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United States v. Drayton: The Need for Bright-Line Warnings during Consensual Bus Searches

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UNITED STATES V. DRAYTON: THE NEED FOR BRIGHT-LINE WARNINGS DURING CONSENSUAL BUS SEARCHES

United States v. Drayton, 536 U.S. 194 (2002)

I. INTRODUCTION

In *United States v. Drayton*, the Supreme Court reviewed the methods that the Tallahassee Police Department used during a routine consensual search of passengers aboard a Greyhound bus.[1] Bus searches have become a method routinely used by police departments to seek out drugs and weapons, as part of their War on Crime.[2] However, these searches have increasingly been challenged as unconstitutional violations of the Fourth Amendment's prohibition against unreasonable searches and seizures.[3] During the search at issue in *Drayton*, bundles of cocaine were found on the bodies of two bus passengers, Christopher Drayton and Clifton Brown, Jr.[4] This discovery led to the arrests of the two men, and both were charged with possession and conspiracy to distribute.[5] The case reached the Supreme Court on the issue of whether consensual bus searches are constitutional under the Fourth Amendment when police officers do not notify passengers that they have the right to refuse to comply with the officers' requests.[6] Both Respondents claimed that without such notice, the factors existing at the time of the search made the environment unduly coercive, and that their consent was involuntary.[7] The Eleventh Circuit Court of Appeals reversed the conviction of the two Respondents, holding

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[1] United States v. Drayton, 536 U.S. 194 (2002).

[2] Dennis J. Callahan, *The Long Distance Remand:* Florida v. Bostick *and the Re-Awakened Bus Search Battlefront in The War on Drugs*, 43 WM. & MARY L. REV. 365 (2001).

[3] *See, e.g.*, Florida v. Bostick, 501 U.S. 429 (1991); United States v. Broomfield, 201 F.3d 1270 (10th Cir. 2000); United States v. Cuevas-Ceja, 58 F. Supp. 2d 1175 (D. Or. 1999).

[4] *Drayton*, 536 U.S. at 199.

[5] *Id.*

[6] *Id.* at 197.

[7] *Id.* at 199.

that the evidence was uncovered during an unconstitutional search and seizure and therefore must be suppressed.[8]

In an opinion written by Justice Kennedy, the Court held that there is no per se requirement that an officer notify bus passengers of their right to refuse to cooperate with the officer's demands.[9] Instead, a situation's coerciveness must be examined by applying a totality-of-circumstances test, where the absence of a warning is just one factor for consideration.[10] Justice Kennedy analyzed the specific bus search at issue using this standard, and found that the officers did not act in a coercive manner; therefore, they did not unconstitutionally seize the Respondents.[11] The Court then addressed whether the suspicionless search was involuntary, and found that because the Respondents had not been seized, there was nothing to indicate that they were forced to consent to the search.[12] The Court therefore reversed and remanded the case.[13] Justice Souter, in a dissent joined by Justices Stevens and Ginsburg, claimed that the circumstances surrounding the encounter did amount to an illegal seizure.[14] The dissent found that the officers' actions were sufficiently coercive to convince the passengers that they were required to comply with the officers' demands; any consent the Respondents gave to the officers' search requests were therefore invalid.[15]

This Note argues that the totality-of-circumstances test which the Court uses to evaluate consensual bus searches is improper. These searches are similar to custodial interrogations, and just as individuals in those situations are afforded the protections of the bright-line *Miranda* warning, the Court should adopt a bright-line rule to apply to bus searches. A mandatory warning should be given to bus passengers before officers begin their search, notifying them of their constitutional right to refuse to cooperate with the officers. Such a rule would lead to more consistent court rulings, by removing the subjectivity that undermines the success of the totality-of-circumstances test. A warning would also take into account important factors which have been ignored by courts that have assessed the circumstances surrounding consensual bus searches. The impact that the warning would have on the officers' ability to detect drugs and weapons

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[8] United States v. Drayton, 231 F.3d 787, 791 (11th Cir. 2000).

[9] *Drayton*, 536 U.S. at 203.

[10] *Id.*

[11] *Id.* at 203-04.

[12] *Id.* at 206-08.

[13] *Id.* at 208.

[14] *Id.* at 212 (Souter, J., dissenting).

[15] *Id.* (Souter, J., dissenting).

would be minimal in comparison to the empowerment that citizens would gain by being aware of, and having the ability to exercise, their constitutional rights.

II. PROCEDURAL HISTORY

A. CONSTITUTIONAL SEARCHES UNDER THE FOURTH AMENDMENT

The first clause of the United States Constitution's Fourth Amendment guards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[16] Since the creation of the Bill of Rights, courts have consistently stressed this right as a priority, stating that "[n]o right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . ."[17] However, this amendment does not extend so far as to allow people to completely isolate themselves, but only "prevent[s] arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."[18]

Despite the amendment's importance, its vague, unelaborated wording has led many courts to curse its "vice of ambiguity."[19] Without more direction, courts have had to define the Amendment's scope, and determine the situations in which it should apply.[20] A three-tiered system has emerged from the case law which distinguishes between different types of police intrusions and determines the constitutionality of each based on its specific circumstances.[21]

The most traditional type of intrusion requires both probable cause and a court-issued warrant before officers may confront a person or commence a search.[22] This system was the original idea of 'reasonable' envisioned by the drafters of the Fourth Amendment, and these prerequisites have had continued importance. [23] Still, according to the Supreme Court, in most

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[16] U.S. CONST. amend. IV.

[17] Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

[18] United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

[19] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 67 (2d ed. rev. 1997) (quoting JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 42 (1966)).

[20] Andrea K. Mitchell, United States v. Drayton*: Supreme Court Upholds Standards for Police Conduct During Bus Searches*, 51 AM. U. L. REV. 1065, 1068 (2002).

[21] Callahan, *supra* note 2, at 369-70.

[22] *See* Katz v. United States, 389 U.S. 347, 357 (1967); Johnson v. United States, 333 U.S. 10, 14-15 (1948).

[23] Callahan, *supra* note 2, at 369-70.

cases "searches conducted . . . without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . ."[24]

Despite this per se standard, two main exceptions have been carved out which allow officers to proceed with a search without probable cause and a warrant.[25] The first deviation from the general standard has been termed 'reasonable suspicion,' and was established by the Supreme Court in *Terry v. Ohio*.[26] There, the Court distinguished limited seizures and searches from a "full-blown search for evidence of crime."[27] This lesser intrusion, called a "frisk," is a quick, limited search of a person's outer clothing, which may only be done when an officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . ."[28] The establishment of this second type of legitimate police intrusion was significant; for the first time, the Court was expanding "the range of encounters between the police and the citizen" that was held to be acceptable under the Fourth Amendment.[29]

The second exception, consensual searches, further extended acceptable interactions between police and citizens by completely doing away with the need for any sort of suspicion at all.[30] This exception is based on the theory that "not all personal intercourse between policemen and citizens involves 'seizures' of persons."[31] A police officer has the right to approach any citizen and question that person.[32] If the person who is approached chooses to respond to the officer's questions and comply with the officer's requests, any search which then occurs does not require probable cause and a warrant.[33] There is only one requirement needed for such a search to be constitutional: the person approached must be "free to

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[24] *Katz*, 389 U.S. at 357.

[25] *See* Michigan v. Chesternut, 486 U.S. 567, 576 (1988); Terry v. Ohio, 392 U.S. 1, 30-31 (1968). Note that other exceptions to the probable cause and warrant requirements have been supported by the Supreme Court. Warden v. Hayden, 387 U.S. 294 (1967) (exigent circumstances); Chimel v. California, 395 U.S. 752 (1969) (search incident to lawful arrest); Carroll v. United States, 267 U.S. 132 (1925) (automobile exception); Arizona v. Hicks, 480 U.S. 321 (1987) (plain view doctrine).

[26] *Terry*, 392 U.S. at 30-31.

[27] *Id.* at 8.

[28] *Id.*

[29] California v. Hodari, 499 U.S. 621, 635 (1991).

[30] Florida v. Bostick, 501 U.S. 429, 434 (1991).

[31] *Terry*, 392 U.S. at 19 n.16.

[32] Florida v. Royer, 460 U.S. 491, 497 (1983).

[33] United States v. Mendenhall, 446 U.S. 544, 553 (1980).

disregard the police presence and go about his business" without being detained or punished for doing so.[34]

B. DETERMINING VOLUNTARINESS IN CONSENT-BASED SEARCHES

Evidence uncovered during an unconstitutional search is generally suppressed and cannot be used at trial.[35] Therefore, in consensual searches, police officers must be certain to have valid permission from the citizens they question, and must be able to prove consent in the courtroom.[36] However, proving that a third person actually gave consent is difficult.[37] People who are arrested as a result of a consensual search will often later claim that they did not give permission. Also, many defendants who did give consent claim that such consent was given involuntarily because they were being questioned in a coercive environment where they were unable to avoid the police's questions.[38]

The Court has chosen to determine when searches were truly consensual, and when the consent was the result of an illegal seizure, by using a "voluntariness" standard.[39] This standard was first clearly defined by the Supreme Court in *Schneckloth v. Bustamonte*.[40] In *Schneckloth*, a defendant was charged with "possessing a check with intent to defraud" after he was pulled over by a police officer because of burnt-out lights.[41] The defendant allowed the officers to search his car, but at trial claimed that his consent had been coerced.[42]

The Court determined that, based on "the totality of all the surrounding circumstances," the defendant's consent was voluntary.[43] This totality-of-circumstances standard considers whether a person's consent was "coerced, by explicit or implicit means, by implied threat or covert force."[44] The Government is not however required to prove that the defendant knew he had the right to refuse to allow the police to search his car.[45]

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[34] Michigan v. Chesternut, 486 U.S. 567, 576 (1988).

[35] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

[36] *Royer*, 460 U.S. at 497.

[37] *Id.*

[38] *See, e.g.*, *Royer*, 460 U.S. at 497; Schneckloth v. Bustamonte, 412 U.S. 218, 221 (1973).

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

[40] *Id.* at 223.

[41] *Id.* at 220.

[42] *Id.* at 217, 220.

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

[44] *Id.* at 228.

[45] *Id.* at 234.

Justices Douglas, Brennan and Marshall each dissented separately in *Schneckloth*; all three challenged the Court's finding that it is unnecessary for citizens to know their Fourth Amendment rights.[46] Marshall, in sentiments echoed by the other two dissenters, argued that a person's "consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police."[47] By finding consent in the face of such an omission of knowledge, the Court allows police to have "the continued ability . . . 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."[48]

Similar cases following the *Schneckloth* decision relied on the totality-of-circumstances test that the Court created.[49] Eight years after *Schneckloth*, in *Mendenhall*, the Supreme Court refined the test by adding a new factor—the free-to-leave standard.[50] The Court concluded that "a person has been 'seized' within the meaning of the Fourth Amendment . . . if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[51] Such a situation only occurs when, "by means of physical force or a show of authority, [a citizen's] freedom of movement is restrained."[52] Once the citizen has been 'seized' by the police, any consent given is viewed as being "the product of duress or coercion,"[53] and therefore is involuntary.[54]

The Court in *Mendenhall* gave some general examples of coercion,[55] but later cases lay out in greater detail what 'shows of authority' are coercive to the point of making a reasonable person believe they were detained.[56] In *Florida v. Royer*, the Supreme Court held that police officers had "illegally detained" a person when they took his identification, told him

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[46] *Id.* at 275-90 (Douglas, Brennan, & Marshall, JJ., dissenting).

[47] *Id.* at 285 (Marshall, J., dissenting).

[48] *Id.* at 288 (Marshall, J., dissenting).

[49] *See, e.g.*, Ohio v. Robinette, 519 U.S. 33 (1996); Florida v. Bostick, 501 U.S. 429 (1991); Michigan v. Chesternut, 486 U.S. 567 (1988); United States v. Mendenhall, 446 U.S. 544 (1980).

[50] *Mendenhall*, 446 U.S. at 554.

[51] *Id.*

[52] *Id.* at 553.

[53] *Id.* at 545.

[54] *Id.* at 553.

[55] These factors include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554.

[56] *See* INS v. Delgado, 466 U.S. 210 (1984); Florida v. Royer, 460 U.S. 491 (1983) (plurality opinion).

that he was suspected of "transporting narcotics," and brought him into a storage closet to be questioned by two officers.[57] The defendant testified that he did not believe that the officers would let him leave the room, and the State conceded that this was likely true.[58] Since the officers had no probable cause justifying the confinement, they had no right to put the defendant in that position.[59] Therefore, the officers' actions violated the free-to-leave test established in *Mendenhall*, and amounted to an illegal seizure under the Fourth Amendment.[60] The consent that this person gave when he was in the small room was "ineffective to justify the search,"[61] so any evidence collected in the search had to be suppressed.[62]

The scope of what constitutes unconstitutional confinement was narrowed one year after *Royer*, in *INS v. Delgado*.[63] The respondents, workers at three factories, claimed that searches done at their workplaces by INS agents violated their Fourth Amendment rights.[64] They claimed that the "several" armed agents who entered the factories and positioned themselves next to all the exits[65] "created a psychological environment which made them reasonably afraid they were not free to leave."[66] However, the Court determined this was not a seizure because the respondents should not have been leaving the buildings anyway; whenever an employee is at his workplace, his "freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by [their] voluntary obligations to their employers."[67] Also, the workers were not actually confined because, as the search was conducted, they could continue going "about their ordinary business," and could move about within the factories.[68]

This decision was not unanimous, and the two Justices who dissented in *Schneckloth*, Brennan and Marshall, felt that the situation in *Delgado* amounted to an unreasonable search.[69] They argued that the search occurred "under conditions designed not to respect personal security and

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[57] *Royer*, 460 U.S. at 496-97, 507.
[58] *Id.* at 496.
[59] *Id.* at 497.
[60] *Id.* at 496-97.
[61] *Id.* at 497.
[62] *Id.* at 501.
[63] INS v. Delgado, 466 U.S. 210 (1984).
[64] *Id.* at 213.
[65] *Id.* at 220.
[66] *Id.* at 220.
[67] *Id.* at 218.
[68] *Id.*
[69] *Id.* at 226.

privacy, but rather to elicit prompt answers from completely intimidated workers."[70] While the majority claimed that the environment was not coercive, the dissent believed that in light of the facts of the case, nobody would actually "have the temerity to believe that he was at liberty to refuse to answer their questions and walk away."[71] Instead of honestly and objectively looking at the actual circumstances under which the search occurred, the dissent claimed that the majority used a "sleight of hand."[72] Marshall and Brennan believed that the Court's decision was skewed to support the needs of the INS, and the constitutional rights of private citizens were sacrificed in the process.[73]

C. BRIGHT-LINE RULES IN CONSTITUTIONAL CASES

In the arena of the Fourth Amendment, the Supreme Court has continually stressed that a search's reasonableness is "measured in objective terms by examining the totality of the circumstances."[74] A bright-line, per se rule requiring police to notify citizens of their right to refuse has been considered unrealistic[75] and unnecessary.[76] As the *Royer* Court stated, "[T]here will be endless variations in the facts and circumstances. . . . [I]t is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question [of] whether there has been an unreasonable search or seizure in violation of the Fourth Amendment."[77] Thus, courts make their determinations based on their assessments of the circumstances in each case.[78]

However, in the Fifth Amendment context, the totality-of-circumstances test was rejected after years of use as the mandatory standard.[79] The Fifth Amendment protects citizens against self-incrimination, and requires that any confessions be voluntarily and knowingly made.[80] In that situation, the Court came to hold that the totality-of-circumstances test was an insufficient measure of voluntariness,

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[70] *Id.* at 231 (Brennan, J., dissenting).

[71] *Id.* at 230 (Brennan, J., dissenting).

[72] *Id.* at 226 (Brennan, J., dissenting).

[73] *Id.* at 239-40 (Brennan, J., dissenting).

[74] Ohio v. Robinette, 519 U.S. 33, 34 (1996).

[75] *Id.* at 40.

[76] Schneckloth v. Bustamonte, 412 U.S. 218, 232 (1973).

[77] Florida v. Royer, 460 U.S. 491, 506-07 (1983).

[78] *Drayton*, 536 U.S. at 202 ("[T]he proper inquiry 'is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" (quoting Florida v. Bostick, 501 U.S. 429, 436 (1991))).

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

[80] *Id.* at 478-79.

because "assessments of the knowledge the defendant possessed . . . can never be more than speculation."[81] Prior to 1966, courts "evaluated the admissibility of a suspect's confession under a voluntariness test,"[82] and courts held that whether a confession "was obtained by coercion or improper inducement can be determined only by an examination of all the attendant circumstances."[83]

An evaluation based on the totality-of-circumstances was held to be deficient in *Miranda*.[84] Because of the "police-dominated atmosphere"[85] in which such confessions were drawn out, the Court expressed worry that there had been an "abdication of the constitutional privilege" against self-incrimination. [86] Fear that "the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak" had increased.[87] As a result, the Court determined that a totality-of-circumstances test may not always sufficiently reveal such coercion.[88] Therefore, the Court decided to change the method used to assess the validity of confessions, declaring that "in order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights . . . ."[89] Only then will individuals being questioned know "of their right of silence and [be assured of] a continuous opportunity to exercise it."[90]

The need for this bright-line, per se rule was reemphasized in a recent decision by the Supreme Court.[91] A Congressional Act, 18 U.S.C. § 3501, attempted to revert the standard back to a totality-of-circumstances test.[92] However, the Court in *Dickerson* held this Act to be unconstitutional, stressing the concern raised in *Miranda* that "the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession . . . ."[93] The *Dickerson* Court held that the *Miranda* warning

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[81] *Id.* at 468-69.

[82] Dickerson v. United States, 530 U.S. 428, 433 (2000); *see also* Escobedo v. Illinois, 378 U.S. 478 (1964); Haynes v. Washington, 373 U.S. 503 (1963).

[83] *Haynes*, 373 U.S. at 513.

[84] *Miranda*, 384 U.S. at 471-72.

[85] *Id.* at 445.

[86] *Id.* at 465.

[87] *Id.* at 468-69.

[88] *Id.* at 472.

[89] *Id.* at 467.

[90] *Id.*

[91] Dickerson v. United States, 530 U.S. 428 (2000).

[92] *Id.* at 436.

[93] *Id.* at 442.

must still be used because "experience suggests that the totality-of-the-circumstances test . . . is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."[94]

D. PREVIOUS COURT DECISIONS REGARDING BUS SEARCHES

As the war on drugs has reached new heights, police have had to develop new tactics to combat the problem.[95] One such tactic has been drug-interdiction bus sweeps, where officers board buses and, after receiving passenger consent, conduct searches.[96] Such searches have been criticized as too coercive, and lower court decisions had been split on the constitutionality of such searches under the Fourth Amendment.[97]

The Supreme Court addressed the issue in *Florida v. Bostick*.[98] Here, the Court reversed a decision by the Florida Supreme Court that held that such searches were per se unconstitutional, and found that drug-interdiction searches on buses are not always unconstitutional seizures.[99] The Court relied on the totality-of-circumstances test to make this decision.[100] However, in order to allow for such searches despite the cramped environment of a bus, the Court was forced to tweak the free-to-leave part of the test.[101] Because buses confine their passengers, and because the searches occur in unfamiliar places where passengers cannot simply walk away, a citizen really is not free to leave, as is required in all consensual searches according to *Mendenhall*.[102] According to the Court in *Bostick*, however, the inability to walk away cannot be the deciding factor in determining the constitutionality of a search, because, like in *Delgado*, a citizen's confinement during a bus search was "the natural result of his decision to take the bus."[103] To address this problem, the Court changed the standard; now, in bus searches, a court only must ask "whether a reasonable

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[94] *Id.* at 444.

[95] Callahan, *supra* note 2, at 365.

[96] *Id.*

[97] *See* United States v. Flowers, 912 F.2d 707, 712 (4th Cir. 1990) (holding that consensual searches on buses were not 'seizures' of the bus); United States v. Rembert, 694 F. Supp. 163, 176 (W.D.N.C. 1988). *But see* United States v. Felder, 732 F. Supp. 204, 207-09 (D.D.C. 1990) (holding that a bus is 'seized' even before police begin questioning the accused).

[98] 501 U.S. 429 (1991).

[99] *Id.* at 433-34.

[100] *Id.* at 436.

[101] *Id.* at 439.

[102] *Id.* at 435.

[103] *Id.* at 436.

person would feel free to decline the officers' requests or otherwise terminate the encounter."[104]

In assessing the specific situation in the Bostick case, the Court stressed two factors—"that the officers did not point guns at Bostick or otherwise threaten him and that they specifically advised Bostick that he could refuse consent."[105] Both of these factors were clear proof, according to the Court, that there was no message conveyed by the officers that "compliance with their requests [was] required."[106]

After the *Bostick* decision, two federal cases out of Florida focused on one of these factors—the officer's advice that the passengers could refuse to consent—and began to set new standards which made bus searches more difficult to conduct.[107] In *United State v. Guapi*, the Eleventh Circuit held that when passengers are not told that they have the right to refuse to consent to the search, "the facts and circumstances of [a] search require some indication to passengers that their cooperation was voluntary . . . ."[108] According to this court, it is insufficient to simply avoid acting in a coercive manner; the officers must in fact "behave in a manner calculated to convey to a reasonable person that cooperation with law enforcement is voluntary."[109] While notification may not be required, it is "the most efficient and effective method to ensure compliance with the Constitution,"[110] and therefore should always be used. The court concluded that the specific conduct of the officers in the *Guapi* bus search, combined with the cramped confines of the bus, was "carefully designed to convince passengers that they had no choice but to accede to" the officer's requests.[111] Therefore, the evidence collected in that search had to be suppressed.[112]

A second Florida case, decided just a few months after *Guapi*, placed even more emphasis upon the importance of an officer specifically

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[104] *Id.*

[105] *Id.* at 437.

[106] *Id.*

[107] *See* United States v. Washington, 151 F.3d 1354 (11th Cir. 1998); United States v. Guapi, 144 F.3d 1393 (11th Cir. 1998).

[108] *Guapi*, 144 F.3d at 1393.

[109] *Id.* at 1395.

[110] *Id.*

[111] *Id.* at 1394-97. This conduct included: 1) a general announcement made "very quickly" by an officer which asked for the passengers "consent and cooperation," *id.* at 1396; 2) the officer standing in front of the person he was questioning, *id.*; and 3) the statement of the bus driver, who had seen many of these searches, that he did not think the passengers had the right to avoid the search. *Id.* at 1396-97.

[112] *Id.* at 1397.

informing passengers of their right not to consent to the search.[113] The Court stated that an officer holding up a police badge was a "show of authority" sufficient to establish a seizure, and that "[a]bsent some positive indication that they were free not to cooperate, it is doubtful a passenger would think he or she had the choice to ignore the police presence."[114] This court stressed that explicit warnings were the only way for the police to "genuinely . . . ensure that their encounters with bus passengers remain absolutely voluntary."[115]

The *Washington* and *Guapi* decisions impacted other circuits in differing ways.[116] The Ninth Circuit followed the Eleventh Circuit's lead and held that a bus search was unconstitutional even when an officer announced that "no one is under arrest, and you are free to leave. However, we would like to talk to you."[117] Such an announcement, according to the court, made the passengers believe that they could either get off the bus or consent to the search, but that they could not simply stay on the bus and refuse to answer the officers' questions.[118] This alone was coercive and misleading enough to make the situation unconstitutional.[119]

The Tenth Circuit, on the other hand, felt that the *Washington* decision created "a per se rule that authorities must notify bus passengers of the right to refuse consent before questioning those passengers."[120] This court rejected such a bright-line rule as inconsistent with *Bostick*, and instead demanded that a totality-of-circumstances analysis be applied in bus search cases.[121]

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[113] United States v. Washington, 151 F.3d 1354, 1356 (11th Cir. 1998). Here, a bus search was unconstitutionally coercive when: 1) the officers were casually dressed with guns in fanny packs; 2) one officer made an announcement while holding up his badge, asking the passengers to show them their bus ticket and photo identification and to identify their luggage; and 3) the officers began their questioning from the back of the bus, to avoid blocking the aisles. *Id.* at 1355.

[114] *Id.* at 1357.

[115] *Id.*

[116] *See* United States v. Stephens, 206 F.3d 914 (9th Cir. 2000); United States v. Broomfield, 201 F.3d 1270, 1275 (10th Cir. 2000).

[117] *Stephens*, 206 F.3d at 916.

[118] *Id.* at 917.

[119] *Id.*

[120] *Broomfield*, 201 F.3d at 1275.

[121] *Id.* at 1274. However, this court did agree with the *Guapi* decision, and felt that the circumstances surrounding that bus search "understandably warranted a finding of coercion." *Id.*

III. FACTS AND PROCEDURAL HISTORY

On February 4, 1999, a Greyhound bus en route from Fort Lauderdale, Florida to Detroit, Michigan made a routine bus stop in Tallahassee, Florida.[122] Three officers from the Tallahassee Police Department's ("TPD") Drug Interdiction Team, Lang, Blackburn and Hoover, were at the bus station.[123] These officers routinely performed bus searches at this station, boarding buses coming in from Southern Florida to search out drugs and weapons.[124] TPD officers have "conducted such searches for three years, up to six or seven buses a day, four or five days a week."[125] A low estimate would be that the officers had searched over 78,000 bus passengers during that period.[126]

During this particular stop, all the passengers exited the bus so that it could be cleaned and refueled.[127] When this was finished, the passengers reboarded the bus, giving their tickets to the driver as they entered.[128] Once all the passengers were back on the bus, about five minutes before the scheduled departure time, the three TPD officers got permission from the driver and boarded the bus.[129] The driver went into the terminal to complete some paperwork, and was not present during the search that followed.[130]

The three officers were "dressed casually and their badges were either hanging around their necks or held in their hands."[131] They each had a set of handcuffs and a gun, which were kept inside holsters and concealed under draped shirts.[132] After boarding, and without any sort of general announcement, Officers Lang and Blackburn immediately walked to the back of the bus.[133] Officer Hoover stayed at the front of the bus and knelt on the bus driver's seat, facing the rear of the bus in order to watch the passengers as they were searched.[134] When Blackburn and Lang reached

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[122] *Drayton*, 536 U.S. at 197.

[123] Brief for Respondents at 2, United States v. Drayton, 536 U.S. 194 (2002) (No. 01-631).

[124] *Id.* at 2.

[125] *Id.* at 3 n.4.

[126] *Id.*

[127] *Drayton*, 536 U.S. at 197.

[128] Brief for Respondents at 2, *Drayton* (No. 01-631).

[129] *Id.* at 3; *Drayton*, 536 U.S. at 197.

[130] Brief for the United States at 2-4, United States v. Drayton, 536 U.S. 194 (2002) (No. 01-631).

[131] *Drayton*, 231 F.3d at 788.

[132] Brief for Respondents at 4, *Drayton* (No. 01-631).

[133] *Id.*

[134] *Drayton*, 536 U.S. at 197-98.

the rear of the bus, Blackburn remained there, facing forward in order to observe the search, while Lang began speaking with passengers.[135] Standing either beside or behind each person, in order to keep the aisle clear, he "asked [them] about their travel plans and sought to match passengers with luggage in the overhead racks."[136] In some instances, with consent, Lang would search a passenger's bag.[137]

The two Respondents, Drayton and Brown, were seated on the driver's side of the bus; Drayton was seated on the aisle and Brown was at the window seat.[138] When Lang reached them, he bent over Drayton's shoulder from behind, "held up his badge long enough for the defendants to see that he was a police officer and, with his face 12-18 inches away from Drayton's face . . . spoke in a voice just loud enough for the defendants to hear."[139] He told the two men: "I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction [sic], attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?"[140] Both defendants pointed to the same bag in the overhead rack.[141] When asked, Brown allowed Lang to check the bag.[142] No contraband was found.[143]

However, at this point Lang noticed that the men were wearing "heavy jackets and baggy pants."[144] He became suspicious because he knew from experience that "drug traffickers often use baggy clothing to conceal weapons or narcotics."[145] Therefore, Lang asked Brown if he could "pat him down for weapons."[146] Brown replied, "Sure," pulled a cell phone from his pocket and opened his jacket.[147] Lang patted down Brown's jacket and waist area, and then "proceeded to check his groin area and touched an unknown object in that area."[148] Because Lang recognized the hard objects

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[135] *Id.* at 198.

[136] *Id.*

[137] Brief for Respondents at 4, *Drayton* (No. 01-631).

[138] Brief for the United States at 4, *Drayton* (No. 01-631).

[139] *Drayton*, 231 F.3d 787, 789 (11th Cir. 2000).

[140] *Drayton*, 536 U.S. at 198.

[141] *Id.* at 199.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] Brief for the United States at 5, *Drayton* (No. 01-631). Note that both the Respondents and the U.S. noted in their briefs that Lang asked specifically to search for weapons. However, in the Supreme Court decision, Kennedy quoted Lang as simply asking Brown, "[d]o you mind if I check your person?" *Drayton*, 536 U.S. at 199.

[147] *Drayton*, 536 U.S. at 199.

[148] Brief for Respondents at 8, *Drayton* (No. 01-631).

from other searches as drug packages, Brown was arrested, handcuffed, and escorted off the bus.[149]

Lang then turned to Drayton, asking, "Mind if I check you?"[150] In response, Drayton simply raised "his hands about eight inches from his legs."[151] Lang did a similar pat-down search, and detected the same hard objects that he felt on Brown.[152] Drayton was also arrested, and taken off the bus.[153] While on the bus, neither man was informed that they had the "right to refuse to cooperate."[154]

Once off the bus, the two men were read their *Miranda* rights.[155] Lang then "unbuttoned their trousers and found plastic bundles of powder cocaine duct-taped between several pairs of boxer shorts."[156] Drayton possessed 295 grams of cocaine, and Brown had 483 grams of cocaine. Based on this evidence, both men were charged with violating 21 U.S.C. §§ 841(a)(1) and 846, for conspiracy to distribute cocaine and possessing cocaine with intent to distribute it.[157]

At trial, the defendants brought motions to suppress the evidence collected during the search.[158] Each claimed that their consent to the pat-down search was coerced and involuntary.[159] Therefore, they asserted, the search violated their Fourth Amendment rights.[160] The United States District Court for the Northern District of Florida denied the defendants' motions.[161] After hearing only Lang testify, the Court held that "[e]verything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative. There was nothing coercive, there was nothing confrontational about it."[162] Based on the evidence found on them during the bus search, Drayton and Brown were both convicted.[163]

The United States Court of Appeals for the Eleventh Circuit reversed the trial court's conviction of the defendants and remanded the case to the

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[149] *Drayton*, 536 U.S. at 199.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.* at 198.
[155] Brief for Respondents at 9, *Drayton* (No. 01-631).
[156] *Drayton*, 231 F.3d 787, 789-90 (11th Cir. 2000).
[157] *Drayton*, 536 U.S. at 199.
[158] *Id.*
[159] *Id.* at 200.
[160] *Drayton*, 231 F.3d at 788.
[161] *Drayton*, 536 U.S. at 200.
[162] *Id.*
[163] *Drayton*, 231 F.3d at 788 n.1.

district court, with instructions to grant the defendants' motions to suppress.[164] Relying on *Washington*, the court found that "these defendants' consent was not sufficiently free of coercion to serve as a valid basis for a search."[165] The facts of this case, the court held, were so similar to those in *Washington* as to control this decision.[166] Because the bus search in *Washington* was held to violate the Fourth Amendment, this search was unconstitutional as well.[167]

The Court of Appeals relied upon the precedent of *Washington* despite the existence of a few differences between the two cases. The rest of the decision was devoted to explaining why these differences were not "material."[168] First, by displaying his badge, leaning in closely, and explaining to the defendants that he was conducting a search, Lang presented "a specific show of authority passenger-by-passenger," which was just as coercive as a general announcement like the one used in *Washington*.[169] Second, the fact that Lang did not ask for any sort of documentation before conducting the search, as the officers in Washington had, was simply not significant to the court.[170] Third, Lang's testimony that "during the past year five to seven people had declined to have their luggage searched," was not considered persuasive because "Lang did not testify that the statements the officers made and the methods they used in the searches where passengers declined to give consent or exited the bus were the same as in this case."[171] Furthermore, considering the number of buses Lang searched in that year, the "six or seven refusals out of hundreds of requests is not very many."[172] The last factor which differentiated *Washington* from the current case was that, in *Washington*, there was no officer positioned at the front of the bus, as Hoover was positioned during the *Drayton* search. The Eleventh Circuit felt that the officer's presence in that position "might make a reasonable person feel less free to leave the bus," exacerbating the coerciveness of the situation.[173]

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[164] *Id.* at 791.

[165] *Id.* at 788.

[166] *Id.* at 790.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.* at 790-91.

[172] *Id.* at 791.

[173] *Id.* (citing United States v. Hill, 228 F.3d 414 (11th Cir. July 24, 2000) (unpublished opinion) ("The presence of an officer at the exit, even if not so intended, is an implication to passengers that the searches are mandatory.")).

On January 4, 2002, the United States Supreme Court granted the United States' petition for certiorari.[174] The Court granted the petition in order to decide whether the Court of Appeals had properly analyzed the circumstances under which the bus search took place.[175] Relying upon the totality-of-circumstances test established in *Schneckloth*, the Court would determine whether the environment was so coercive as to be a "seizure," and whether the searches of Drayton and Brown violated their Fourth Amendment rights.[176]

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

In an opinion by Justice Kennedy,[177] the Supreme Court reversed the Eleventh Circuit's decision and held that "the totality of circumstances indicates that [the defendants'] consent was voluntary, so the searches were reasonable."[178] Rejecting the standard established in *Washington* and *Guapi*, which required some positive show by the officers indicating that consent was not required, the Court determined that searches are acceptable as long as officers do not give passengers any "reason to believe that they were required to answer the officers' questions."[179]

After detailing the facts of the case, Kennedy began his discussion with an overview of the limits of Fourth Amendment protections,[180] stressing that even without any suspicion, law enforcement officials have the right to approach any citizen, and ask them questions or for consent to search their belongings.[181] As long as the citizen is not coerced into complying with the officers' questions or requests, and can "terminate the encounter," there has been no unconstitutional action by the police.[182] Kennedy also explained the special totality-of-circumstances test for bus searches established in *Bostick*, which does not rely on whether a

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[174] United States v. Drayton, 231 F.3d 787 (11th Cir. 2000), *cert. granted*, 534 U.S. 1074.

[175] *Drayton*, 536 U.S. at 196-97.

[176] *Id.* at 197-98.

[177] Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas, and Breyer joined Justice Kennedy in the majority opinion. Justice Souter filed a dissenting opinion, joined by Justices Stevens and Ginsburg.

[178] *Drayton*, 536 U.S. at 207.

[179] *Id.* at 203.

[180] *Id.* at 200-01.

[181] *Id.* at 201.

[182] *Id.*

reasonable person would feel free to walk away from the situation.[183] Since the person chose to enter the confining situation, the "proper inquiry 'is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'"[184]

Next, Kennedy discussed the importance of a warning.[185] Such a warning is not a per se requirement.[186] However, the Court felt that after *Washington* and *Guapi* the Eleventh Circuit "would suppress any evidence obtained during suspicionless drug interdiction efforts aboard buses in the absence of a warning that passengers may refuse to cooperate."[187] This amounted to a per se rule and was therefore impermissible.[188]

Kennedy demanded that an unbiased totality-of-circumstances test be applied to the facts of the case.[189] Based on this test, there was insufficient proof that the defendants in the *Drayton* case were forced by the officers to comply.[190] In fact, there were no factors that should have given the defendants the impression that they could not refuse to cooperate. The officers did not display their weapons, left the aisle clear, and spoke to the passengers individually "in a polite, quiet voice."[191] According to the Court, this search was even less intimidating than a similar encounter occurring on a street; here, because there were "many fellow passengers . . . present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances."[192]

The decision discounted the three factors which the Respondents argued had made the search coercive.[193] Lang's display of his badge to the two men was not an adequate show of authority to create a seizure,[194] and the officers were neither wearing uniforms, nor brandishing their weapons, which would have been more compelling shows of authority.[195] Hoover's position in the driver's seat at the front of the bus was not persuasive

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[183] *Id.*

[184] *Id.* at 201-02 (quoting Florida v. Bostick, 501 U.S. 429, 436 (1991)).

[185] *Id.* at 202.

[186] *Id.* at 203.

[187] *Id.*

[188] *Id.*

[189] *Id.* at 207.

[190] *Id.* at 204.

[191] *Id.*

[192] *Id.*

[193] *Id.* at 204-05.

[194] *Id.*; *see* Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984); INS v. Delgado, 466 U.S. 210 (1984).

[195] *Drayton*, 536 U.S. at 204-05.

evidence of coercion because he "did nothing to intimidate passengers, and he said nothing to suggest that people could not exit and indeed he left the aisle clear."[196] Plus, *Delgado* allowed officers to stand at exits and question anyone attempting to leave the building; in *Drayton*, the officer claimed he would not even question those choosing to get off the bus.[197] The last factor, that so few passengers had refused to cooperate in the past, was unimportant since the Court assumed that most people comply because they "know that their participation enhances their own safety and the safety of those around them."[198] According to Kennedy, it is impossible to conclude that compliance is coerced simply from the fact that most people do cooperate with the officers.[199]

After determining that the passengers on the bus had not been seized, Kennedy also stated that the two men's consent to the search was voluntary.[200] Lang had asked permission from both men before beginning any search, and "[n]othing Officer Lang said indicated a command to consent to the search."[201] Even after Brown was arrested, Drayton still could have refused to comply, since "the arrest of one person does not mean that everyone around him has been seized by the police."[202] Drayton voluntarily chose to cooperate.[203]

B. DISSENTING OPINION

Justice Souter[204] disagreed with the majority's belief that the circumstances surrounding the bus search did not amount to a seizure.[205] Like the majority, he did not believe that it is always necessary to warn passengers that they can refuse to be questioned.[206] However, "the facts here surely required more from the officers than a quiet tone of voice."[207] Souter compared this situation to the questioning of a pedestrian on the

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[196] *Id.* at 205.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.* at 206-07.

[201] *Id.* at 206.

[202] *Id.* However, the Court does mention, without discussing, the possibility that if, after Brown was arrested, Drayton suddenly refused to comply, officer Lang "may have had reasonable suspicion to conduct a *Terry* stop and frisk on Drayton." *Id.* at 207.

[203] *Id.* at 207 (Souter, J., dissenting).

[204] Justices Stevens and Ginsburg joined in Souter's opinion.

[205] *Drayton*, 536 U.S. at 208-09 (Souter, J., dissenting).

[206] *Id.* at 209 (Souter, J., dissenting).

[207] *Id.* at 212 (Souter, J., dissenting).

street.[208] A perfectly constitutional interaction occurs when a single officer simply "goes up to a pedestrian on the street and asks him a question."[209] However, a very different situation arises when such questioning occurs in a narrow alley, with "three officers, one of whom stands behind the pedestrian, another at [the citizen's] side toward the open sidewalk, with the third addressing questions to the pedestrian a foot or two from his face."[210] In the first situation the citizen likely felt that he could walk away, while in the second, "the imbalance of immediate power is unmistakable."[211] This imbalance, "even in the absence of explicit commands or the formalities of detention," can be sufficient to "overbear a normal person's ability to act freely," therefore constituting an unconstitutional seizure.[212]

Souter drew a parallel between the second example and the search at issue in *Drayton*.[213] In both cases, the officers completely control the environment.[214] Like in the alleyway, the three officers basically made certain that the bus's exit could easily be blocked.[215] The narrow aisles meant that Lang addressed the passengers "at very close range," and, because the overhead rack made it impossible for passengers to stand up straight, "[d]uring the exchanges, the officers looked down, and the passengers had to look up if they were to face the police."[216] The authority of these officers also seemed to supersede the driver's; the bus driver "yielded his custody of the bus and its seated travelers to three police officers" and, with possession of the passengers' tickets, waited in the bus station while the search was conducted.[217] Furthermore, rather than asking for the passengers' permission to conduct the search, the officers merely displayed their badges, and stated that they were conducting the search and "'would . . . like cooperation.'"[218] This statement made cooperation seem to be a preference rather than a requirement.[219]

Such circumstances, to Souter, established an "atmosphere of obligatory participation."[220] Only an "uncomprehending" passenger would

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[208] *Id.* at 209 (Souter, J., dissenting).
[209] *Id.* (Souter, J., dissenting).
[210] *Id.* at 210 (Souter, J., dissenting).
[211] *Id.* (Souter, J., dissenting).
[212] *Id.* (Souter, J., dissenting).
[213] *Id.* at 212 (Souter, J., dissenting).
[214] *Id.* (Souter, J., dissenting).
[215] *Id.* at 211 (Souter, J., dissenting).
[216] *Id.* (Souter, J., dissenting).
[217] *Id.* (Souter, J., dissenting).
[218] *Id.* (Souter, J., dissenting).
[219] *Id.* at 212 (Souter, J., dissenting).
[220] *Id.* (Souter, J., dissenting).

believe that "he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether."[221] Instead, as each passenger was questioned, he was "conscious of an officer in front watching, one at his side questioning him, and one behind for cover, in case he became unruly, perhaps, or 'cooperation' was not forthcoming."[222] And the fact that passengers had refused to be searched in the past was insignificant, since the circumstances surrounding those instances were unknown and may have been very different from the situation at hand.[223]

Souter also distinguished bus searches from the type of search conducted in *Delgado*.[224] In *Delgado*, even as the search was being conducted, the employees could continue to perform their normal workday business.[225] Conversely, because of the officers' search of the bus, "the customary course of events was stopped flat."[226] With the bus stopped, and the driver not even present, "it was reasonable to suppose no passenger would tend to his own business until the officers were ready to let him."[227]

V. ANALYSIS

The totality-of-circumstances test does not adequately protect citizens' rights in the context of bus searches. The Supreme Court has failed to provide consistent guidance on what police conduct is unacceptable, and there is simply no consensus among lower courts on which actions constitute coercion and which are acceptable. The totality-of-circumstances test has not been uniformly applied, and inconsistent and disputed decisions will continue to be handed down without a change in the standard used to measure coerciveness.

Bus searches are more similar to custodial interrogations than to general consensual searches, and possess the same weaknesses which forced the Court to create the *Miranda* warning.[228] A similar bright-line warning is necessary in this situation.[229] A clear-cut standard is easier for

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[221] *Id.* (Souter, J., dissenting).

[222] *Id.* (Souter, J., dissenting).

[223] *Id.* at 212-13 (Souter, J., dissenting).

[224] *Id.* at 213 (Souter, J., dissenting).

[225] *Id.* (Souter, J., dissenting).

[226] *Id.* (Souter, J., dissenting).

[227] *Id.* (Souter, J., dissenting). Souter also pointed out that the Court's purpose in the *Delgado* case was to consider granting summary judgment to the Respondents. Thus, the Court had to construe all the facts in favor of the INS, rather than neutrally. *Id.* (Souter, J., dissenting).

[228] *See infra* Part A.

[229] *Id.*

courts to apply, and will end the continuous arguments in the courts over which statements and actions are unduly coercive.[230] Also, a warning can prevent situational problems which are currently not considered: individual knowledge of constitutional rights, unclear questioning tactics, and psychological coercion.[231]

A. BUS SEARCHES OCCUR IN SITUATIONS THAT ARE VERY SIMILAR TO CUSTODIAL INTERROGATIONS AND WHICH PRESENT THE SAME RISKS OF COERCION

The Supreme Court has recognized that Fourth and Fifth Amendment inquiries can be quite similar.[232] In *Boyd v. United States*, the Court stated that "the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment."[233] The main distinction between the two amendments is the location of the questioning; while Fifth Amendment questioning occurs when a suspect is in custody, searches performed within the Fourth Amendment scope are done in non-custodial contexts.[234] However, several factors distinguish bus searches from other Fourth Amendment consensual searches, and align bus searches closely with custodial interrogations.[235] Since the *Miranda* Court's holding was extended to every situation where a citizen is "deprived of his freedom by the authorities in any significant way and is subjected to questioning," the protections created for those situations should also cover bus searches.[236]

The basic distinction between custodial and non-custodial interrogations is simply location.[237] Generally, Fourth Amendment searches occur with "'police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend.'"[238] In such an environment, a person "is more keenly aware of his rights and more reluctant" to cooperate with the officers.[239]

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[230] *See infra* Part B.

[231] *See infra* Part C.

[232] Boyd v. United States, 116 U.S. 616, 633 (1886).

[233] *Id.*

[234] Schneckloth v. Bustamonte, 412 U.S. 218, 247 (1973).

[235] *See infra* notes 227-61 and accompanying text.

[236] Miranda v. Arizona, 384 U.S. 436, 478 (1966).

[237] *Schneckloth*, 412 U.S. at 232.

[238] *Miranda*, 384 U.S. at 478 n.46 (quoting Chalmers v. H.M. Advocate, [1954] Sess. Cas. 66, 78 (J.C.)).

[239] *Id.* at 449-50 (quoting CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1st ed. 1956)).

Conversely, custodial interrogations normally take place in unfamiliar places, where the suspect is isolated.[240] Experience has shown that in this strange environment citizens are less likely to "be confident, indignant, or recalcitrant," and police are given the "psychological advantage."[241]

Bus searches are more similar to custodial interrogations.[242] The passenger is "confronted by the police outside of his 'own familiar territory,'" and "cannot simply leave the scene and repair to a safe haven to avoid unwanted probing."[243] This gives officers the same psychological advantages as in a custodial interrogation.[244]

Along with the general location of the questioning, the type of space in which the questioning occurs during a bus search is similar to the space in a custodial interrogation.[245] According to the Supreme Court in *Miranda*, whenever a person is "deprived of his freedom by the authorities in any significant way," a custodial environment is created.[246] In *Royer*, a situation where a man was confronted by two officers within a "small enclosed area" was considered "an almost classic definition of imprisonment."[247] This is contrasted with Fourth Amendment searches, which occur in places where the person can get up and walk away, and which "result in considerably less inconvenience for the subject of the search."[248] Passengers during a bus search do not have the opportunity to walk away from the scene; doing so would lead to the risk of "being stranded" in an unfamiliar place.[249] The passengers are enclosed in the bus, surrounded by police officers who are watching their every move.[250] And since the bus drivers are usually absent until the search is over, the passengers cannot go on with their daily lives.[251] They have no choice but to comply with the search until the police are satisfied and declare the search over.[252]

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[240] *Id.* at 450.

[241] *Id.* at 449 (quoting CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1st ed. 1956)).

[242] *Id.*

[243] Florida v. Bostick, 501 U.S. 429, 448 (1991) (Marshall, J., dissenting).

[244] *Id.*

[245] United States v. Drayton, 536 U.S. 194, 211 (2002).

[246] *Miranda*, 384 U.S. at 478.

[247] Florida v. Royer, 460 U.S. 491, 496 (1983) (quoting Royer v. State, 389 So.2d 1007, 1018 (Fla. Dist. Ct. App. 1980)).

[248] Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

[249] Florida v. Bostick, 501 U.S. 429, 435 (1991).

[250] *Drayton*, 536 U.S. at 211.

[251] *Id.*

[252] *Id.* at 211-12.

A third factor the Supreme Court uses to compare custodial and non-custodial investigations is the organization of the search.[253] Custodial interrogations occur in structured environments completely controlled by the officers.[254] In that environment, uniform guidelines are easier for officers to follow.[255] Consensual interactions between police and citizens generally "develop quickly," and occur "under informal and unstructured conditions."[256] Therefore, to demand that officers follow set procedures under these conditions is unrealistic.

Interdictions occurring on buses are like the custodial interrogations in that they are more invariable. Bus searches are usually part of a police program, and are routinely performed over long periods of time.[257] At the time of the respondent's arrest, the officers in the *Drayton* case had conducted these routine searches at the Tallahassee bus station four or five days every week for three years, searching up to seven buses a day.[258] Also, most officers conducting such searches are required to abide by strict written guidelines.[259] In fact, officers already almost always have a set announcement which they make to passengers after boarding the bus.[260] Given such structure, it would be easy for officers to add a sentence to their requisite announcement, clearly stating that the passengers have a right to refuse to consent to the search.[261]

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[253] *See, e.g., id.* at 197 (The officers boarded the bus as part of a "routine drug and weapons interdiction effort.").

[254] Miranda v. Arizona, 384 U.S. 436, 445-56 (1966); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 247 (1973).

[255] *Schneckloth*, 412 U.S. at 232.

[256] *Id.*

[257] *See, e.g.*, Brief of Respondents at 3 n.4, *Drayton* (No. 01-631).

[258] *Id.*; *see also* United States v. Guapi, 144 F.3d 1393, 1396 (11th Cir. 1998) (where the bus driver discussed "normal procedure" during these searches); Florida v. Bostick, 501 U.S. 429, 431 (1991) ("County Sheriff's Department officers routinely board buses at scheduled stops and ask passengers for permission to search their luggage.").

[259] United States v. Cuevas-Ceja, 58 F. Supp. 2d 1175, 1179 n.2 (D. Or. 1999) (where the search instructions for the officers to follow have eighteen separate directives).

[260] After all, the officers must make an announcement when requesting to search the bus passengers. *See, e.g., Bostick*, 501 U.S. at 441 (noting that part of the routine of the searching officers was to "identify themselves and announce their purpose").

[261] Brief of Respondents at 9, *Drayton* (No. 01-631). Officer Lang admitted that "advising passengers of their right to refuse takes 'only three to five seconds' and imposes no 'additional burden' on him." *Id.*

B. COURTS CURRENTLY DO NOT USE AN OBJECTIVE STANDARD WHEN APPLYING THE TOTALITY-OF-CIRCUMSTANCES TEST TO A SITUATION

During the oral argument of the Drayton case, one justice stated that "an objective consideration [is] of the highest importance," when applying the totality-of-circumstances test to a situation.[262] "Objective" is defined as "of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions."[263] In consensual search cases, by looking to "a reasonable man's interpretation of the conduct," judges believe that they are separating out their own beliefs.[264] This standard, ideally, is "flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, [even while] it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police."[265]

Certain factors have been declared per se coercive, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[266] But these descriptions are vague, and judges are still relied upon to interpret the specific factors in each situation. In doing so, despite attempts not to, the judges rely on their own experiences in determining what behavior is intimidating.[267] This is why, in opposing opinions, judges continue to point to one another's "unwillingness . . . to adhere to the 'reasonable person' standard."[268]

In the context of bus searches, courts' disagreements over what is "objectively" coercive conduct has led to contradictory court decisions.[269]

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[262] Transcript of Oral Argument at 17, United States v. Drayton, 536 U.S. 194 (2002) (No. 01-631).

[263] BLACK'S LAW DICTIONARY 1101 (7th ed. 1999).

[264] Michigan v. Chesternut, 486 U.S. 567, 574 (1988).

[265] *Id.*

[266] United States v. Mendenhall, 446 U.S. 544, 554 (1980).

[267] *See, e.g.*, United States v. Drayton, 536 U.S. 194, 213 (2002) (Souter, J., dissenting) (stating that the majority and the dissent "see" the situation differently).

[268] California v. Hodari, 499 U.S. 621, 638 (1991).

[269] *See, e.g.*, United States v. Felder, 732 F. Supp. 204, 207 (D.C. 1990) (explaining that a reasonable person would not "feel free to leave under the circumstances of a 'bus stop,' in which officers board a narrow, cramped bus en route to another destination in order to randomly question passengers"). *But see* United States v. Lewis, 921 F.2d 1294, 1299, 1300 (D.C. Cir. 1990) (noting that bus searches are not unconstitutional, and since a bus passenger "voluntarily placed himself in tight quarters," this should not be important); United States v. Flowers, 912 F.2d 707, 711 (4th Cir. 1990) (explaining that because a consensual search occurred on a bus does not "automatically transform it into a seizure").

The Supreme Court attempted to clear up such discrepancies in *Bostick*.[270] Instead, the Court only managed to further complicate the totality-of-circumstances test; disagreements among the justices persisted even within the decision itself.[271] The Supreme Court majority did not agree that the factors that had swayed the State Supreme Court's decision to hold bus searches unreasonably coercive were important.[272] Those factors, including the passengers' confinement and the unfamiliar environment, were secondary to other aspects of the search which upheld the actions of the police.[273] The Supreme Court felt that two different factors were "particularly worth noting:" that the police informed Bostick of his "right to refuse consent," and that the officers never threatened Bostick with a gun.[274] Because of these factors, the majority did not believe that that the officers could have conveyed "a message that compliance with their requests is required."[275]

Conversely, the three dissenters found that the facts of this particular search "exhibit[ed] *all* of the elements of coercion associated with a typical bus sweep."[276] They could not "understand how the majority [could] possibly suggest" that passengers would feel free to refuse to comply with the officers' requests.[277] Where the majority held that the location of the search is only of minimal importance, the dissent agreed with the State Supreme Court that the cramped confines and unfamiliar location of the search strongly "aggravates the coercive quality of such an encounter."[278] Also, while the majority felt that there was no real show of authority because the officers did not wield a gun, the dissent felt that the officers' display of their badges, their "bright green 'raid' jackets bearing the insignia of the Broward County Sheriff's Department," and the fact that one officer "held a gun in a recognizable weapons pouch" were sufficient grounds for declaring the conduct "an intimidating 'show of authority.'"[279]

The predictable result of such a split decision at the highest level has led to more disagreement in the lower courts.[280] In *Washington*, the

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[270] Florida v. Bostick, 501 U.S. 429, 431 (1991).

[271] *Id.* at 440. Justices Marshall, Blackmun and Stevens dissented.

[272] *Bostick*, 501 U.S. at 435.

[273] *Id.* at 433.

[274] *Id.* at 432.

[275] *Id.* at 437.

[276] *Id.* at 446 (Marshall, J., dissenting) (emphasis added).

[277] *Id.* at 445 (Marshall, J., dissenting).

[278] *Id.* at 448-49 (Marshall, J., dissenting).

[279] *Id.* at 446 (Marshall, J., dissenting).

[280] *See* United States v. Washington, 151 F.3d 1354 (11th Cir. 1998); United States v. Guapi, 144 F.3d 1393 (11th Cir. 1998).

Eleventh Circuit majority held that the bus search at issue "was consciously designed to take full advantage of a coercive environment,"[281] while the dissent concluded that this search was reasonable. [282] The policeman's conduct was an impermissible and coercive 'show of authority' when he "held his badge above his head and identified himself as a federal agent . . . [and] announced what he wanted the passengers to do, and what he was going to do."[283] Yet the dissenter felt that the reasonable man would not have been intimidated because during the search the officers were not in uniform.[284] Also, he believed the search would not have intimidated people because there was no officer standing at the front of the bus, and the officers left the aisles open while they questioned the passengers.[285] In *Guapi*, the Eleventh Circuit reversed the district court's decision and found the officers' conduct impermissible, despite conceding that, as the District Court found, the officers "did not touch or grab Defendant, block his path of regress, or retain something of value from him."[286] Because the officers began questioning at the front of the bus, an officer stayed in the driver's seat throughout the search, and no warning was given, the permissible actions that the District Court stressed meant little.[287]

Even *Drayton*, the Court's most recent attempt to clarify the test, simply resulted in more irreconcilably different interpretations of the coerciveness of a search.[288] The justices disagreed on the threshold at which a reasonable person would become intimidated.[289] The majority of the Supreme Court disagreed with the Eleventh Circuit's holding that reasonable people would have felt obliged to consent during the bus search.[290] The passengers would not be intimidated since Lang "did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one-by-one and in a polite, quiet voice."[291] The presence of Hoover at the front of the bus

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[281] *Washington*, 151 F.3d at 1357.

[282] *Id.* at 1358.

[283] *Id.* at 1357.

[284] *Id.* at 1358 (Black, J., dissenting).

[285] *Id.* at 1358 (Black, J., dissenting).

[286] United States v. Guapi, 144 F.3d 1393, 1395 (11th Cir. 1998).

[287] *Id.* at 1396.

[288] United States v. Drayton, 536 U.S. 194 (2002). Justices Souter, Stevens and Ginsburg dissented.

[289] The majority held that "the officers gave the passengers no reason to believe that they were required to answer the officers' questions," *id.* at 203, while the dissent held that the officers' actions made clear that "cooperation is expected." *Id.* at 212 (Souter, J., dissenting).

[290] *Id.* at 205.

[291] *Id.* at 204.

was unimportant because the officer "did nothing to intimidate passengers, and he said nothing to suggest that people could not exit."[292] The display of the badge should have "little weight in the analysis," since such marks of authority are meant to provide "assurance, not discomfort."[293] Also, the simple fact that the officers were armed, is "unlikely to contribute to the coerciveness of the encounter," according to the majority, because passengers would only be scared if the gun was actually brandished.[294]

The dissent found that these same actions were sufficient to constitute coerciveness, arguing that police conduct "may overbear a normal person's ability to act freely, even in the absence of explicit commands or the formalities of detention."[295] According to Souter, the majority was not being rational and, by combining all the "relevant facts" of the case, it was clear that "an atmosphere of obligatory participation was established."[296] The factors contributing to this interpretation included the display of badges; Hoover's positioning by the exit; the questioning of passengers at close range; the cramped quarters of the bus; the absence of the bus driver with the passengers' tickets; the initial announcement's phrasing, commanding that the officers "would like . . . cooperation" rather than asking for cooperation; and the delay of travel while the search was being conducted.[297] These dissenting justices felt that the officer's polite tone of voice would not comfort the reasonable person because "a police officer who is certain to get his way has no need to shout."[298] Also, individual questioning which began with "Do you mind . . . ," meant little after the scene of "obligatory participation" had already been set.[299]

The conclusion of Justice Souter's dissent clearly displays how evaluations of a situation are based on individual perceptions of the circumstances.[300] Expressing his incredulity at the majority's holding, he writes that it is obvious that "the majority cannot *see* what [the dissent

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[292] *Id.* at 205.

[293] *Id.* at 204. In the transcript of the oral arguments, there was some discussion over how Hoover's position may be intimidating. Transcript of Oral Argument at 6, *Drayton* (No. 01-631).

[294] *Drayton*, 536 U.S. at 205. However, the Court does admit that most people on the bus probably knew that the officers were armed, since "everybody knows" that officers are always armed when on duty. Transcript of Oral Argument at 7-8, *Drayton* (No. 01-631).

[295] *Drayton*, 536 U.S. at 210 (Souter, J., dissenting).

[296] *Id.* at 212 (Souter, J., dissenting).

[297] *Id.* at 212-13 (Souter, J., dissenting).

[298] *Id.* at 212 (Souter, J., dissenting).

[299] *Id.* (Souter, J., dissenting).

[300] *Id.* at 213 (Souter, J., dissenting).

does]."[301] The use of this word, "see," exaggerates the lack of objectivity and also reflects why such diverse ideas of how a "reasonable" person would act in certain situations persist.[302]

C. COURTS DO NOT TAKE CERTAIN IMPORTANT FACTORS INTO CONSIDERATION WHEN APPLYING THE TOTALITY-OF-THE-CIRCUMSTANCES TEST TO A SITUATION

Certain factors that exacerbate the coerciveness of a bus search are not being sufficiently and consistently considered by courts when examining the circumstances of a search, resulting in even more infringements on citizens' rights.[303] Three such factors are the individual characteristics of the bus passenger,[304] the phrasing of the questions posed by police during their searches,[305] and the psychological influences which affect citizens' responses to the police officers and the search.[306] A mandatory warning would mitigate each of these problems.[307]

The totality-of-circumstances test used in consensual search cases does not take into account the individual characteristics or knowledge of the person giving the consent.[308] A reliance on the "reasonable person" is intended to "ensure . . . that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached."[309] It also allows the Court to make certain assumptions.[310] In bus search cases, there is an assumption that the reasonable citizen will "know and . . . exercise his rights or her rights."[311] This idea enables the Court to shift part of the Government's burden; the prosecutor no longer has to prove that the citizen understood that the search was voluntary.[312] However, such an assumption also "ignores the demographic realities of the

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[301] *Id.* (Souter, J., dissenting) (emphasis added).

[302] *Id.* (Souter, J., dissenting).

[303] Callahan, *supra* note 2, at 394-415.

[304] *See infra* notes 308-22.

[305] *See infra* notes 323-32.

[306] *See infra* notes 333-58.

[307] Adrian J. Barrio, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 247.

[308] Transcript of Oral Argument at 35, *Drayton* (No. 01-631) (questioning whether the Government should be required "to educate citizens as to their rights in every encounter").

[309] Barrio, *supra* note 307, at 247.

[310] *Id.*

[311] Transcript of Oral Argument at 35, *Drayton* (No. 01-631).

[312] Mitchell, *supra* note 20, at 1078.

reasonable bus passenger."[313] People who travel by bus are generally less educated than the average citizen, and know less about their Constitutional rights.[314] But the static "reasonable person" standard does not take this ignorance into account, and "places the burden of knowing one's right to refuse consent squarely on individual citizens—not law enforcement."[315] As a result, those with less knowledge, like the average bus passenger, are punished because of their ignorance.[316]

The *Miranda* Court realized the weakness of making assumptions based upon a reasonable person standard.[317] There, the Court described citizens who do not understand their constitutional rights as "helpless," and held that they should not be penalized for that ignorance.[318] The Court also recognized that any "reasonable person" assumption will always "favor the defendant whose sophistication or status had fortuitously prompted him" to know how to respond to the situation at hand.[319] Therefore, the Court chose to use a standard that assumes that no one knows their rights.[320] A warning, the only "ascertainable assurance that the accused was aware of [his] right," became mandatory in every case.[321] If the Court condemns such assumptions in custodial interrogations, it seems wrong to then rely on these same assumptions as a shortcut in search and seizure cases.[322]

A second factor that is generally not taken into consideration by courts is the wording of the questions that police ask the passengers.[323] Though subtle, this factor can greatly influence the direction that a search may take.[324] For example, in *Drayton*, Officer Lang's question to the Respondents, "Do you mind if I check [your bag]?"[325] is problematic because

> no matter how the subject answers, it can be interpreted by the testifying officer as

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[313] Transcript of Oral Argument at 35, *Drayton* (No. 01-631).

[314] *Id.* at 42.

[315] Mitchell, *supra* note 20, at 1076.

[316] Transcript of Oral Argument at 35, *Drayton* (No. 01-631).

[317] Miranda v. Arizona, 384 U.S. 436, 471 (1966).

[318] *Id.*

[319] *Id.* (quoting People v. Dorado, 398 P.2d 361, 369-70 (1965)).

[320] *Id.*

[321] *Id.* at 472.

[322] United States v. Drayton, 536 U.S. 194, 203 (2002) (rejecting the requirement that passengers be warned).

[323] Respondents' Brief at 41-42, *Drayton* (No. 01-631).

[324] *See* T. Holgraves, *Communication in Context: Effects of Speaker Status on the Comprehension of Indirect Requests*, 20 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 1205 (1994).

[325] *Drayton*, 536 U.S. at 199.

> affirmative consent. That is, if Brown had said, 'Yes,' it could be interpreted as 'Yes, you may check me for weapons.' Conversely, if he had answered, 'No,' it could be interpreted as 'No, I don't mind.'[326]

Studies have shown that often these types of indirect questions are really subtle demands and not truly inquiries regarding willingness.[327] Furthermore, this type of questioning always leaves the citizen at the control of the officer.[328] No matter how the passenger responds, the officer can always claim a good faith belief that the passenger had consented to the search.[329]

By being advised of their rights at the beginning of the investigation, the bus passengers may prepare themselves to withhold consent to the search, despite how the officers phrase their individual requests for permission.[330] They are not put on the spot as much.[331] Also, because the warning acknowledges the passengers' rights, these people can be more assured that the officers are "prepared to recognize" their right to refuse consent and will not bully them into complying.[332]

The third factor which should be considered is the psychological pressures exerted on the passengers during these bus searches.[333] Courts do not adequately consider the data which psychological studies have uncovered: "police-initiated encounters and attendant search requests conducted in the close confines of a bus engender psychological pressures on passengers to comply and can result in grants of consent to search that are not voluntarily given, but are in fact the product of police coercion."[334] Several studies have demonstrated that people do not always respond rationally to the demands of authority figures.[335] One study, conducted by Leonard Bickman, determined that symbols of authority can hugely impact

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[326] Respondents' Brief at 42, *Drayton* (No. 01-631).

[327] *Id.* at 42 n.34.

[328] *See, e.g.*, H.H. Clark, *Responding to Indirect Speech Acts*, 11 COGNITIVE PSYCHOL. 430 (1979); R.W. Gibbs, *Do People Always Process the Literal Meaning of Indirect Requests?*, 9 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 524 (1983).

[329] *Drayton*, 536 U.S. at 199.

[330] Barrio, *supra* note 307, at 247.

[331] *Id.*

[332] *Id.*

[333] Callahan, *supra* note 2, at 394.

[334] *Id.* at 416.

[335] Barrio, *supra* note 307, at 238-39. Bickman had three experimenters each dress up in a different outfit—as a business man in a sports jacket and tie, a milkman, and a guard. Each experimenter would confront pedestrians on the street randomly and command the pedestrian to perform a task. Seventy-five percent of the subjects obeyed the guard's command, forty-seven percent obeyed the milkman and twenty-nine percent obeyed the civilian. *Id.*

a person's conduct.[336] Based on people's recognition of certain uniforms, Bickman found that authority figures perceived to be high on the social hierarchy were able to exert a lot of control over people.[337] This power is rooted, Bickman believes, in Americans' learned belief that such agents are meant to help society; any demands they make must serve some beneficial purpose and should be followed.[338] A second well-known study illustrated what occurs when such an authority figure makes unreasonable or illogical demands on a person.[339] Stanley Milgram found that a person is more likely to follow the demands of a legitimate authority figure than he is to follow his own internal system of beliefs, even when the two are incompatible.[340]

In bus searches, the officers' symbols of authority, including their uniforms and badges, are signs to the passengers of the officers' authority, and reminders that these police have ultimate control over the situation.[341] Furthermore, the bus driver's deference to the officers, leaving them to control the bus, reflects the police's power.[342] The officers have the ability to control the movements of the bus and the movements of the passengers.[343] The result of such authority is an obviously "marked discrepancy . . . between the status of the detained citizen and the status of the police officer."[344] When confronted with such an authority figure, a citizen is likely to concede to requests made of them, even when, as in the case of the *Drayton* Respondents, compliance is not in one's best interests.[345]

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[336] Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPL. SOC. PSYCHOL. 47, 58 (1974).

[337] *Id.* at 58-59.

[338] *Id.*

[339] Barrio, *supra* note 307, at 234.

[340] *Id.* at 237. In Milgram's experiment, the subject was assigned the role of a 'teacher,' who was told to ask a 'learner' a variety of questions. Whenever the learner (who was a confederate of the experimenter) answered a question wrong, the teacher was commanded to administer an electric shock to the learner. As the learner audibly expressed increasing discomfort at the shocks, the experimenter used verbal prods to encourage the teacher to continue the test. Milgram measured "the point at which the teacher's moral resolve exceeded the pressure of obedience." Sixty-five percent of the teachers proceeded to shock the learner up to the maximum voltage level. *Id.* at 234-36.

[341] Callahan, *supra* note 2, at 410.

[342] United States v. Drayton, 536 U.S. 194, 211 (2002) (Souter, J., dissenting).

[343] *Id.*

[344] Barrio, *supra* note 307, at 240.

[345] *Id.* at 241.

The confined environment also has a psychological impact on the passengers.[346] While the Court held that the confinement during a bus search is minimal, since the passengers chose to confine themselves,[347] a person's comfort in a certain environment has been found only to extend to the actions that the person had intended to take in that space.[348] In the case of a bus passenger, the intended use of the space is to travel; once the space changes into an interrogation room, the sense of confinement also must be adjusted.[349] In terms of the actual questioning, the Court does not consider how the close confines affect a person's responses to the actual questioning.[350] When speaking to Drayton, Officer Lang's face was only twelve to eighteen inches away from Drayton's face.[351] The eighteen inches around a person are considered intimate space; studies have shown that an invasion of that space results in "emotional distress, physiological reactions, and . . . loss of control."[352] Thus, such close proximity is an invasion of personal space, and likely affected Drayton's response to the situation.[353]

Brief warnings can help minimize the "instinctive reaction to the police officer's perceived legitimacy."[354] Such a warning would counter the reflexive obedience most citizens have towards authority figures, by "dispelling the socially-engineered belief" that one cannot disobey a law enforcement official.[355] Even a citizen who knows his rights abstractly may find that, when confronted in the actual situation, he does not have the capacity to stand up to the authority figure.[356] When that figure begins the interaction by reminding the citizen of his rights, it strengthens the person's ability to stand up to the figure and actually exercise this right.[357] Later intimidation, like the close face-to-face questioning, therefore can be responded to more rationally.[358]

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[346] Callahan, *supra* note 2, at 399.

[347] Florida v. Bostick, 501 U.S. 429, 436, 439 (1991).

[348] Michael A. Weinstein, *Coercion, Space, and the Modes of Human Domination*, COERCION 63, 65 (J. Roland Pennock & John W. Chapman eds., 1972).

[349] Callahan, *supra* note 2, at 399 n.167.

[350] United States v. Drayton, 536 U.S. 194, 202 (2002).

[351] United States v. Drayton, 231 F.3d 787, 789 (11th Cir. 2000).

[352] Respondents' Brief at 33 n.26, *Drayton* (No.01-631).

[353] *Id.*

[354] Barrio, *supra* note 307, at 247.

[355] *Id.*

[356] *Id.*

[357] *Id.*

[358] *Id.*

D. A BRIGHT-LINE RULE WILL NOT DRAMATICALLY HINDER THE SUCCESS OF LAW ENFORCEMENT AGENTS.

Bus searches performed without warnings "are undoubtedly successful in ferreting out some unspecified amount of drugs and thus removing such material from the street."[359] Therefore, a main hindrance to the passage of a bright-line warning requirement is the fear that such a warning would seriously hinder the success rate of these searches in seeking out illegal drugs and weapons.[360] The actual impact, though, may be minimal.

Citizens choose to consent to searches for a variety of reasons, only one of which is coercion.[361] Innocent passengers, with nothing to hide, will not be affected by the warning, and may consent simply to prove their innocence.[362] Guilty suspects may have reason to still consent, despite knowing their rights.[363] Many suspects, like Drayton and Brown, attempt to conceal their drugs and think that they can convince the officers of their innocence by consenting to the search.[364] These people would allow a search in spite of the warning.[365] Others may not realize that they have something that is illegal, or may not think that whatever they have is serious enough to have any dramatic consequences.[366] The warning will not let all guilty people "get away with it," but will guarantee that when people do consent, they do not do so because of ignorance.[367] The notice gives people knowledge of the options that they have; what people choose to do with that knowledge is up to them.[368]

Officers also will not suddenly be struck helpless by such a requirement.[369] Despite the risk that they cannot immediately search a suspicious subject, officers can continue to pursue the suspect until they have sufficient probable cause for a search warrant.[370] Also, if officers are so suspicious of a passenger that they believe they need to immediately

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[359] Brief of Amicus Curiae Americans for Effective Law Enforcement, Inc. at 8, Florida v. Bostick, 501 U.S. 429 (1991) (No. 89-1717).

[360] Brief of Amicus Curiae Americans for Effective Law Enforcement, Inc. at 10, United States v. Drayton, 536 U.S. 194 (2002) (No. 01-631).

[361] Barrio, *supra* note 307, at 244.

[362] *Id.*

[363] *Id.* at 245.

[364] *Id.*

[365] *Id.*

[366] *Id.*

[367] *Id.*

[368] *Id.* at 245-46.

[369] Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1260 (1983).

[370] *Id.*

search the person, they likely have sufficient reasonable suspicion to perform a *Terry* frisk.[371]

A second problem associated with the warning is the fear that such mandatory procedures may "greatly increase the administrative and operational burden of screening and interacting with passengers."[372] However, these additional problems are mere speculation, and must be contrasted against the resources currently used by courts in trying to objectively collect and analyze the facts of each situation when applying the totality-of-circumstances test.[373] As discussed above, recent cases keep rising to appellate courts, and no consistent guidelines have been established for determining when situations are coercive.[374] The confusion and inconsistency of the current system is a greater burden than an additional sentence at the beginning of each search.[375] After all, courts already encourage the use of warnings as much as possible, and these warnings are encouraged in police manuals and handbooks.[376] A warning is not a novel or outrageous idea, but is one that is known to work[377] and simple to implement.[378]

VI. CONCLUSION

Blocking the Eleventh Circuit's attempts to implement a *per se* rule, the Court in *Drayton* held that verbal announcements to bus passengers that notify them of their constitutional right to refuse to be searched, were not mandatory.[379] The United States Supreme Court held that as long as officers do not give the passengers any reason to believe that their compliance is required, a search done with the person's consent is constitutional.[380] To determine whether officers acted in a manner which

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[371] For example, in *Drayton*, after Brown was arrested, officers may have had sufficient reasonable suspicion to frisk Drayton even if he had not consented to the search. United States v. Drayton, 536 U.S. 194, 207 (2002).

[372] Brief of Amicus Curiae of Americans for Effective Law Enforcement, Inc. at 10, *Drayton* (No. 01-631).

[373] *See supra* Part V-B.

[374] *Id.*

[375] Respondents' Brief at 17, *Drayton* (No. 01-631).

[376] *Id.* at 26 n.21.

[377] After all, the Supreme Court recently applauded the continued success of the bright-line rule in the Fifth Amendment context, holding that the per se rule is easier "for law enforcement officers to conform to, and for courts to apply in a consistent manner," than a totality-of-circumstances test. Dickerson v. United States, 530 U.S. 428, 444 (2000).

[378] Respondents' Brief at 26 n.21, *Drayton* (No. 01-631).

[379] United States v. Drayton, 536 U.S. 194, 203 (2002).

[380] *Id.* at 203-04.

unreasonably intimidated the bus passengers, courts must use a totality-of-circumstances test.[381] Judges must look at the factors involved in each specific situation to decide whether the passengers on the bus would feel that they could freely decline to answer the officers' questions without any fear of repercussions.[382]

The totality-of-circumstances test is ineffective, inconsistently applied, and flawed. A bright-line rule which requires officers to tell bus passengers of their right to refuse to consent should be implemented.[383] Searches conducted on buses hold the same risks of coercion as custodial interrogations and therefore, just as the *Miranda* Court held a bright-line rule necessary to counter coercion in that setting, a bright-line rule is necessary for consensual bus searches.[384] The totality-of-circumstances test is not objectively or consistently applied by the courts, and certain important factors are not currently being taken into consideration by courts.[385] A bright-line rule would also clear up confusion by giving officers a clear statement on how to proceed in consensual bus searches and allowing courts to hand down consistent and clear decisions.[386]

The importance of protecting citizens' fundamental rights has become especially pressing in the wake of September 11, 2001.[387] Americans are more worried about their safety than ever before, and new measures are being implemented to keep the public secure.[388] However, such security concerns do not give the Government the right to disregard the constitutional rights of American citizens; in fact, these are the liberties the United States claims to be fighting to protect.[389] In the Fourth Amendment arena, the Court has been trying to balance priorities.[390] And in cases such as *Drayton*, the Court has chosen to increase officers' ability to uncover

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[381] *Id.*

[382] *Id.* at 201.

[383] *See supra* Parts V-A, V-B, V-C, and V-D.

[384] *See supra* Part V-A.

[385] *See supra* Parts V-B and V-C.

[386] *See supra* Part V-D.

[387] Mitchell, *supra* note 20, at 1076.

[388] *See, e.g., Federal Agency Protection of Privacy Act: Hearing on H.R. 4561 Before the House Subcommittee on Commercial and Administrative Law*, 107th Cong. 10 (2002) (statement of Lori L. Waters, Executive Director, Eagle Forum) (stating that measures such as National I.D. cards and government databases to track Americans are being considered to increase security).

[389] *See* American Civil Liberties Union, *Advertisements Urge Senate to Guarantee Homeland Security Legislation Not Become a "Bill of Wrongs"* (Sept. 30, 2002), *available at* http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=10810&c=24.

[390] Mitchell, *supra* note 20, at 1078.

illegal drugs and weapons at the cost of citizens' rights.[391] However, "no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights."[392] By adding a warning before conducting consensual bus searches, officers can still do their jobs, but without ignoring the rights of the individual citizen.[393]

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[391] *See* Brief of Amicus Curiae Americans for Effective Law Enforcement, Inc. at 9, *Bostick* (No. 89-1717) (stating their fear that bus searches must require a level of suspicion in order to protect "citizens against the arbitrary and often abusive techniques employed in totalitarian societies").

[392] Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

[393] Craig M. Bradley, *The Court's Curious Consent Search Doctrine*, TRIAL, Oct. 2002, at 72, 74.