KNOWING "CONSENT" MEANS "KNOWING CONSENT": THE UNDERAPPRECIATED WISDOM OF JUSTICE MARSHALL'S *SCHNECKLOTH V. BUSTAMONTE* DISSENT

Arnold H. Loewy[*]

The first task of one who is asked to speak about great Fourth Amendment dissents is to ascertain what constitutes greatness. Historically, greatness has contained two components: prescience and correctness. The former is objective: Did it ultimately prevail? The latter is normative: That is, was it correct in the mind of the evaluator?

Justice Holmes is classically regarded as the Great Dissenter. His classic dissents in Commerce Clause,[1] Due Process,[2] and Free Speech[3] cases are practically the paradigm of great dissents. Of course, one who liked the original result in those cases, but did not like the result in the dissent-inspired sequels would not think of these dissents as great. Indeed, one who thinks that only states should be able to regulate child labor, that no government should be able to regulate wages and hours, and that free speech should only apply to advocacy of lawful activities will rue the existence of Justice Holmes and his "stupid opinions" that others consider great.

By the criteria of prescience and correctness, there are few Fourth Amendment dissents that could be considered great. Perhaps Justice Brandeis's and Justice Holmes's dissents in *Olmstead v. United States*[4] would qualify, but only one of us

[*] George Killam Professor of Criminal Law–Texas Tech School of Law. The author would like to thank Matthew Rittmayer, a recent graduate of Texas Tech School of Law, and Rachel Nichols, a third year law student at Texas Tech School of Law, for their helpful research assistance.

[1] *See* Hammer v. Dagenhart, 247 U.S. 251, 277-81 (1918) (Holmes, J., dissenting).

[2] *See* Lochner v. New York, 198 U.S. 45, 65-72 (1905) (Holmes, J., dissenting).

[3] *See* Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

[4] *See* Olmstead v. United States, 277 U.S. 438, 471-485 (1928) (Brandeis, J, dissenting), 469-72 (1928) (Holmes, J., dissenting).

could talk about that and Carol Steiker has beaten me to it.[5] So, I have chosen to rethink the "prescience" criterion.[6]

Indeed, it is the absence of realized prescience that makes Justice Marshall's dissent in *Schneckloth v. Bustamonte* so tragic. Not only was the majority woefully wrong and the dissent clearly correct (normatively speaking), but the failure of the Court to appreciate the correctness of the dissent has led to a burgeoning jurisprudence of placing a premium on citizens' ignorance of their Fourth Amendment rights.[7]

For the reasons that I will explain today, it is my fondest hope that the lack of prescience of Justice Marshall's opinion is not an absence, but merely delayed fulfillment. *Schneckloth* is, after all *only* thirty-six years old. Holmes's dissent in *Abrams* was not fully accepted for nearly fifty years.[8] Candidly, but sadly, I have to note that judicial momentum has not been kind to Justice Marshall's dissent. Indeed, in case after case, as I shall explain, movement has been away from his dissent, and towards enlarging the original error of the majority opinion. So, if you share my assessment of the wisdom of Justice Marshall's dissent, perhaps the best we can hope for is that Marshall's opinion was so prescient that its wisdom will be recognized by many judicial generations after the fact.

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[5] Carol Steiker, *Brandeis in* Olmstead*: "Our Government is the Potent, the Omnipresent Teacher"*, 79 MISS. L.J. 147 (2009).

[6] Two other dissents that ultimately prevailed that perhaps I could have chosen are Justice Frankfurter's dissent in *United States v. Rabinowitz*, and Justice Douglas's dissent in *Wolf v. Colorado*. United States v. Rabinowitz, 339 U.S. 56, 68-86 (1950) (Frankfurter, J., dissenting), *overruled by* Chimel v. California, 395 U.S. 752 (1969) (adopting Justice Frankfurter's dissent in *Rabinowitz*); Wolf v. Colorado, 338 U.S. 25, 40-41 (1949) (Douglas, J., dissenting), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961) (adopting Justice Douglas's dissent in *Wolf*). Ironically, both *Chimel* and *Mapp* are on shakier ground now than when they were decided, largely because of the work of Justice Scalia. *See* Thornton v. United States, 541 U.S. 615, 625-32 (2004) (Scalia, J., concurring); Arizona v. Gant, 129 S. Ct. 1710, 1724-25 (2009) (Scalia, J., concurring); Hudson v. Michigan, 547 U.S. 586 (2006).

[7] *See* Arnold, H. Loewy, *Police, Citizens, the Constitution, and Ignorance: The Systematic Value of Citizen Ignorance in Solving Crime, Police Deception, and the Constitution: A Symposium*, 39 TEX. TECH L. REV. 1077 (2007).

[8] *See* Brandenburg v. Ohio, 395 U.S. 444, 451-52 (1969).

I. THE FACTS

At 2:40 in the morning, while driving the streets of Sunnyvale, California, with five passengers, Joe Gonzalez was pulled over by Officer James Rand for driving with a burned-out headlight and license plate light.[9] Gonzalez could produce neither registration for the vehicle nor a driver's license.[10] The other five passengers were then asked for evidence of identification, and only one passenger, Joe Alcala, was able to produce a driver's license, and he claimed that the car belonged to his brother.[11]

Then, according to the Court: "[T]he six occupants . . . stepped out of the car at the officer's *request*. . . ."[12] Surely, the word "request" is misleading. Assuming the officer said something like: "Will you please step out of the car," it seems highly unlikely that the occupants really believed they had a choice. And if they did, they would have been wrong.[13] Surely six men driving around in a car with no proof of ownership and most with no identification could not have believed that they were free to ignore the officer's request (or more accurately, polite demand) to exit the car.

Then, two more officers arrived.[14] After being buttressed by these reinforcements, Officer Rand "*asked* Alcala if he could search the car."[15] Alcala responded: "Sure, go ahead."[16] There is no allegation that officer Rand used any coercion beyond that inherent in an officer's politely demanding that six people leave their undocumented car at nearly three in the morning after two reinforcement officers had driven up to join the show of force before the requested search.[17] The police found a stolen

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[9] Schneckloth v. Bustamonte, 412 U.S. 218, 220 (1973).

[10] *Id.*

[11] *Id.*

[12] *Id.* (emphasis added).

[13] *See generally* the later case of Maryland v. Wilson, 519 U.S. 408, 410 (1997) (holding that a police officer may order both the driver and passenger out of the vehicle after a lawful traffic stop).

[14] *Schneckloth*, 412 U.S. at 220.

[15] *Id.* (emphasis added).

[16] *Id.*

[17] *Id.*

check which was used to convict one of the car's passengers, Robert Bustamonte.[18]

II. NON-ISSUES

There are three possible ways the Court might have decided the case without having to consider the consent issue. Of these three, two were never argued, and the third, which was argued, was not considered by the Court.

First, it would have been possible to argue that given all of the circumstances of this case, six men, near three in the morning, no proof of car ownership, etc., that a search of the car should have been deemed reasonable under the Fourth Amendment. Though not devoid of plausibility, the Government did not choose to make that argument, and the case was decided as though there were no probable cause, or even reasonable suspicion. Consequently, that option was off the table.

Second, it would have been possible to decide that as a mere passenger in the vehicle, Bustamonte lacked standing to challenge the constitutionality of the search. Though a similar position was sustained several years later in *Rakas v. Illinois*,[19] it was neither suggested nor considered in this case. Thus, the case proceeded on the assumption that Bustamonte had standing to challenge the illegality of the search. So this option was also off the table.

Finally, it would have been possible to conclude that Bustamonte's Fourth Amendment claim was not cognizable on habeas corpus, as the Court held a few years later in *Stone v. Powell*.[20] Unlike the other two non-issues, this one actually was argued, and three of the Justices (Powell, Burger, and Rehnquist) would have found against Bustamonte on that ground alone.[21] Justice Blackmun was prepared to join them, but for his belief that it was unnecessary due to his agreement with the majority opinion (which Powell, Burger, and Rehnquist also joined).[22]

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[18] *Id.*

[19] *See* Rakas v. Illinois, 439 U.S. 128, 132-38 (1978).

[20] 428 U.S. 465, 494 (1976).

[21] *Schneckloth*, 412 U.S. at 250 (Powell, J., concurring).

[22] *Id.* at 259 (Blackmun, J., concurring).

Consequently, although the case might have been disposed of on that ground, it was not.

The upshot of all of this is that, while there may have been several reasons to find against Bustamonte, the *only* one relied on by the Court was that his otherwise valid and cognizable Fourth Amendment right was waived by Alcala's consent to the search.

III. THE LOGIC OF THE MAJORITY

Justice Stewart, who wrote the majority opinion began by narrowing the conflict, noting that Bustamonte had conceded "that a search conducted pursuant to a valid consent is constitutionally permissible,"[23] and that the prosecutor had conceded that "he has the burden of proving that the consent was, in fact, freely and voluntarily given."[24] Stewart then concluded that the issue squarely presented was whether a consent could be proven voluntary without proof that the defendant was aware of his right to decline consent.

Obviously, the word "voluntary" is capable of multiple meanings. In the criminal law, for example, as applied to actus reus, the term simply means a muscularly willed movement.[25] Thus, if one consciously moves his finger, he would be said to have voluntarily acted even if he did not know that his finger was on the trigger of a gun and another person was in the line of fire.[26] The defendant might be able to defend (if it were true) on the ground that he did not act knowingly, recklessly, or negligently, but he could not claim that he didn't act voluntarily.

Fortunately, Justice Stewart did not define "voluntary" so narrowly.[27] Rather, he focused on the cases dealing with "voluntary confessions."[28] There the Court employed a balancing test, never relying on any one factor, including the defendant's

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[23] *Id.* at 222 (majority opinion).

[24] *Id*. (internal citations omitted).

[25] FREEDOM AND RESPONSIBILITY 129-30 (Herbert Morris ed., Stanford University Press 1961).

[26] *Id.*

[27] *Schneckloth,* 412 U.S. at 218.

[28] *Id* at 227.

awareness of his right to remain silent.[29] Thus, Justice Stewart concluded that awareness of the right to decline consent was only one factor (and apparently not a terribly important one) in assessing voluntariness (and hence validity) of consent.[30]

Ironically, probably the least controversial aspect of the *Miranda* case, which essentially rendered voluntariness largely irrelevant in the area of confessions, was the requirement that the arrestee be told that he had a right to remain silent.[31] The dissents and much of the literature criticized the Court for announcing a right to counsel during interrogation, but nobody seriously questioned the right of the defendant to know of his right to remain silent.[32] Even Professor (and former Federal Judge) Paul Cassell, one of *Miranda's* most vehement critics, does not quarrel with the requirement that an accused be informed of his right to remain silent.[33]

So what value did the Court think it was serving by allowing ignorant consent? The Court put it this way:

> In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. In the present case for example, while the police had reason to stop the car for traffic violations, the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants. Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more

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[29] *Id.*

[30] *Id.* at 218.

[31] Miranda v. Arizona, 384 U.S. 436, 468 (1966).

[32] *See*, *e.g.*, *id.* at 504-26 (Harlan, J., dissenting).

[33] *See* Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 257 (1999).

> extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is constitutionally permissible and wholly legitimate aspect of effective police activity.[34]

Of course, these are good reasons to encourage consent. As the Court put it later in its opinion, "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."[35] But what is noticeably lacking in Justice Stewart's opinion is a reason for valuing the searchee's ignorance.

Let me illustrate the difference. Assume I am driving from Lubbock to Dallas in my white Saturn. Assume further that a policeman pulls me over and tells me the following: "We had a report that somebody driving a white Saturn from Lubbock to Dallas is carrying heroin in his trunk. I'd like to search your trunk to see if it's you. You don't have to let me, but I'd sure appreciate it if you did." I might well decide as a good citizen, as well as one who would like to remove a cloud of suspicion, that consenting to this polite request to search would be a good idea.

Now, change the facts slightly. This time the officer stops me and asks if I am carrying drugs. Upon my negative response, he asks: "May I search your car?" Although I may be aware that "no" is a permissible response, most drivers would not. They would yield to authority because they think they have to rather than because they want to. Unlike the first hypothetical, this is not "responsible citizenship." It is ignorant submission.

Basically, the Court seems to take two positions: (1) coerced consent is forbidden and (2) unknowing consent is not. Thus, if the police ask nicely, and the suspect consents, all is good because coercion is absent. Indeed, if one believes that unknowing consent can render a search reasonable, there is little to quarrel with the Court's opinion.

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[34] *Schneckloth*, 412 U.S. at 227-28.

[35] *Id.* at 232 (quoting *Miranda*, 384 U.S. at 477-78).

It should be noted that although the effect of the decision is to allow ignorant consents, its concern appears more related to burden of proof. The Court talks about the "near impossibility of meeting this prosecutorial burden."[36] The Court suggests and rejects what one might have thought was the obvious answer to its conundrum: "[I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning."[37] So, in the Court's view, because a warning would be impractical, proving knowing consent would be an impossible burden.

Undoubtedly, if the Court's impracticality premise were correct, its conclusion would be arguable. As will become apparent when we examine Justice Marshall's "great" dissent, a warning would not be at all impracticable. Furthermore, if the impracticality of proving consent were really driving the Court's opinion, presumably the Court would have at least excluded evidence where the defendant could show that he did not know that he could refuse. Yet as the great dissent pointed out, the Court did not even accept this modest proposal.

IV. THE GREAT DISSENT

Justice Marshall begins his opinion by referring to the Court's "*curious result* that one can choose to relinquish a constitutional right—the right to be free from unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request."[38] If anything, Justice Marshall was charitable in his use of the word "curious." If he were wont to speak like Chief Justice Burger, he might have used the word "bizarre."[39] Or to be completely accurate, he could have said "oxymoronic."

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[36] *Schneckloth*, 412 U.S. at 230.

[37] *Id*. at 231.

[38] *Id*. at 277 (Marshall, J., dissenting) (emphasis added).

[39] *See* Brewer v. Williams, 430 U.S. 387, 417 (1977) (Burger, C.J., dissenting) ("I categorically reject the remarkable notion that the police in this case were guilty of unconstitutional misconduct, or any conduct justifying the *bizarre* result reached by the Court.") (emphasis added). *See* Maine v. Moulton, 474 U.S. 159, 181 (1985) (Burger, C.J., dissenting) ("Nothing whatever in the Constitution or our prior opinions supports this *bizarre* result, which creates a new 'right.'") (emphasis added).

So one might ask, what is so "great" about recognizing such an obvious truism? My answer is that when one can see the obvious where all others are missing it, there is something great about the person who sees it. Perhaps it is nothing more than the ability to avoid distracting irrelevancies, much like the boy who knew that the emperor had no clothes.[40]

In criticizing the Court's reliance on the concept of "voluntary" in the confession cases, Marshall makes what might be his most telling point in, of all places, a footnote. Though not yet having reached the notoriety of *Carolene Products*' famous footnote 4[41] or *Brown v. Board of Education*'s footnote 11,[42] the wisdom of Justice Marshall's footnote 6 should not be ignored. In response to the Court's contention that voluntary consent means the same thing as voluntary confession, footnote 6 says: "That this application of the 'domino' method of adjudication is misguided is shown, I believe, by the fact that 'voluntary consent' seems redundant in a way that the phrase 'voluntary confession' does not."[43]

To illustrate, the phrase "involuntary confession" seems to accurately describe the situation where a police officer tortures a suspect into confessing. We would say that he confessed, but it was involuntary. On the other hand, where an officer tortures a suspect until he consents to a search, we would not say that he involuntarily consented. We would, instead, say that he did not consent at all. Indeed, that was essentially the Court's holding in *Bumper v. North Carolina,* where a woman consented to a search only after being told that the police had a search warrant.[44]

Building on this dichotomy, Justice Marshall proceeds to distinguish "coercion" from "consent," explaining that voluntariness is relevant to the issue of coercion, but not to consent.[45]

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[40] *See* HANS CHRISTIAN ANDERSEN, *The Emperor's New Clothes, in* ANDERSON'S FAIRY TALES 263 (Mrs. E. V. Lucas & Mrs. H.B. Paull, trans., Grosset & Dunlap 1945) (1837).

[41] United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938).

[42] Brown v. Bd. of Educ., 347 U.S. 483, 495 n.11 (1954).

[43] *Schneckloth*, 412 U.S. at 280 n.6 (1973).

[44] *See* Bumper v. North Carolina, 391 U.S. 543, 546-47 (1968).

[45] *Schneckloth,* 412 U.S. at 283-84 (Marshall, J., dissenting).

He uses *Bumper* as an illustration, noting that, while under all of the circumstances of that case, the woman's consent may have been involuntary, the decision was not predicated on that ground. Rather, it was predicated on her not making a choice to give up a known right, and thus not consenting at all.[46] By way of illustration, consider the rapist who points a gun at his victim, saying, "Consent to sex or I'll blow your brains out." We would not treat her "ok" as an involuntary consent. We would say that she did not consent at all.

The great dissent then goes on to suggest that, "If the consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police."[47] Marshall adds, "I can think of no other situation in which we would say that a person agreed to some course of action if he convinced us that he did not know that there was some other course that he might have pursued."[48]

Frankly, I find such logic impossible to refute, which may explain why the Court never attempted to refute it. Rather, the Court did what it must when confronted with this kind of logic against its position. It ignored it. Plausibly, I suppose one could have argued with Marshall's dependent clause, ("[i]f consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search"[49]) and contended instead that an uncoerced, albeit unknowing, consent rendered the search reasonable.

Such was the logic of the Court's subsequent decision, *Illinois v. Rodriguez*,[50] a decision with which I have no quarrel. In *Rodriguez*, again over Marshall's dissent, the Court held that consent predicated on a reasonable belief that the defendant's former co-tenant had authority to consent to a search, rendered

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[46] *Id.*
[47] *Id*. at 284-85.
[48] *Id*. at 285.
[49] *Id.* at 284.
[50] 497 U.S. 177, 188-89 (1990) (Marshall, J. dissenting).

the search reasonable, and thus constitutional.[51] Thus, if the Court had found that Officer Rand reasonably believed that Alcala had knowingly consented to the search of the car, and that the search was therefore reasonable, the opinion would have made a great deal more sense (though candidly Marshall still would not have agreed with it).[52]

Of course, there is no evidence that Officer Rand thought any such thing. Instead, the Court was willing to go with the untenable proposition that absent actual consent, the search would have been invalid, but one can give up his constitutional right to be free from an unreasonable search, even if in doing so, he did not know that he had a choice. So, rather than quarreling with Marshall's logic, the Court simply ignored it.

Marshall then jumps to the heart of the majority's reasoning, namely that a warning would be impractical because it would break the informality. He understates: "I doubt that a simple statement by an officer of an individual's right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he surely is entitled to know."[53] Indeed, I wish he had gone further and spelled out his obvious truism inasmuch as it was not so obvious to the majority. He could have used the following illustration: "Joe, I'd like you to let me search your car. You don't have to if you don't want to, but I'd sure appreciate it if you did."

How on earth can a warning like that be said to break the informality? That question, I think is unanswerable. Indeed, such a warning would have made the discussion less formal, not more, causing Marshall to "conclude with some reluctance that when the Court speaks of practicality, what it is really talking of is the continued ability of the police to capitalize on the ignorance of citizens to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights."[54] He adds: "Of course it would be

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[51] *Cf.* Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773 (2005).

[52] *See Rodriguez*, 497 U.S. at 189-98 (Marshall, J., dissenting).

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

[54] *Id*. at 288.

'practical' for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the boards."[55]

These sentences are truly "The Emperor has no clothes" coup de grace.[56] He strips bare the Court's ridiculous assertion of the need for informality, then lays out in no uncertain terms precisely what was afoot: the Court's disrespect of sound Fourth Amendment theory.

And, for those who might think, "Oh well, another criminal is off the street and no harm done," let us not forget Justice Marshall's concern for the innocent. How, one might ask, are the rights of innocent people relevant? The answer, as I have written elsewhere,[57] is that the procedure sanctioned in this case will subject far more innocent people to a search because they may consent when they think they have no choice. Indeed, it is at least possible that Alcala, who may have believed he had nothing to hide, and so far as we know was innocent, believed that he had no choice after being confronted by Officer Rand and the two other policemen who drove up behind him in the wee hours of the morning.

More importantly, as we look at what *Schneckloth* has wrought, we will get some idea of how many innocent people have been unnecessarily subject to a search that (1) would have been unlawful without their consent and (2) for which they had no idea that they were free to "just say no."

V. WHAT *SCHNECKLOTH* HATH WROUGHT (*OHIO V. ROBINETTE*)

For the Supreme Court, *Ohio v. Robinette*[58] was an easy case, wrongly decided by the Ohio Supreme Court, in light of *Schneckloth*. Robinette was stopped by Officer Robert Newsome

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[55] *Id*.

[56] *See* ANDERSEN, *supra* note 40.

[57] *See generally* Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1257-59 (1983).

[58] 519 U.S. 33 (1996).

for speeding in a construction zone.[59] Robinette gave Newsome his license and exited the car after being asked to do so.[60] Newsome then returned Robinette's license and issued him a warning.[61] Then, as captured by Newsome's video camera, the following dialogue occurred:

> Newsome: "One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"
>
> Robinette: "No."[62]

Newsome then asked for and received consent to search Robinette's car where he found a small amount of illegal drugs.[63]

The Ohio Supreme Court reversed Robinette's conviction, holding that before a police officer could seek consent to search, he was required to tell the motorist that he was free to leave.[64] Relying on and quoting *Schneckloth*, Chief Justice Rehnquist opined:

> And just as it 'would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning,'[65] 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.[66]

Well, far be it from me to advocate unrealism. Indeed, if *Schneckloth* had been correctly reasoned there is some logic to extending it to a person's false belief that he is not being detained. But how many people who have been stopped by a policeman, given a warning ticket, and heard the policeman utter the words "Before you get gone," would know they were free to leave? Yet, if the driver were not free to leave, as he almost cer-

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[59] *Id.* at 35.
[60] *Id.*
[61] *Id.*
[62] *Id*. at 36.
[63] *Id.* at 35-36.
[64] *Id.* at 38.
[65] *Schneckloth*, 412 U.S. at 231.
[66] *See Robinette*, 519 U.S. at 39-40.

tainly believed was the case, the consent would not have been valid (unless, of course, the policeman had a right to detain him, which nobody on the Court even suggested was the case).[67]

So what does all this mean for the innocent driver, who unlike Robinette has nothing to hide? It means that large numbers of them are going to be stopped for minor traffic offenses, asked for consent to search with no understanding of either their right to leave or their right to say "no." How many? Well, Deputy Newsome testified that he routinely requested permission to search automobiles that he stopped for traffic violations.[68] And, in another case, he testified that in the year of Robinette's arrest, he requested consent in 786 traffic stops.[69]

Even if we assume that Newsome was above the curve in requesting searches (without telling people that they were either free to leave or free to say "no"), there were probably thousands of motorists in Ohio whose cars were searched, who had no idea that they were free to leave and free to refuse the search. Voluntary cooperation with the police is a wonderful thing and should be encouraged. But the embarrassment, humiliation, and just plain loss of valuable time suffered by our innocent citizens is considerably less wonderful. Let me illustrate. Posit a businessman stopped by Officer Newsome. With no knowledge of his right to refuse, he consents to a search despite being late for a business meeting (which is why he was speeding in the first place). The officer goes through his briefcase looking for drugs, and in the course thereof leaves his business notes in disarray. Consequently, the businessman is both late for his meeting and disorderly in his presentation.

The Government's ability to so inconvenience our citizenry is directly attributable to *Schneckloth*'s conclusion that ignorance, even if not bliss, is no cause for Fourth Amendment concern. Justice Marshall understood what such a rule could have on the innocent. If Deputy Newsome is at all typical, his fears have come to pass. Ironically, Deputy Newsome and others like

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[67] *See, e.g.*, Florida v. Royer, 460 U.S. 491, 498 (1983) (requiring at least reasonable suspicion before one could be justifiably detained).

[68] *Robinette*, 519 U.S. at 40 (Ginsburg, J., concurring).

[69] State v. Retherford, 93 Ohio App. 3d 586, 594 (1994).

him are no longer free to dupe the citizenry in Ohio, because on remand, the Ohio Supreme Court held that the Ohio Constitution does require that citizens be informed that they are free to leave before being asked for consent.[70]

CONCLUSION

Nine years, prior to *Schneckloth*, in 1964, Judge Madden of the Ninth Circuit (of all places), with remarkable candor, wrote the following:

> While it may not be 'in accord with common experience' for a guilty person to consent to a search which, if successful, may help to prove his guilt, it may nevertheless occur. Happily, not all criminals are highly intelligent and use the most effective tactics in their contacts with the police. Again happily, sometimes their contacts with the police confuse them, and they say and do things which, after deliberation, they regret. To whatever extent stupidity or confusion on the part of the guilty person contributes to the prompt acquisition by the police of evidence of crime, so that the police can get back to work on the numerous cases which may remain unsolved, society is the gainer and nobody is the loser of anything to which he is constitutionally entitled.[71]

Frankly, Justice Stewart's opinion in *Schneckloth* said the same thing, but without the transparency of Judge Madden's candor. Even without the transparency, Justice Marshall clearly saw what the decision would do to the innocent, as well as the guilty, and perhaps most importantly to the Constitution that we are all supposed to live under. It is my fondest hope that someday, preferably in my lifetime, the wisdom of this magnificent dissent will be fully appreciated, and that a future Court will return us to the Constitution under which we are supposed to live.

Were this just a law review article, it would end here. But it is not just a law review article; it is an opportunity to speak to

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[70] State v. Robinette, 73 Ohio St. 3d 650, 655 (1995).

[71] Martinez v. United States, 333 F.2d 405, 407 (9th Cir. 1964) (quoting United States v. Gregory, 204 F. Supp. 884, 885 (S.D.N.Y. 1962)).

state appellate judges, the one group of people who can do something about consent searches. You cannot, of course, directly mold federal constitutional law, but you can mold state constitutional law. Under your state constitutional prohibition against unreasonable searches, you have the power to hold that searches conducted pursuant to consent are unconstitutional unless there is good reason to believe that the searchee knew of his right to refuse consent. You could even require that police give a specific warning such as, "You don't have to let me search, but I'd sure appreciate it if you did."

When the result of such a holding overturns a criminal conviction, you might feel some reluctance to so rule (especially if you have to run for reelection). But as Justice Scalia, of all people, once wisely observed, "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."[72] So, in explaining your opinion, you should emphasize that you are doing it for all of the innocent citizens of your state. You should explain that you are freeing them from being subject to importuning, and frankly bullying, police officers who obtain consent to search from unwitting citizens, simply because they know they can. Ohio took a major step in that direction in *Robinette,* and there is good reason for other states to follow suit.

If you agree with me that the *Schneckloth* domain is not the type of society under which we are supposed to be living, your decisions can make a real difference. First, at minimum, you will free the innocent citizens of your state from such importuning. And second, if enough of you so rule, the Supreme Court is likely to take notice. For example, between 1949 and 1961, enough states chose to adopt the exclusionary rule that when *Mapp v. Ohio*[73] was decided, the Court elected to abandon the *Wolf v. Colorado*[74] majority, and follow its dissent. And thus the exclusionary rule became applicable to the states.

Similarly, it is my firm belief that a groundswell of state indignation towards the *Schneckloth* decision may well cause

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[72] Arizona v. Hicks, 480 U.S. 321, 329 (1987).

[73] 367 U.S. 643, 654-55 (1961).

[74] 338 U.S. 25, 25-30 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

the Supreme Court to rethink this sorry chapter in our Fourth Amendment jurisprudence. Then perhaps, just perhaps, Justice Marshall's great dissent will become the law of the land.