IGNORANCE AND DEMOCRACY

by Morgan Cloud[*]

I. INTRODUCTION

Anyone familiar with traditional ideas about the origins and nature of our democracy will be surprised to learn that contemporary Fourth Amendment doctrine governing consent searches accepts—even encourages—ignorance among the people about their constitutional rights. Consent can justify otherwise illegal searches even if the consenting individuals do not know they possess the constitutional right to say "no." For more than a third of a century, Supreme Court opinions have decreed that a person can consent to government intrusions otherwise prohibited by the Fourth Amendment if that decision is "voluntary" according to the "totality of the circumstances" standard that the Court has held inadequate to protect other constitutional rights.[1]

As a result, the Fourth Amendment right to be free from unreasonable searches and seizures receives less protection than other rights, including the Sixth Amendment right to counsel and, of greatest relevance here, the Fifth Amendment privilege against self-incrimination. In general, decisions to relinquish Fifth and Sixth Amendment rights are judged against the constitutional waiver test, which requires not only that decisions are voluntary, but also that they are "knowing and intelligent." As a practical matter, the knowing and intelligent prong of the waiver test requires that government actors, whether police officers, prosecutors, or judges, must advise people of the nature of the constitutional rights they are forsaking. Yet, people ignorant of their Fourth Amendment rights can relinquish them by acceding to government requests for consent to search. This seems to

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1. *See infra* Part III.

contradict the most fundamental notions of individual autonomy embodied in the Constitution.

On the macro level, our democratic theory has emphasized the centrality of Lockean notions of consent by the people collectively in the creation of our constitutional scheme of government.[2] The best known expression of the idea must be this passage from the Declaration of Independence: "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed."[3] This vision of democratic societies claims that the government's very existence depends upon the people, who possess the inherent "[r]ight... to alter or to abolish it, and to institute new Government."[4]

Our traditional democratic theory also articulates notions of consent on the micro level—at the point of contact between an individual and the government.[5] On this level, traditional doctrine has asserted the fundamental value of the individual, who possesses rights that constrain government power.[6] Decisional autonomy over the exercise and relinquishment of fundamental constitutional rights, including some protected in the Bill of Rights, is an essential element of this view of the relationship of the citizen

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2. *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT, THE SECOND TREATISE, AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT, §§ 87, 89, 94-100, 119-28 (1698).

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1176). Perhaps as well known is the Preamble to the Constitution: "WE THE PEOPLE of the United States, in Order to from a more perfect Union . . . do ordain and establish this CONSTITUTION for the United States of America." U.S. CONST. pmbl.

4. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

5. *See, e.g.*, U.S. CONST. amend. V.

6. *See, e.g.*, U.S. CONST. amend. V, VIII. The Constitution imposes limits on the authority of the government to exercise power over individuals and limits some functions as structural limits on government power. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 2 (granting the writ of habeas corpus); *id.* cl. 3 (forbidding bill of attainder or ex post facto laws); *id.* cl. 8 (forbidding the granting of titles of nobility); *id.* art. IV, § 2, cl. 1 (creating the Privileges and Immunities Clause); *id.* art. VI, cl. 1 (validating debts predating the Constitution against the United States); *id.* amend. V (granting the right to a grand jury and due process and limiting government power with the Takings Clauses and double jeopardy); *id.* amend. VI (granting the right to a speedy and public trial, a jury trial, and related clauses in criminal cases); *id.* amend. VII (granting the right to a jury trial in civil cases); *id.* amend. VIII (limiting government power through the bail and punishment clauses); *id.* amend. IX (preserving rights retained by the people). *See also* THE FEDERALIST NO. 84, at 510 (Alexander Hamilton) (Clinton Rossiter, ed. 1961).

Other provisions also may be viewed not merely as structural limits of government power but also as devices protecting the exercise of free will by autonomous individuals. *See, e.g.*, U.S. CONST. amend. I (granting the freedoms of religion, speech, press, assembly, and right of petition); *id.* amend. III (barring quartering of soldiers in homes during peacetime "without the consent of the Owner"); *id.* amend. IV (granting the freedom from unreasonable searches and seizures, which was historically linked to English searches for seditious publications and religious dissenters); *id.* amend. V (granting the freedom not to incriminate oneself); *id.* amend. VI (granting the rights to compulsory process and to confront adverse witnesses in criminal cases).

The rights to jury trials in criminal and civil cases also can be seen in their historical contexts as a vehicle for preserving the right to expressive autonomy by members of the community. *See, e.g.*, THE FEDERALIST NO. 83, at 495 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing civil juries).

and government.[7] Supreme Court decisions occasionally have emphasized the importance of decisional autonomy within our constitutional system. For this Essay, the most relevant example in constitutional criminal procedure is *Miranda v. Arizona*.[8]

The *Miranda* opinion begins: "The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime."[9] At various points in that seminal opinion, the Court notes that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals; that the custodial "interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner;" that the privilege against self-incrimination "has come rightfully to be recognized in part as an individual's substantive right, a 'right to a private enclave where he may lead a private life. That right is the hallmark of our democracy.'"[10] Most comprehensively, the *Miranda* opinion stresses that:

> [T]he privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."[11]

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7. Some rights serve as bridges between the macro and micro levels of constitutional rights. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("An individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."); Wesberry v. Sanders, 376 U.S. 1, 17 (1963) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.").

8. Miranda v. Arizona, 384 U.S. 436 (1966).

9. *Id.* at 439.

10. *Id.* at 455, 457, 459 (quoting United States v. Grunewald, 233 F.2d 556, 579, 581-82 (1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957)).

11. *Id.* at 459 (citations omitted). This analysis was not original but rested upon Supreme Court opinions extending from the late nineteenth century until the 1960s. *See, e.g.*, Murphy v. Waterfront Comm., 378 U.S. 52, 55 (1964).

> The privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.'" It reflects many of our fundamental values and most noble aspirations: . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life."

As the reader surely knows, to secure these values the *Miranda* opinion requires officers to advise suspects subjected to custodial interrogations of various constitutional rights.[12] The stated purpose is, at least in part, to ensure decisional autonomy based upon adequate knowledge of the nature of the individuals' constitutional rights and the consequences of relinquishing them: "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant."[13] "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."[14]

Miranda rests upon a theory of decisional autonomy that envisions the citizen as a rational decision maker entitled to possess information explaining the nature of the citizen's constitutional rights and the consequences of relinquishing them as a prerequisite to deciding whether to forego the exercise of those rights.[15] In other words, *Miranda* rejects constitutional ignorance on the micro level.[16]

One of the anomalies of contemporary Fourth Amendment doctrine is that it permits people to consent to police searches although ignorant that they have the right to refuse—even when the intrusions would be unconstitutional absent consent.[17] The case of *Schneckloth v. Bustamonte* established the foundations of the current rules governing Fourth Amendment consent searches, which Part III examines.[18] That discussion explores both the majority's rationale for adopting a standard for consent by those who are ignorant of their rights and the dissenters' arguments for applying the traditional waiver standard to Fourth Amendment rights.[19]

Id. at 55 (citations omitted).

12. *See, e.g., id.* at 471-72.

> Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

Id. Some subsequent Court decisions explicitly retreated from this emphasis upon the values underlying the Fifth Amendment privilege against self-incrimination. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 167 (1986) (rejecting the argument that the Fifth Amendment privilege protects the exercise of "free will," asserting instead that it only protects against government coercion); Kastigar v. United States, 406 U.S. 441, 453 (1972).

13. *Miranda*, 384 U.S. at 476.

14. *Id.* at 444.

15. *See id.* at 469.

16. *See id.*

17. Schneckloth v. Bustamonte, 412 U.S. 218, 231-33 (1973).

18. *Id.*; *see infra* Part III.

19. *See infra* Part III.

Part IV of the Essay demonstrates how the "ignorant consent" doctrine is linked to other contemporary Fourth Amendment doctrines that maximize law enforcement efficiency while minimizing the importance of the privacy, property, and liberty rights ostensibly protected by the Constitution.[20] This analysis examines how the ignorant consent doctrine is related to other contemporary Fourth Amendment theories that also permit individuals to unknowingly relinquish their privacy rights.[21] The subject of Part II is the surprising analytical starting point for understanding these Fourth Amendment doctrines, *Miranda v. Arizona*, the Supreme Court's most famous opinion interpreting the Fifth Amendment privilege against self-incrimination.[22]

II. *MIRANDA*, KNOWLEDGE, AND WAIVER

Volenti non fit injura: To a person who consents, no injustice is done.[23]

The *Miranda* Court concluded that in the context of custodial interrogation, the totality of the circumstances test, traditionally used to determine if a confession was the product of unconstitutional coercion, was inadequate to guarantee the Fifth Amendment privilege.[24] The solution devised by the Court rested upon assumptions that knowledge about constitutional rights would affect citizen decision making.[25] The solution adopted the test of waivers of constitutional rights in the Fifth Amendment context.[26] In *Bustamonte*, the majority rejected both Fifth Amendment tests for the protection of Fourth Amendment rights.[27] To understand the anomalies embedded in contemporary Fourth Amendment consent doctrine, one must begin with *Miranda*'s treatment of the knowledge and waiver issues in the context of custodial interrogation by the police.[28]

Miranda "rested upon an untested, unverified, and unproven assumption [that] the *Miranda* warnings . . . *work*" in the sense that they ensure the voluntariness of confessions.[29] The Court assumed, without offering any support for this critical assumption, that suspects who were advised of their rights "would possess the tools necessary to counteract the pressures inherent in custodial interrogation and thus ensure that a confession was 'voluntary' and not compelled."[30] The analysis in *Miranda* presumed that this knowledge

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20. *See infra* Part IV.
21. *See infra* Part IV.
22. *See infra* Part II.
23. BLACK'S LAW DICTIONARY 1605 (8th ed. 2004).
24. Miranda v. Arizona, 384 U.S. 436, 502-03 (1966) (Clark, J., dissenting and concurring).
25. *Id.* at 467.
26. *Id.* at 444-45.
27. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).
28. *Miranda*, 384 U.S. at 468-70, 475-78.
29. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 517 (2002) (alteration in original).
30. *Id.* at 498.

would resolve the relevant issues about the constitutional validity of confessions.[31]

To determine whether a person has surrendered the Fifth Amendment privilege, the *Miranda* opinion adopted the traditional test for waiving constitutional rights, concluding that anyone can give up *Miranda* rights by executing a waiver that is "made voluntarily, knowingly and intelligently."[32] The waiver test has two dimensions, requiring both that the waiver be voluntary—a "free and deliberate choice" not compelled by government pressure—and also that it is "knowing and intelligent"—implying that "the person comprehend[ed] the nature of the right and the consequences of abandoning it."[33]

Miranda assumed that knowledge of rights solves the problems raised by both prongs of the waiver test.[34] Simply stated, the opinion presumed that adequately informing people of their rights would guarantee that waivers were both voluntary and knowing.[35]

The validity of these assumptions is open to question.[36] What is not disputable, however, is that *Miranda* declared that people in custody could not validly give up the right to refuse to answer questions unless they were first informed they had the right to say "no."[37] Seven years later, the Justices debated whether people asked to consent to searches had the same right.[38] The majority answered "no," and its decision laid the foundation for a contemporary constitutional doctrine governing consent searches.[39]

III. *BUSTAMONTE*, IGNORANCE, AND CONSENT SEARCHES

Stopping an automobile for a traffic violation is the archetypal scenario in which an officer asks for consent to search.[40] *Schneckloth v. Bustamonte*

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31. *Id.* at 497-98.
32. *Id.* at 499.
33. *Id.* at 498.
34. *See id.*
35. *See* Cloud et al., *supra* note 29, at 517 (critiquing this analysis).

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

Miranda, 384 U.S. at 469.

36. Cloud et al., *supra* note 29, at 498.
37. *Miranda*, 384 U.S. at 467-68.
38. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).
39. *Id.*
40. *See, e.g., id.*

was just such a case.[41] In this case, officers stopped an automobile because one headlight and the license plate light were burned out; Robert Bustamonte was a passenger in an automobile.[42] The officers learned that the driver did not have a driver's license, and none of the six men in the vehicle was its owner.[43] One of the passengers, Joe Alcala, said the car belonged to his brother.[44] The officers asked Alcala for consent to search and he replied: "Sure, go ahead."[45] While searching the vehicle, the officers discovered stolen checks, and Bustamonte was convicted "of possessing a check with intent to defraud" in violation of state law.[46] The admissibility of the checks depended upon the validity of Alcala's consent to the search.[47] The parties conceded "that a search conducted pursuant to a valid consent is constitutionally permissible," and that "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."[48] As a result, the Supreme Court faced a single interpretive task—defining "the definition of 'consent' in this Fourth and Fourteenth Amendment context."[49] Justice Stewart's majority opinion rejected *Miranda*'s knowledge-driven conception of constitutional rights, expressly holding that those ignorant of their Fourth Amendment rights can forsake them.[50]

The Court affirmed that only voluntary consent to search satisfies the Fourth Amendment.[51] Ironically, Justice Stewart acknowledged that the Supreme Court's most detailed and comprehensive critique of the meaning of voluntariness arose after 1936 in cases involving interrogations and

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41. *Id.* at 220.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 219-21.
47. *Id.* at 223.
48. *Id.* at 222.
49. *Id.* at 219. Stewart later described the issue more narrowly as "what [ ] the prosecution [must] prove to demonstrate that a consent was 'voluntarily' given." *Id.* at 223.
50. *Id.* at 234. During the preceding decade, Justice Stewart had authored a number of important Fourth Amendment opinions. The most famous is *Katz v. United States*, but other important opinions included *Hoffa v. United States*, *Osborn v. United States*, *Silverman v. United States*, and *Elkins v. United States*. *See* Katz v. United States, 389 U.S. 347 (1967); Hoffa v. United States, 385 U.S. 293 (1966); Osborn v. United States, 385 U.S. 323 (1966); Silverman v. United States, 365 U.S. 505 (1961); Elkins v. United States, 364 U.S. 206 (1960).
51. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).

> Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Id.

confessions.[52] This traditional analysis utilized a totality of the circumstances methodology to judge the voluntariness of confessions.[53] The irony is that *Miranda* explicitly rejected this methodology in the Fifth Amendment context, but *Bustamonte* adopted it to judge the validity of consent-based searches.[54] As a result, people ignorant of their rights could consent to a government search otherwise prohibited by the Fourth and Fourteenth Amendments:

> [T]he question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.[55]

The Supreme Court overruled the Court of Appeals, which had held that the government must prove that a person consenting to a search know that he has a right to refuse consent.[56] Justice Stewart asserted that this "would, in practice, create serious doubt whether consent searches could continue to be conducted."[57] Although professing a concern for protecting both liberty and law enforcement values, the majority opinion emphasized the need for promoting efficient searches rather than insuring that the people know their rights.[58] Consider the following passage:

> 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.[59]

Nearly ninety years before *Bustamonte*, the Supreme Court had rejected the argument of utility that Fourth Amendment rights were less important than the

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52. *Id.* at 223 (citing Brown v. Mississippi, 297 U.S. 278, 285-86 (1936)).

53. *Id.* at 226.

54. *Compare id.* (adopting the totality of the circumstances methodology), *with* Miranda v. Arizona, 467 U.S. 436, 467 (1966) (rejecting the totality of the circumstances methodology).

55. *Bustamonte*, 412 U.S. at 227.

56. *Id.*

57. *Id.* at 229.

58. *See id.* at 227-28.

59. *Id.*

"'means of detecting offenders by discovering evidence.'"[60] For decades thereafter, the rights-oriented constitutional theories of the late nineteenth and early twentieth century jurisprudence openly protected privacy, property, and liberty rights at the expense of efficient law enforcement. Justice Stewart's opinion in *Bustamonte* reversed that value choice.[61]

The dissenting Justices objected that the majority had abandoned the fundamental principles embedded in the Amendment's history, principles inimical to an interpretive theory designed to promote government authority over individual autonomy:

> In the final analysis, the Court now sanctions a game of blindman's buff, in which the police always have the upper hand, for the sake of nothing more than the convenience of the police. But the guarantees of the Fourth Amendment were never intended to shrink before such an ephemeral and changeable interest. The Framers of the Fourth Amendment struck the balance against this sort of convenience and in favor of certain basic civil rights. It is not for this Court to restrike that balance because of its own views of the needs of law enforcement officers. I fear that is the effect of the Court's decision today.[62]

The majority did not share Marshall's fear. Instead, the majority reasoned that the Fourth Amendment differs fundamentally from other rights protecting constitutional provisions.[63] One rationale for according Fourth Amendment rights lesser protection is that, unlike the Fifth and Sixth Amendments, it does not protect "trial rights."[64] The majority articulated a preference for efficient searching in language, suggesting that the court was troubled that people advised of their rights may actually choose to exercise these rights.[65]

> And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against

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60. Boyd v. United States, 116 U.S. 616, 629 (1886) (quoting Entick v. Carrington, (1765) 19 Howell's State Trials 1029, 1073 (Eng.)).

61. *Bustamonte*, 412 U.S. at 288 (Marshall, J., dissenting).

> I must conclude, 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. Of course it would be "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 board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.

Id.

62. *Id.* at 289-90.

63. *Id.* at 241.

64. *Id.*

65. *See id.* at 245.

> voluntary relinquishment. We have only recently stated: "[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." Rather, the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.[66]

A fundamental societal interest exists in solving crimes; society does want people to assist the police, and finding evidence implicating one person may remove suspicion from others. None of this, however, explains why the Fourth Amendment right to be free from unreasonable searches and seizures does not receive the same level of constitutional protections as the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to counsel. Perhaps this is why Justice Stewart's arguments in favor of the distinction are strained and unpersuasive.

His first argument is the weakest. Justice Stewart initially argued that requiring that people know they have the right to refuse to consent to searches would impose insuperable burdens on prosecutors required to prove that the consent was voluntary:

> The very object of the inquiry—the nature of a person's subjective understanding—underlines the difficulty of the prosecution's burden under the rule applied by the Court of Appeals in this case. Any defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent. And the near impossibility of meeting this prosecutorial burden suggests why this Court has never accepted any such litmus-paper test of voluntariness.[67]

It is hard to take this argument seriously—particularly when offered by a Justice who had participated in the *Miranda* decision, albeit as a dissenter.[68] Justice Stewart may have disagreed with *Miranda*, but he was well aware of its reliance upon warnings, knowledge, and waiver as the mechanisms for ensuring that confessions were voluntary.[69] The obvious, simple, and easy solution to proving knowledge would be to offer a *Miranda*-style warning briefly explaining the right not to consent as a prerequisite for establishing voluntary consent.[70]

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66. *Id.* at 243 (citation omitted).

67. *Id.* at 229-30.

68. Miranda v. Arizona, 384 U.S. 436, 504, 526 (1966). Justice Stewart concurred in all the dissenting opinions in *Miranda*. *See id.*

69. *Id.* at 504-45.

70. *See id.* at 483. Chief Justice Marshall noted in the majority that the Federal Bureau of

Justice Stewart's attempt to explain why a simple warning would not work in the Fourth Amendment context fails because it relies upon inapt analogies generated by asking the wrong question. For example, after admitting that "[o]ne alternative that would go far toward proving that the subject of a search did know he had a right to refuse consent would be to advise him of that right before eliciting his consent," he dismissed this alternative with the strawman argument that situations in which police officers ask for consent to search "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."[71]

This is a perplexing analogy. No one would reasonably suggest that a courtroom setting is analogous to an investigation in the field, where "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies . . . normally occur[ring] on the highway, or in a person's home or office, and under informal and unstructured conditions."[72] But this could just as well describe custodial interrogations in the field, which frequently occur on highways, in homes or offices, and in circumstances far less formal and structured than any trial.[73]

Justice Stewart came close to acknowledging the similarity, but nonetheless explained that searches in the field differ from custodial interrogations.[74] "[W]hile surely a closer question, these situations are still immeasurably far removed from 'custodial interrogation' where, in *Miranda* . . . we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation."[75]

Investigative techniques like searches and interrogations surely are more akin to each other than to courtroom trials, but Justice Stewart's analogies obscure the critical task that faced the Court in *Bustamonte*.[76] That task was not to create a hierarchy of unequal constitutional rights.[77] The Court's task

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Investigation (FBI) utilized such warnings for decades. *Id.*

71. *Bustamonte*, 412 U.S. at 231-32.

72. *See id.* at 232.

73. *See id.*

74. *Id.*

75. *Id.* A decade later, the Supreme Court held that custody for *Miranda* purposes is not coextensive with Fourth Amendment seizures. Berkemer v. McCarty, 468 U.S. 420, 434 (1984).

76. *See Bustamonte*, 412 U.S. at 232.

77. *See* Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 616-627 (1996); Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 55-64 (2005) [hereinafter *A Liberal House Divided*]. The unequal status accorded fundamental rights in *Bustamonte* conflicted with traditional constitutional theory. *Bustamonte*, 412 U.S. at 230-33. For eighty years, from 1886 to 1966, the Court's opinions treated Fourth and Fifth Amendment rights not merely as equivalent in value, but as linked in the sense that each helped inform our understanding of the other. *A Liberal House Divided*, *supra*, at 55-64. Not until the Warren Court began dismantling this structural theory of rights did it become possible for Justices to characterize the Fourth Amendment rights as "lesser" than those protected by the Fifth. *See id.*

was, as it often is, to articulate rules protecting fundamental constitutional rights while permitting government actors to enforce the laws.[78] Also, Stewart's expressed concern that advising the citizen of his right not to consent would destroy the informality of the encounter can have only one justification—that a person aware of his rights might exercise them.[79] Justice Marshall complained, with apparent frustration, that experience proved that informing people of their Fourth Amendment rights would not hamper law enforcement efforts:

> The Court contends that if an officer paused to inform the subject of his rights, the informality of the exchange would be destroyed. 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. It is not without significance that for many years the agents of the Federal Bureau of Investigation have routinely informed subjects of their right to refuse consent, when they request consent to search. The reported cases in which the police have informed subjects of their right to refuse consent show, also, that the information can be given without disrupting the casual flow of events. What evidence there is, then, rather strongly suggests that nothing disastrous would happen if the police, before requesting consent, informed the subject that he had a right to refuse consent and that his refusal would be respected.[80]

Ironically, four decades of experience with the *Miranda* warnings confirms Marshall's arguments.[81] These warnings have proven not to be an impediment to law enforcement.[82] Instead, they serve as a vehicle for securing admissible confessions.[83]

To appreciate how little concern the *Bustamonte* majority exhibited for invigorating the privacy and property rights protected by the Fourth Amendment, one only need consider its rationale for permitting people ignorant of their Fourth Amendment right to relinquish them.[84] Justice Stewart quickly rejected the following argument that:

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78. *Bustamonte*, 412 U.S. at 290 (Marshall, J., dissenting).

> It is regrettable that the obsession with validating searches like that conducted in this case, so evident in the Court's hyperbole, has obscured the Court's vision of how the Fourth Amendment was designed to govern the relationship between police and citizen in our society. I believe that experience and careful reflection show how narrow and inaccurate that vision is . . . .

Id.

79. *See id.* at 287.

80. *Id.* at 287-88 (citations omitted).

81. *See, e.g.*, Cloud et al., *supra* note 29, at 498.

82. *See id.*

83. *See id.*

84. *See Bustamonte*, 412 U.S. at 233-36.

> [a] "consent" is a "waiver" of a person's rights under the Fourth and Fourteenth Amendments. The argument is that by allowing the police to conduct a search, a person "waives" whatever right he had to prevent the police from searching. It is argued that . . . to establish such a "waiver" the State must demonstrate "an intentional relinquishment or abandonment of a known right or privilege."[85]

The Constitution does not demand such "a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection," because waivers apply "[a]lmost without exception," only for those rights that are necessary to ensure a fair criminal trial.[86] These include waiving the right to defense counsel, to a jury trial, to a speedy trial, to confrontation, to be free from double jeopardy, and to enter a guilty plea.[87]

Once again, no one would dispute that informal criminal investigations differ from trials in which the parties and their attorneys appear in formal judicial proceedings. Once again, the analogy, however, seems to be a conclusion in search of a justification. By operating within the narrow parameters of the trial rights model, Justice Stewart could assert:

> The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial [but rather] stand "as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone."[88]

The dissenting Justices countered by focusing upon the nature of the decision to relinquish rights.[89] Justices Brennan and Marshall both argued that knowledge of the existence of fundamental constitutional rights was a prerequisite to forsaking them, particularly in response to government requests. Justice Brennan protested the Court's holding:

> that an individual can effectively waive this right even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of his privacy would be constitutionally prohibited. It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence.[90]

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85. *Id.* at 235.
86. *Id.* at 235-36.
87. *Id.* at 237-38
88. *Id.* at 242.
89. *See id.* at 276-77 (Brennan, J., dissenting).
90. *Id.* at 277.

In his dissent, Justice Marshall also rejected "the curious result that one can choose to relinquish a constitutional right—the right to be free of unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search."[91] Perhaps because of the power of this argument, perhaps because *Miranda* applied the knowing, intelligent, and voluntary waiver standard to pretrial interrogation settings, Justice Stewart did not respond directly but instead finessed the issue.[92] He steadfastly pressed the claim that waivers are restricted to the trial setting even when applied to waivers obtained during pretrial interrogations:

> [I]n *Miranda v. Arizona*, . . . the Court found that *custodial* interrogation by the police was inherently coercive, and consequently held that detailed warnings were required to protect the privilege against compulsory self-incrimination. The Court made it clear that the basis for decision was the need to protect the fairness of the trial itself . . . .[93]

Nearly two decades later, the Court held that the Fifth Amendment privilege is violated without necessarily destroying the fairness of a criminal trial, but in 1973 the majority did not have to cope with that decision.[94] This was just as well, because even its characterization of the *Miranda* opinion was questionable. Of course, introduction of a coerced confession threatens the fairness of any trial, but as the passages quoted earlier demonstrate, this was not the basis for the *Miranda* decision.[95] The Court founded that opinion on a number of values, none more important than preserving the decisional

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91. *Id.* (Marshall, J., dissenting).

92. *See generally id.* (majority opinion). In fact, two years before *Miranda*, the Court had imposed the waiver standard in the context of pretrial interrogations, even when defendants did not know they were dealing with undercover agents, once the indictment triggered the Sixth Amendment right to counsel. *See* Massiah v. United States, 377 U.S. 201, 201 (1964).

93. *Bustamonte*, 412 U.S. at 240 (alteration in original).

94. Arizona v. Fulminante, 499 U.S. 279, 310 (1991). In *Fulminante*, a five-justice majority held that introduction of a coerced confession at trial could be harmless constitutional error because it was merely a trial error—an evidentiary error—and not a structural defect like conducting a criminal trial in which a defendant was denied defense counsel or in which the judge was biased. *See id.* One might argue that the differing treatments given the privilege against self-incrimination in the two cases is easily explained by turnover on the Court. It is interesting to note, therefore, that four of the Justices deciding *Fulminante* had also participated in *Bustamonte*. *See Fulminante*, 499 U.S. at 310; *Bustamonte*, 412 U.S. at 219-78. Justice White wrote a four-part opinion in *Fulminante*. *See Fulminante*, 499 U.S. at 282-302. Three of the parts were majority opinions, in which White was joined by two Justices—Marshall and Blackmun—who were Justices in 1973. *See id.* On the issue of whether admitting a coerced confession into evidence could ever be harmless error, White wrote in dissent for four Justices. *See id.* Three of the five Justices in the *Fulminante* majority on the harmless error question, including its author, Chief Justice Rehnquist, also were members of the majority in *Bustamonte*. *See id.*; *Bustamonte*, 412 U.S. at 219.

95. *See supra* note 92 and accompanying text. *See also* Chavez v. Martinez, 538 U.S. 760, 763-802 (2003). In *Chavez* a badly splintered Court concluded that the Fifth Amendment was violated only by the introduction of a coerced confession into evidence and not by methods used to extract that confession. *Id.* A majority concluded that interrogation methods alone could, however, violate due process standards. *Id.* at 761.

autonomy of the Court by ensuring that the suspect is informed of her constitutional rights.[96] Justice Marshall repeatedly stressed this point in pressing the claim that the waiver standard applied in the Fourth Amendment context.[97]

He objected, for example, that employing the waiver test to protect the Fifth Amendment privilege against self-incrimination while permitting ignorant consent for searches and seizures relegated the Fourth Amendment to second-class status in the pantheon of constitutional rights.[98] Justice Marshall conveyed the point as follows:

> I believe that the Court misstates the true issue in this case. That issue is not, as the Court suggests, whether the police overbore Alcala's will in eliciting his consent, but rather, whether a simple statement of assent to search, without more, should be sufficient to permit the police to search and thus act as a relinquishment of Alcala's constitutional right to exclude the police. This Court has always scrutinized with great care claims that a person has forgone the opportunity to assert constitutional rights. I see no reason to give the claim that a person consented to a search any less rigorous scrutiny. Every case in this Court involving this kind of search has heretofore spoken of consent as a waiver. Perhaps one skilled in linguistics or epistemology can disregard those comments, but I find them hard to ignore.
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> . . .
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> If 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. . . . I find this incomprehensible. 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 he might have pursued. I would therefore hold, at a minimum, that the prosecution may not rely on a purported consent to search if the subject of the search did not know that he could refuse to give consent.[99]

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96. Miranda v. Arizona, 384 U.S. 436, 466 (1966). The Court in *Miranda* did assert that the warnings and the presence of a lawyer "during interrogation obviously enhances the integrity of the fact-finding processes in court." *Id.* Any fair reading of the relevant passage demonstrates that the opinion treated this as only one of many benefits flowing from its ruling. The evidentiary benefit would result because these safeguards that "enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process." *Id.*

> Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."

Id. (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961)).

97. *Bustamonte*, 412 U.S. at 278.

98. *Id.* at 278-80.

99. *Id.* at 278-85 (Marshall, J., dissenting) (citations omitted).

A decision establishing ignorant consent in Fourth Amendment theory may have been incomprehensible to Justice Marshall, but that is precisely what *Bustamonte* did. And this was not a fleeting idea. The validity of consent given without knowledge of the right to refuse is ensconced as a central concept in this area of constitutional law. The significance of this concept is the topic of the final section of this Essay.

IV. IGNORANCE AND FOURTH AMENDMENT DOCTRINE

Ignorant consent is integral to two important dimensions of contemporary Fourth Amendment theory. First, *Bustamonte* has survived as the definitional source of the nature of voluntary consent.[100] Second, integrated into broader doctrines emphasizing the importance of the "reasonableness" of the conduct of government actors and diminishing the scope of individual liberties is the idea that people can give up unknown rights.

A. Ignorant Consent "Objective Reasonableness"

The opinion in *Bustamonte* persists as an important source of Fourth Amendment rules. All of the important recent Supreme Court opinions defining the nature and scope of Fourth Amendment consent cite it.[101] These opinions also use *Bustamonte* as a building block for constructing theories that authorize otherwise illegal searches because the officers were reasonable. Two important cases should suffice to illustrate this development.

In *Illinois v. Rodriguez*, the Court for the first time held that someone without any lawful authority could consent to a search of another person's home.[102] Justice Scalia's majority opinion acknowledged that the "Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects," but then cited two opinions, including *Bustamonte*, for the rule that this "prohibition does not apply, however, to situations in which voluntary consent has been obtained

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100. *Id.* at 218. Justice Stevens's concurring opinion in *Georgia v. Randolph* demonstrates that at least one current member of the Court imposes the waiver standard in Fourth Amendment consent cases. Georgia v. Randolph, 126 S. Ct. 1515, 1528-29 (2006) (Stevens, J., concurring). Citing Marshall's dissent in *Bustamonte* "pointing out that it is hard to comprehend 'how a decision made without knowledge of available alternatives can be treated as choice at all,'" Stevens argued:

> When an occupant gives his or her consent to enter, he or she is waiving a valuable constitutional right. To be sure that the waiver is voluntary, it is sound practice—a practice some Justices of this Court thought necessary to make the waiver voluntary—for the officer to advise the occupant of that right. The issue in this case relates to the content of the advice that the officer should provide when met at the door by a man and a woman who are apparently joint tenants or joint owners of the property.

Id. at 1528-29.

101. *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

102. *Id.* at 186.

either from the individual whose property is searched or from a third party who possesses common authority over the premises."[103] The problem in *Rodriguez* was that the police obtained consent from someone who failed both tests.[104]

Justice Scalia then reiterated the central holding of *Bustamonte*:

> We have been unyielding in our insistence that a defendant's waiver of his trial rights cannot be given effect unless it is "knowing" and "intelligent." We would assuredly not permit, therefore, evidence seized in violation of the Fourth Amendment to be introduced on the basis of a trial court's mere "reasonable belief"—derived from statements by unauthorized persons—that the defendant has waived his objection. But one must make a distinction between, on the one hand, trial rights that *derive* from the violation of constitutional guarantees and, on the other hand, the nature of those constitutional guarantees themselves. As we said in *Schneckloth*:
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> "There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures."

His next analytical step linked ignorant consent to a critical development in Fourth Amendment doctrine in the 1980s—the abandonment of traditional rules in favor of a malleable reasonableness standard viewed from the perspective of the officers conducting the search.[105] The search in *Rodriguez* violated traditional Fourth Amendment rules requiring that officers possess a warrant, exigency, or consent to enter a home.[106] The investigating officers had no warrant, no exigency existed, and Rodriguez could not consent to the entry because he was asleep.[107] "Consent" to enter was given by a third party —his former girlfriend—who no longer lived in the apartment, was not a party to the lease, and had no actual authority to consent under any theory previously recognized by the Supreme Court.[108] Nonetheless, the entry was lawful if the officers' mistaken belief that she possessed such authority was reasonable.[109] Justice Scalia cited cases upholding warrant-based searches conducted by mistake, noted that "[t]he ordinary requirement of a warrant is sometimes supplanted by other elements that render the unconsented search 'reasonable,'" and stressed that the Court had "not held that the Fourth

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103. *Id.* at 181 (citations omitted).
104. *Id.* at 177-78.
105. *Id.* at 184-85.
106. Payton v. New York, 445 U.S. 573, 586 (1980).
107. *Rodriguez*, 497 U.S. at 179-80.
108. *Id.* at 179.
109. *Id.* at 185-86.

Amendment requires factual accuracy."[110] Even without a warrant, officers "conducting a search or seizure under one of the exceptions to the warrant requirement [need not] always be correct, but . . . they must always be reasonable."[111]

Justice Scalia's analysis merged the *Bustamonte* doctrine favoring consent and the more recent doctrinal developments permitting otherwise illegal searches if the officers were "objectively reasonable."[112] The decision validated unconstitutional searches that were justified by consent obtained from people who had no lawful authority to do so:

> We see no reason to depart from this general rule with respect to facts bearing upon the authority to consent to a search. Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.[113]

This linkage of ignorant consent and objective reasonableness later was held to justify a search exceeding the scope of the suspect's actual consent.[114] In *Florida v. Jimeno*, the suspect was stopped for a traffic infraction by a police officer who suspected Jimeno was carrying drugs in the car.[115] The officer told Jimeno that the stop was for a traffic violation, that he believed Jimeno had drugs in the car, asked for consent to search the car, and advised the suspect that he did not have to consent to a search.[116] Contradicting the prediction in *Bustamonte* that such a warning would obstruct consent searches, Jimeno gave "permission to search the automobile."[117] The officer searched a brown paper bag lying on the floor of the passenger's side of the vehicle and "found a kilogram of cocaine inside."[118]

Jimeno argued that he had only consented to a search of the vehicle, and not containers within it.[119] Citing *Bustamonte* and *Rodriquez*, Chief Justice

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110. *Id.* at 184-85.
111. *Id.* at 185-86.
112. *See id.* at 179-89.
113. *Id.* at 186.
114. *See* Florida v. Jimeno, 500 U.S. 248, 249-52 (1991).
115. *Id.* at 249-50.
116. *Id.*
117. *Id.* at 250.
118. *Id.*
119. *Id.*

Rehnquist's opinion upheld the search, even if one accepted Jimeno's claim.[120] His analysis demonstrated how ignorant consent has become intertwined with the theory of officers' objective reasonableness:

> The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. Thus, we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? The question before us, then, is whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car. We think that it is.[121]

The trial court agreed with Jimeno that officers seeking to search closed containers found in a car must get specific consent for each container.[122] The Supreme Court disagreed, holding that if the officers' belief that the consent extended to containers is reasonable, the Fourth Amendment does not require more.[123] The Chief Justice cited a passage from *Bustamonte* discussed above: "'[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime. . . .'"[124] In short, efficient searches trumped the individual's claim of decisional autonomy.[125] Whatever one thinks of the ignorant consent doctrine, it now is linked with objective reasonableness theories that derogate the Warrant Clause while enhancing police power to search.[126] Other important doctrines developed by the Supreme Court in recent decades also are linked, albeit more subtly, to the ideas validating consent by those ignorant of their rights.

B. Constitutional Ignorance, Assumption of Risks, and Expectations of Privacy

Government actors now are permitted to exploit constitutional ignorance to conduct searches not only when the suspect does not know he can refuse a request to search, but also in situations in which the citizen cannot consent

120. *See id.*
121. *Id.* at 250-51 (citations omitted).
122. *Id.* at 250.
123. *Id.*
124. *Id.* at 252.
125. *See id.*
126. *See id.* at 254-55.

because he does not know the government is searching.[127] Surprisingly, the theoretical consonance among these judicially created doctrines is rarely discussed today—although this was a significant topic of debate when these doctrines first emerged.

The Supreme Court began to develop a body of case law endorsing constitutional ignorance in the years preceding *Bustamonte* and continued the process in the succeeding decades.[128] The scope of this body of case law is suggested by the following, non-exhaustive list of decisions. Beginning in 1966, the Court held that people assume the risk that others will tell the government about their words and conduct when they choose to speak to one another—even if those people are undercover government agents wearing electronic monitoring or recording devices in the suspect's home.[129] Beginning in 1967, the Court held that people have a reasonable expectation of privacy in conversations carried on in telephone booths when the doors are closed and in activities carried on in the privacy of their home.[130]

People do not, however, have a reasonable expectation of privacy under the following circumstances: if police officers search under the seats or in the glove box of an automobile in which they are mere passengers; if officers install an electronic beeper to monitor their travels in public; if government agents request copies of their deposit slips and checks from their banks; if government agents ask telephone companies to record numbers dialed from their customers' private telephones; if police officers trespass on the open fields portions of private lands, even if the landowners took extensive steps to exclude trespassers, including erecting fences and posting no trespassing signs; if police officers use flying machines to see into the enclosed curtilage of private homes, even if those areas cannot be observed from ground level.[131]

In each of the settings in which the Court concludes that a person assumed the risk or had no reasonable expectation of privacy, no matter how intrusive the government conduct is, there is no Fourth Amendment search. As a result, the government can continue these practices unconstrained by any Fourth Amendment rules or limits.

These decisions have been subjected to withering criticism by commentators and dissenting Justices, but in recent years courts and

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127. Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973).

128. *See* Hoffa v. United States, 385 U.S. 293, 295 (1966).

129. United States v. White, 401 U.S. 745, 747 (1971); Osborn v. United States, 385 U.S. 323, 325-26 (1966).

130. *See* United States v. Kyllo, 533 U.S. 27 (2001); United States v. Karo, 468 U.S. 705, 721 (1984); United States v. Payton, 445 U.S. 573, 576 (1980); Katz v. United States, 389 U.S. 347, 360-61 (1967).

131. Florida v. Riley, 488 U.S. 445, 449 (1989); United States v. Dunn, 480 U.S. 294, 301-02 (1987); Ciraolo v. United States, 476 U.S. 207, 213-14 (1986); Oliver v. United States, 466 U.S. 170, 179 (1984); United States v. Knotts, 460 U.S. 276, 282-83 (1983); Smith v. Maryland, 442 U.S. 735, 735-36 (1979); Rakas v. Illinois, 439 U.S. 128, 148-49 (1978); United States v. Miller, 425 U.S. 435, 440 (1976).

commentators typically have overlooked how the doctrines of consent, risk assumption, and privacy are linked by a shared acceptance of constitutional ignorance. When these doctrines first were developed, however, the link between consent and the other doctrines was apparent in the debate among Supreme Court Justices. The following discussion revisits that debate from the 1960s. Because the reader likely is more familiar with the post-*Katz* expectations analysis, this discussion will focus upon two important opinions—one a majority opinion, the other a dissent—debating the assumption of the risk doctrine. The terms of the debate implicate both the expectation of privacy and ignorant consent doctrines that would emerge in the succeeding years.

1. Hoffa v. United States

While Jimmy Hoffa was on trial in Nashville on federal criminal charges (the Test Fleet Trial), an official from a Teamsters local in Louisiana named Partin, acting as a paid undercover informer for the FBI, infiltrated Hoffa's inner circle of associates and advisors.[132] Partin gathered information by listening to conversations and then passed that information along to federal law enforcers.[133] Hoffa's attorneys participated in many of these discussions, which took place in Hoffa's hotel room.[134] Partin supplied part of the evidence used to convict Hoffa and others of attempting to fix the jury in the Test Fleet Trial.[135]

Hoffa argued that sending a secret government agent to seize a private conversation carried on in a hotel room, defined under Fourth Amendment case law at the time as a "constitutionally protected area," and then using those seized words to convict him violated his Fourth Amendment right to be free from unreasonable searches and seizures.[136] One of Hoffa's arguments articulated the link between the problem of ignorant consent and the risk

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132. Hoffa v. United States, 385 U.S. 293, 296 (1966).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 296, 300-01 (citing Gouled v. United States, 255 U.S. 298 (1921)). Justice Stewart's opinion five years earlier in *Silverman v. United States* reversed a conviction for which evidence was obtained by seizing intangible conversations. *See* Silverman v. United States, 365 U.S. 505 (1961). This opinion is viewed as overruling *Olmstead*'s holding that only tangible things, and not intangibles like conversations, could be seized within the meaning of the Fourth Amendment. *Id.* Stewart was able to finesse ruling upon the constitutionality of *Olmstead*'s trespass doctrine because the federal investigators in *Silverman* had committed an actual physical trespass into the most constitutionally protected area, the home. *Id.* Hoffa also claimed that the government violated his Fifth and Sixth Amendment rights, and the Court also rejected these claims. *Hoffa*, 385 U.S. at 304-10; *see also A Liberal House Divided*, *supra* note 77, at 33 (discussing the constitutional issues debated in *Hoffa*).

assumption and privacy expectations doctrines ultimately developed by the Court.[137]

Hoffa argued that his consent to grant Partin "repeated entries into the suite" was invalid because Partin had not first disclosed that he was a government informer.[138] In other words, the issue was not whether Hoffa assumed the risk that his associate would talk to the police.[139] The issue was the absence of knowledge necessary to exercise the fundamental right to exclude a government agent from conducting a warrantless search in a constitutionally protected place.[140]

Justice Stewart, writing for the majority, rejected the idea that a citizen had the right to know that a person was a government agent before granting him entry into a private area.[141] To the majority, consent to enter the hotel suite was not the constitutional issue.[142] Rather, Partin had seized Hoffa's statements because Hoffa had misplaced confidence in his associates, including the undercover informer, and not because he had relied upon the privacy of his constitutionally protected hotel room.[143] Hoffa had assumed he could trust other people, and therefore voluntarily assumed the risk that they would inform the government of his crimes.[144] Justice Stewart emphasized that "[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[145]

In a related passage, Justice Stewart expressed ideas that he would develop in a different form in his landmark *Katz* opinion.[146] In *Hoffa* Justice Stewart asserted that "[w]hat the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile."[147] Only a year later in *Katz*, Justice Stewart dismissed constitutionally protected areas as a discredited idea, but nonetheless tried to define Fourth Amendment privacy by focusing on the significance of a person's conduct in a particular place:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as

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137. *Hoffa*, 385 U.S. at 300.
138. *Id.*
139. *See id.*
140. *See id.*
141. *Id.* at 301-03.
142. *See id.*
143. *Id.* at 302.
144. *Id.*
145. *Id.* at 302.
146. Katz v. United States, 389 U.S. 347, 347 (1967).
147. *Hoffa*, 385 U.S. at 301.

> private, even in an area accessible to the public, may be constitutionally protected.[148]

The links between the opinions are apparent. In both, the place alone does not provide Fourth Amendment protection. Hoffa could reasonably expect privacy from prying eyes peering into his hotel room—but not for information he willing shared with another person.[149] Katz could not expect visual privacy in a glass phone booth, but he could for conversations he attempted to keep private.[150] In neither case did the outcome turn on whether the citizen knowingly consented to the government search for his words.[151] In *Katz* the search and seizure were unconstitutional because they were conducted without a warrant.[152] In *Hoffa* no Fourth Amendment intrusion occurred that required a warrant.[153]

Hoffa erred by relying upon Partin—he had obviously lodged his confidence in the wrong person.[154] Just as obviously, he permitted Partin to join his inner circle precisely because he was ignorant of Partin's status as an FBI operative.[155] *Hoffa* raises questions analogous to those debated in *Bustamonte*.[156] Can a person give up a constitutional right without knowing he has it? Can a person voluntarily "confess" to a government agent without know he's speaking with one?

The Supreme Court has drawn categorical lines in answering the latter question.[157] Once the adversary process has begun, the Sixth Amendment right to counsel requires exclusion of statements secured by undercover interrogation.[158] Before the commencement of adversarial proceedings, neither the Sixth nor Fifth Amendments require that result.[159]

Analysis restricted to this procedural model would rarely lead to the exclusion of evidence under the Fourth Amendment. But, of course, that is not the only possible approach, as the dissenters in each of those Fifth and Sixth Amendment interrogation cases make clear. And if we were to employ what I have termed a micro theory of democratic consent, as Justice Marshall did in his *Bustamonte* dissent, the results could be different.[160] Under this

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148. *Katz*, 389 U.S. at 351-52 (citations omitted).
149. *Hoffa*, 385 U.S. at 301-02.
150. *Katz*, 389 U.S. at 352 (citations omitted).
151. *See Katz*, 389 U.S. 347; *Hoffa*, 385 U.S. 293.
152. *Katz*, 389 U.S. 347.
153. *Hoffa*, 385 U.S. 293.
154. *See id.* at 302.
155. *See id.*
156. *See id.* at 293; Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
157. *See* McNeil v. Wisconsin, 501 U.S. 171, 171 (1991); Moran v. Burbine, 475 U.S. 412, 412 (1986); Maine v. Moulton, 474 U.S. 159, 159 (1985); Massiah v. United States, 377 U.S. 201, 201 (1964).
158. *Maine*, 474 U.S. 159; *Massiah*, 377 U.S. 201.
159. *McNeil*, 501 U.S. at 171; *Moran*, 475 U.S. at 412.
160. *See Bustamonte*, 412 U.S. at 277-90.

approach, an autonomous member of the democracy cannot relinquish an unknown right. A dissenting Justice advanced just such a theory in the *Hoffa* litigation.[161]

C. Waiver, Autonomy, and the Fourth Amendment

Hoffa was one of three companion cases.[162] Justice Douglas dissented in all three.[163] He wrote a joint dissent for two of them, *Lewis v. United States* and *Osborn v. United States*, disputing that a person can forsake Fourth Amendment protections by unwittingly permitting a government agent to seize his words in his own home.[164] *Lewis* involved "the breach of the privacy of the home by a government agent posing in a different role for the purpose of obtaining evidence from the homeowner to convict him of a crime."[165] The issue in *Osborn* was "whether the Government may compound the invasion of privacy by using hidden recording devices to record incriminating statements made by the unwary suspect to a secret federal agent."[166]

Justice Douglas argued that the Constitution guaranteed a right of privacy in both settings.[167] This privacy right cannot be overcome by lawful constitutional means—a search based upon a warrant for example.[168] But if the justification for the intrusion is that the suspect permitted it, then Justice Douglas rejected the idea that this could be justified by either ignorant consent or the person assuming the risk when he was dealing with a government agent whenever he spoke to anyone.[169]

Citing his controversial opinion in *Griswold v. Connecticut*, Justice Douglas claimed that "[p]rivacy, though not expressly mentioned in the Constitution, is essential to the exercise of other rights guaranteed by it."[170] One of the sources of those guarantees was the Fourth Amendment.[171] Therefore, the undercover agent's warrantless intrusion into Lewis's home was "a 'search' that should bring into play all the protective features of the

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161. *Hoffa*, 385 U.S. at 320-21 (Douglas, J., dissenting).

162. *Id.* at 293 (majority opinion); Lewis v. United States, 385 U.S. 206 (1966); Osborn v. United States, 385 U.S. 323 (1966).

163. *Hoffa*, 385 U.S. at 321; *Lewis*, 385 U.S. at 340; *Osborn*, 385 U.S. at 340.

164. *Lewis*, 385 U.S. at 340 (Douglas, J., dissenting); *Osborn*, 385 U.S. at 340 (Douglas, J., dissenting). Justice Douglas concurred with Justice Clark in the third companion case, *Hoffa v. United States*, arguing for a dismissal of certiorari as improvidently granted. *See Hoffa*, 385 U.S. at 321.

165. *Lewis*, 385 U.S. at 340 (Douglas, J., dissenting) (combining with *Osborn* dissent).

166. *Osborn*, 385 U.S. at 340 (Douglas, J., dissenting).

167. *Lewis*, 385 U.S. at 340, 352-54 (Douglas, J., dissenting); *Osborn*, 385 U.S. at 340, 352-54 (Douglas, J., dissenting).

168. *See* Katz v. United States, 389 U.S. 347, 354-56 (1967).

169. *See id.*

170. *Osborn*, 385 U.S. at 341 (Douglas, J., dissenting) (citing Griswold v. Connecticut, 381 U.S. 479, 484 (1965)).

171. *See id.*

Fourth Amendment."[172] Justice Douglas did not claim that the government was barred from entering a home to search, but rather that it must satisfy Fourth Amendment standards—it must obtain a search warrant before investigating in a home.[173]

Justice Douglas's arguments presaged elements of the majority opinion issued a year later in *Katz*, particularly his reliance on the procedural protections of the warrant process and his focus on the subjective expectations of the homeowner:

> A home is still a sanctuary, however the owner may use it. There is no reason why an owner's Fourth Amendment rights cannot include the right to open up his house to limited classes of people. And, when a homeowner invites a friend or business acquaintance into his home, he opens his house to a friend or acquaintance, not a government spy.
>
> This does not mean he can make his sanctuary invasion-proof against government agents. The Constitution has provided a way whereby the home can lawfully be invaded, and that is with a search warrant. Where, as here, there is enough evidence to get a warrant to make a search I would not allow the Fourth Amendment to be short-circuited.[174]

When law enforcers do not possess enough evidence to secure a warrant, however, Justice Douglas objected that the Constitution does not permit the government to trick the homeowner into giving up his constitutional right to privacy in the home by unknowingly admitting a secret government agent:

> A householder who admits a government agent, knowing that he is such, waives of course any right of privacy. One who invites or admits an old "friend" takes, I think, the risk that the "friend" will tattle and disclose confidences or that the Government will wheedle them out of him. The case for me, however, is different when government plays an ignoble role of "planting" an agent in one's living room or uses fraud and deception in getting him there. These practices are at war with the constitutional standards of privacy which are parts of our choicest tradition.[175]

In sum, Justice Douglas argued the following: (1) not that the law prohibited government initiated investigations within the home, but that a court must authorize this type of intrusion in advance with a search warrant; (2) that the actions sending secret agents into the home implicated the Fourth

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172. *Id.* Justice Douglas argued that because "[a]lmost every home is at times used for purposes other than eating, sleeping, and social activities[,]" the privacy rights protected by the Constitution within the home should survive even when on occasion "it is used for business[,]" apparently even an illegal business. *Id.* at 346.

173. *Id.*

174. *Id.*

175. *Id.* at 347.

Amendment and its greatest protection; (3) that the Constitution protects a claim to privacy in the home—it is not just objectively but constitutionally reasonable—because it occurs in the home; and (4) that a homeowner can relinquish this protected claim of privacy by intentional, and therefore knowing, disclosure to government agents.[176]

That final argument highlights a critical difference between Justice Douglas's theories and those later developed in risk assumption and privacy expectations case law.[177] Justice Douglas did not equate intentional disclosure to private citizens and to government agents.[178] One could always legitimately disclose information to private citizens. If they later choose to take this information to the police, no constitutional issues would arise. But the architects of the Constitution erected constitutional privileges like the Fourth Amendment precisely to limit government power. Disclosures to government agents are, in fact, different from those made to private citizens. Recent Supreme Court decisions have taken the opposite approach, making it possible

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176. *Id.* at 341-43. Like Stewart's opinion for the Court in *Katz*, Douglas would have enforced the privacy right by suppressing evidence. *See* Katz v. United States, 389 U.S. 347, 350-59 (1967). Douglas also concurred with Stewart's opinion in *Katz* that the Fourth Amendment regulated the use of non-trespassory electronic surveillance techniques because they intruded upon protected privacy rights, even when outside the home. *See id.* Douglas's examples of these techniques included some employed by agents of many governments long before the age of electronic technologies. Osborn v. United States, 385 U.S. 323, 340-43 (Douglas, J., dissenting).

> We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government. The aggressive breaches of privacy by the Government increase by geometric proportions. Wiretapping and "bugging" run rampant, without effective judicial or legislative control.
>
> Secret observation booths in government offices and closed television circuits in industry, extending even to rest rooms, are common. Offices, conference rooms, hotel rooms, and even bedrooms are "bugged" for the convenience of government. Peepholes in men's rooms are there to catch homosexuals. Personality tests seek to ferret out a man's innermost thoughts on family life, religion, racial attitudes, national origin, politics, atheism, ideology, sex, and the like. Federal agents are often "wired" so that their conversations are either recorded on their persons or transmitted to tape recorders some blocks away. The Food and Drug Administration recently put a spy in a church organization. Revenue agents have gone in the disguise of Coast Guard officers. They have broken and entered homes to obtain evidence.
>
> Polygraph tests of government employees and of employees in industry are rampant. The dossiers on all citizens mount in number and increase in size. Now they are being put on computers so that by pressing one button all the miserable, the sick, the suspect, the unpopular, the offbeat people of the Nation can be instantly identified.
>
> These examples and many others demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man's life at will.

Id. at 341-43.

177. *Id.*

178. *Id.*

for people, ignorant that their rights are in jeopardy, to give them up unintentionally.[179]

These arguments are consistent with Justice Douglas's expansive views of constitutional liberties.[180] Later in the dissent, he proffered a notion of democracy that inevitably would prohibit ignorant consent.[181] He argued that "[a] free society is based on the premise that there are large zones of privacy into which the Government may not intrude except in unusual circumstances."[182] That presumption could be defeated "only pursuant to a search warrant, based upon probable cause, and specifically describing the objects sought," or by the citizens knowing and intentional relinquishment of the right to privacy.[183] Ignorance does not suffice.[184]

V. CONCLUSION

It is hardly surprising that we would lose track of the debates giving rise to constitutional doctrines now firmly entrenched by more than a third of a century of Supreme Court decisions. It is surprising, however, that these decisions would reject a conception of the relationship of the citizen to the government that is elemental in our constitutional culture. Any competent person can give up rights at the request of the government. But it is hard to comprehend a theory of individual rights that permits that decision to be made by someone unaware that he is relinquishing a fundamental civil liberty.

The Fourth Amendment exists to limit government power to intrude upon our lives. The limits are not, and can never be, absolute. But they do command that we are protected against unreasonable intrusions. It is hard to understand how citizens could waive "something as precious as a constitutional guarantee without ever being aware of its existence."[185] It is just as hard to understand how such a rule could be deemed reasonable in a free society.

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179. *See, e.g.*,Florida v. Riley, 488 U.S. 445, 449-51 (1989); California v. Ciraolo, 476 U.S. 207, 212-15 (1986); Smith v. Maryland, 442 U.S. 735, 741-46 (1979).

180. *See Osborn*, 385 U.S. at 340-43 (Douglas, J., dissenting).

181. *See id.* at 347-53.

182. *Id.* at 352.

183. *Id.* at 352-53.

184. *Id.*

185. Schneckloth v. Bustamonte, 412 U.S. 218, 277 (1973) (Brennan, J., dissenting).