, 813 (2004) ("[I]t has been noted that the justices may be influenced by public opinion to ensure the institutional legitimacy of the Court."); Kelly A. MacGrady & John W. Van Doren, *AALS Constitutional Law Panel on Brown, Another Council of Nicaea?* 35 AKRON L. REV. 371, 387 (2002) (reviewing scholarship concluding "that public opinion more often than not leads the Supreme Court so that judges then 'discover' new rights in the Constitution").

[26] *See, e.g.*, Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 HOW. L.J. 73, 80-81 (2008); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1641 (2003); J. M. Balkin, *Frontiers of Legal Thought II the New First Amendment: Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 388. Professor William E. Nelson helpfully defines legal realism as follows:

> A realist believes that judges must bring something else to the table. But what else? Here I need to draw an overly sharp, analytical distinction. On the one hand, a judge might see herself as an agent of society who is under a duty to make law conform to the wishes of society. If such a judge thinks of society as a train, law will appear as the caboose at the end of the train, and the judge's job will be to keep the caboose on the same track as the train. On the other hand, a judge might see himself as society's commander. Looking upon society as a train, law will emerge as the engine, and the judge as the engineer who must determine the direction that the train ultimately will take.

William E. Nelson, *Childress Lecture:* Brown v. Board of Education *and the Jurisprudence of Legal Realism*, 48 ST. LOUIS L.J. 795, 799 (2004).

[27] *E.g.*, Robert E. Riggs, *The Supreme Court and Same-Sex Marriage: A Prediction*, 20 BYU J. PUB. L. 345, 377 (2006) (suggesting "the Court may conserve its legitimacy by not going too far beyond the area of public acceptance"); Bruce Ledewitz, *Corporate Advertising's Democracy*, 12 B.U. PUB. INT. L.J. 389, 452 n.323 (2003) (noting "[p]ublic opinion probably is a factor in Supreme Court decision-making").

[28] The Court has admitted as much, at least in the context of its Eighth Amendment jurisprudence. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 173 (1976) ("[Eighth Amendment analysis] requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction."); Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); Weems v. United States, 217 U.S. 349, 378 (1910) ("The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." (internal citation omitted)).

more basic level, social science literature confirms we are all to some extent influenced by external factors when making decisions in our own lives.[29] It is therefore seemingly impossible to ignore what was happening—and how *much* was happening—in America around the time of *Schneckloth*.

In particular, the changing nature and volume of police-citizen encounters certainly suggests, in hindsight, that the Supreme Court's creation in *Schneckloth* of a more law enforcement-friendly consent doctrine was no temporal accident.[30] The *Schneckloth* defendant—Robert Clyde Bustamonte—was arrested in 1967,[31] just as domestic involvement in Vietnam increased.[32] As criticism of that involvement also increased,[33] so too did the conflict itself; the conflict peaked with the Viet Cong New Year offensive,[34] and Americans grew increasingly concerned about whether the war could be won following the Tet offensive.[35] Yet, the public was also deeply concerned about poverty issues, civil rights, the threat of nuclear war, and environmental issues.[36] The division in American popular thought was perhaps best illustrated by the 1968 election of Richard Nixon as President, who earned only 43.5 percent of the popular vote.[37]

---

[29] *See, e.g.*, BYRON M. ROTH & JOSH D. MULLEN, DECISION MAKING: ITS LOGIC AND PRACTICE 22 (2002) (discussing how the human need to have a "coherent and consistent view of the world" can impact decision making); ROB RANYARD ET AL., DECISION MAKING: COGNITIVE MODELS AND EXPLANATIONS 75 (1997) (discussing the impact of external events on personal decision making); CAROL H. WEISS & MICHAEL J. BUCUVALAS, SOCIAL SCIENCE RESEARCH AND DECISION MAKING 117 (1980) (discussing the role of location, experience, and background characteristics in decision making).

[30] NAT'L ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968), http://www.eisenhowerfoundation.org/docs/kerner.pdf.

[31] People v. Bustamonte, 76 Cal. Rptr. 17, 18 (Cal. Ct. App. 1969) (noting Bustamonte's full name).

[32] TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE 261 (1987) (discussing the doubling and redoubling of American troops in Vietnam between 1965 and 1967).

[33] *Id.* ("[M]ost antiwar movers and shakers shook off their leftover faith in negotiations and endorsed immediate withdrawal.")

[34] DAVID FARBER, THE SIXTIES: FROM MEMORY TO HISTORY 108 (1994).

[35] *Id.* at 108.

[36] MAURICE ISSERMAN & MICHAEL KAZIN, AMERICA DIVIDED: THE CIVIL WAR OF THE 1960S 288 (2008).

[37] ALLEN J. MATUSOW, THE UNRAVELING OF AMERICA 437 (1987).

Even as the Vietnam War drew to a close along with the decade, societal chaos continued.[38] Dr. Martin Luther King's death in Memphis on April 4, 1968,[39] sparked rioting in the city and required the aid of 4,000 National Guardsmen.[40] Then, 1969 saw the beginnings of militant gay activism,[41] a momentous push by the women's liberation movement that prompted adoption of the Equal Rights Amendment,[42] and issuance of the landmark Supreme Court decision in *Brown v. Board of Education*.[43]

Collectively, the social tensions arising from the Vietnam War and the civil rights movement gave rise to mass demonstrations and protests unlike any the country had ever before seen.[44] By way of illustrative example, nearly 150 American cities experienced civil unrest in the summer of 1967 alone.[45] Law enforcement officials were often uncertain as to appropriate responses and measures of force to use in light of these unprecedented civil disturbances.[46] In short, the police were encountering citizens outside of the custodial context in numbers they had never previously experienced.[47]

The tenuous environment in and around America during the time of Bustamonte's criminal case was arguably heightened by the wake left behind by the Warren Court.[48] Although Earl Warren sat

---

[38] ISSERMAN & KAZIN, *supra* note 36, at 297.

[39] Dr. Martin Luther King, Jr.—Biography, THE KING CENTER, http://www.thekingcenter.org/drmlkingjr/ (last visited July 1, 2011).

[40] Earl Caldwell, *Guard Called Out*, N.Y. TIMES, Apr. 5, 1968, at 1.

[41] ISSERMAN AND KAZIN, *supra* note 36, at 288 (discussing the Stonewall Riots of June 1969, which "sparked the organization of a new activist-oriented homosexual rights movement.")

[42] FARBER, *supra* note 34, at 162.

[43] 347 U.S. 483 (1954).

[44] DAVID STEIGERWALD, THE SIXTIES AND THE END OF MODERN AMERICA 187 (1995).

[45] *Id*. at 187 ("Beginning with the 1965 Watts riot in Los Angeles through July 1968, over one hundred cities experienced riots...189 people were killed, 7, 614 were injured, 59, 257 were arrested, and nearly $160 million in property was damaged.")

[46] NAT'L ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968), http://www.eisenhowerfoundation.org/docs/kerner.pdf.

[47] *Id*.

[48] THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 3-4 (Mark Tushnet, ed., 1993) (referring to the Warren Court as a "cultural phenomenon" and noting that "[m]any observers sense . . . that the Warren Court was quite unusual in United States history").

as Chief Justice on the Court from 1953 until his retirement in 1969,[49] commentators often refer to the "Warren Court" to mean the time spanning from 1961, when Arthur Goldberg replaced Felix Frankfurter on the Court, to 1969, when Warren retired.[50] During that period, the Court issued rulings about an inordinate number of controversial issues like those related, for example, to indigent criminal defense trial[51] and appellate representation,[52] marital privacy,[53] and state voting rights.[54] Those decisions, alongside so many other Warren Court decisions,[55] set off quite the

---

[49] *See* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 8 (4th ed. 2010). Shortly after Warren announced he would step down from serving as Governor of California, Chief Justice Fred Vinson died. SCHWARTZ, *supra* note 10, at 265. President Dwight Eisenhower had previously promised Warren the first open seat on the Court, and Warren considered that promise to include any opening—including the seat of Chief Justice. MICHAL R. BELKNAP, THE SUPREME COURT AND CRIMINAL PROCEDURE: THE WARREN COURT REVOLUTION 1 (2011). At the end of September 1953, with Congress no longer in session, Warren received a recess appointment to the Court. DENIS STEVEN RUTKUS & LORRAINE H. TONG, THE CHIEF JUSTICE OF THE UNITED STATES 24 (2007). The Senate ultimately confirmed him on March 1, 1954. *See* SCHWARTZ, *supra* note 10, at 265.

[50] Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 2 (1995); THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 7 (Mark Tushnet, ed., 1993). Still others regard the Warren Court in terms of its revolution in criminal procedure—beginning in 1961 its decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), to 1966 or 1967, Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 12 (1988); Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 519 n.4. The Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding unconstitutional state laws that established separate public schools for black and white students), is not generally considered part of the "Warren Court." THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 3 (Mark Tushnet, ed., 1993).

[51] Gideon v. Wainwright, 372 U.S. 335 (1963) (interpreting the Sixth Amendment to require that states provide counsel to indigent criminal defendants).

[52] Douglas v. California, 372 U.S. 353 (1963) (broadening the availability of appellate counsel to indigent defendants).

[53] Griswold v. Connecticut, 81 U.S. 479 (1965) (holding that a state ban on the use of contraceptives violated the right to marital privacy).

[54] Reynolds v. Sims, 377 U.S. 533 (1964) (requiring that legislative districts across states be equal in population).

[55] *See also, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (establishing actual malice as the libel/defamation standard for press reports about public officials); Brady v. Maryland, 373 U.S. 83 (1963) (requiring the prosecution to disclose "material" evidence to the defense); Mapp v. Ohio, 367 U.S. 643 (1961) (applying the Fourth Amendment's exclusionary rule to the states through the Fourteenth Amendment).

countrywide public outcry.[56] "Impeach Earl Warren" signs littered the countryside,[57] and the Court endured criticism from, among other prominent critics, the American Bar Association, the National Association of Attorneys General, and Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit.[58] Even Congress joined the fray by refusing to authorize a pay increase for the Justices,[59] and seeking to limit the Court's jurisdiction.[60]

Thus, although Bustamonte's story spanned six years—from 1967-1973—the outcome in *Schneckloth* (alongside the nature of the Court's questions during oral argument)[61] undoubtedly seems informed by the social impact of the Warren Court's decisions prior to 1967.[62] Chief Justice Warren initially announced his retirement on June 13, 1968 and, to replace him, President Lyndon

---

[56] Alden Whitman, *For 16 Years, Warren Saw the Constitution as Protector of Rights and Equality*, N.Y. TIMES, July 10, 1974, at 24 (recalling signs calling for Warren's impeachment and noting President Eisenhower's reflective comment that appointing Warren was "the biggest damned-fool mistake I ever made"); Paul Crowell, *Pickets Jeer Warren Here and Hurl Placards at Him*, N.Y. TIMES, Oct. 30, 1963, at 1 (noting the demonstration "had been intended to emphasize displeasure with the Supreme Court's activities since Justice Warren was appointed 10 years ago").

[57] *Compare* Robert Barnes, *In Emotionally Charged Times, Calls Arise for Impeachment of a Justice or Two*, THE WASHINGTON POST, Nov. 1, 2010, at A19 (recalling the "'Impeach Earl Warren' billboards that sprouted across the South after the court's desegregation rulings"), *with 'Impeach Earl Warren' Sign Posted on Highway Upstate*, N.Y. TIMES, Nov. 28, 1963, at 36 (documenting appearance of "Impeach Earl Warren" signs in New York).

[58] LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 27 (1983). Warren was stung by the American Bar Association's criticism; he resigned from the organization. *Id*.

[59] Russell Baker, *Observer: The Precious Impeachable Court*, N.Y. TIMES, Mar. 21, 1965, at E10.

[60] William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFFALO L. REV. 483, 484 (2002).

[61] *See* Part I(B), *infra*, and accompanying discussion (discussing, in particular, the Court's questioning during the *Schneckloth* oral argument which, in part, focused on whether *Miranda*-style warnings should be required in consent-search scenarios).

[62] *See* SCHWARTZ, *supra* note 10, at 285 ("[The Warren Court's] impact on a whole society's way of life can be compared only with that caused by the political revolution or military conflict."). Of Chief Justice Warren specifically, Justice Marshall would later comment: "When history is written, he'll go down as one of the greatest Chief Justices the country has ever been blessed with. I think he is irreplaceable." *Warren Rites Slated Tomorrow*, N.Y. TIMES, July 11, 1974, at 34.

B. Johnson nominated sitting Associate Justice Abe Fortas.[63] Yet, because of questionable off-bench conduct—most notably, his acceptance of a $20,000 fee from a friend under investigation by federal authorities for violating securities laws—a Senate filibuster blocked his confirmation.[64] Warren therefore remained as Chief for one additional year because Johnson's term as President was set to expire before another nominee could be considered.[65] When Chief Justice Burger was finally sworn in to fill Warren's position on June 23, 1969,[66] he was anxious to distance his tenure from Warren's legacy.[67] Of particular note was Chief Justice Burger's criticism of the Warren Court's most famous decision—*Miranda v. Arizona*.[68]

Yet, the seeds for *Miranda* were planted by the Warren Court's decision in *Escobedo v. Illinois* two years earlier[69]—a decision Justice Burger likewise disliked.[70] The year was 1964 and law

---

[63] Linda Greenhouse, *Warren E. Burger is Dead at 87; Was Chief Justice for 17 Years*, N.Y. TIMES, June 26, 1995, at A1.

[64] *Id*.

[65] *Id.*

[66] *Id*.

[67] Robert B. Semple, Jr., *Warren E. Burger Named Chief Justice by Nixon; Now on Appeals Bench*, N.Y. TIMES, May 22, 1969, at 1 (noting Burger's thematic criticism of the Warren Court, including his comments that the Supreme Court has ignored "'the moral basis of the criminal law'"); *see* Sidney Zion, *A Decade of Constitutional Revision*, N.Y. TIMES, Nov. 11, 1979, at SM1 ("The criminal-justice revolution forged by the Warren Court has been virtually dismantled through a series of decisions [by the Burger Court] that have sharply limited the rights of suspects[.]"). Despite his anxiousness, history has generally concluded that Burger's goal to supplant many of the Warren Court's rulings went unfulfilled. Linda Greenhouse, *Warren E. Burger is Dead at 87; Was Chief Justice for 17 Years*, N.Y. TIMES, June 26, 1995, at A1 ("While there were some substantial changes of emphasis, the Burger Court—a label liberals tended to apply like an epithet—overruled no major decisions from the Warren era."); Stephen Gillers, *Burger's Warren Court*, N.Y. TIMES, Sept. 25, 1983, at E19 ("Predictions of the death of the death of the Warren Court have been considerably overstated.").

[68] *E.g.,* EARL M. MALTZ, THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969-1986 9 (2000) ("Burger's opinions and speeches criticizing the *Mallory* and *Miranda* rules on confessions . . . earned him the respect of more conservative members of Congress and often found their way into the *Congressional Record*."); Fred P. Graham, *Chief Justice Burger*, N.Y. TIMES, May 25, 1969, at E2 (noting that *Miranda* is "[o]ne Supreme Court decision of which Judge Warren Burger has been particularly critical").

[69] 378 U.S. 478 (1964).

[70] Julius Duscha, *Chief Justice Burger asks: 'If it Doesn't Make Good Sense, How Can it Make Good Law'*, N.Y. TIMES, Oct. 5, 1969, at SM30 (noting that Burger has his "deepest disagreement" with *Miranda* and *Escobedo*).

enforcement agencies nationwide were debating what limits existed—other than a prohibition against officers' use of the third degree[71]—when interrogating a suspect.[72] For years prior, the Supreme Court dictated that a due process "voluntariness" standard governed the interrogation room; indeed, as early as 1884, the Supreme Court declared, "[a] confession, if freely and voluntarily made, is evidence of the most satisfactory character."[73] The voluntariness standard, however, allowed for considerable interpretive differences;[74] the Supreme Court's desire to identify a more precise method of evaluating interrogation methods therefore persisted.[75] But, given the Court's focus on eradicating more violent methods of extracting a confession, police were minimally entitled to think that the non-violent behavior of law enforcement in *Escobedo* was constitutionally permissible.

Welcome in Danny Escobedo, a twenty-two-year-old of Mexican descent working as a laborer in Chicago.[76] Escobedo's brother-in-

---

[71] "The 'third degree' is an overarching term that refers to a variety of coercive interrogation strategies, ranging from psychological duress such as prolonged confinement to extreme physical violence and torture." Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, *in* 20 INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37, 42 (G. Daniel Lassiter ed., 2004). Although the "third degree" method of interrogation was popular in the early part of the twentieth century, *see* NAT'L COMM. ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931), the Supreme Court would soon make clear that the techniques employed by interrogators utilizing the "third degree" were unconstitutional, *e.g.*, *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944); *Chambers v. Florida*, 309 U.S. 227, 238-42 (1940).

[72] FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 165 (1962) (noting that interrogation procedures were changing and cautioning that the Supreme Court "may eventually require the warning as an element of due process in state cases").

[73] Hopt v. Utah, 110 U.S. 574, 584 (1884); *accord* Bram v. United States, 168 U.S. 532, 542-43 (1897).

[74] *Compare* Spano v. New York, 360 U.S. 315, 323-24 (1959) (concluding that a confessing defendant's will was overborne by police tactics that, *inter alia*, exploited defendant's poor education and emotional nature, relied on multiple lengthy interrogations, denied counsel, and relied on a trickery from a false friend), *with* Lisenba v. California, 314 U.S. 219, 292 (1941) (concluding that an uneducated defendant's confession was voluntary despite police interrogation that involved physical contact, sleep deprivation, prolonged interrogation sessions, and denial of counsel).

[75] Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 754 (1987) (asserting that "the Court became disaffected from its own work product" in the context of the voluntariness standard).

[76] BAKER, *supra* note 58, at 28.

law was killed on January 19, 1960, and the police immediately suspected Escobedo's involvement.[77] Specifically, police suspected that Escobedo hired another individual, Benedict DiGerlando, to murder his brother-in-law because he frequently beat his wife—Escobedo's sister.[78] The police arrested Escobedo at 2:30 a.m. the next morning at his sister's home and he was thereafter transported to the police station, where he was questioned for between fourteen to fifteen hours.[79] Remarkably, he made no statement and was released because insufficient evidence existed to hold him.[80]

Ten days later, sometime between 7:30 and 8:00 p.m. on January 30, DiGerlando told police while in custody that Escobedo was the shooter.[81] Based on DiGerlando's statement, police arrested Escobedo and his sister between 8:00 and 9:00 p.m.[82] While on the way to the station, officers told Escobedo that he was identified as the shooter;[83] "[w]e have you sewed up pretty tight," an officer told him, but Escobedo did not take the bait.[84] Instead, Escobedo said, first, he would like to have advice from his lawyer and,[85] second, that he wanted to hear DiGerlando accuse him directly.[86] Officers therefore arranged a stationhouse confrontation between Escobedo and DiGerlando at around 10:00 p.m., during which the latter accused Escobedo of having done the shooting.[87] Escobedo responded by saying "I didn't shoot Manual, you did it."[88]

Meanwhile, outside the interrogation room, Escobedo's lawyer arrived at the police station at around 10:30 p.m. and sought permission from several officers to see Escobedo.[89] His repeated

---

[77] People v. Escobedo, 190 N.E.2d 825, 826 (Ill. 1963), *rev'd sub nom*. Escobedo v. Illinois, 378 U.S. 478 (1964).

[78] *Id*.

[79] BAKER, *supra* note 58, at 28.

[80] *Id*.; *Escobedo*, 190 N.E.2d at 826.

[81] *Escobedo*, 190 N.E.2d at 826.

[82] *Id*.

[83] *Id*.

[84] BAKER, *supra* note 58, at 29.

[85] *Id*. (noting that Escobedo asked for his lawyer again upon arriving at the station).

[86] *Escobedo*, 190 N.E.2d at 826.

[87] *Id*.

[88] BAKER, *supra* note 58, at 29.

[89] *Escobedo*, 190 N.E.2d at 826.

requests were denied.[90] At one point during the night, Escobedo and his lawyer saw one another through an open door and waved; police thereafter promptly shut the door.[91] Escobedo's lawyer ultimately left the station at 1:00 a.m. without having spoken with Escobedo.[92] After his lawyer departed, Escobedo went on to make additional incriminating statements.[93]

Prior to Escobedo's subsequent trial, he unsuccessfully sought to suppress his confession.[94] Although he conceded that no officer beat or threatened him,[95] he did contend that he incriminated himself for two reasons. First, he testified, "I seen that my sister was being put at the head of this crime and I knew she had not done it and I wanted to help my sister and that is the reason why I made the statement."[96] Second, he contended that a Spanish-speaking officer claimed to be a friend of his brother and, outside the hearing of any other officer, promised that Escobedo would not be prosecuted if he agreed to be a witness against DiGerlando.[97] A jury found Escobedo guilty and he was sentenced to twenty years imprisonment.[98]

On May 27, 1963, the Illinois Supreme Court affirmed the trial court's denial of his motion to suppress the confession, despite Escobedo's contention that it should be inadmissible because he had previously requested counsel.[99] Months later, on July 1, 1963, Escobedo filed a petition for writ of certiorari to the Supreme Court; the Court agreed to hear Escobedo's case on November 12, 1963, and set oral argument for April 29, 1964.[100]

---

[90] *Id*.

[91] BAKER, *supra* note 58, at 29.

[92] *Escobedo*, 190 N.E.2d at 826.

[93] BAKER, *supra* note 58, at 30.

[94] *Escobedo*, 190 N.E.2d at 827.

[95] *Id*. at 826.

[96] *Id*.

[97] *Id*. at 826-27.

[98] *Id*. at 826.

[99] *Id*. at 827-31.

[100] *Escobedo*, 378 U.S. at 478 (noting the date of oral argument). Interestingly, Escobedo filed his petition to the Supreme Court eleven days after Ernest Miranda's trial in Arizona. BAKER, *supra* note 58, at 31.

The Supreme Court decided *Escobedo v. Illinois* on June 22, 1964.[101] Writing for a five-member majority, Justice Goldberg reversed the Illinois Supreme Court's decision.[102] A lengthy and awkward *Sixth Amendment* holding—complete with a lengthy list of prerequisite conditions—supported the Court's reversal:[103]

> [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[[104]]

The rationale underlying the Court's run-on single sentence holding was equally notable. In stirring language, Justice Goldberg reasoned, "[w]e have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[105]

The Court's decision in *Escobedo* served notice: things were going to change inside the interrogation room. The law enforcement community, however, was not anxious to embrace change.[106] New York's police commissioner accused the

---

[101] *Escobedo*, 378 U.S. at 478 (noting the date of decision).

[102] *Id.* at 492.

[103] The *Escobedo* holding's Sixth Amendment foundation was relatively short-lived; the Court re-characterized *Escobedo* as a Fifth Amendment decision in 1972. Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[104] *Escobedo*, 378 U.S. at 490-91.

[105] *Id*. at 488-89 (footnotes omitted).

[106] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 391-92 (2000) (discussing the unreceptive reaction to *Escobedo* among police).

Escobedo decision as joining a series of Supreme Court decisions that "unduly hampered" law enforcement.[107] And the Philadelphia District Attorney went so far as to state his belief that certain killings "'were spawned by the Court's liberal interpretations of the Constitution.'"[108]

The judiciary likewise did not receive *Escobedo* with uniform approval. Concededly, a handful of lower court decisions interpreted *Escobedo* broadly.[109] California's Supreme Court interpreted *Escobedo* to require the provision of counsel—even in the absence of a defendant's request—by construing interrogation as a "critical stage" for Sixth Amendment purposes.[110] The Supreme Court of Oregon held that *Escobedo* required that law enforcement warn a defendant of his right to remain silent.[111] And, finally, the Supreme Court of Tennessee applied *Escobedo's* precise language to a case it believed was factually similar.[112]

More representative of the cold reception with which the judiciary gave *Escobedo*, though, were the significant handful of lower courts that sought to limit its implications.[113] The Seventh Circuit and the state of Maryland, for example, declined to extend *Escobedo* to factual scenarios wherein defendant did not

---

[107] *E.g.*, Sidney E. Zion, *High Court Scored on Crime Rulings: Bars Against Confessions, Searches and Seizures Attached by Murphy*, N.Y. TIMES, May 14, 1965, at 39 ("Police Commissioner Michael J. Murphy sharply criticized the United States Supreme Court yesterday for a series of decisions on confessions and searches and seizures which he said 'unduly hampered' law enforcement.").

[108] Sidney E. Zion, *Attorneys Chafe at Crime Rulings: Prosecutors Fear the Guilty Will be Able to Avoid Trial*, N.Y. TIMES, Mar. 21, 1965, at 61.

[109] *E.g.*, United States *ex rel.* Russo v. New Jersey, 351 F.2d 429, 437 (3d Cir. 1965); Commonwealth v. McCarthy, 200 N.E.2d 264, 266 (Mass. 1964). Although the Third Circuit's decision *Russo* held that no request for counsel was necessary to trigger *Escobedo's* protections, 351 F.2d at 437, the New Jersey Supreme Court flagrantly disregarded that ruling by instructing all of its state judges to ignore the *Russo* ruling, Sidney E. Zion, *Jersey to Ignore U.S. Court Ruling on Confessions*, N.Y. TIMES, June 9, 1965, at 1.

[110] People v. Dorado, 398 P.2d 361, 367 (Cal. 1965).

[111] State v. Neely, 395 P.2d 557, 561 (Ore. 1964).

[112] Campbell v. State, 384 S.W.2d 4, 9 (Tenn. 1964).

[113] *E.g.*, Commonwealth v. Negri, 213 A.2d 670, 676 (Pa. 1965); Wamsley v. Commonwealth, 137 S.E.2d 865, 868 (Va. 1964); Browne v. State, 131 N.W.2d 169, 171 (Wis. 1964); State v. Smith, 202 A.2d 669, 678 (N.J. 1964).

specifically request counsel during the interrogation.[114] The Supreme Court of Illinois concluded that a defendant's confession remained admissible despite law enforcement's failure to "affirmatively caution the accused of his right to have an attorney and his right to remain silent before his admissions of guilt."[115] And, by way of final example, the Ohio Supreme Court declined to extend *Escobedo* to a defendant's request for counsel at the time of arrest.[116]

But, perhaps the biggest *Escobedo*-related war—one arguably most predictive of *Schneckloth*—waged inside the United States Court of Appeals for the District of Columbia. Inside that court, Republican-appointee Judge Warren Burger led a conservative bloc of judges against a separate liberal bloc led by Democratic-appointee Chief Judge David Bazelon.[117] When given the

---

[114] United States *ex rel*. Townsend v. Ogilvie, 334 F.2d 837, 843 (7th Cir. 1964) (noting also that defendant failed to raise the applicability of *Escobedo* until late in the appellate proceedings); Sturgis v. Maryland, 201 A.2d 681, 682 (1964) (reasoning that defendant's failure to request counsel rendered *Escobedo* inapplicable).

[115] People v. Hartgraves, 202 N.E.2d 33, 36 (Ill. 1964).

[116] McQueen v. Maxwell, 201 N.E.2d 701, 701-02 (Ohio 1964).

[117] JOSEPH C. GOULDEN, BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES 253 (1974). Warren Burger's path to the D.C. Circuit was not entirely expected. He was born on September 17, 1907, in St. Paul, Minnesota, as one of seven children. SIGNIFICANT SUPREME COURT OPINIONS OF CHIEF JUSTICE WARREN E. BURGER Introduction (Philippine Bar Ass'n eds., 1984). After his graduation from high school, Justice Burger worked for an insurance company for seven years. *History: A Rich Heritage*, MOORE COSTELLO & HART, P.L.L.P, http://www.mchlaw.com/history/ (last visited June 9, 2011). During that time, one of his high school teachers remembered Burger's efforts and entered his application for a scholarship to Princeton University. *Id.* He declined it because of his shared obligation to support his family. SIGNIFICANT BURGER OPINIONS, *supra* note 117, at Introduction. Accordingly, Justice Burger attended night classes at the University of Minnesota. *Id*. Following his undergraduate graduation, he enrolled in night classes at what is now the William Mitchell College of Law and received his LL.B *magna cum laude* in 1931. *Id.*

After graduating from law school, Justice Burger went to work for the relatively small firm of Faricy, Burger, Moore & Costello. Sidney E. Zion, *Nixon's Nominee for the Post of Chief Justice: Warren Earl Burger*, N.Y. TIMES, May 22, 1969, at 36; *see History: A Rich Heritage*, MOORE COSTELLO & HART, P.L.L.P, http://www.mchlaw.com/history/ (last visited June 9, 2011) (noting the firm's name change, that it is still in existence, and that it is the oldest law firm in the state of Minnesota). He practiced both criminal and civil law while accepting an adjunct faculty appointment at William Mitchell teaching contracts. SIGNIFICANT BURGER OPINIONS, *supra* note 117, at Introduction. Burger taught for twelve years and practiced with Faricy, Burger, Moore & Costello for a total of twenty-two years until his appointment by President Eisenhower in 1953 to the position of Assistant Attorney General for

opportunity, a Bazelon-led panel generally aligned itself with the *Escobedo* majority,[118] whereas Burger-involved decisions applied rationale from the dissent.[119] Of course, what made the ideological battle particularly interesting was that both judges' names were, at varying times, floated in conversations about Supreme Court vacancies.[120]

As the post-*Escobedo* judicial battle waged on, one influential academic saw *Escobedo* as a gateway to something more. In 1965, Professor Yale Kamisar had recently joined the law faculty at the University of Michigan after having taught for seven years at the University of Minnesota.[121] Although he would go on to author many other influential articles and books in his still-ongoing illustrious career,[122] Professor Kamisar penned what history would call his "masterpiece"[123] that same year—*Equal Justice in the*

---

the Civil Division of the Justice Department. *Biographies of the Robes: Warren Earl Burger*, PBS.ORG, http://www.pbs.org/wnet/supremecourt/rights/robes_burger.html (last visited June 9, 2011). Although he sought to return to private practice three years later, President Eisenhower talked Justice Burger into accepting an appointment to the U.S. Court of Appeals for the District of Columbia Circuit. *Id*. He remained on the Circuit Court for thirteen years, from 1956-1969. *Id*.

[118] Hutcherson v. United States, 351 F.2d 748, 751 (D.C. Cir. 1965) (holding a defendant's confession involuntary by relying, in part, on *Escobedo*); Jones v. United States, 342 F.2d 863, 871 (D.C. Cir. 1964) (applying *Escobedo* to dismiss the indictment against defendant); Greenwell v. United States, 336 F.2d 962, 966 (D.C. Cir. 1964) (applying *Escobedo* to exclude defendant's confession); Johnson v. United States, 344 F.2d 163, 164 (D.C. Cir. 1964) (same); Naples v. United States, 344 F.2d 508, 514 (D.C. Cir. 1964) (affirming defendant's conviction but citing *Escobedo* to support the proposition that evidence is necessary to corroborate a defendant's confession).

[119] Cephus v. United States, 352 F.2d 663, 665 (D.C. Cir. 1965) (declining to read *Escobedo* as prohibiting confessions in the absence of counsel); Williams v. United States, 345 F.2d 733, 734 (D.C. Cir. 1965) (declining to read *Escobedo* to exclude certain identification evidence); Kennedy v. United States, 353 F.2d 462, 464 (D.C. Cir. 1965) (same); Jackson v. United States, 337 F.2d 136, 140 (D.C. Cir. 1964) (declining to read *Escobedo* to bar the use of defendant's confession).

[120] BAKER, *supra* note 58, at 52.

[121] Yale Kamisar—Biography, UNIVERSITY OF MICHIGAN LAW SCHOOL, http://web.law.umich.edu/_facultybiopage/facultybiopagenew.asp?ID=201 (last visited June 12, 2011).

[122] *Id*. (listing select publications from Professor Kamisar)

[123] Ronald J. Allen, *In Praise of Yale Kamisar*, 2 OHIO ST. J. OF CRIM. L. 9, 14 (2004). It is difficult to overstate the influence of *Equal Justice*; indeed, the piece earned Professor Kamisar the unofficial title "Father of *Miranda*."

Gatehouses and Mansions of American Criminal Procedure: From Powell *to* Gideon, *From* Escobedo *to* . . . .[124] In it, Professor Kamisar wrote that he "would not abolish all in-custody police interrogation"[125] but, rather, would impose upon the police a duty to inform suspects subject to incommunicado interrogation of certain constitutional rights.[126]

Amidst the post-*Escobedo* chaos, the Supreme Court followed Professor Kamisar's lead and dropped the *Miranda* bombshell on June 13, 1966.[127] In *Miranda*, Chief Justice Warren wrote for a majority of the Court, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-

---

Terry Carter, *The Man Who Would Undo* Miranda, A.B.A. J., Mar. 2000, at 44, 46.

[124] 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 (A.E. Dick Howard ed., 1965).

[125] *Id*. at 10.

[126] *Id*. at 10-11.

[127] Miranda v. Arizona, 384 U.S. 436 (1966) (noting the date of decision); Tracey Maclin, *Is Yale Kamisar as Good as Joe Namath?: A Look Back at Kamisar's "Prediction" of* Miranda v. Arizona, 2 OHIO ST. J. CRIM. L. 33, 34-35 (2004) (detailing the similarities between positions Kamisar took in *Equal Justice* and the rationale in *Miranda*).

incrimination."[128] The "procedural safeguards" to which the Court referred are, of course, the now familiar *Miranda* warnings.[129]

Given modern citizens' ability to recite those warnings,[130] it is both easy and tempting to forget how profound of an impact the *Miranda* decision had on the public generally and the interrogation room specifically.[131] Yet, in short, the reaction was intense.[132] A *New York Times* piece characterized the *Miranda* decision as providing "immunity from punishment for crime on a wholesale basis."[133] Some police believed that the decision forced them to

---

[128] *Miranda*, 384 U.S. at 444. Of Chief Justice Warren, Chief Justice Rehnquist would later write, "[f]ew would have thought of Warren as a champion of individual rights or of minority interests at the time he was nominated to be Chief Justice in 1953. In 1942 he was one of the leading advocates of the evacuation and internment of the West Coast Japanese-American citizens and resident aliens following the bombing of Pearl Harbor." WILLIAM H. REHNQUIST, THE SUPREME COURT 196 (2001). Chief Justice Warren's pro-individual rights opinions were likewise surprising because of his early background as Alameda County District Attorney. BAKER, *supra* note 58, at 113. During that time, in 1938, after having announced his candidacy for state attorney general, Warren would learn that his father was murdered. *Id*. at 113-14. In an effort to explain what many perceived to be an unthinkable change in his legal philosophy, Warren said after his retirement, "[o]n the Court I saw [things] in a different light[.]" Alden Whitman, *For 16 Years, Warren Saw the Constitution as Protector of Rights and Equality*, N.Y. TIMES, July 10, 1974, at 24 (internal quotation marks omitted). "I wasn't 'softer' on crime than I ever was," he continued, "[a]ll we did on the Court was to apply the Constitution, which says that any defendant is entitled to due process and to certain basic rights." *Id*. (internal quotation marks omitted).

[129] *Id*. at 471 (providing warnings to a suspect that must precede custodial interrogation).

[130] ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 167 (5th ed. 2010) (highlighting research confirming that "an astonishing number of Americans—and, indeed, people around the world—knew about *Miranda* from watching television police dramas"); JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 398 (1994) (remarking that "[e]veryone who watches television" knows the *Miranda* warnings).

[131] Yale Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, *in* THE BURGER YEARS 147 (Herman Schwartz ed., 1987) ("*Miranda* is probably the most highly publicized criminal procedure case in our history.").

[132] WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON 57 (2001). As Professor White put it, "[c]ritics who believed the Court had placed undue burdens on law enforcement were more numerous and less measured in their attacks on *Miranda*." *Id*. He added: "for at least two years after the *Miranda* decision, conservative criticism of the Supreme Court was not only intense and passionate but often very near the center of the political debate." *Id*.

[133] Arthur Krock, *In the Nation: The Wall Between Crime and Punishment*, N.Y. TIMES, June 14, 1966, at 46.

fight criminals "with two hands tied behind their back."[134] The Chief of Police in Cleveland, Ohio, claimed that the Supreme Court made it impossible to obtain a suspect's voluntary statement,[135] and the Los Angeles police chief predicted "that all confessions would soon be useless."[136] Legislators even proposed amending the constitution to overturn *Miranda*.[137]

Amid the post-*Miranda* frustration,[138] Judge Burger—then still a member of the U.S. Court of Appeals for the District of Columbia—gave an address on May 21, 1967, at Ripon College in Ripon, Wisconsin.[139] His speech included these remarks:

> I assume that no one will take issue with me when I say that these North Europe countries are as enlightened as the United States in the value they place on the individual and on human dignity. When we look at the two stages of the administration of criminal justice in those countries, we find some interesting contrasts. They have not found it necessary to establish a system of procedure which makes a criminal trial so complex or so difficult or so long drawn out as in this country. They do not employ our system of 12 men and women as jurors. They do not consider it necessary to use a device like our 5th Amendment under which an accused person may not be required to testify. They go swiftly, efficiently and directly

---

[134] STEPHEN L. WASBY, CONTINUITY AND CHANGE: FROM THE WARREN COURT TO THE BURGER COURT 183 (1976) (internal quotation marks omitted).

[135] Fred P. Graham, *Survey Shows Court Rule Curbs Police Questioning*, N.Y. TIMES, June 20, 1966, at 1.

[136] Brian Palmer, *What Happens When Your Miranda Rights Are Revoked?*, SLATE.COM, May 10, 2010, http://www.slate.com/id/2253499/ (last visited June 17, 2011).

[137] Nan Robertson, *Ervin Protests Curbs on Police: Proposes an Amendment to Upset High Court Decision*, N.Y. TIMES, July 23,1966, at 36.

[138] The Chief of Police in Boston, Massachusetts, expressed frustration that "criminal trials no longer will be a search for truth, but a search for technical error." Fred P. Graham, *Survey Shows Court Rule Curbs Police Questioning*, N.Y. TIMES, June 20, 1966, at 1. The Philadelphia Police Commissioner added his belief that "[t]he present rules and interpretations whether or not so intended—in fact protect the guilty." *More Criminals Go Free? Effect of High Court's Ruling*, U.S. NEWS & WORLD REPORT, June 27, 1966, at 32.

[139] RONALD L. TROWBRIDGE, WITH SWEET MAJESTY, WARREN E. BURGER 21 (2000).

> to the question of whether the accused is guilty. By our standards their system of finding the facts concerning guilt or innocence is almost ruthless. In those systems they do not have cases . . . where the accused has countless hearings and trials and re-trials and reviews over 10 or 12 years. In these long drawn out cases everyone loses sight of the factor of guilt and even the most guilty convict comes to believe the press releases of his lawyer.[140]

Judge Burger's remarks were later published in a 1967 *U.S. News and World Report*, and Republican nominee Richard M. Nixon was captivated when he read them;[141] he even began to integrate Burger's ideas into his own 1968 presidential campaign speeches.[142] Burger himself viewed the speech as the primary reason that Nixon selected him to replace Warren as Chief.[143]

As for the 1968 election itself, it began to heat up alongside frustrations with *Miranda.*[144] In May of 1968, for example, Senator John L. McClellan decried the *Miranda* and *Escobedo* decisions, arguing that they brought "confusion and disarray . . . into law enforcement" and produced "deplorable and demoralizing" results.[145] Moreover, he contended, the decisions "weakened intolerably the force and effect of our criminal laws" because they "set free many dangerous criminals" and "prevent[ed]

---

[140] S. COMM. ON THE JUDICIARY, 91ST CONG., NOMINATION OF WARREN E. BURGER 49 (Comm. Print 1969).

[141] Linda Greenhouse, *Warren E. Burger is Dead at 87; Was Chief Justice for 17 Years*, N.Y. TIMES, June 26, 1995, at A1. The White House would later distribute copies of the speech at the time of Burger's nomination, "and the Supreme Court press office handed it out for years when asked for information about his views." *Id.*

[142] BAKER, *supra* note 58, at 245.

[143] TROWBRIDGE, *supra* note 139, at 21. When Burger was asked whether he and Nixon had been friends, or whether some other reason existed to suggest Burger's appointment, Burger "said no, that the reason for the selection owed chiefly to this one article." *Id.* Nixon himself expressed concern about nominating an individual to the Chief Justice position whom he considered a friend. Robert B. Semple, Jr., *Nixon Influenced by Fortas Affair in Court Choices: President Says His Friends Were, and Will Be, Ruled Out of Consideration*, N.Y. TIMES, May 23, 1969, at 1 ("The President said the Court required a quick infusion of men whose nominations raised no questions of close political or personal ties to the White House.").

[144] WASBY, *supra* note 134, at 183 (noting that *Miranda* "seemed to exacerbate the problem of rising crime rates and increasing racial tension").

[145] 114 CONG. REC. 11,201 (1968).

the convictions of others [including] known, admitted, and confessed murderers, robbers, and rapists[.]"[146] That same month, the New York County District Attorney professed that only 15% of defendants now gave incriminating statements post-*Miranda*—compared with 49% beforehand.[147] Moreover, the Chief of Police in Fresno, California, indicated that convictions and guilty pleas had declined dramatically since *Escobedo*.[148]

For Nixon himself, *Miranda* was likewise too much: "During the 1968 presidential election, Richard M. Nixon had run against Chief Justice Warren and his Court as much as he had run against his Democratic opponent, Hubert H. Humphrey."[149] Indeed, Nixon believed that the courts "[had] gone too far in weakening the peace forces as against the criminal forces."[150] He therefore made "law and order" a central issue in his campaign and gave speeches decrying the *Miranda* and *Escobedo* decisions.[151] If elected, Nixon promised on the campaign trail, he would fill the Court with "strict constructionists."[152]

Nixon was ultimately elected in 1968—largely because of his law and order campaign, as a dejected former President Lyndon Johnson would later concede.[153] The search thereafter began for Chief Justice Warren's replacement in early 1969; Nixon sought a judge who, among other characteristics, would share his view that "the Court should interpret the Constitution rather than amend it by judicial fiat[.]"[154] Coincidentally, in March of that year, the U.S. Court of Appeals for the District of Columbia reversed a defendant's conviction, citing an inability to determine whether defendant waived his *Miranda* rights prior to confessing.[155]

---

[146] *Id*.

[147] 114 CONG. REC. 14,153 (1968).

[148] *Id*.

[149] SCHWARTZ, *supra* note 10, at 329.

[150] *The New Chief Justice*, N.Y. TIMES, May 22, 1969, at 46; *see* JAMES MACGREGOR BURNS, PACKING THE COURT 202 (2009) (noting that Nixon repeated this "applause line[ ]" in "speech after speech").

[151] STEPHEN E. AMBROSE, NIXON: THE TRIUMPH OF A POLITICIAN, 1962-1972 154 (1989).

[152] Evan Thomas, *Inside the High Court*, TIME MAGAZINE, Nov. 5, 1979, http://www.time.com/time/magazine/article/0,9171,912517,00.html (last visited July 7, 2011).

[153] BAKER, note 58 *supra*, at 259.

[154] *Id*. at 274 (internal quotation marks omitted).

[155] Frazier v. United States, 419 F.2d 1161, 1167 (1969).

Attacking the majority (and *Miranda*), Judge Burger issued a bitter dissent, asserting in part that "[w]e are well on our way to forbidding *any* utterance of an accused to be used against him unless it is made in open court. Guilt or innocence becomes irrelevant in the criminal trial as we founder in a morass of artificial rules poorly conceived and often impossible of application."[156]

Reports of Burger's dissent emerged in the local press,[157] and Nixon noticed.[158] He would ultimately nominate Burger to be Chief Justice on May 22, 1969; the Senate confirmed him eighteen days later.[159]

B. *Considering the Schneckloth opinion.*

Once on the Supreme Court, Justice Burger began to reverse the course set by his predecessor,[160] a pattern that most noticeably

---

[156] *Id.* at 1176 (Burger, J., dissenting).

[157] Thomas W. Lippman, *Robbery Trial Overturned on Confession*, WASH. POST, Mar. 15, 1969, at A1.

[158] BAKER, *supra* note 58, at 275-76. As Justice Burger got settled as Chief, the Nixon administration quietly instructed government attorneys that they could offer confessions as evidence, "even if the *Miranda* warnings were not properly given." Fred P. Graham, *Mitchell Wants Looser Rules on Confessions*, N.Y. TIMES, Aug. 3, 1969, at E12.

[159] SIGNIFICANT BURGER OPINIONS, *supra* note 117, at Introduction. Interestingly, Nixon also considered Associate Justice Stewart to fill the vacancy; Stewart, however, declined interest citing his belief that it would not be in the Court's best interest to appoint a sitting judge as Chief. Special to the New York Times, *Excerpts from Account of Nixon's Comments in Informal Meeting with Reporters*, N.Y. TIMES, May 23, 1969, at 27.

[160] Many commentators are skeptical about the precise extent to which the Burger Court truly *reversed* precedents created by the Warren Court. *E.g.*, MALTZ, *supra* note 68, at 266 (asserting that Burger Court criminal procedure decisions "modified Warren Court precedents" but "did not dramatically alter the state of existing law"). Most agree, however, that the Burger Court—at a minimum—eviscerated numerous Warren Court criminal procedure precedents. Joseph M. McLaughlin, *The Burger Court: A Critique*, *in* THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION 290 (Bernard Schwartz ed. 1998) ("The most sulphurous attacks on the Warren Court were launched against its criminal justice decisions, and, not surprisingly, this is where the Burger Court went the furthest in rejecting the Warren Court's legacy."); RICHARD Y. FUNSTON, CONSTITUTIONAL COUNTER-REVOLUTION? THE WARREN AND THE BURGER COURT: JUDICIAL POLICY MAKING IN MODERN AMERICA 176-79 (1977) (discussing cases that reflect the erosion of *Miranda*). Of particular note in this regard is the Burger Court's gradual degradation of *Miranda*. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 655-56 (1984) (creating a "public safety" exception to *Miranda*); Michigan v. Tucker, 417 U.S. 433, 450 (1974) (declining to extend the *Miranda* exclusionary rule to the "fruits" of a statement

began during the 1972-73 term when *Schneckloth* was argued.[161] Thus, one thing seemed clear when the Court considered *Schneckloth*: providing citizens with prophylactic Fourth Amendment consent warnings would likely be an unwelcome suggestion.

Prior to *Schneckloth*, the law was not clear on what "consent" actually meant.[162] Enter Bustamonte, whose story began in Mountain View, California, with the burglary of Speedway Car Wash on the morning of January 19, 1967.[163] Although the facts are not perfectly clear, it seems Bustamonte was involved—along with Joe Gonzales and Joe Alcala—in that burglary wherein the trio took a check-writing machine and a number of blank checks.[164] The trio sought over the next couple of weeks to pass several checks in the name of Speedway Car Wash using the check-writing machine.[165]

Then, on January 31, 1967, the trio drove to San Jose to identify individuals who might be willing to use false identification in order to cash checks.[166] They picked up three additional men around 11

---

taken in violation of *Miranda*); Harris v. New York, 401 U.S. 222, 226 (1971) (allowing statements taken in violation of *Miranda* to be used for impeachment purposes). The Burger Court also worked to reduce the strength of the exclusionary rule. *E.g.*, United States v. Leon, 468 U.S. 897, 922 (1984) (creating a good faith exception to the Fourth Amendment exclusionary rule); Nix v. Williams, 467 U.S. 431, 448 (1984) (creating a Sixth Amendment inevitable discovery exception to the exclusionary rule).

[161] Paul C. Bartholomew, *The Supreme Court of the United States, 1972-1973*, 27 W. POL. Q. 164, 164 (1974).

[162] Some pre-*Schneckloth* Supreme Court decisions treated consent as a voluntary choice by a citizen to allow a search. *E.g.*, Davis v. United States, 328 U.S. 582, 593-94 (1946); Zap v. United States, 328 U.S. 624, 628 (1946). Others decisions from the Court seemingly required that a citizen knowingly and intentionally waive their rights as a prerequisite to a consensual law enforcement search. Johnson v. United States, 333 U.S. 10, 13 (1948); Stoner v. California, 376 U.S. 483, 489 (1964); *see* 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 8.31 (4th ed. 2010) ("Some courts, primarily on the federal level, applied the knowing waiver standard to searches, while others, primarily at the state level, continued to utilize the voluntariness test."). Even as late as 1968, the Court considered the constitutionality of a consent search but, in doing so, failed to clearly indicate what standard governed the Court's inquiry. *See* Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968).

[163] People v. Bustamonte, 76 Cal. Rptr. 17, 18 (Cal. Ct. App. 1969).

[164] *Id*. Bustamonte was not convicted for burglary; instead, he was convicted of possessing a completed check with intent to defraud. *Id*.

[165] *Id*. at 18-19.

[166] *Id*. at 19.

p.m. and sought unsuccessfully throughout the night to cash the checks at grocery stores, a bar, and a shopping center.[167] As luck would have it, Officer James Rand was on routine patrol at 2:40 a.m. the next morning and observed a vehicle with only one functioning headlight.[168] He stopped the vehicle—a black 1958 Ford four-door sedan—and asked the driver, Gonzalez, for identification.[169] Of the car's six occupants, only Alcala was able to produce identification and, in doing so, indicated that the car belonged to his brother.[170]

At that point, Officer Rand asked the occupants to exit the vehicle.[171] Rand, having been joined by two additional officers, thereafter asked Alcala if he could search the car, to which Alcala replied, "Sure, go ahead."[172] Officer Rand, aided by the other two officers, searched the Ford and found three checks under the left rear seat.[173] The checks matched those stolen from Speedway Car Wash.[174] A subsequent search of Bustamonte's car pursuant to a warrant uncovered the check-writing machine belonging to Speedway Car Wash and several more blank checks.[175] Bustamonte was thereafter arrested and convicted, following a jury trial, of possession of a completed check with intent to defraud.[176] He was sentenced to prison for a term of one to fourteen years.[177]

On appeal to the California Court of Appeals, Bustamonte contended that the trial court improperly refused to grant his motion to suppress for two reasons relevant to consent. First, he argued that Alcala's consent to search was obtained in a coercive atmosphere and was therefore involuntarily given.[178] In an opinion

---

[167] *Id.*

[168] *Bustamonte*, 76 Cal. Rptr. at 19.

[169] *Id*.

[170] *Id*.

[171] *Id*.

[172] *Id.* (internal quotation marks omitted).

[173] *Id*.

[174] *Bustamonte*, 76 Cal. Rptr. at 19.

[175] *Id*.

[176] *Id*.

[177] Brief for Petitioner at 2, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732).

[178] *Bustamonte*, 76 Cal. Rptr. at 20. Guy O. Kornblum represented Bustamonte pro bono on appeal to the Court of Appeal of California. E-mail from Guy O. Kurnblum, Principal and Trial Attorney, Guy Kornblum &

issued on March 14, 1969, the court applied a totality of the circumstances voluntariness test and rejected Bustamonte's argument by noting the existence of "circumstances from which the trial court could ascertain that consent had been freely given without coercion or submission to authority."[179] In particular, the court reasoned, Officer Rand testified during that the atmosphere at the time he requested consent was "'congenial' and there had been no discussion of any crime."[180]

Second, Bustamonte argued that no voluntary consent could occur unless Alcala had properly been advised that he had a legal right to refuse consent.[181] The court rejected the argument, noting its historical dislike of a proposed Fourth Amendment consent warning.[182] Relying on prior precedent, the court reasoned that "'[w]hen permission is sought from a person of ordinary intelligence the very fact that consent is given . . . carries the

---

Associates, to Brian R. Gallini, Associate Professor of Law, University of Arkansas School of Law-Fayetteville (May 25, 2011, 14:19 CST) (on file with author). It was, at the time, Kornblum's first appellate case. E-mail from Guy O. Kurnblum, Principal and Trial Attorney, Guy Kornblum & Associates, to Brian R. Gallini, Associate Professor of Law, University of Arkansas School of Law-Fayetteville (May 27, 2011, 13:47 CST) (on file with author). Kornblum believes that, were the case argued today, he would have a better chance of winning in the California courts. *Id*.

Thomas C. Lynch, Robert R. Granucci, and Michael J. Kelly all represented the state of California. Lynch served as the twenty-fifth attorney general for the State of California. Office of the Attorney General, *Thomas C. Lynch, 25th Attorney General*, STATE OF CALIFORNIA DEPARTMENT OF JUSTICE, http://ag.ca.gov/ag/history/25lynch.php. Interestingly, Lynch knew then Governor—and later Chief Justice—Earl Warren and once remarked, "I knew Earl Warren fairly well, and I never heard him say a kind word about [President Richard] Nixon." Interview by Ameila R. Fry with Thomas C. Lynch, Attorney General, State of California, in Berkley, Ca. 95 (1978); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 4 (1979) (noting that Warren "could find no redeeming qualities" in Nixon). Lynch would die of cancer at the age of 82 before *Schneckloth* was argued. *Ex-State Attorney General Thomas Lynch Dies at 82*, SAN FRANCISCO CHRONICLE, May 29, 1986, at 50.

Granucci would go on to argue *Schneckloth* to the Supreme Court. Transcript of Oral Argument at 1, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732). He also argued as Deputy Attorney General of California in *Stone v. Powell*, 428 U.S. 465 (1976), and earlier as Assistant Attorney General of California alongside Lynch in *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

[179] *Bustamonte*, 76 Cal. Rptr. at 20.

[180] *Id*.

[181] *Id*.

[182] *Id*. at 21.

implication that the alternative of a refusal existed.'" [183] Bustamonte's conviction was therefore affirmed, [184] and the California Supreme Court rejected his subsequent request for additional appellate review.[185]

Following the denial of Bustamonte's petition for habeas corpus at the district court level,[186] the Ninth Circuit considered the propriety of the state court's denial of his motion to suppress.[187] Bustamonte contended that the government unconstitutionally failed to prove that Acala consented to the search of the Ford with knowledge that he did not have to consent.[188] On September 13, 1971, the Ninth Circuit agreed and reversed the district court's denial of Bustamonte's writ by treating consent to search as equivalent to waiving a constitutional right.[189] That waiver, held the Ninth Circuit, cannot be presumed from a verbal agreement to consent.[190] In so doing, the court reasoned, "a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law."[191]

The U.S. Supreme Court granted certiorari on February 28, 1972.[192] In doing so, the Court sought to "determine whether the

---

[183] *Id*. (quoting People v. MacIntosh, 70 Cal. Rptr. 667, 670 (Cal. Ct. App. 1968)).

[184] *Id*. at 23. Before affirming Bustamonte's conviction, the court also separately rejected his other arguments that (1) the affidavit supporting the warrant issued to search his vehicle lacked probable cause, *Bustamonte*, 76 Cal. Rptr. at 21-22, and (2) Officer Rand inappropriately commented during his testimony on Bustamonte's election to exercise his *Miranda* right to silence, *id*. at 22-23.

[185] Bustamonte v. Schneckloth, 448 F.2d 699, 699 (9th Cir. 1971). The California Supreme Court's order denying review is unreported. *Schneckloth*, 412 U.S. at 221 n.2.

[186] This order is not reported. *Id*. at 221 n.3. Evidently, according to Bustamonte's counsel before the Ninth Circuit and the Supreme Court, Bustamonte prepared the writ of habeas corpus in the district court without the assistance of counsel. Transcript of Oral Argument at 18, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732).

[187] *Bustamonte*, 448 F.2d at 699.

[188] *Id*. at 700.

[189] *Id*.

[190] *Id*.

[191] *Id*. at 701.

[192] Schneckloth v. Bustamonte, 405 U.S. 953 (1972). The petitioner, Schneckloth, actually argued two issues, the other of which was phrased as follows: "[w]hether claims relating to search and seizure should be available to a state prisoner seeking to set aside his final conviction on federal habeas

Fourth and Fourteenth Amendments require the showing thought necessary by the [Ninth Circuit]."[193] In Schneckloth's initial brief to the Supreme Court, filed on April 20, 1972,[194] he asserted that

---

corpus." Brief for Petitioner at 2, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732). The majority's election not to reach that issue prompted a lengthy critical concurrence from Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, who read the majority's opinion as condoning an implicit extension of the *Mapp* exclusionary rule to a federal habeas proceeding. *Schneckloth*, 412 U.S. at 271 (Powell, J., concurring) ("It makes little sense to extend the *Mapp* exclusionary rule to a federal habeas proceeding where its asserted deterrent effect must be least efficacious, and its obvious harmful consequences persist in full force.").

Even a cursory review of Justice Powell's papers indicates that the frustration voiced in his concurrence should have come as no surprise.

[193] *Schneckloth*, 412 U.S. at 222.

[194] Brief for Petitioner at Cover Page, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732) (providing file clerk's date stamp reflecting date of receipt). Around this timeframe, specifically on May 1, 1972, the state of Illinois and The Americans for Effective Law Enforcement ("AELE") filed a joint amicus brief. Brief for Illinois & AELE, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732). Fred E. Inbau both founded the AELE, AELE Law Enforcement, Fred E. Inbau (1909–1998), http://www.aele.org/Inbau.html (last visited Jan. 12, 2010), and signed onto the amicus brief, Brief for Illinois & AELE at 24, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732) (providing Inbau's signature block).

Inbau is of course noteworthy because he developed what is now the most popular set of interrogation techniques used in police interrogation rooms today. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 212 (4th ed. 2001); FRED E. INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986); FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); FRED E. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION (1942); *see, e.g.*, CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 141 (2007) (characterizing the Reid and Inbau text as "[t]he Bible of interrogation methods"); WELSH S. WHITE, *MIRANDA'S* WANING PROTECTIONS 25 (2001) ("Of all the interrogation manuals, the Inbau Manual, as it is commonly known, has been the most influential."); Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 808 (2006) ("The interrogation method most widely publicized and probably most widely used is known as the Reid Technique . . . .").

And, interestingly, Inbau founded AELE in order to counteract the Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), a decision that both restricted an interrogator's freedom in the interrogation room and expressly took issue with Inbau's interrogation methods. Fred E. Inbau (1909–1998) Papers, Series 17/28, at 2 (Nw. Univ. Archives, 1930–1998) (unpublished papers); *Miranda*, 384 U.S. at 448–55 (discussing in detail the interrogation techniques outlined by the first edition of Inbau's interrogation text); *see* Yale Kamisar, *The Importance of Being Guilty*, 68 J. CRIM. L. & CRIMINOLOGY 182, 195 (1977) ("The Miranda opinion quotes from or cites the 1953 and 1962

third party consent searches "will become virtually impossible" if the Ninth Circuit's waiver standard is constitutionally required.[195] More specifically, Schneckloth warned, upholding the Ninth Circuit's ruling would probably also require the Court to "impose a warning requirement akin to the *Miranda* rule."[196] Perhaps seizing on the ever-tenuous nature of *Miranda*,[197] particularly in the early years after the decision's issuance,[198] Schneckloth pressed on, arguing that imposing a Fourth Amendment *Miranda*-style warning would contradict the great weight of authority to the contrary.[199] And, in perhaps his most persuasive argument,[200] Schneckloth contended that no warnings were required given that consent to search encounters rarely implicate concerns similar to *custodial* encounters.[201]

Inbau-Reid manuals no less than ten times—and never with approval."). He specifically used the AELE, in part, to file amicus curiae briefs in Supreme Court cases that involved limitations on the police. Fred E. Inbau (1909–1998) Papers, Series 17/28, at 2 (Nw. Univ. Archives, 1930–1998) (unpublished papers).

[195] Brief for Petitioner at 7, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732).

[196] *Id*. at 14.

[197] *Compare* Dickerson v. United States, 530 U.S. 428, 432 (2000) ("We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves."), *with* Michigan v. Tucker, 417 U.S. 433, 444 (1974) ("[The *Miranda*] procedural safeguards [are] not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.").

[198] *E.g.*, notes 67-68, *supra*, and accompanying citations (noting Burger's criticism of *Miranda* at the time he was appointed as Chief Justice).

[199] Brief for Petitioner at 18, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732).

[200] If not his most persuasive, it was certainly an argument that interested the Court. *E.g.*, Transcript of Oral Argument at 24, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732) ("QUESTION: That really isn't my question. Let's assume a law enforcement officer, who is—just like these law enforcement officers, there's a set of regulations issued that says you need only to be worried about consent, you need no[sic] worry about waiver standards or *Miranda* warnings in getting consent in searches. That's the rule."); *see* notes 213, 216-19, *infra*, and accompanying text (discussing the Court's additional *Miranda*-related questions for *Schneckloth's* counsel at oral argument).

[201] Brief for Petitioner at 19-20, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732).

In his responsive brief, filed on June 16, 1972,[202] Bustamonte argued in straightforward fashion that evaluating a waiver of Fourth Amendment rights requires determining whether the individual intentionally relinquished a known right or privilege.[203] Inherent in that standard, argued Bustamonte, is the need for an individual to be informed that she may freely and effectively withhold consent.[204] Yet, Bustamonte cleverly suggested that no *Miranda*-style warning was required in all cases; instead, he asserted that informing an individual of her rights prior to her giving consent would simply make the waiver analysis easier.[205]

In Schneckloth's reply brief, filed on October 3, 1972,[206] he persuasively argued that Fourth Amendment rights are fundamentally different from Fifth and Sixth Amendment rights.[207]

---

[202] Brief for Respondent at Cover Page, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732) (providing file clerk's date stamp reflecting date of receipt).

[203] *Id*. at 9.

[204] *Id*. at 11.

[205] *Id*. at 16-17. On this point, Bustamonte argued as follows:

> It is true that a number of courts and commentators have suggested that law enforcement officials should be required to inform a person of his Fourth Amendment rights before obtaining authorization to conduct a warrantless search. It is also true that law enforcement agencies may decide to give Fourth Amendment admonitions as a judgment of good police practices. However, the question before the Court is California's unwillingness to apply long standing criteria for determining a waiver's validity, not whether specific Fourth Amendment admonitions are required in all cases. This Court may eventually decide that such warnings are required to ensure that Fourth Amendment rights are protected and enforced, but the respondent's arguments, and the Ninth Circuit Court of Appeals' decision are based upon existing authorities regarding waivers of constitutional rights.

Id. (internal citations and footnote reference omitted).

[206] Reply Brief for Petitioner at Cover Page, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732) (providing file clerk's date stamp reflecting date of receipt). The American Civil Liberties Union and The American Civil Liberties Union of Southern California jointly filed a brief in favor of Bustamonte as amici curiae on this same date. Amicus Brief for The American Civil Liberties Union and The American Civil Liberties Union of Southern California at Cover Page, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732) (providing file clerk's date stamp reflecting date of receipt). The substance of the brief focused only on the habeas issue. *Id*. at i (providing the table of contents).

[207] *Id*. at 2.

That matters, he suggested, because the Fourth Amendment is not linguistically absolute; thus, the Fourth Amendment prohibits only unreasonable searches and seizures—as opposed to *all* searches and seizures.[208] Unlike the Fourth Amendment, he continued, "the Fifth Amendment does not guarantee security from unreasonable compulsory self-incrimination, but from all such incrimination."[209] Accordingly, he concluded, "[t]hat the Fourth Amendment is couched in terms of reasonableness militates against a subjective waiver standard and in favor of an objective standard for assessing the voluntariness of consent searches."[210]

Oral argument occurred on October 10, 1972, before Chief Justice Burger and Associate Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, and Rehnquist.[211] Robert R. Granucci began for petitioner-Schneckloth by provocatively analogizing "California's consent rule, . . . to the rule articulated by this Court prior to *Miranda* for assessing the voluntariness of confessions, [thereby] mak[ing] knowledge of one's rights one of the circumstances to be considered in determining voluntariness."[212]

Granucci's focus on *Miranda* became pervasive. For several pages of oral argument transcript, he either argued substantive points to distinguish *Miranda* warnings from consent to search cases,[213] or responded to questions from the Justices about the role of an officer's request to search and the extent to which that request

---

[208] *Id*.

[209] *Id*. ("Neither does the Sixth Amendment say that the accused in a criminal case shall have the assistance of counsel or a jury trial when it is reasonable under the circumstances.").

[210] *Id*. at 2-3.

[211] Transcript of Oral Argument at 1, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732).

[212] *Id*. at 4; *see* note 178, *supra*, and accompanying text (noting other arguments Granucci made before the Supreme Court).

[213] *E.g.*, Transcript of Oral Argument at 4, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732) ("If we were talking about Fifth and Sixth Amendment rights, surely this Court would not countenance a third party's waiver of a defendant's *Miranda* rights, his right to counsel, or his right to a jury trial."). Justice Powell apparently found this argument persuasive; he notated the following hand-written note, which he took during Granucci's argument: "[w]e have held that a 3rd party may validly waive 4th Amend. This is different from Miranda rule where no 3rd party may consent for the [defendant]." Justice Lewis F. Powell, Jr., Oral Argument Notes in Schneckloth v. Bustamonte (October 10, 1972) (on file with Washington & Lee University School of Law, Lewis Powell Papers, Box 151, File, "Bustamonte Folder 1").

could be seen as a demand.[214] Regardless of the setting, though, the attention to the issue he garnered from the Court suggested that he had hit a nerve.

When Stuart P. Tobisman got up to argue on behalf of Bustamonte,[215] *Miranda* still lingered on the Justices' minds.[216]

---

[214] Transcript of Oral Argument at 7, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732). At points, the Court seems concerned both about when an officer's request becomes a demand, and similarly when that demand suggests a custodial encounter. Consider this representative exchange:

> QUESTION: The thing that worries me is the officer comes up and says, "Would you let me see your driver's license?"
>
> MR. GRANUCCI: Under California law, Your Honor, —
>
> QUESTION: No, but if he says, "would you mind," don't you usually understand that he means "you either show it to me or else"? Isn't that what you think?
>
> MR. GRANUCCI: Your Honor, I can go beyond that, because under California law a driver is required to exhibit his license whenever an officer requests it.
>
> QUESTION: That's not my question. But the nice polite police officer says, "would you mind doing it?"
>
> MR. GRANUCCI: Yes. That is —
>
> QUESTION: That means "give it to me."
>
> MR. GRANUCCI: That is —
>
> QUESTION: That instant; that means "give it to me."
>
> MR. GRANUCCI: That is, Your Honor, a polite assertion of authority.
>
> QUESTION: Right. Right. Then he says, "Would you mind letting me see your registration?"
>
> MR. GRANUCCI: Again a polite assertion of authority.
>
> QUESTION: Then he says, "May I search your car?" Then. Now, what's the difference?
>
> MR. GRANUCCI: No, there may or may not be an assertion of authority.
>
> QUESTION: Well, what's the difference?
>
> MR. GRANUCCI: I think the difference is twofold. It depends in the circumstances of the case, and it also, I think — I also think you have to take into account the knowledge of California drivers. You know, in our State, before you can get a driver's license, you have to take a rather comprehensive examination of the responsibility of drivers.

Id.

[215] *Id.* at 11. Tobisman and his co-counsel, Thomas Pollack, represented Bustamonte before the Supreme Court pro bono, as they had

Yet, the Court now expressed a more precise concern about what those warnings might look like. At one point, for example, the Court asked whether it would satisfy Tobisman's proposed standard "if the policeman had said, in addition to what he did say, 'You are not required by law to consent, you may refuse your consent if you wish; but if you refuse, we will be obliged to detain you here until we can get a search warrant'?"[217] Later in the argument, the Court asked the following:

> QUESTION: Mr. Tobisman, it's my understanding that your opponent takes the position that the giving of warning for a Fourth Amendment situation would be much, much more complicated, since the right protected is the right to be free from unreasonable search and seizure, rather than just an

---

throughout the Ninth Circuit proceedings. Memorandum from J. Harvie Wilkinson III to Justice Lewis F. Powell, Jr. (March 29, 1972) (on file with Washington & Lee University School of Law, Lewis Powell Papers, Box 151, File, "Bustamonte Folder 1"). Tobisman continues to practice today as a partner with the law firm of Loeb & Loeb, LLP, practicing in the firm's trusts and estates department. Stuart P. Tobisman—Profile, LOEB & LOEB, LLP, http://www.loeb.com/stuart_tobisman/ (last visited June 5, 2011). Pollack, like Tobisman, continues to practice law. Thomas Pollack—Profile, IRELL & MANELLA, LLP, http://www.irell.com/professionals-54.html (last visited June 5, 2011). Pollack is a partner emeritus with the firm of Irell & Manella, LLP, practicing white-collar criminal defense. *Id*.

As an aside, Powell's clerk at the time, J. Harvie Wilkinson, is now a federal judge serving on the Fourth Circuit Court of Appeals. Biographical information: Judge J. Harvie Wilkinson III, http://www.ca4.uscourts.gov/JudgesBio/JHW_bio.htm (last visited June 2, 2011). His name once circulated as a possible nominee to the Supreme Court. *See, e.g.*, Associate Press, Possible Miers Replacements, USAToday.com, October 27, 2005, http://www.usatoday.com/news/washington/2005-10-27-list-next_x.htm (profiling Wilkinson as a possible nominee); Kathy Kiely, *Roberts picks up Democratic Support in Senate*, USATODAY.COM, September 21, 2005, http://www.usatoday.com/news/washington/2005-09-21-court-vacancy_x.htm ("Among candidates widely mentioned are: federal appellate judges . . . J. Harvie Wilkinson . . . ."); *Bush Picks Roberts for Supreme Court*, FOXNEWS.COM, July 20, 2005, http://www.foxnews.com/story/0,2933,163025,00.html ("Other possible candidates were conservative federal appellate court judges . . . J. Harvie Wilkinson III . . . .").

[216] *E.g.*, Transcript of Oral Argument at 14, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732). ("QUESTION: Mr. Tobisman, as a practical matter, with the consent standard that you're seeking to have upheld here, does that mean that the police would have to give warnings much as they do on the *Miranda* situation now?").

[217] *Id.* at 13.

> absolute right to counsel. Do you have any comment on what I understand to be his point?[218]

Of course, the broader question of whether an individual should be *told* of her right to refuse consent likewise persisted throughout Tobisman's presentation.[219]

Tobisman did his best to allay the Court's concerns about *Miranda*. Consistent with the position he took in his brief on behalf of Bustamonte, Tobisman reiterated that specific warnings were not a talisman to demonstrate an individual's knowing provision of consent to search.[220] As a result, he suggested, the solution was not the requirement of warnings, but rather a revision of the California voluntariness test.[221] In place of the voluntariness test, Tobisman suggested that the burden rested with the state to prove that an individual whom law enforcement asks for consent actually knew that he could say no.[222] He concluded his presentation by reiterating that an individual can consent to a search only if she is aware of her right to say no.[223]

A peek inside the Court's conference on October 11, 1972, the day after oral argument, reflects the Justices' early thoughts. Chief Justice Burger began, stating, "he wouldn't require [consent] warnings."[224] Instead, he said he would accept "[former State of California Chief Judge] Traynor's totality [test which] adds up to reasonable under all the circumstances."[225] Justice Brennan

---

[218] *Id*. at 19.

[219] *Id*. at 15 ("QUESTION: I suppose it would be enough to satisfy your rule if it were clearly shown that the defendant knew what his rights were, even though he wasn't informed? Even though someone hadn't — even though the officer hadn't given him some warning?").

[220] *Id*. at 14. Justice Powell was not persuaded. The hand-written notes he took during Tobisman's argument include this question: "How does one show [awareness of right to refuse consent] without equivalent of *Miranda*[?]" Justice Lewis F. Powell, Jr., Oral Argument Notes in Schneckloth v. Bustamonte (October 10, 1972) (on file with Washington & Lee University School of Law, Lewis Powell Papers, Box 151, File, "Bustamonte Folder 1").

[221] *Id*. at 20.

[222] *Id*. at 22.

[223] Transcript of Oral Argument at 25, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (No. 71-732).

[224] BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 357 (1990) (internal quotation marks omitted).

[225] *Id*. (calling Judge Traynor "one of the best judges never to sit on the Supreme Court").

thereafter expressed his disagreement, stating that the state had to prove consent and part of doing so obligated it to demonstrate knowledge of the right to refuse consent.[226] Justice Stewart then intervened: "I would agree with [Brennan] that the state has to prove consent, though not that the burden included knowledge that he didn't have to agree to the search[.]"[227]

Although Justices Marshall and Douglas expressed their agreement with Justice Brennan, Justices Blackmun and White did not. Justice White commented at the conference, "[the Court] can infer from the request to search, and the consent thereto, that one knew that he could refuse."[228] For his part, Blackmun agreed with Judge Traynor's approach; "I always read *Ker* [an earlier Supreme Court case] as giving the states latitude to develop their own standards [as] California did here as to its voluntariness standard."[229] Justice Powell reduced the substance of the Court's discussion, alongside the Justices' conference votes, via the following handwritten notes:

> Douglas: "Consent: Affirm"
>
> Brennan: "Affirm consent issue. If state relies on consent, state must carry burden of proving that party had knowledge of his rights."
>
> Stewart: "Consent. Must be uncoerced but state doesn't have to prove knowledge. Thus,"
>
> White: "Consent. Purely a voluntariness issue. State has no burden to show knowledge.
>
> Marshall: "Affirm Consent. Agree with Brennan on both issues."
>
> Blackmun: "Reverse Consent. Agrees with White & Stewart."
>
> Powell: "Reverse Consent. Agrees with Byron & Potter."

[226] *Id*. at 358.

[227] *Id*. (internal quotation marks omitted).

[228] *Id*. (internal quotation marks omitted).

[229] *Id*. (internal quotation marks omitted).

> Rehnquist: "Reverse Consent. Agrees with Byron & Potter."
>
> Burger: "Reverse. Calif. Rule enumerated by Traynor – views all circumstances + determines voluntariness."[230]

Justice Powell added this note: "all votes tentative."[231]

Justice Stewart distributed a first draft majority opinion on April 13, 1973[232]—sixth months and four days after oral argument. Given the significant length of time between oral argument and the distribution of Stewart's first draft opinion, one wonders what caused the delay. An applicable historical anecdote suggests the answer: after one of Justice Stewart's clerks returned a draft of the *Schneckloth* opinion, weeks passed with no instructions or indication of approval or disapproval.[233] The clerk became distressed and finally asked if Justice Stewart had seen *Schneckloth*.[234] "Yes," Stewart replied, pulling open his top drawer; "I can see it any time I want."[235] The clerk concluded that Justice Stewart was avoiding circulating the opinion until late in the term to preclude time for a lengthy Fourth Amendment debate; one of the first cases argued in the 1972 term, *Schneckloth* was one of the last to be decided.[236]

Justice White characterized the Justice Stewart's first draft as "very good" and joined it on April 16.[237] Justice Powell joined the same day, though he noted that he "may file a concurring

---

[230] Justice Lewis F. Powell, Jr., Vote Sheet in *Schneckloth v. Bustamonte* (October 11, 1972) (on file with Washington & Lee University School of Law, Lewis Powell Papers, Box 151, File, "Bustamonte Folder 1").

[231] *Id.*

[232] First Draft of Schneckloth v. Bustamonte Majority Opinion (April 13, 1973) (on file with Washington & Lee University School of Law, Lewis Powell Papers, Box 151, File, "Bustamonte Folder 10").

[233] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 327 (1979).

[234] *Id*.

[235] *Id.*

[236] *Id*.

[237] Letter from Justice Byron R. White to Justice Potter Stewart (April 16, 1973) (on file with Yale University Library Manuscripts and Archives, Potter Stewart Papers, Box 86, File, "Folder 753").

opinion[.]"[238] Justice Blackmun joined the opinion two days later, noting in doing so "that this is a very significant case[.]"[239] Justice Rehnquist joined on the 19th,[240] and Chief Justice Burger's vote on May 8 rounded out the six-member majority.[241]

The Court issued the *Schneckloth* opinion on May 29, 1973—more than six years after the initial traffic stop that led to Bustamonte's arrest and over seven months after the Court heard oral argument. The black-letter holding on the consent issue in *Schneckloth* is simple: knowledge of the right to refuse consent is but one factor in determining whether consent is valid, which is otherwise to be determined from the totality of the circumstances.[242]

The rationale is more complex. At the outset of the opinion, Justice Stewart clarified that voluntary consent is a permissible and constitutional exception to the general requirement that officers must possess a search warrant prior to undertaking a search.[243] The question before the Court, however, was how to *define* voluntary consent.[244] To begin with, the Court found instructive the same Fourteenth Amendment interrogation cases rejected by

[238] Letter from Justice Lewis F. Powell, Jr., to Justice Potter Stewart (April 16, 1973) (on file with Yale University Library Manuscripts and Archives, Potter Stewart Papers, Box 86, File, "Folder 753") ("I would have preferred to dispose of the case on the broader ground (briefed and argued) that the exclusionary rule should not be available to a state prisoner alleging only a Fourth Amendment violation in a federal habeas corpus proceeding[.]").

[239] Letter from Justice Harry A. Blackmun to Justice Potter Stewart (April 18, 1973) (on file with Yale University Library Manuscripts and Archives, Potter Stewart Papers, Box 86, File, "Folder 753").

[240] Letter from Justice William H. Rehnquist to Justice Potter Stewart (April 18, 1973) (on file with Yale University Library Manuscripts and Archives, Potter Stewart Papers, Box 86, File, "Folder 753").

[241] Letter from Chief Justice Warren Burger to Justice Potter Stewart (May 8, 1973) (on file with the Library of Congress, Manuscript Division, William Douglas Papers, Box 1595, File, "Folder 1(a)").

[242] *Schneckloth*, 412 U.S. at 227.

[243] *Id*. at 219.

[244] *Id*.

Miranda,[245] yet conceded that "[t]hose cases yield no talismanic definition of 'voluntariness.'"[246]

Despite the absence of a precise definition for voluntariness in the Court's pre-*Miranda* Fourteenth Amendment confession cases, the *Schneckloth* majority continued its reliance on those cases.[247] In particular, the Court observed, the voluntariness test in the context of confession cases sought to evaluate the totality of the circumstances in an effort to determine whether defendant's will was overborne.[248] Those circumstances, among others, historically included (1) defendant's age; (2) defendant's level of education/intelligence; (3) whether defendant was advised of his constitutional rights; (4) the length of defendant's detention; and (5) the presence of food or sleep deprivation.[249] Importantly, said the Court, none of the decisions in those cases "required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put."[250]

With voluntariness now framed in the historical context of the Court's pre-*Miranda* confession jurisprudence, the Court simply extended the Fourteenth Amendment to Fourth Amendment consent searches.[251] It therefore held that voluntariness is a question of fact that turns on the totality of the circumstances.[252] Although, in doing so, the Court acknowledged that the definition of voluntariness must accommodate "the legitimate need for such searches and the equally important requirement of assuring the absence of coercion[,]"[253] it nevertheless candidly feared that

---

[245] *Id*. at 223-24. According to the Court, it relied on pre-*Miranda* cases because they contained "[t]he most extensive judicial exposition of the meaning of 'voluntariness[,]'" *id*. at 223, and because there existed prior precedent for doing so, *id*. at 224 n.6 ("[W]hen we recently considered the meaning of a 'voluntary' guilty plea, we returned to the standards of 'voluntariness' developed in the coerced-confession cases." (citing Brady v. United States, 397 U.S. 742, 749 (1963))).

[246] *Schneckloth*, 412 U.S. at 224.

[247] *Id*. at 225-26.

[248] *Id*. at 226.

[249] *Id*.

[250] *Id*. at 226-27.

[251] *Id*. at 229 ("[T]here is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness.'").

[252] *Schneckloth*, 412 U.S. at 228.

[253] *Id*. at 227.

requiring the prosecution to prove that a defendant *knew* he had the right to refuse consent "would, in practice, create serious doubt whether consent searches could continue to be conducted."[254] Requiring proof of knowledge, the majority reasoned, would be difficult for the prosecution to demonstrate;[255] meanwhile, a defendant could seek exclusion of evidence obtained on the basis of consent simply by testifying that he was unaware that he could refuse to consent.[256]

Apart from requiring proof of knowledge, what about a warnings regime that would simply *inform* prospective defendants of their right to refuse consent? The Court answered as follows: "it would be *thoroughly impractical* to impose on the normal consent search the detailed requirements of an effective warning."[257] As to *why* a Fourth Amendment warnings system would be "thoroughly impractical," the majority suggested the following rationale:

> Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights. And, while surely a closer question, these situations are still immeasurably far removed from "custodial interrogation" where, in *Miranda v. Arizona*, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation.[[258]]

---

[254] *Id*. at 229.

[255] *Id*. at 229-30.

[256] *Id*. at 230.

[257] *Id.* at 231 (emphasis added).

[258] *Schneckloth*, 412 U.S. at 231-32.

The Court even quoted the following language from *Miranda* to round out its rationale: "'Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . .'"[259]

After relegating knowledge to a mere factor in the voluntariness inquiry, the Court thereafter rejected Bustamonte's argument that consenting to a police search is equivalent to a waiver of Fourth Amendment rights and, accordingly, the Court should evaluate consent pursuant to its waiver jurisprudence.[260] Were Bustamonte correct, the prosecution would have to demonstrate "'an intentional relinquishment or abandonment of a *known* right or privilege.'"[261] But, according to the Court, the requirement of a knowing and intelligent waiver applied "only [to] those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair *trial*."[262] Although trial rights and Fourth Amendment rights are both constitutional rights, the majority reasoned that "[t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment."[263] Fourth Amendment rights, said the Court, have nothing to do with promoting the fair ascertainment of truth at a criminal trial; rather they protect the security of one's privacy against arbitrary intrusion by the police.[264]

Moreover, reasoned the Court, it would be "next to impossible" for an officer to make the detailed examination demanded by the waiver standard in the informal and unstructured context of a consent search.[265] Although warnings could aid the waiver evaluation, the idea of such a requirement had been "all but universally rejected to date."[266] Finally, the Court found support in its third-party consent cases, a review of which disclosed that although third party consent was permissible in the Fourth

---

[259] *Id*. at 232 (quoting *Miranda*, 384 U.S. at 477).

[260] *Id*. at 235.

[261] *Id*. at 235 (quoting Johnson v. Zerbst, 304 U.S. 458, 465 (1938)).

[262] *Id*. at 237 (emphasis added).

[263] *Id*. at 241.

[264] *Schneckloth*, 412 U.S. at 242.

[265] *Id*. at 243-45.

[266] *Id*. at 245 n.33.

Amendment context,[267] it was not similarly permissible in the trial right context.[268]

Considering the Court's insecurity about *Miranda*, perhaps the most important argument still remained: "that *Miranda* requires the conclusion that knowledge of a right to refuse is an indispensible element of a valid consent."[269] In rejecting that argument, the majority reasoned that custodial interrogation is fundamentally different from the environment of consent searches.[270] Indeed, because most consent searches occur "on a person's familiar territory" rather than in the stationhouse, Justice Stewart found no reason to believe that a response to an officer's request for consent could be presumptively coerced.[271] The majority therefore concluded by reiterating its position that no reason existed to depart from the traditional totality of the circumstances test for measuring the voluntariness of consent.[272]

II.

After the Court issued *Schneckloth*, scholars generally agreed that it represented a deviation from how the Warren Court would have, if given the opportunity, treated consent law.[273] That deviation is best understood as a predictable *Miranda* backlash; the Burger Court was simply not in the business of expanding the rights of criminal defendants. *Miranda's* fame remains unmatched despite Burger Court decisions,[274] but its jurisprudential impact has

---

[267] *See* Frazier v. Cupp, 394 U.S. 731, 740 (1969); Hill v. California, 401 U.S. 797, 802-05 (1971).

[268] *Schneckloth*, 412 U.S. at 246.

[269] *Id*. at 246.

[270] *Id.* at 247.

[271] *Id*.

[272] *Id*.

[273] Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1398 (1977) (noting *Schneckloth* is "another case that arguably deviates form the policy of the Warren Court through its generous interpretation of a doctrine (search by consent) that validates searches without probable cause").

[274] *See, e.g.*, David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L REV. 859, 904 (2009) (referring to *Miranda* as "[t]he most famous criminal procedure decision"); Eric English, *You Have the Right to Remain Silent. Now Please Repeat Your Confession:* Missouri v. Seibert *and the Court's Attempt to Put an End to the Question-First Technique*, 33 PEPP. L. REV. 423, 429 (2006) ("*Miranda* is recognized as the Warren Court's landmark criminal law decision and remains good law today."); Richard A. Leo, *The*

softened.[275] One wonders, then, whether the *Schneckloth* majority's assertions remain valid—was Justice Stewart right to conclude that a Fourth Amendment right to refuse consent warning would be "thoroughly impractical"? And, moreover, was the Burger Court properly concerned about creating a Fourth Amendment *Miranda*? In other words, would fewer people consent if they were first told of their right to refuse consent?

This Part explores those and related questions. To do so, Section A tests the *Schneckloth* majority's "thoroughly impractical" assertion by considering the historical considerations that likely led to Justice Stewart's phrasing alongside various post-*Schneckloth* state court decisions. Section B then asserts that *Schneckloth* warnings—i.e., a set of warnings to inform the citizens of their right to refuse consent—would not impair law enforcement. The absence of political, social, and judicial considerations similar to those present in 1973, Section B asserts, suggests that *Schneckloth* was wrong and, as such, requiring Fourth Amendment warnings is a far more attractive proposition today.

A. Schneckloth *warnings are not "thoroughly impractical."*

As detailed above, part of Justice Stewart's majority opinion in *Schneckloth* included the assertion that it would be "thoroughly impractical" to provide citizens with consent search warnings."[276] Is that true? Or, instead, was Justice Marshall correct in his dissent when he "conclude[d] with some reluctance, that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights."[277] This section submits that Justice Stewart was wrong to write that requiring Fourth Amendment warnings would be "thoroughly impractical" and, moreover, that he may have *known*

Impact of Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 671 (1996) ("The *Miranda* warnings may be the most famous words ever written by the United States Supreme Court."); Israel, *supra* note 273, at 1373 ("The *Miranda* decision is the most highly publicized of all the Warren Court's criminal procedure decisions . . . .").

[275] *See* note 160, *supra*, and accompanying discussion (citing cases that tempered *Miranda's* impact).

[276] *Schneckloth*, 412 U.S. at 231 (emphasis added).

[277] *Id*. at 288 (Marshall, J., dissenting); *see* HOWARD BALL, A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA 292 (2001) (observing that *Schneckloth* still irked Justice Marshall in 1991—his last year on the Court).

he was wrong at the time he wrote the *Schneckloth* opinion. Regardless, given his personal hostility toward *Miranda* and *Escobedo*, there was little chance he might be open to extending the rationale of those decisions to consent searches.

To better understand those latter assertions, consider Justice Stewart's tenure on the Court. He began on the Court in 1958 and completed his twenty-three years of service in 1981.[278] Speaking generally, history would come to view Stewart as a pragmatist who had a "reputation for injecting a cooling influence on the fiery passions that frequently flared in the Court's conference room, and like his personal style, his opinions were cool analysis of the issues involved in a case."[279] He is perhaps best known for his definition of hard-core pornography: "I know it when I see it."[280]

More specifically in the realm of criminal procedure, Justice Stewart is perhaps best known for his dedication to the Sixth Amendment; in particular, his effort to identify with precision *when* the Sixth Amendment procedurally attaches and what it protects.[281] Embodied in that pursuit, however, was his own private discontent with both *Escobedo* and *Miranda*—alongside his discontent with Warren Court opinions more generally. Indeed, Justice Stewart would come to lead the justices in percentage of dissents during the 1966 term.[282]

---

[278] Potter Stewart—Biography, THE OHIO JUDICIAL CENTER, http://www.ohiojudicialcenter.gov/p_stewart.asp (last visited July 1, 2011).

[279] BAKER, *supra* note 58, at 155.

[280] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[281] Brewer v. Williams, 430 U.S. 387, 398 (1977) (stating, per Stewart, "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him"); Massiah v. United States, 377 U.S. 201, 206 (1964) (holding, per Stewart, that defendant "was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel"); Spano v. New York, 360 U.S. 315, 326 (1959) (Stewart, J., concurring) (arguing, despite that the Sixth Amendment was yet incorporated, that "the absence of counsel when this confession was elicited was alone enough to render it inadmissible under the Fourteenth Amendment"). *See* Jesse C. Stewart, *The Untold Story of Rhode Island v. Innis: Justice Potter Stewart and the Development of Modern Self-Incrimination Doctrine*, 97 VA. L. REV. 431, 449 (2011) (noting the Sixth Amendment right to counsel was a doctrine that Stewart "had long championed").

[282] *Id*. at 392-93. Interestingly, however, Justice Stewart broke from that voting pattern whenever the Nixon appointees sought to expressly overrule

By the time of *Escobedo* in 1964, Stewart had already made his position clear that he favored an automatic right to counsel pursuant to the Sixth Amendment at the procedural point when the suspect became the accused.[283] *Escobedo's* interpreting the Sixth Amendment to apply to the interrogation room—in other words, prior to a formal charge—particularly frustrated Stewart and prompted him to break from his otherwise even-keeled opinion-writing.[284] In his *Escobedo* dissent, he passionately wrote the following:

> Supported by no stronger authority than its own rhetoric, the Court today converts a routine police investigation of an unsolved murder into a distorted analogue of a judicial trial. It imports into this investigation constitutional concepts historically applicable only after the onset of formal prosecutorial proceedings. By doing so, I think the Court perverts those precious constitutional guarantees, and frustrates the vital interests of society in preserving the legitimate and proper function of honest and purposeful police investigation.[[285]]

With that language in mind, it is hardly surprising that he dissented again two years later in *Miranda*. In *Miranda*, however, Stewart declined to pen his own dissent, instead electing to join opinions authored by Justices Harlan and White. The first, by Justice Harlan, echoed Justice Stewart's sentiments in *Escobedo*; indeed, said Harlan, "[*Miranda*] represents poor constitutional law"[286] that, like *Escobedo*, could not be "sustained by precedents under the Fifth Amendment."[287] Justice White's dissent went further. Citing his *Escobedo* dissent, White commented in *Miranda* that he saw "nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause

---

precedent established during the Warren Court. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 406 (1979).

[283] *Massiah*, 377 U.S. at 206.

[284] BAKER, *supra* note 58, at 155.

[285] *Escobedo*, 378 U.S. at 494 (Stewart, J., dissenting).

[286] *Miranda*, 384 U.S. at 504 (Harlan, J., dissenting).

[287] *Id*. at 512. Harlan thought the *Miranda* majority's discussion of *Escobedo* in was surprising because, he said, "it contains no reasoning or even general conclusions addressed to the Fifth Amendment . . . ." *Id*. at 512 n.9.

to arrest whether or not he killed his wife . . . at least where he has been plainly advised that he may remain completely silent[.]"[288] Of course, White famously added his belief that *Miranda* would "have a corrosive effect on the criminal law as an effective device to prevent crime."[289]

Immediately after *Miranda's* issuance, academics and other court commentators got to work assessing the accuracy of Justice White's prediction.[290] One 1967 study, conducted by Yale Law School, examined police behavior during interrogations in New Haven, Connecticut in an effort to assess that very statement.[291] It found, after observing well over one hundred interrogations over three months,[292] "that warnings had little impact on suspects' behavior."[293] Indeed, the study reported, "[n]o support was found for the claim that warnings reduce the amount of 'talking.'"[294]

The Yale study was hardly the only effort, completed prior to *Schneckloth*, to assess what impact *Miranda* would have on the effectiveness of law enforcement. Indeed, studies popped up examining *Miranda's* impact in New York,[295] Philadelphia,[296] D.C.,[297] Detroit,[298] Pittsburgh,[299] and Los Angeles.[300] In D.C.,

---

[288] *Id*. at 538 (White, J., dissenting) (citing *Escobedo*, 378 U.S. at 499 (White, J., dissenting)).

[289] *Id*. at 543 (White, J., dissenting).

[290] *Miranda*, 384 U.S. at 543 (White, J., dissenting).

[291] Note, *Interrogations in New Haven*, 76 YALE L.J. 1521, 1521-22 (1967).

[292] *Id*. at 1532.

[293] *Id*. at 1563.

[294] *Id*.

[295] *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 200-19 (1967).

[296] *Id*.

[297] Richard J. Medalie, Leonard Zeitz & Paul Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347, 1347-48 (1968).

[298] Sidney E. Zion, *Advice to Suspect Found Police Aid: Detroit Detective Says Rate of Confessions Increased*, N.Y. TIMES, Feb. 28, 1966, at 18.

[299] Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 6 (1967).

[300] Evelle J. Younger, *Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effects of the Dorado*

post-*Miranda*, nearly forty percent of suspects gave incriminating statements to the police post-arrest, compared to forty-three percent who gave statements pre-*Miranda*.[301] The Pittsburgh and Los Angeles studies similarly saw little change post-*Miranda*.[302] In Detroit, "the rate of confessions increased . . . after the police instituted a system of warning suspects of their constitutional rights."[303] Criticized surveys conducted by prosecutors' offices in Philadelphia and New York were alone in finding that *Miranda* caused a drop in confession and conviction rates.[304]

Accordingly, by the time of *Schneckloth* in the early 1970s, the *Miranda* storm began to subside. As a *New York Times* story in 1972 observed, "[n]o better proof could be found that the once-controversial procedural limitations have not really handcuffed the police than the fact that the police have largely quit complaining about them."[305] Additional studies conducted in Denver,[306] Knoxville,[307] and Southern California,[308] among others,[309] all

---

and Miranda decisions Upon the Prosecutions of Felony Cases, 5 AM. CRIM. L. Q. 32 (1966).

[301] Medalie, *supra* note 297, at 1414 (Table E-1).

[302] Seeburger & Wettick, *supra* note 299, at 26 ("[T]he Pittsburgh figures collected through this study support the generalization that *Miranda* has not impaired significantly the ability of the law enforcement agencies to apprehend and convict the criminal."); Younger, *supra* note 300, at 34 ("The percentage of cases in which confessions or admissions were made has not decreased, as might have been anticipated, because of the increased scope of the admonitions required by *Miranda*.").

[303] Sidney E. Zion, *Advice to Suspect Found Police Aid: Detroit Detective Says Rate of Confessions Increased*, N.Y. TIMES, Feb. 28, 1966, at 18.

[304] *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 1st Sess. 200-19 (1967). The unpublished surveys from New York and Philadelphia have since been heavily criticized for their "severely flawed methodology." Leo, *supra* note 274, at 636.

[305] Fred P. Graham, *The "Nixon Court": A Premature Label?*, N.Y. TIMES, Jan. 7, 1972, at 8.

[306] Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of* Miranda, 47 DENV. L.J. 1 (1970).

[307] Otis H. Stephens, Robert L. Flanders & J. Lewis Cannon, *Law Enforcement and the Supreme Court: Police Perceptions of the* Miranda *Requirements*, 39 TENN. L REV. 407 (1972).

[308] James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of Miranda on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973).

[309] DAVID W. NEUBAUER, CRIMINAL JUSTICE IN MIDDLE AMERICA 167 (1974) (evaluating the impact of *Miranda* on Prairie City, Oregon, and concluding the decision's impact has been "minimal"); NEAL A. MILNER, THE

sought to further the effort to evaluate *Miranda's* impact on law enforcement. Like their predecessors, however, each concluded that *Miranda* did not significantly diminish the prevalence of confessions.[310] Thus, while Justice Stewart wrote in *Schneckloth* that consent warnings would be "thoroughly impractical," he did so while the academic and law enforcement communities' reached the almost uniform conclusion to the contrary about *Miranda* warnings.

Perhaps, then, it is unsurprising that several states have since questioned *Schneckloth* and its accompanying rationale. The Mississippi Supreme Court, in "sharp departure" from *Schneckloth*, requires a "*knowledgeable waiver* . . . before consenting to a search."[311] Contrary to *Schneckloth's* reasoning, the New Hampshire Supreme Court noted the possibility for coercion in knock-and-talk procedures, though it stopped short of requiring warnings.[312] The Minnesota Supreme Court has similarly recognized problems of pretext and inherent coercion when officers seek a citizen's consent during traffic stops.[313] Finally, in Indiana, an appellate court has suggested that the "better practice" would be for officers to identify themselves and provide warnings during knock-and-talk encounters;[314] rather than hamper police investigations, "such an advisement would minimize needless suppression motions, hearings, and appeals."[315]

Still others have gone so far as to interpret their own state's constitution to require right to refuse consent warnings. In 1975,

---

COURT AND LOCAL LAW ENFORCEMENT; THE IMPACT OF MIRANDA 223 (1971) (reporting a significant, but temporary, decline in Chicago clearance rates, though conviction rates remained relatively constant).

[310] Leiken, *supra* note 306, at 47 (explaining that suspects in the study did not meaningfully understand their *Miranda* rights and therefore willingly waived them); Stephens et al., *supra* note 307, at 424 (observing that although officers disapproved of *Miranda*, it still "left room for traditional forms of interrogation"); Witt, *supra* note 308, at 325 (noting a 2% decline in confessions in Southern California post-*Miranda*).

[311] Graves v. State, 708 So.2d 858, 863 (Miss. 1997) (internal citation omitted).

[312] State v. Johnson, 839 A.2d 830, 836 (N.H. 2004).

[313] State v. George, 557 N.W.2d 575, 580 (Minn. 1997).

[314] Hayes v. State, 794 N.E.2d 492, 497 (Ind. Ct. App. 2003).

[315] *Id*. at 497-98. The court further stated that the "best practice would be for the officer to obtain written consent" and noted that such forms were already in use throughout the state. *Id*. at 498 (citing state cases involving written consent forms).

for example, the New Jersey Supreme Court held that an "essential element" of voluntary consent "is the knowledge of the right to refuse."[316] Accordingly, the court adopted a waiver requirement, thereby requiring the government to prove that consenting individuals *knew* that they could refuse consent.[317]

Two decades later, the Supreme Court of Hawaii held, in the "walk and talk" investigative encounter context, that consent cannot be voluntary if obtained through the "material nondisclosure" of failing to advise the individual that the officer is investigating crime and that the individual is free to go at any time.[318] Shortly thereafter, the Supreme Court of Washington held that warnings of the right to refuse, to limit, and to withdraw consent were required when officers sought consent to search a citizen's home.[319] In doing so, the court rejected *Schneckloth's* impracticality argument on an empirical basis—citing its own cases where officers obtained consent despite providing warnings, and studies reflecting *Miranda's* minimal impact on law enforcement.[320] Finally, and most recently, Arkansas adopted a rule requiring notice of the right to refuse consent in knock-and-talk searches.[321]

Considering a handful of states that *do* require warnings, one commentator recently reported, "even with requirements more stringent than the bare warning requirement that was rejected in *Schneckloth*, there was little effect on the rate of consent."[322] The totality of the foregoing suggest that Justice Stewart wrote tongue-in-cheek that right to refuse consent warnings would be "thoroughly impractical." Indeed, as one commentator concludes about the *Schneckloth* reasoning, "[p]erhaps it was all a joke."[323]

---

[316] State v. Johnson, 346 A.2d 66, 68 (N.J. 1975).

[317] *Id*.

[318] State v. Trainor, 925 P.2d 818, 828 (Haw. 1996) (citing State v. Quino, 840 P.2d 358, 364 (Haw. 1992)).

[319] 960 P.2d 927, 933 (Wash. 1998).

[320] *Id*. at 933-34; *see* State v. Stenson, 697 P.2d 1239, 1254 (Wash. 1997) (noting defendant signed a written consent to search that contained "a clear statement that the Defendant had 'the lawful right to refuse to consent to such a search'"), *cert. denied,* 523 U.S. 1003 (1998); State v. Smith, 801 P.2d 975, 984 (Wash. 1990) (noting defendant "signed a written consent search which included specific language that documented his right to refuse consent").

[321] State v. Brown, 156 S.W.3d 722, 728 (Ark. 2004).

[322] Phillips, *supra* note 17, at 1205.

[323] 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, 499 (1993).

B. *Historical circumstances suggest the modern need for* Schneckloth *warnings*.

Miranda warnings are now standard police practice.[324] And, despite the outrage surrounding *Miranda's* initial issuance,[325] the decision's requirement that officers provide certain warnings to suspects subject to custodial interrogation has, as the early *Miranda*-impact studies posited, not diminished confessions.[326]

Consistent with conclusions reached by the early *Miranda*-impact literature in the late 1960s and throughout the 1970s,[327] *Miranda* scholarship in the 1980s offered more of the same: law enforcement had learned to live with *Miranda* and most officers believed that *Miranda* posed no "serious" law enforcement problems.[328] A couple of *Miranda* impact studies reconfirmed the decision's limited impact either on local prosecutors,[329] or juvenile defendants.[330] Importantly, however, the 1980s seemingly saw a resurgence of academic scholarship reevaluating *Miranda*.[331] One

---

[324] LAWRENCE BAUM, THE SUPREME COURT 232 (7th ed. 2001).

[325] *See* WHITE, *supra* note 132, at 57; *see also* note 138, *supra*, and accompanying discussion (citing illustrative post-*Miranda* frustrations from law enforcement leadership in Boston and Philadelphia).

[326] WHITE, *supra* note 132, at 60; *see also* notes 335-37, *infra*, and accompanying textual discussion.

[327] *See* notes 291, 297-300, *supra*, and accompanying textual discussion.

[328] JEFFERIES, *supra* note 130, at 399.

[329] John Gruhl & Cassia Spohn, *The Supreme Court's Post*-Miranda *Rulings*, 3 LAW & POL'Y Q. 29, 34 ("Local prosecutors overwhelmingly support the general principles of the Warren Court's *Miranda* doctrine.").

[330] Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1166 (1980) (concluding that *Miranda* is of limited aid to juvenile defendants because they "do not understand the nature and significance of their *Miranda* rights to remain silent and to counsel").

[331] *See, e.g.*, Karen L. Guy & Robert G. Huckabee, *Going Free on a Technicality: Another Look at the Effect of the* Miranda *Decision on the Criminal Justice Process*, 4 CRIM. JUST. RES. BULL. 1, 2 (1988) ("It would appear from the present research that the debate over the impact of *Miranda v. Arizona* on the ability of American police to enforce the law and protect the public amounts to little more than political rhetoric."); Stephen J. Shulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 461 (1987) (concluding that *Miranda* reflects a Fifth Amendment compromise and that its "safeguards deserve to be strengthened, not overruled"); Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1419 (1985) (arguing that *Miranda* should be overruled).

individual, Professor Joseph Grano, was particularly—and pervasively—critical of *Miranda*, often arguing that no problem existed by creating an uneven playing field when interacting with potentially guilty suspects.[332]

Academic scholarship in the 1990s expanded upon Professor Grano's *Miranda*-based criticisms by venturing into the empirical realm in an effort to demonstrate *Miranda's* harmfulness.[333] Professor Paul Cassell led a vocal charge asserting, in a variety of articles, that prior *Miranda* impact studies had understated the decision's harmful impact on confessions.[334] Other empirical

---

[332] *See, e.g.*, Joseph D. Grano, *The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REFORM 395, 405 (1989) (reviewing and agreeing with the government's position that Congress has the power to overrule *Miranda*); Joseph D. Grano, Miranda's *Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 178 (1988) (suggesting that *Miranda* cannot be justified as a constitutional exercise of judicial authority); Joseph D. Grano, Miranda v. Arizona *and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 289 (1986) (concluding the Court should "admit that it made a serious mistake" by issuing *Miranda*); Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 690 (1986) (asserting that the newest edition of Reid & Inbau's interrogation manual helps to demonstrate "how misguided our recent direction has been"); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. 100, 110-11 (1985) (questioning the Court's ability to promulgate prophylactic rules and therefore questioning *Miranda's* legitimacy); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 865 (1979) (arguing for a new due process voluntariness test).

[333] *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1059 (1998); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 NW. U. L. REV. 1084, 1110-11 (1996); *but cf.* Martin Belsky, *Living with* Miranda: *A Reply to Professor Grano*, 43 DRAKE L. REV. 127, 137 (1994).

[334] Paul G. Cassell, Miranda's *Negligible Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL'Y 327, 327-28 (1997); Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 390 (1996); Paul G. Cassell & Brett S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 842-43 (1996); *but cf.* Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of* Miranda *on the Police*, 32 RUTGERS L.J. 1, 4-5 (2000) (expressing reservations about whether the data reported in the Cassell studies accurately reflects its claim that *Miranda* has hampered law enforcement); George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. Rev. 933, 935 (1996) (same); John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness*, 50 STAN. L. REV. 1147, 1172 (1998) (same); Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90

literature sought to move past the early post-*Miranda* studies; indeed, Professor Richard Leo asserted in his mid-1990s study of multiple police departments in California that whether *Miranda* significantly impacted law enforcement had become a "sterile issue."[335] But even more modern scholarship has again confirmed *Miranda's* acceptance in the law enforcement community,[336] and its contextually minimal impact on confessions.[337]

Whatever conclusion should be drawn from the *Miranda* impact literature about its precise impact on law enforcement, one thing seems clear: informing citizens of their rights does not, as Justice White feared in his *Miranda* dissent,[338] *significantly* impair law enforcement. People are indeed still confessing.[339] But why? An early post-*Miranda* study concluded that, assuming suspects understood their rights, they nonetheless confessed for one of several reasons: (1) they did not trust a lawyer offered by the police; (2) they wanted to talk only to people "who would let me know what [they were] up against;" (3) preoccupation with other concerns; (4) a concern for being hit or beaten by the police; (5) a desire to convince the police of their innocence; (6) a hope for leniency; or (7) an overarching compulsion to speak.[340] Given that the intensity of the interrogation room environment persisted post-*Miranda*, that factor alone contributed most significantly to suspects' continued willingness to confess.[341]

NW. U. L. REV. 500, 548-60 (1996) (expressing concern about Cassell's proposals for reform).

[335] Leo, *supra* note 274, at 649.

[336] Marvin Zalman & Brad W. Smith, *Criminology: The Attitudes of Police Executives Toward* Miranda *and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 904-05 (2007) (discussing nationwide survey research reflecting a widespread acceptance of *Miranda*).

[337] Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 231-33 (2006) (discussing *Miranda's* minimal impact on adolescents).

[338] *Miranda*, 384 U.S. at 543 (White, J., dissenting).

[339] Saul M. Kassin, *Understanding and Addressing Criminal Injustice: False Confessions*, 73 ALB. L. REV. 1227, 1230 (2010) (discussing 2007 research indicating that roughly "67.57 percent of suspects make self-incriminating statements").

[340] Medalie, *supra* note 297, at 1378.

[341] *See* Edwin Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 59 (1969) ("The *Miranda* warnings fail to provide safeguards against the social psychological rigors of arrest and interrogation except to the extent that they prevent interrogation altogether."); *see also* David L. Sterling, *Police Interrogation and the Psychology of*

Similar logic pervades during the police-citizen consent search encounter. The limited empirical research available to explain why people consent to search—despite some being warned of their right to refuse consent—reveals that citizens are simply afraid.[342] Stated with more precision, citizens' fear of an officer's reprisal is the primary reason why people consent to search.[343] Other researchers have concluded, more basically, that "man's innate tendency to obey authority can impair his decision making and, ultimately, dull the understanding with which he exercises his constitutional rights."[344]

Given the apparent overlap between the circumstances prevalent in Fourth and Fifth Amendment police-citizen encounters,[345] there seems good reason to apply *Miranda*-related empirical research to consent searches—despite what the *Schneckloth* Court believed.[346] And, assuming that warnings do not significantly impair law enforcement, then Justice Stewart must be wrong; it would not be "thoroughly impractical"[347] to require that officers provide citizens with a consent search Fourth Amendment warning. It therefore seems difficult to rationalize retaining *Schneckloth* as good law or, at a minimum, declining to adopt one of the fundamental propositions rejected by the *Schneckloth* majority: "proof of knowledge of the right to refuse consent [as] a necessary prerequisite to demonstrating a 'voluntary' consent."[348]

Equally if not more important than the implications of *Miranda*-related empirical research on consent searches is the modern absence of a President preoccupied with a single Supreme Court decision alongside a series of justices appointed to overrule that decision. In contrast, by the time Bustamonte's case emerged

---

Confession, 14 J. PUB. L. 25, 27 (1965) (reviewing literature that reflects suspects feel burdened by guilt and confessing alleviates that burden).

[342] Chanenson, *supra* note 16, at 453-54.

[343] *Id.* at 454.

[344] Barrio, *supra* note 16, at 233.

[345] *Id*. at 240-44 (reviewing psychological literature supporting the idea that there exist psychological pressures on citizens during consent search police-citizen interactions).

[346] As discussed in Part I(B) above, the *Schneckloth* majority resoundingly rejected the idea that the environment of consent searches resembled the one present during custodial interrogations. 412 U.S. at 246-47.

[347] *Schneckloth*, 412 U.S. at 231.

[348] *Id*. at 232-33.

before the Supreme Court, Nixon was confident that his four appointees were well on their way to his stated mission: overrule *Miranda.*[349] Admittedly, *Miranda* was never overruled, but the Burger Court did something equally remarkable: it told citizens that they had no right to be informed of their constitutional rights during a police-citizen encounter involving a request for their consent search.

Yet, the *Schneckloth* decision received a dearth of media attention. Although the *New York Times* reported the issuance of the *Schneckloth* opinion on the front page of its May 30, 1973, newspaper, alongside the issuance of *Cupp v. Murphy*,[350] that day's paper was unaccompanied by an editorial about *Schneckloth's* implications.[351] The substantive story did, however, characterize the decision as part of a "continuing trend on the Court toward majorities that favor the protection of society as a whole as against the rights of the accused. Appointees of President Nixon formed the core of both majorities."[352] The *Schneckloth* opinion's far-reaching ramifications seemingly came and went in 1973 without significant notice by the academic community either.[353]

---

[349] Aryeh Neier, *Nixon's Court: Its Making and Its Meaning*, TIME MAGAZINE, Nov. 1, 1971, at 18 (noting that criminal law is "the President's special concern" and that *Miranda* is "[t]he principal target").

[350] 412 U.S. 291, 296 (1973) (holding that officers need not obtain a warrant prior to scraping a defendant's fingernails for blood at the stationhouse).

[351] Warren Weaver, Jr., *Justices Broaden Power of Police to Hunt Evidence*, N.Y. TIMES, May 30, 1973, at 1.

[352] *Id.*

[353] A number of journals of course reported decisions by the Supreme Court in 1973. *See, e.g.*, William N. Mehlhaf, *Recent Decisions*: *Valid Consent to Search Does Not Require Knowledge of the Constitutionally Protected Right to Refuse*, 9 GONZ. L. REV. 845 (1974); Paul R. Baier, *Criminal Procedure I*, 34 LA. L. REV. 396, 413 (1974); John L. Farquhar, James Lieb & Miriam Vogel, *Criminal Procedure*, 1973 ANN. SURV. AM. L. 379, 407 (1973). But, only a select few articles seized on *Schneckloth* specifically. John B. Wefing & John G. Miles, Jr., *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 212 (1974) ("*Bustamonte* is a strained, self-contradictory opinion which not only represents a drastic departure from the Court's own previous cases, but also undermines a substantial body of prior federal case law which reflected a sustained and sometimes creative effort to develop a coherent consent-search doctrine."); James Hartline, Note, Schneckloth v. Bustamonte: *A New Era in Consent Searches?* 35 U. PITT. L. REV. 655, 656 (1974) (analyzing the "future significance in the area of consent searches"); Eugene E. Smary, *The Doctrine of Waiver and Consent Searches*, 49 NOTRE DAME L. REV. 891, 892 (1974) (analyzing *Schneckloth's* rejection of a waiver standard); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 445 n.102 (1974) (same).

The initial absence of media and academic attention paid to *Schneckloth* belies its impact on citizens' day-to-day lives. Given that so few citizens commit a crime,[354] a correspondingly insignificant number of those citizens will face off against an officer during an interrogation; after all, *Miranda* does not apply to anything other than custodial interrogation.[355] Yet, outside the interrogation room, 43.5 million (of 288.4 million) persons in 2005, for example, had at least one police contact; 56% of those contacts arose in a traffic-related context.[356] Given the popularity of consent searches amongst officers,[357] the traffic stop carries with it the real potential that citizens will be asked for consent to search their cars.[358] Roadside questioning, after all, is not custodial interrogation within the meaning of *Miranda*.[359] The Burger Court therefore pulled off—under the radar mind you—telling America that officers may constitutionally seek your consent to search without informing you of your rights during *any* and *every* police-citizen encounter. Putting aside the irony, telling *criminal suspects* their rights, but not ordinary citizens is, in a word, remarkable.

The Burger Court's doing so was, as discussed at length above, the predictable result of pushing back against the Warren Court legacy and a corresponding effort to restore a perceived absence of "law and order." The Burger Court was indeed simply doing what Nixon foresaw even before he appointed Chief Justice Burger. Thus, in hindsight, the composition of the *Schneckloth* majority and its preoccupation with *Miranda* is unsurprising. Chief Justice Burger's criticism of *Miranda* prior to his joining the Court,[360]

---

[354] According to one district attorney, "[a]bout 8 percent of the people commit about 70 percent of your crimes, so if you can get the majority of that community, you don't have to do more than that[.]" Solomon Moore, *F.B.I. and States Vastly Expand DNA Databases*, N.Y. TIMES, Apr. 18, 2009, at A1 (internal quotation marks omitted).

[355] *Miranda*, 384 U.S. at 478-79.

[356] MATTHEW R. DUROSE, ERICA L. SMITH & PATRICK A. LANGAN, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005 2 (2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/cpp05.pdf.

[357] Thomas, *supra* note 2, at 1505.

[358] In 2005, 57.6% of all searches performed during traffic stops were consent searches. DUROSE ET AL., *supra* note 350, at 6.

[359] Pennsylvania v. Bruder, 488 U.S. 9, 10 (1988).

[360] BAKER, *supra* note 58, at 194-97 (discussing Burger's criticism of *Miranda*).

alongside his thematic criticism of the Warren Court,[361] suggests that his vote to join Justice Stewart's opinion was preordained. So too perhaps were the other Justices'; when, for example, Justice Rehnquist joined the Court in 1971,[362] he did so "with a desire to counteract some 'excesses' of the liberal activist Warren Court[.]"[363] And, as Assistant Attorney General, Rehnquist gave a speech at the University of Arizona,[364] during which he suggested "that the Court should overrule decisions like *Miranda*, without feeling bound by 'stare decisis[.]'"[365] One commentator, reflecting on Rehnquist's voting record, confirmed a "consistency between the views he indicated before his appointment to the Court and his record on the Court[.]"[366]

Votes from Justices Powell and Blackmun, as Nixon appointees and *Miranda* critics, were likewise foreseeable.[367] So too was the vote cast by Justice White, author of a vigorous *Miranda* dissent in which he claimed that *Miranda* would "measurably weaken"[368] the

---

[361] Prior to the 1969 term, Burger wrote a letter to Blackmun in which he commented, "[i]t is really incredible to me how 9 men could have gone so far from reality for so long." LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 44 (2005). Other letters from Burger to Blackmun included language describing the members of the Warren Court as "phonies" and "mediocrities." *Id*. at 25.

[362] 92 CONG. REC. 46,197 (1971).

[363] Stuart Taylor, Jr., *Opinions Set Legal Experts Buzzing*, N.Y. TIMES, Feb. 28, 1988, at 182; *accord* John A. Jenkins, *The Partisan*, N.Y. TIMES, Mar. 3, 1985, at SM28 (reporting Justice Rehnquist's comment that the Burger Court "called a halt to a number of the sweeping rulings that were made in the days of the Warren Court").

[364] David E. Rosenbaum, *William Hubbs Rehnquist*, N.Y. TIMES, Oct. 22, 1971, at 25.

[365] Alan Dershowitz, *The Court*, N.Y. TIMES, Oct. 24, 1971, at E1.

[366] BAUM, *supra* note 318, at 144. Rehnquist's vote in *Schneckloth* may have been particularly foreseeable given his long-lasting distaste for *Miranda*. At the Court's annual Christmas party in 1975, Rehnquist and his clerks composed and sung a Christmas carol parody designed to mock remaining members of the *Miranda* majority. ROBERT SCHNACKENBERG, SECRET LIVES OF THE SUPREME COURT 199 (2009).

[367] Stephen Wasby, *Justice Harry A. Blackmun: Transformation from "Minnesota Twin" to Independent Voice*, *in* THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 93 (Charles M. Lamb & Stephen C. Halpern eds., 1991) (discussing Blackmun's "unhappiness with *Miranda*"); Fred P. Graham, *The "Nixon Court": A Premature Label?*, N.Y. TIMES, Jan. 7, 1972, at 8 (reporting that the four Nixon appointees "are all critics" of *Miranda* and *Escobedo*); Aaron Epstein, *Abortion Decision is His Legacy: Blackmun Defended Individuals' Rights*, DETROIT FREE PRESS, Apr. 7, 1994, at 6A (discussing the close voting relationship between Blackmun and Burger during their early years on the Court).

[368] *Miranda*, 384 U.S. at 541.

criminal law because "[i]n some unknown number of cases . . . [it would] return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him."[369] Justice Stewart, the opinion's author, although not a Nixon appointee,[370] was likewise predictable; he often helped to form necessary majorities following the Nixon appointments.[371]

The takeaway point is therefore hopefully clear: all of the majority Justices' positions in *Schneckloth* were more than foreseeable.[372] Indeed, the 1972-1973 term was the first full term for all of President Nixon's appointees[373]—Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist.[374] And, during that term, the Nixon-appointed justices remarkably agreed in more than 100 of all the 177 cases heard[375]—they were even more closely aligned in criminal procedure cases.[376] As a result, the Burger Court for the first time that term effectuated a gradual but pronounced shift away from Warren Court values in the context of criminal defendants'

---

[369] *Id.* at 542.

[370] President Eisenhower appointed Justice Stewart. Tinsley E. Yarbrough, *Justice Potter Stewart: Decisional Patterns in Search of Doctrinal Moorings*, *in* THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES 378 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

[371] *Id*. at 392-93. Interestingly, however, Justice Stewart broke from that voting pattern whenever the Nixon appointees sought to expressly overrule precedent established during the Warren Court. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 406 (1979).

[372] FUNSTON, *supra* note 157, at 133 (noting that Nixon appointees were "expected" to cut back on Warren Court criminal procedure decisions).

[373] Bartholomew, *supra* note 158, at 164.

[374] SCHWARTZ, *supra* note 10, at 317. Nixon's appointments to the Court particularly troubled Justice Marshall. He believed that Nixon's ascendancy threatened "his life's work, [and] everything he stood for[.]" MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 285 (1992). Marshall's relationship with one Nixon appointee—Chief Justice Burger—would in fact come to decline so steadily that Burger would rarely speak to Marshall and, moreover, would assign "tedious writing assignments" to him. WILLIAMS, *supra* note 13, at 375.

[375] Bartholomew, *supra* note 158, at 164; *see* Fred P. Graham, *The "Nixon Court": A Premature Label?*, N.Y. TIMES, Jan. 7, 1972, at 8 (noting that Chief Justice Burger and Justice Blackmun had "agreed on all but six of the 138 cases decided since they have been on the Court together").

[376] *See* Wasby, *supra* note 361, at 68. Justice Blackmun in particular voted with the other Nixon appointees most frequently on criminal procedure issues and "[h]is conservatism was most evident on Fourth Amendment issues[.]" *Id*. at 89.

rights.[377] Its doing so was unsurprising; by the time of *Schneckloth*, only two Justices from the five-justice *Miranda* majority remained on the Court.[378]

But similar circumstances do not persist today. Overlap between then and now unquestionably exists,[379] but only the temporal period surrounding Bustamonte's case can claim ownership over *Miranda*—and the Supreme Court's preoccupation with it. Commentators, politicians, and citizens have since seen no criminal procedure case issued by the Supreme Court that is similar to *Miranda* in terms of its fame and impact.[380] Congress does not now seek to limit the Court's jurisdiction or its pay.[381] Senators do not spend time on the senate floor seeking to convince colleagues that legislation is required to overrule the Court's criminal procedure decisions.[382] Outside of Congress, civil unrest does not litter our streets.[383] Politicians do not criticize the Supreme Court as a "lousy, no account outfit,"[384] or build campaigns around replacing the Court's Justices.[385] But, perhaps most telling of the temporal differences between now and when the

---

[377] Bartholomew, *supra* note 158, at 164.

[378] Fred P. Graham, *Court to Review Miranda Ruling*, N.Y. TIMES, Mar. 21, 1972, at 1 ("Only two Justices who joined the 5-to-4 Miranda decision, William J. Brennan, Jr., and William O. Douglas, are still on the Supreme Court Court."). The five members of the *Miranda* majority were Chief Justice Warren and Associate Justices Black, Douglas, Brennan, and Fortas. Christopher E. Smith, *Justice John Paul Stevens: Staunch Defender of* Miranda *Rights*, 60 DEPAUL L. REV. 99, 110 n.68 (2010). By the time of *Schneckloth*, only Justices Douglas and Brennan were still on the Court. 412 U.S. at 218 (listing the participating justices). Nixon appointed Warren Burger in 1969 to replace Earl Warren; Harry Blackmun in 1970 to replace Abe Fortas; Lewis Powell in 1971 to replace Hugo Black; and William Rehnquist in 1971 to replace John Harlan. Smith, *supra* note 372, at 100 n.15.

[379] *E.g*., Ed O'Keefe, *Bush Accepts Iraq-Vietnam Comparison*, ABCNEWS.COM, Oct. 18, 2006, http://abcnews.go.com/WNT/story?id=2583579 (last visited July 5, 2011).

[380] *See* note 268, *supra*, and accompanying citations.

[381] *Cf.* Russell Baker, *Observer: The Precious Impeachable Court*, N.Y. TIMES, Mar. 21, 1965, at E10 (noting "the House of Representatives refused the other day to give the Supreme Court a pay raise").

[382] Nan Robertson, *Ervin Protests Curbs on Police: Proposes an Amendment to Upset High Court Decision*, N.Y. TIMES, July 23,1966, at 36.

[383] *Cf.* NAT'L ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968), http://www.eisenhowerfoundation.org/docs/kerner.pdf.

[384] Thomas, *supra*, note 149.

[385] *Id*.

Court issued *Schneckloth*, signs do not litter the country's landscape calling for the impeachment of Chief Justice Roberts.[386]

Even the Supreme Court has tacitly acknowledged that circumstances have changed since *Miranda*. In 2000, the Court in *Dickerson v. United States* both reaffirmed that *Miranda* is a constitutional decision and, in doing so, added that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[387] Amidst other rulings that seemingly narrow the breadth and scope of *Miranda's* applicability,[388] the Court has also recently issued a pair of rulings that arguably expand *Miranda's* core holding requiring warnings.[389]

The totality of the foregoing clearly reflects that reason no longer exists to uphold *Schneckloth* as the law on consent. In its place, commentators have often suggested that police officers be required to advise a suspect of her right to withhold consent prior to requesting permission to search.[390] Any such warning should likely also include a caution to suspects of their right to temporally or spatially limit their grant of consent.[391] That warning scheme

---

[386] *Cf.* note 58, *supra*, and accompanying citations (documenting the placement of "Impeach Earl Warren" signs around the country).

[387] 530 U.S. 428, 443 (2000) (citations omitted).

[388] Berghuis v. Thompkins, -- U.S. -- , 130 S. Ct. 2250, 2260 (2010) (narrowing the applicability of the right to remain silent by requiring that a suspect unambiguously invoke the right); Montejo v. Louisiana, 556 U.S. -- , 129 S. Ct. 2079, 2091 (2009) (holding that waiver of the Sixth Amendment right to counsel is no longer tied to *Miranda's* Fifth Amendment right to counsel).

[389] J.D.B. v. North Carolina, 564 U.S. -- , 131 S. Ct. 502 (2011) (holding that a child's age is a relevant factor for determining *Miranda* custody); Florida v. Powell, -- U.S. -- , 130 S. Ct. 1195, 1203-04 (2010) (holding that suspects have a right to have their lawyer present during police questioning, and the police are required to inform suspects of that right as part of their *Miranda* warnings).

[390] Barrio, *supra* note 16, at 247; *accord* Phillips, *supra* note 17, at 1203-05; Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 252-54 (2002); Aaron H. Mendelsohn, *The Fourth Amendment and Traffic Stops: Bright-Line Rules in Conjunction with the Totality of the Circumstances Test*, 88 J. CRIM. L. & CRIMINOLOGY 930, 952 (1998); Rebecca A. Stack, *Airport Drug Searches: Giving Content to the Concept of Free and Voluntary Consent*, 77 VA. L. REV. 183, 205-06 (1991); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L. Q. 175, 192 (1991).

[391] Florida v. Jimeno, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents."); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 241-42 (2d ed. 1990) (explaining that

makes particular sense given Justice Marshall's observation in his *Schneckloth* dissent that the Federal Bureau of Investigation for years routinely informed subjects of the right to refuse consent[392]—a practice that has persisted well beyond the timing of *Schneckloth*.[393]

Detractors of this thesis may rightly suggest that the Supreme Court would be loath to overrule *Schneckloth*, particularly given the Court's current composition. Critics may likewise suggest that a more modern Supreme Court already declined the opportunity to overrule *Schneckloth* in 1996 when it held in *Ohio v. Robinette* that officers need not inform lawfully seized citizens that they are free to go prior to requesting consent to search.[394]

As to point one—that the modern Supreme Court is unlikely willing to overrule *Schneckloth*—there is but one response: fair enough. After all, many thought at the time of *Dickerson* that the Court should seize the opportunity to overrule *Miranda*[395]—which it declined—particularly with Rehnquist serving as Chief Justice. But the Fifth Amendment requires *Miranda* warnings and states are not free to reject them.[396] In contrast, states *are* free to reject

---

consent searches can be limited or withdrawn "at any time prior to the completion of the search").

[392] *Schneckloth*, 412 U.S. at 287 (Marshall, J., dissenting) (citation omitted).

[393] Kevin Corr, *A Law Enforcement Primer on Vehicle Searches*, 30 LOY. U. CHI. L.J. 1, 5 (1998) (noting that "the FBI's own internal consent-to-search form indicates that the consenting driver was advised of his right to refuse").

[394] 519 U.S. 33, 39-40 (1996). Critical commentators might likewise point to the Court's decision in *United States v. Drayton*, 536 U.S. 194 (2002), for evidence of the Court's hostility toward this Article's contention that *Schneckloth* be overruled. That is indeed persuasive evidence given that *Drayton* indicates that police do not have to tell citizens of their right to terminate a police-citizen encounter. *Id*. at 205. At least in consent search situations the officer has to *ask* for consent, a behavior that strongly implies the officer cannot automatically conduct a search.

[395] *E.g.*, Joseph A. Lavigne, *A Misapplication of the Exclusionary Rule to Voluntary Confessions: the Fallacy that Knowingly and Intelligently made Statements are Constitutional Prerequisites to Admissibility*, 1999 L. REV. M.S.U.-D.C.L. 677, 698 (1999) ("The Supreme Court should take the opportunity presented in *Dickerson* to pull the plug on *Miranda* . . . .").

[396] Malloy v. Hogan, 378 U.S. 1, 11 (1964) (holding that the Due Process Clause of the Fourteenth Amendment "incorporated" the Self-Incrimination Clause of the Fifth Amendment).

Schneckloth and require Fourth Amendment consent warnings.[397] And, as demonstrated above, a significant handful of states have rejected *Schneckloth* or, at a minimum, questioned its reasoning. Thus, although it remains highly unlikely that the Court would overrule *Schneckloth*, it at least has historically acknowledged the climate of state approaches to certain doctrines[398] alongside a willingness to evaluate poorly reasoned opinions.[399]

As to point two, the problem with suggesting that *Robinette* was the appropriate—or even *a* vehicle[400]—for overruling *Schneckloth*, however, resides again with timing. By the time of *Robinette's* issuance, the Rehnquist Court was well into furthering its predecessor Court's pattern of narrowing precedents favorable to the accused[401] and, just as important, Chief Justice Rehnquist

---

[397] *See, e.g.*, Skeen v. Minnesota, 505 N.W.2d 299, 313 (Minn. 1993) ("Minnesota is not limited by the United States Supreme Court and can provide more protection under the state constitution than is afforded under the federal constitution."); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 332 (Wyo. 1980) ("A state may enlarge rights under the Fourteenth Amendment announced by the Supreme Court of the United States, which are considered minimal, and thus a state constitutional provision may be more demanding than the equivalent federal constitutional provision."); Horton v. Meskill, 376 A.2d 359, 371 (Conn. 1977) ("Decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law."); Serrano v. Priest, 557 P.2d 929, 950 (Cal. 1976) (noting that state equal protection principles "may demand an analysis different from that which would obtain if only the federal standard were applicable").

[398] In the context of its Eighth Amendment jurisprudence, for example, the Court has previously inquired into whether a nationwide consensus exists for a particular punishment. *See generally, e.g.*, Roper v. Simmons, 543 U.S. 551, 564 (2005); Stanford v. Kentucky, 492 U.S. 361, 370 (1989); Thompson v. Oklahoma, 487 U.S. 815, 822 n.7 (1988).

[399] *E.g.*, Payne v. Tennessee, 501 U.S. 808, 827 (1991).

[400] As reflected by petitioner's brief in *Robinette*, the sole question was whether the Ohio Supreme Court was correct in holding that the Fourth Amendment requires police officers to inform *motorists stopped for traffic violations* prior to requesting consent to search. Brief for Petitioner at 6-7, Ohio v. Robinnette, 519 U.S. 33 (1996) (No. 95-891). Given the Supreme Court's strong preference for deciding constitutional issues on the narrowest possible grounds, *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-73 (1947), it seems unlikely that the narrow issue presented in *Robinnette* could facilitate overruling the far broader proposition established by *Schneckloth*.

[401] Madhavi M. McCall & Michael A. McCall, *Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice*, 39 AKRON L. REV. 323, 333 (2006). Rehnquist was elevated to Chief Justice in 1986. *Id*. at 331.

authored the majority opinion in *Robinette*.[402] In doing so, Rehnquist emphasized then what he found persuasive back in 1973—Justice Stewart's initial[403] and final thoughts about consent:[404]

> And just as it "would be *thoroughly impractical* to impose on the normal consent search the detailed requirements of an effective warning," so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.[[405]]

Given that lingering alliance between *Schneckloth* majority members Rehnquist and Stewart,[406] using *Robinette* as a vehicle for overruling *Scheckloth* seems unlikely indeed.

A final question perhaps remains amongst doubters of this thesis: why bother with right to refuse consent warnings if suspects, to begin with, suspects do not invoke their *Miranda* rights?[407] Apart from dissipating the coercive environment of a police-citizen encounter and helping to decrease the possibility of pretext,[408] Justice Goldberg answered this question long ago in *Escobedo*:

> [N]o system of criminal justice can, or should, survive if it comes to depend for its continued

---

[402] *Robinette*, 519 U.S. at 35 (indicating that Chef Justice Rehnquist authored the majority opinion).

[403] Justice Lewis F. Powell, Jr., Vote Sheet in *Schneckloth v. Bustamonte* (October 11, 1972) (on file with Washington & Lee University School of Law, Lewis Powell Papers, Box 151, File, "Bustamonte Folder 1") (noting Rehnquist's specific agreement with Justice Stewart at the *Schneckloth* conference).

[404] Letter from Justice William H. Rehnquist to Justice Potter Stewart (April 18, 1973) (on file with Yale University Library Manuscripts and Archives, Potter Stewart Papers, Box 86, File, "Folder 753") (providing Rehnquist's decision to join Justice Stewart's opinion in *Schneckloth*).

[405] *Robinette*, 519 U.S. at 39-40 (quoting *Schneckloth*, 412 U.S. at 231) (emphasis added).

[406] Justice Stewart was of course no longer a member of the Court by the time of *Robinette*. Steven R. Weisman, *Stewart Will Quit High Court July 3; Reasons Not Given*, N.Y. TIMES, June 19, 1981, at A1 (noting Justice Stewart's resignation on July 3, 1981).

[407] Jan Hoffman, *Police Tactics Chipping Away at Suspects' Rights,* N.Y. TIMES, Mar. 29, 1998, at A1 (citing studies indicating that 80-90% of suspects waive their *Miranda* rights).

[408] Phillips, *supra* note 17, at 1207-09.

> effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.[409]

His words are persuasive now as they were then. Justice Goldberg was, however, before his time. Modern society is now again prepared to embrace his logic and similar logic espoused long ago by the Supreme Court:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to *unwarranted practices* destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[410]

CONCLUSION

In 1973, the Supreme Court held that providing a right to refuse consent warning to citizens would be "thoroughly impractical." Doing so at that time perhaps made sense. The political, social, and judicial circumstances were truly unique; the Burger Court—wary of creating another *Miranda*—was in no mood to provide additional prophylactic warnings. Nixon all but made sure of the Court's mood by packing the Court with four anti-*Miranda* justices of his choosing.

But, today, similar circumstances do not persist. *Miranda* has not been overruled; rather, it has been affirmed. Along the way, researchers have exhaustively confirmed that *Miranda* has not

---

[409] *Escobedo*, 378 U.S. at 490; *accord* Kate Schuyler, *Right-to-Refuse Warnings: A Minority's Crusade for Justice*, 38 U. TOL. L. REV. 769, 783 (2007) ("[W]ith a warning system in place, at least the façade of a fair and balanced search and seizure procedure would be preserved.").

[410] Weeks v. United States, 232 U.S. 383, 392 (1914) (emphasis added).

significantly impaired law enforcement. Citizens therefore remain entitled to know of their Fifth Amendment rights anytime they are in police custody and subject to interrogation. Logic suggests that citizens should likewise be told of their Fourth Amendment rights during the far more likely chance that they are involved in an encounter with the police. In short, "[t]here is no war between the Constitution and common sense."[411] The Constitution affords citizens the right to refuse an officer's request to search their person or property; common sense dictates that officers tell them that.

[411] Mapp v. Ohio, 367 U.S. 643, 657 (1961).