Rethinking Schneckloth v. Bustamonte

Brian Gallini, University of Arkansas, Fayetteville
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by Brian R. Gallini

Associate Professor of Law, Robert A. Leflar Law Center, University of Arkansas

The officer walking the beat has numerous tools at her disposal to effectuate a warrantless search. One of the more popular of those tools is the consent search; although no precise data exist on how often consent searches are conducted, one study reports that the two most commonly utilized warrantless searches are consent searches and searches incident to arrest. In that study, one detective estimated that consent serves as the basis for 98% of all searches conducted. Police may also request consent even if they do not need it. At no point must an officer advise the citizen that she can refuse consent. Schneckloth v. Bustamonte, 412 U.S. 218, 232-33 (1973)

With the foregoing in mind, it would 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. Courts and academics alike view consent searches as difficult to police given the pervasive discretion that officers have in deciding who to ask for consent to search. As a result of this discretion, allegations of racism pervade many state police officers’ consent search practices.

If academics, courts, and the public appear uniformly skeptical of current consent search practices—as opposed to the concept of consent searches—a simple question arises: how did we get here? To answer that question, step back to 1969 when Warren Burger replaced Earl Warren as Chief Justice of the Supreme Court. 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). Because that never happened, a handful of important commentators and historians view the Burger Court’s criminal procedure decisions as anticlimactic. That popular view, however, overlooks the Burger Court’s crowning—but unspoken—anti-Miranda achievement: Schneckloth v. Bustamonte, 412 U.S. 218 (1973). 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 lives.

Why provide warnings to criminal suspects subject to custodial interrogation, but decline to 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 administering a right to refuse consent warning would be “thoroughly impractical”?

This issue of SEARCH & SEIZEURE LAW REPORT 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 Court similar to that present around the fevered post-Miranda and post Warren Court—time of Schneckloth. Second, several states have confirmed that Schneckloth’s underlying premise—administering Fourth Amendment consent warnings would be “thoroughly impractical”—is simply wrong. Finally, post-Miranda 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.

Schneckloth’s origins

The seeds for the Schneckloth decision were planted long before the Court actually issued the opinion on May 29, 1973. How did we get to Schneckloth?

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TABLE OF CONTENTS

Rethinking Schneckloth v. Bustamonte........... 9

Schneckloth’s origins........................................ 9

After Schneckloth........................................... 13

Conclusion ................................................... 16

Setting stage for Schneckloth

In hindsight, the changing nature and increased volume of police-citizen encounters in the 1960s certainly suggests that it was no temporal accident the Supreme Court used Schneckloth to create a more law enforcement-friendly consent doctrine. The Schneckloth defendant—Robert Clyde Bustamonte—was arrested in 1967, a time rife with conflicting American opinion as perhaps best illustrated by the 1968 election of Richard Nixon as President, who earned only 43.5% of the popular vote. Apart from the Presidential election, though, 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 seen. For example, nearly 150 American cities experienced civil unrest in the summer of 1967 alone. Law enforcement officials were often uncertain as to the appropriate responses and measures of force to use in light of these unprecedented civil disturbances. In short, the police were encountering citizens outside of the custodial context in unprecedented numbers.

The tenuous environment in America during the time of Bustamonte’s criminal case was arguably heightened by the wake left behind by the Warren Court. Although Earl Warren served as Chief Justice from 1953 until 1969, commentators often refer to the “Warren Court” to mean the time spanning from 1961, when Justice Arthur Goldberg replaced Justice Felix Frankfurter, to 1969, when Chief Justice Warren retired. During that period, the Court issued rulings on several controversial issues, which sparked national public outcry. “Impeach Earl Warren” signs littered the countryside, and the Court endured criticism from a variety of prominent critics.

Thus, although Bustamonte’s story spanned six years—from 1967-1973—the outcome in Schneckloth undoubtedly seems informed by the social impact of the Warren Court’s decisions prior to 1967. When Chief Justice Burger finally filled Warren’s position on June 23, 1969, he was anxious to distance his tenure from Warren’s legacy. Of particular note was Chief Justice Burger’s criticism of the Warren Court’s most famous decision—Miranda v. Arizona.

Yet, the seeds for Miranda were planted two years earlier by the Warren Court’s decision in Escobedo v. Illinois, 378 U.S. 478 (1964)—a decision Chief Justice Burger likewise disliked. In 1964, law enforcement agencies nationwide were debating what limits existed—other than a prohibition against officers’ use of the third degree—when interrogating a suspect. But given the Court’s focus on eradicating more violent methods of extracting confessions, police were minimally entitled to think that the non-violent behavior of law enforcement in Escobedo was constitutionally permissible.

The Supreme Court decided Escobedo on June 22, 1964. In doing so, the Court suppressed a defendant’s confession though the defendant was neither beaten nor threatened; rather, he had repeatedly requested counsel, but was denied, during an overnight interrogation. The Court specifically held, pursuant to the Sixth Amendment, as follows:

[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 . . . no statement elicited by the police during the interrogation may be used against him at a criminal trial.

The Court’s decision in Escobedo served notice: procedure inside the interrogation room was going to change.

The judiciary, however, did not receive Escobedo with uniform approval. Perhaps the biggest Escobedo-related war—one arguably most predictive of Schneckloth—waged inside the U.S. 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. When given the opportunity, a Bazelon-led panel generally aligned itself with the Escobedo majority, e.g., Hutcherson v. U.S., 351 F.2d 748, 751 (D.C. Cir. 1965), whereas Burger-involved decisions applied rationale from the dissent, e.g., Cephus v. U.S., 352 F.2d 663, 665 (D.C. Cir. 1965). What made the ideological battle particularly interesting was that both judges’ names were, at varying times, floated in conversations about Supreme Court vacancies.

Amidst the post-Escobedo chaos, the Supreme Court dropped the Miranda bombshell on June 13, 1966. 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-incrimination.” Public reaction to Miranda reaction was intense. A New York Times piece characterized the Miranda decision as providing “immunity from punishment for crime on a wholesale basis.” Some police believed that the decision forced them to fight criminals “with two hands tied behind their back.”

Amid the post-Miranda frustration, Judge Burger gave an address critical of Miranda and the Supreme Court on May 21, 1967, at Ripon College in Ripon, Wisconsin. His remarks
were later published and Republican nominee Richard M. Nixon was captivated when he read them. Nixon even began to integrate Burger’s ideas into his own 1968 presidential campaign speeches. Burger himself viewed the speech as the primary reason that Nixon selected him to replace Warren as Chief Justice.

For Nixon, Miranda was indeed too much to take. Nixon believed that the courts “had gone too far in weakening the peace forces as against the criminal forces.” He therefore made “law and order” a central issue in his campaign and gave speeches decrying the Miranda and Escobedo decisions. After ultimately winning the election, Nixon began searching 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.” Coincidentally, in March of that year, the D.C. Circuit reversed a defendant’s conviction, citing an inability to determine whether the defendant waived his Miranda rights prior to his confession. Frazier v. U.S., 419 F.2d 1161, 1168-69 (1969). Attacking the majority (and Miranda), Judge Burger issued a bitter dissent, reports of which emerged in the local press. Nixon noticed, and nominated Burger to be Chief Justice on May 22, 1969; the Senate confirmed him 18 days later.

**Considering the Schneckloth opinion**

Once on the Supreme Court, Burger began to reverse the course set by his predecessor. This pattern most noticeably began during the 1972-73 Term when Schneckloth was argued. 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 unclear on the actual meaning of “consent.” Enter Bustamonte, whose story began in Mountain View, California, with the burglary of Speedway Car Wash on the morning of January 19, 1967. Although the facts are not perfectly clear, it appears 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. In the weeks following the burglary, the trio sought to pass several checks in the name of Speedway Car Wash using the check-writing machine.

Then, on January 31, 1967, the trio drove to San Jose to identify individuals who might be willing to use false identification to cash checks. They picked up three additional men around 11:00 p.m. and sought unsuccessfully throughout the night to cash the checks at grocery stores, a bar, and a shopping center. 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. He stopped the vehicle—a black 1958 Ford four-door sedan—and asked the driver, Gonzalez, for identification. 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.

At that point, Officer Rand asked the occupants to exit the vehicle. Rand, along with two additional officers, thereafter asked Alcala if he could search the car, to which Alcala replied, “Sure, go ahead.” Officer Rand, aided by the other two officers, searched the Ford and found three checks under the left rear seat. The checks matched those stolen from Speedway Car Wash. Bustamonte was arrested and convicted, following a jury trial, of possession of a completed check with intent to defraud.

Bustamonte’s conviction was subsequently affirmed on direct appeal. Then, following the denial of Bustamonte’s petition for habeas corpus, the Ninth Circuit reversed the district court’s denial of Bustamonte’s writ by treating consent to search as equivalent to waiving a constitutional right, holding that waiver cannot be presumed from a verbal agreement to consent.

The Supreme Court granted certiorari on February 28, 1972 to “determine whether the Fourth and Fourteenth Amendments require the showing thought necessary by the [Ninth Circuit].” Oral argument occurred on October 10, 1972, before Chief Justice Burger and Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, and Rehnquist. Robert 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.”

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, or responded to questions from the Justices about the role of an officer’s request to search, and the extent to which that request could be seen as a demand. Regardless of the setting, the attention to the issue he garnered from the Court suggested that he had hit a nerve.
When Stuart Tobisman began his argument on behalf of Bustamonte, *Miranda* still lingered on the Justices’ minds. 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’?” Of course, the broader question of whether an individual should be told of her right to refuse consent likewise persisted throughout Tobisman’s presentation.

Tobisman did his best to allay the Court’s concerns about *Miranda*. Tobisman reiterated that specific warnings were not a talisman to demonstrate an individual’s knowing provision of consent to search. As a result, he suggested, the solution was not to require warnings, but rather to revise the California voluntariness test. In place of the voluntariness test, Tobisman suggested that State should bear the burden of proving that an individual actually knew that he could say “no” when asked by law enforcement for consent. Tobisman concluded his presentation by reiterating that an individual can consent to a search only if she is aware of her right to say “no.”

A peek inside the Court’s conference on October 11, 1972, the day after oral argument, reflects the Justices’ early thoughts. Chief Justice Burger initiated the conversation by stating, “he wouldn’t require [consent] warnings.” Instead, he would accept “[former State of California Chief Judge] Traynor’s totality [test which] adds up to reasonable under all the circumstances.” Justice Brennan thereafter expressed his disagreement, asserting that the state had to prove consent and part of the burden of proving consent obligated it to demonstrate knowledge of the right to refuse consent. 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.”

Although Justices Marshall and Douglas agreed with Justice Brennan, Justices Blackmun and White did not. Justice White commented at the conference that the Court “can infer from the request to search, and the consent thereto, that one knew that he could refuse.” For his part, Justice Blackmun supported Judge Traynor’s approach, stating “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.” Justice Powell reduced the substance of the Court’s discussion, alongside the Justices’ conference votes, in 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.”

Rehnquist: “Reverse Consent. Agrees with Byron & Potter.”


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.

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. The question before the Court, however, was how to define voluntary consent. As an initial matter, the Court found instructive the same 14th Amendment interrogation cases rejected by *Miranda*, yet conceded that “[t]hose cases yield no talismanic definition of ‘voluntariness.’”

After framing “voluntariness” in the historical context of the Court’s pre-*Miranda* confession jurisprudence, it simply extended the 14th Amendment coerced confession voluntariness analysis to Fourth Amendment consent searches. The Court therefore held that voluntariness is a question of fact that turns on the totality of the circumstances. The definition of voluntariness, it added, must accommodate “the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.” Nevertheless, it candidly feared that requiring the prosecution to prove that a defendant knew that he had the right to refuse consent “would, in practice, create serious doubt whether consent searches could continue to be conducted.” Requiring proof of knowledge, the majority reasoned, would be difficult for the prosecution to demonstrate. Additionally, a defendant could seek to exclude evidence obtained on the basis of consent simply by testifying that he was unaware that he could refuse to consent.

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.” 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 cir-
cumstances 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.

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 indispensable element of a valid consent.” In rejecting that argument, the majority reasoned that custodial interrogation is fundamentally different from the environment of consent searches. 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. 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.

**After Schneckloth**

After the Court issued *Schneckloth*, scholars generally agreed that it represented a deviation from how the Warren Court would have treated consent law if given the opportunity. 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, but its jurisprudential impact has softened. 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”? Moreover, was the Burger Court properly concerned with creating a Fourth Amendment *Miranda*? In other words, would fewer people consent if they were first told of their right to refuse consent?

**Schneckloth warnings are not “thoroughly impractical”**

Justice Stewart was wrong to write that requiring Fourth Amendment warnings would be “thoroughly impractical.” Moreover, he may have known 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 23-year-tenure on the Court. 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.”

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 precisely when the Sixth Amendment procedurally attaches and what it protects. *E.g., Brewer v. Williams*, 430 U.S. 387, 398 (1977). Embodyed in that pursuit, however, was his private discontent with both *Escobedo* and *Miranda*—alongside his discontent with Warren Court opinions more generally.

By the time of *Escobedo* in 1964, Justice Stewart had already made clear his position that he favored an automatic right to counsel pursuant to the Sixth Amendment at the procedural point when the suspect became the accused. *Massiah v. U.S.*, 377 U.S. 201, 206 (1964). *Escobedo’s* interpreting the Sixth Amendment to apply to the interrogation room—in other words, prior to a formal charge—particularly frustrated Justice Stewart, and prompted him to pen his own passionate *Escobedo* dissent.

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. Justice White’s dissent became more than a historical footnote when he famously wrote that *Miranda* would “have a corrosive effect on the criminal law as an effective device to prevent crime.”

Immediately after *Miranda’s* issuance, academics and other court commentators assessed the accuracy of Justice White’s prediction. 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. After observing well over 100 interrogations over three months, it found “that warnings had little impact on suspects’ behavior.” Indeed, the study reported, “[n]o support was found for the claim that warnings reduce the amount of ‘talking.’”

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. For example, a study from Washington D.C. found that nearly 40% of suspects gave incriminating statements to the police post-arrest, compared to 43% who gave statements pre-*Miranda*. Pittsburgh and Los Angeles studies similarly saw little change post-*Miranda*. In Detroit, “the rate of confessions increased . . . after the police instituted a system of warning suspects of their constitutional rights.”

By the time of *Schneckloth* in the early 1970s, the *Miranda* storm began to subside. Additional studies conducted in Denver, Knoxville, Los Angeles, and other cities, all 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. 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.” Graves v. State, 708 So. 2d 858, 863 (Miss. 1997). 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. State v. Johnson, 839 A.2d 830, 836 (N.H. 2004). The Minnesota Supreme Court has similarly recognized problems of pretext and inherent coercion when officers seek a citizen’s consent during traffic stops. State v. George, 557 N.W.2d 575, 580 (Minn. 1997). Finally, an Indiana appellate court has suggested that the “better practice” would be for officers to identify themselves and provide warnings during knock-and-talk encounters, Hayes v. State, 794 N.E.2d 492, 497-98 (Ind. App. 2003), rather than hamper police investigations, “such an advisement would minimize needless suppression motions, hearings, and appeals.”

Still others have gone so far as to interpret their own state’s constitution to require that officers provide right to refuse consent warnings. For example, in 1975, the New Jersey Supreme Court held that an “essential element” of voluntary consent “is the knowledge of the right to refuse.” State v. Johnson, 346 A.2d 66, 68 (N.J. 1975). Accordingly, the court adopted a waiver requirement, thereby requiring the government to prove that consenting individuals knew that they could refuse consent.

Two decades later, the Supreme Court of Hawaii held that in the “walk and talk” investigative encounter context, 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. State v. Trainer, 925 P.2d 818, 828 (Haw. 1996). 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. State v. Ferrier, 960 P.2d 927, 934 (Wash. 1998). 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. Most recently, Arkansas adopted a rule requiring notice of the right to refuse consent in knock-and-talk searches. State v. Brown, 156 S.W.3d 722, 732 (Ark. 2004). The totality of the foregoing suggests that Justice Stewart wrote tongue-in-cheek that right to refuse consent warnings would be “thoroughly impractical.”

**Historical circumstances suggest modern need for Schneckloth warnings**

Consistent with conclusions reached by the early Miranda-impact literature in the late 1960s and throughout the 1970s, 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. Importantly, however, the 1980s seemingly saw a resurgence of academic scholarship reevaluating Miranda. One individual, Professor Joseph Grano, was particularly—and perversely—critical of Miranda, often arguing in favor of creating an uneven playing field when interacting with potentially guilty suspects.

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. 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. Other empirical 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.”

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, significantly impair law enforcement. People are indeed still confessing. 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. Given that the intensity of the interrogation room environment persisted post-Miranda, that factor alone contributed most significantly to suspects’ continued willingness to confess.

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. Stated more precisely, citizens’ fear of an officer’s reprisal is the primary reason why people consent to search.

Given the apparent overlap between the circumstances prevalent in Fourth and Fifth Amendment police-citizen encounters, there seems good reason to apply Miranda-related empirical research to consent searches—despite what the Schneckloth Court believed. And, assuming that warnings do not significantly impair law enforcement, then Justice Stewart must be wrong; it would not be “thoroughly impractical” to require that officers provide citizens with a consent search Fourth Amendment warning. It therefore seems difficult not to discard the rationale underlying Schneckloth in favor of adopting 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.”

Equally if not more important than the implications of Miranda-related empirical research on consent searches is the recent absence of a President preoccupied with a single Supreme Court decision along with justices appointed to overrule that decision. In contrast, by the time Bustamonte’s case emerged
before the Supreme Court, Nixon was confident that his four appointees were well on their way to his stated mission: overrule *Miranda*. *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 encounter involving a 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, that day’s paper did not feature an accompanying editorial about *Schneckloth*’s implications. 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” and noted that “[a]ppointees of President Nixon formed the core of both majorities.” *Id*. The *Schneckloth* opinion’s far-reaching ramifications seemingly came and went in 1973 without significant notice by the academic community either.

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, a correspondingly insignificant number of those citizens will face off against an officer during an interrogation; after all, *Miranda* only applies to custodial interrogation. Yet, outside the interrogation room, 43.5 million (of 288.4 million) persons in 2005 had at least one police contact; 56% of those contacts arose in a traffic-related context. Given the popularity of consent searches amongst officers, the traffic stop carries with it the real potential that officers will ask citizens for consent to search their cars. Roadside questioning, after all, is not custodial interrogation within the meaning of *Miranda*. *Pennsylvania v. Bruder*, 488 U.S. 9, 11 (1988). 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, informing criminal suspects of their rights, but not ordinary citizens is, in a word, remarkable.

The Burger Court’s doing so was 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, alongside his thematic criticism of the Warren Court, suggests that his vote to join Justice Stewart’s opinion was preordained. So too perhaps were the other Justices’ votes; when, for example, Justice Rehnquist joined the Court in 1971, he did so “with a desire to counteract some ‘excesses’ of the liberal activist Warren Court.” And, as Assistant Attorney General, Rehnquist gave a speech at the University of Arizona during which he suggested “that the Court should overrule decisions like *Miranda*, without feeling bound by ‘stare decisis.’” 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.”

Votes from Justices Powell and Blackmun, as Nixon appointees and vocal *Miranda* critics, were likewise foreseeable. So too was the vote cast by Justice White, author of a vigorous *Miranda* dissent in which he claimed that *Miranda* would “measurably weaken” the criminal law because “[i]n some unknown number of cases the Court’s rule will 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.” Justice Stewart, the *Schneckloth* opinion’s author, although not a Nixon appointee, was likewise predictable; he often helped to form majorities on the Court that were consistent with votes by the Nixon appointees.

The takeaway point, therefore, is hopefully clear: all of the majority Justices’ positions in *Schneckloth* were more than foreseeable. Indeed, the 1972-1973 Term was the first full Term for all of President Nixon’s appointees—Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. Remarkably, during that term, the Nixon-appointed justices agreed in more than 100 of all the 177 cases heard, and they were even more closely aligned in criminal procedure cases. 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’ rights. Its shift was unsurprising; by the time of *Schneckloth*, only two Justices from the five-justice *Miranda* majority remained on the Court.

But similar circumstances do not persist today. Although similarity between then and now unquestionably exists, only the time period around Bustamonte’s case can claim ownership over *Miranda*—and the Supreme Court’s preoccupation with it. Commentators, politicians, and citizens have since seen no Supreme Court criminal procedure case that is similar to *Miranda* in terms of its fame and impact. Congress does not now seek to limit the Court’s jurisdiction or its pay. 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. Outside of Congress, civil unrest does not litter our streets. Politicians do not build campaigns around replacing the Court’s Justices. Signs do not litter the country’s landscape calling for the impeachment of Chief Justice Roberts.

The Supreme Court has tacitly acknowledged that circumstances have changed since *Miranda*. In 2000, the Court in *Dickerson v. U.S.* reaffirmed the constitutionality of *Miranda* and noted that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.” 530 U.S. 428, 443 (2000). Amidst other rulings that seemingly narrow the breadth and scope of *Miranda*’s applicability—and *Dickerson*’s relevance—the Court has also recently issued a pair of rulings that arguably expand *Miranda*’s core holding requiring warnings. Compare *Berghuis v. Thompson*, 130 S. Ct. 2250, 2260 (2010) (narrowing the applicability of the right to remain silent by requiring that a suspect unambiguously invoke the right), with *Florida v. Powell*, 130 S. Ct. 1195, 1203-04 (2010) (holding that suspects have a right to have their lawyer present during police ques-
tioning, and the police are required to inform suspects of that right as part of their *Miranda* warnings).

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. Any such warning should likely also include a caution to suspects of their right to temporally or spatially limit their grant of consent. That warning scheme 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—a practice that has persisted well beyond the timing of *Schneckloth*.

Detractors of this thesis may rightly suggest that the Court would be loath to overrule *Schneckloth*, particularly given its 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. 519 U.S. 33, 39-40 (1996).

As to point one, 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*—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. In contrast, states are free to reject *Schneckloth* and require Fourth Amendment consent warnings. And, as demonstrated above, a significant handful of states have rejected *Schneckloth* or, at a minimum, questioned its reasoning. Moreover, as the *Miranda* Court recognized (but the *Schneckloth* Court ignored), there is something inherently important about the awareness of rights and ensuring that awareness via warnings is a way to protect those rights. Logic therefore dictates that law enforcement practice adapt to those protections. Thus, although it remains highly unlikely that the Court would overrule *Schneckloth*, it has, at least historically, acknowledged the climate of state approaches to certain doctrines, alongside a willingness to evaluate poorly reasoned opinions.

As to point two, the problem with suggesting that *Robinette* was the appropriate vehicle 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, and just as important, Chief Justice Rehnquist authored the majority opinion in *Robinette*. In his opinion, Rehnquist emphasized what he found persuasive back in 1973—Justice Stewart’s thoughts about consent:

And just as it “would be *thoroughly impractical* to impose on the normal consent search the detailed re-

quirements 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.

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

A final question perhaps remains amongst doubters of this thesis: why bother with requiring officers to provide right to refuse consent warnings if suspects do not invoke their *Miranda* rights? First, warnings would help dissipate the coercive environment of a police-citizen encounter and help to decrease the possibility of pretext. Moreover, the idea that coercion exists in the ordinary police-citizen encounter suggests the applicability of concerns voiced by the *Miranda* Court about police coercion in the interrogation room. Finally, from the standpoint of the criminal justice system’s aesthetic credibility, Justice Goldberg long ago offered these words in *Escobedo*:

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

His words are persuasive now as they were then.

**Conclusion**

In 1973, the Supreme Court held that providing a right to refuse consent warning to citizens would be “thoroughly impractical.” At that time, the holding 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 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. The Constitution affords citizens the right to refuse an officer’s request to search their person or property; common sense dictates that officers inform them of that right.