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A LAW STUDENT IN THE SUPREME COURT: *UNITED STATES V. DRAYTON* AND THE FUTURE OF CONSENT SEARCH ANALYSIS

Dennis J. Callahan*

In my third year of law school, I hit the student note lottery. Like thousands of law students, the year before I had analyzed a legal issue in my student note. Despite my passion for the issue, I felt like many others that this was a warming-up exercise, a preliminary to my real future as a lawyer. However, the narrow issue I examined soon came before the Supreme Court and months later, I found myself in the Supreme Court watching oral arguments in a case I helped prepare. I would like to tell my story not only to relive an amazing episode in my own new career, but also to remind law students of the powerful legal tool that the student note can be. I will also recap and look forward from this important moment in consent search jurisprudence in which I was lucky to play a part.

Part I of this Article is my story. It outlines the topic and content of my student note and describes my whirlwind journey as a member of the respondent's representation team in *United States v. Drayton*.¹ Though this story may be worth telling for its entertainment value alone, my hope is that future note writers will draw some tips and encouragement from my experience to make their note writing process more enjoyable and their work more valuable.

Parts II and III discuss the constitutional future of bus sweeps in the wake of the Supreme Court's *Drayton* decision with an eye toward aiding future defendants in preparing their motions to suppress. Part II examines various situations in which a consent search may take place and draws from the reasoning in these cases to argue that in the significant subset of bus sweeps which delay the departure of a bus before contraband is discovered, the interdicting officers impermissibly "seize" all of the passengers for Fourth Amendment purposes. In such cases, the analysis presented in this Part urges defense attorneys to establish the delay at trial and outlines Supreme Court precedent for considering the delay to be a Fourth Amendment violation. The analysis presented in this Part may be exportable to consent searches in open areas.

Part III explains why it may appear in suppression hearings that drug-carrying passengers voluntarily consent to a search they know will reveal illegal narcotics. This Part applies two quirks of human perception to on-bus police-initiated

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¹ 536 U.S. 194 (2002).

encounters that question traditional judgments of reasonableness in consent search scenarios. Defendants moving to suppress evidence under state constitutional search and seizure provisions that are interpreted to be more restrictive of law enforcement activities than are the Supreme Court's pronouncements on the Fourth Amendment should consider the analysis of this Part in preparing their arguments.

The Article concludes by presenting the New York model for analyzing subconstitutional police-initiated encounters. Drawing on the analysis of Parts II and III, the Conclusion argues that the New York approach of applying common law principles to consent searches provides a sensible framework which demands that police have a "founded suspicion" that criminality is afoot before engaging in intrusive questioning of citizens. This quantum of suspicion is somewhat lower than the reasonable suspicion police need to stop and frisk a citizen. The balance struck by New York courts promotes individual autonomy while sacrificing little in the way of law enforcement.

I. A LAW STUDENT IN THE SUPREME COURT

A. *Bus Sweep Background*

Bus sweeps are a drug interdiction tactic used by federal and local police authorities in scores of cities across the United States.² Bus sweeps developed in the early 1980s as part of President Reagan's proclaimed "war on drugs"³ and today bus sweeps everywhere follow essentially the same script.⁴ Officers mount intercity buses at stopover bus depots and ask passengers for permission to search their carry-on luggage and to conduct pat-down frisks of passengers in order to find drugs or other contraband.

According to the Supreme Court's interpretations of the Fourth Amendment's prohibition against unreasonable searches and seizures, police can ask bus passengers' permission to frisk them or search their belongings.⁵ The police can do this randomly or on a mere hunch, and passengers are free to refuse permission

² A sample of reported cases from the summer of this writing show bus sweeps in several areas of the country. *See, e.g.*, *United States v. Winborn*, 344 F.3d 766 (8th Cir. 2003); *United States v. Fulani*, 277 F. Supp. 2d 454 (M.D. Pa. 2003); *Islam v. State*, No. 12-02-001172-CR, 2003 WL 21771752 (Tex. App. 2003); *State v. Saluki*, 580 S.E.2d 430 (N.C. App. 2003).

³ *See* President's Radio Address, 18 WEEKLY COMP. PRES. DOC. 1249, 1250 (Oct. 2, 1982) ("Drugs are bad, and we're going after them. . . . [W]e've taken down the surrender flag and run up the battle flag. And we're going to win the war on drugs.").

⁴ Dennis J. Callahan, Note, *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, 396-97 & n.156 (2001).

⁵ *Florida v. Bostick*, 501 U.S. 429, 435 (1991).

without fear of further official scrutiny.⁶ As long as the encounter is considered consensual and the permission to search voluntarily granted, the search does not violate the Fourth Amendment.⁷ Any contraband that the police find during a consensual encounter will be admissible against the passenger in court, and drugs are often the only hard evidence against such passengers. People found transporting illegal drugs for sale routinely receive prison sentences of ten to twenty years.⁸

If, however, a court determines that the police behavior on the bus was so authoritative that a reasonable person would not have felt free to ignore the police officer,⁹ or if the court finds the police behavior to have been so imperious that the passenger's consent to search was not voluntary, but rather was the product of police coercion, the search will be deemed unreasonable under the Fourth Amendment.¹⁰ The remedy for an unconstitutional search is that the discovered contraband will be excluded from the evidence at trial.¹¹ Without evidence of the drugs, a prosecutor will not be able to make the case, and will likely drop the charges.

Police catch hundreds of drug couriers during bus sweeps each year, and courts have generally found the encounters were consensual and that the permissions

⁶ *INS v. Delgado*, 466 U.S. 210, 216–17 (1984) (“[I]f the person refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.”). As with many facets of bus sweeps and consent searches generally, the law on the books likely differs greatly from that practiced in police-citizen encounters. For instance, it is difficult to imagine that an officer whose suspicion is aroused by the rare person who refuses a search request will simply drop the matter without attempting to satisfy that suspicion in some way. *See, e.g., United States v. Cothran*, 729 F. Supp. 153, 156 (D.D.C. 1990) (noting a drug interdiction officer’s testimony that he “might be suspicious” of a passenger who refused a search request and that he would notify police at the next bus depot that he suspected the passenger of transporting drugs).

⁷ Consent acts as a waiver of one’s Fourth Amendment right to be free from official searches not supported by probable cause. *Schneckloth v. Bustamonte*, 412 U.S. 218, 235 (1972) (holding that knowledge of a right to withhold consent need not be proven to show waiver of Fourth Amendment rights).

⁸ *See, e.g., United States v. Portillo-Aguirre*, 311 F.3d 647, 651 n.4 (5th Cir. 2002) (noting a 151 month prison sentence imposed on a drug courier); *State v. Saluki*, 580 S.E.2d 430 (N.C. App. 2003) (175–219-month sentence). Depending on one’s criminal history, a drug courier caught with 50–150 grams of crack cocaine — a small handful — faces a prison sentence of 121–262 months. *See* U.S. SENTENCING GUIDELINES MANUAL §2D1.1(c) (Drug Quantity Table) (2003).

⁹ *Bostick*, 501 U.S. at 435 (applying the “free to leave” principle of *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988), to police-citizen encounters on buses).

¹⁰ *Id.* at 438 (“‘Consent’ that is the product of official intimidation or harassment is not consent at all.”).

¹¹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

to search were voluntary.¹² The natural question is, Why would a drug courier consent to a search he knows will reveal drugs and lead to a lengthy prison sentence?¹³ Of course, drug couriers always claim that the police forced the search on them and that discovery of the drugs was therefore the product of illegal coercion and, of course, the officers on the witness stand counter that they were the proverbial "Officer Friendly" during any given bus sweep, thus indicating that the encounter was consensual and the passenger's consent voluntary.¹⁴

In 1991, the Supreme Court in *Florida v. Bostick*,¹⁵ instructed lower courts to apply a "totality of the circumstances test" in determining whether the facts of a given case indicate that a permissible consensual encounter occurred, or whether the police conduct was such that a reasonable passenger would have felt pressured to comply with the requests.¹⁶ That these sweeps take place in the cramped confines of a bus is one factor among many weighing into the totality of the circumstances analysis. Others include the number, location, and dress of the officers; whether police displayed their guns; whether they used commanding language or an authoritative tone of voice; and whether the police informed passengers of their right to refuse consent.¹⁷

¹² See, e.g., *United States v. Montilla*, 928 F.2d 583, 584–85 (2d Cir. 1991) (reporting three to four arrests per month at the Buffalo, New York bus terminal); *Quarles v. State*, 696 A.2d. 1334, 1339 (Del. 1997) (noting that consent searches resulted in twelve narcotics arrests in a year by a single officer at the Wilmington, Delaware bus depot). A quick search of cases in the major on-line legal databases will reveal dozens of local police departments and field offices of federal law enforcement agencies that also conduct bus sweeps.

¹³ Justice Thurgood Marshall posed this question during the oral argument in *Florida v. Bostick*. Transcript of Oral Argument, *Florida v. Bostick*, 501 U.S. 429 (1991) (No. 89–1717) ("[W]hy do dope pushers plead guilty? . . . I mean, when I have got dope on me, and I say search me, am I not pleading guilty?"). I explore this question in Part II.

¹⁴ Callahan, *supra* note 4, at 404 n.182 (collecting sources) (noting criticism concerning the difference between officer demeanor on the street and on the witness stand). The inherent difficulty in adjudicating swearing contests between drug interdicting officers and drug carrying passengers can exasperate courts. See, e.g., *United States v. Quintana-Ledezma*, 758 F. Supp. 1 (D.D.C. 1991):

The Court's experience with this never-ending stream of drug interdiction cases continues to suggest that the ability of judges to evaluate the reliability of testimony would be greatly enhanced if officers taped their encounters with bus and train passengers. Such an approach might help mend the uneasy state of affairs within this Circuit over the reliability of District Court findings and the constitutionality of police interdiction activities.

Id. at 2.

¹⁵ 501 U.S. 429 (1991).

¹⁶ *Id.* at 437.

¹⁷ *Id.*

B. Bus Sweep Jurisprudence — Bostick (1991) to Drayton (2002)

Through most of the 1990s, lower courts applying the Supreme Court's *Bostick* test almost always found on-bus police-citizen encounters consensual and the consents to search voluntarily given.¹⁸ Beginning in 1998, however, the United States Court of Appeals for the Eleventh Circuit applied the *Bostick* test in a series of three bus sweep cases and found Fourth Amendment violations in each.¹⁹ These

¹⁸ WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §9.3(c) (3d ed. 1996); see also Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729, 752 (concluding that the *Bostick* Court seemed to instruct lower courts "not to interfere with bus sweep procedures"). The dip in the number of published bus sweep opinions between *Bostick* and 1998 may have been due in part to plea bargaining. Defendants, seeing little upside to pressing claims of Fourth Amendment violations in the wake of *Bostick*, may have been more willing to plead guilty to possessing a lesser quantity of narcotics, and thus receive a shorter prison sentence under sentencing guidelines.

¹⁹ The Eleventh Circuit bus sweep opinions in 1998 may have been the first thorough application of *Bostick* in the federal appeals courts. It is important to note that the Supreme Court determined that the Florida Supreme Court, in its *Bostick* decision, had adopted a per se rule prohibiting all bus sweeps. The Florida Supreme Court reached this decision by applying the Florida Constitution's search and seizure provision, which by its terms is coextensive with the United States Supreme Court's construction of the Fourth Amendment. See FLA. CONST. of 1968, art. 1 § 12 (amended 1982). The United States Supreme Court remanded *Bostick* to the Florida Supreme Court for application of its newly articulated standard which called for weighing all the circumstances of the bus sweep in question. Rather than apply the *Bostick* standard, however, in a 4–3 decision the Florida Supreme Court summarily denied *Bostick*'s motion to suppress in a one-sentence opinion. Florida's dissenting justices on remand chastised the majority, applied the standard set out by the United States Supreme Court, and found that *Bostick* had been impermissibly seized. But the chill was on — in the seven years between the *Bostick* decision and the Eleventh Circuit opinions in 1998, virtually no federal courts issued thorough bus sweep opinions.

The particularly egregious bus sweep procedure used in *United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998), presented the Eleventh Circuit a clear invitation to fully apply the *Bostick* standards, and to find a Fourth Amendment violation. Unlike most bus sweeps, the drug interdiction agents in *Guapi* made a general announcement directing passengers to retrieve their carry-on luggage and hold it open for inspection. *Id.* at 1394. Also, the officers stood in front of the passengers and only let them off the bus after their carry-on bags were searched for drugs. According to the court, this presented "[t]he unambiguous message that the attention and cooperation of all passengers [was] required." *Id.* at 1396.

Two months later, in *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998), the Eleventh Circuit again found that a Fourth Amendment violation occurred during a bus sweep, but this time the interdiction seemed to follow the usual bus sweep script. The procedure in *Washington* was nearly identical to that in *Bostick*, but differed in that the officers in *Washington* did not give passengers a *Miranda*-like warning that they could refuse the search request, a factor to which the Eleventh Circuit gave substantial weight. See *id.* at 1357. The third Eleventh Circuit case was *United States v. Drayton*, 231 F.3d 787 (11th Cir.

decisions refocused attention on bus sweep procedures and perhaps emboldened accused drug couriers to press their Fourth Amendment defenses rather than waive them in a plea bargain. Other federal appeals courts soon addressed the Eleventh Circuit's bus sweep decisions in their own opinions. The Ninth Circuit sided with the Eleventh Circuit, finding impermissible police behavior had occurred in a rather routine bus sweep.²⁰ Significantly, both circuits emphasized that the police did not warn passengers that they had a right to refuse consent to search, and this factor weighed heavily in the courts' decisions.

The Tenth Circuit disagreed with the Eleventh Circuit's application of the *Bostick* test, and continued to admit into evidence narcotics discovered during routine bus sweeps, even in cases where police did not give a verbal warning.²¹ Such clear circuit splits are a marker the Supreme Court considers in deciding which cases to hear.²²

C. My Student Note

One of the obligations of law students who work on scholarly legal journals is to write an article of publishable quality during their second year of law school. These "student notes" are akin to a master's thesis and typically run 25–50 journal pages and include 125–250 footnotes. Given the time pressures on second-year students — for example, applying and interviewing for summer employment and judicial clerkships, myriad journal-related duties, moot court competitions, and

2000), which explicitly followed the *Washington* precedent. *Id.* at 790.

The Eleventh Circuit's progression from *Guapi* to *Washington* to *Drayton* are of a piece. *Guapi*'s blatantly coercive facts clearly indicated that an impermissible seizure had occurred. However, without the egregious facts of *Guapi* to trigger a robust examination and application of the *Bostick* standard, arguably for the first time, *Washington* and *Drayton* may have followed the pattern of validating the typical post-*Bostick* bus sweep procedures at issue in those cases.

As a first detailed application of *Bostick*, *Guapi* made *Washington* possible. As binding circuit precedent, *Washington* led directly to *Drayton*. See *Drayton*, 231 F.3d at 788 n.2 (refusing "to pass on [the] criticism, and express[ing] no view concerning" the negative reception *Washington* had received in the Tenth Circuit because the court was bound by *Washington*'s precedent in any event); see also *Glazner v. Glazner*, 330 F.3d 1298, 1301 (11th Cir. 2003) (discussing the Eleventh Circuit's "prior panel precedent rule" that later Circuit panels must follow until overturned *en banc* or by the Supreme Court).

²⁰ See *United States v. Stephens*, 206 F.3d 914, 918 (9th Cir. 2000) (describing factual similarity to *Washington*).

²¹ See *United States v. Broomfield*, 201 F.3d 1270, 1275 (10th Cir. 2000) (rejecting *Washington* as creating a per se rule that police must inform passengers of right to refuse consent).

²² See *infra* note 24 and accompanying text.

course work — the note writing process is considered by many students to be the most difficult and ill-timed graduation hurdle.

Adding to the insult of the measly two credits one earns for writing a note is the potentially enervating fact that, regardless of how many hours one works on a piece, in the vast majority of cases few people outside of a handful of journal colleagues who are obligated to do so are likely ever to read the article.²³ For the most part, the scholarly effort is its own reward, but for the quarter to one-third of journal members whose notes are chosen to be published, the achievement is a valuable addition to their resume and the reprints provide a ready-made writing sample.

Having long disagreed with our nation's drug policy, I decided to write on the bus sweep circuit split.²⁴ My passion for the broader context of the issue was a great advantage in the research and writing. As I read more bus sweep opinions, my increasing conviction that targeting "drug mules" is an absurd policy had a sustaining effect.

In the note I explain the development of bus sweep jurisprudence from its beginning, through *Bostick*, and to the circuit split. I then apply psychological theories to standard bus sweep procedures and argue that the Eleventh and Ninth Circuits were correct in finding bus sweeps, conducted without warning passengers that they can ignore police or refuse to be searched, are impermissible "seizures"

²³ It is probably little comfort that the largely instrumental character of academic legal writing applies to professors as well. See Harold C. Havinghurst, *Law Reviews and Legal Education*, 51 NW. U. L. REV. 22, 24 (1957) ("Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written.").

²⁴ Addressing a circuit split is a common student note approach, and I think it is the best one for several reasons.

First, circuit splits come with a built-in three-part format: (1) define the constitutional, statutory, or administrative issue and discuss its trajectory in the courts; (2) discuss the different views of the circuits which have created the split; and (3) analyze the split and describe why your favored approach to the issue is the better one.

Second, circuit splits number in the hundreds (if not thousands), are easy to identify, and save time in choosing a topic by limiting research dead-ends. Finding a circuit split in an area of interest is not very difficult. Law professors generally will know of several circuit splits in their subject area; the "Key Number Digest" at the front of West's Federal Reporter series contains case synopses listed by subject area, and a fair percentage of these cases will involve circuit splits which will be discussed in the full opinion; and the weblog "How Appealing," <http://legalaffairs.org/howappealing>, regularly discusses important circuit splits.

Third, writing about circuit splits helps keep student notes moored to legal doctrine. It is fine to sprinkle notes with a little theory and policy, but law students generally reside at the low end of the credibility spectrum, and a note that strays too far from legal doctrine will be handicapped from the start. By the time the writer fully develops the issue and explains the circuit split (a valuable pursuit in itself), the note will be several thousand words deep, and to be proportionate in length, one's analysis in the third section will remain focused.

under the Fourth Amendment, and that such a result is faithful to the *Bostick* test. Essentially, my reasoning in the piece, which I develop by applying the findings of several psychological studies, is that the confines of a bus are inherently coercive and that police-citizen encounters entail a built-in power relationship that police can subtly leverage to extract “consents” to search. I conclude that the Eleventh Circuit was correct to presume that a consent search was the product of impermissible coercion whenever the police conduct bus sweeps without warning passengers that they can refuse to consent.

I was fortunate to have my note selected for publication, and when *The Long Distance Remand: Florida v. Bostick and the Re-Awakened Bus Search Battlefield of the War on Drugs*, appeared in print in October 2001, I duly updated my resume and mailed a few copies to family and friends. Because there had already been a few months’ lag since my final edit and publication, by the time the October 2001 issue arrived, my note was already half out of mind.

D. The Supreme Court Decides to Decide

Aside from the rare case in which the Supreme Court has original jurisdiction and acts as a trial court (such as in border disputes between states), the Court’s docket is completely discretionary — it only decides cases it chooses to hear. In recent years the Supreme Court has decided only about eighty-five cases per year of the 8,000-plus cases parties petition the Court to consider.²⁵ Two of the markers the Court uses in deciding whether to hear a case (“grant a writ of certiorari” or simply “grant cert”) are (1) to resolve a circuit split, and (2) if the federal government is the party petitioning the Court to hear a case.²⁶ Because a circuit split had developed over bus sweeps and because the federal government was the appealing (i.e., petitioning) party from the Eleventh Circuit’s decision, the *Drayton* case had two critical features weighing in favor of the Supreme Court granting certiorari. An important “wild card” factor was the September 11th backdrop which formed the subtext of the government briefs asking the Supreme Court to hear the case. Similar legal arguments to those regarding drug interdictions can be used to validate consent search procedures of vaguely suspected terrorists, whether or not the

²⁵ About 2,000 of these petitions are “paid,” while the majority are *in forma pauperis* petitions filed by prisoners. Still, an eight-five out of 2,000 chance of having one’s case heard by the Supreme Court is slim. See Chief Justice William Rehnquist, *2002 Year-End Report on the Federal Judiciary*, Supreme Court of the United States, at <http://www.supremecourt-us.gov/publicinfo/year-end/2002year-endreport.html> (Jan. 1, 2003).

²⁶ See *The Court and Constitutional Interpretations*, at <http://www.supremecourtus.gov/about/constitutional.pdf> (last visited Sept. 20, 2004).

encounters take place on buses.²⁷ On January 4, 2002, the Supreme Court granted certiorari in *Drayton* and set the date of oral argument for April 16, 2002.

E. Getting Involved

I was in Alabama on January 5, 2002, when I read in the *Montgomery Advertiser* that the Supreme Court would hear *Drayton*. I was unaware that the government had asked the Court to hear the case back in October. I immediately went on-line and discovered that my note was the only published scholarly work discussing the circuit split. That morning I called my criminal procedure professor, Paul Marcus, to ask what I could do to get involved in this case. My realistic hope was to get my note cited in a "friend of the court" brief.²⁸ My wildest dream was to participate in the drafting of an amicus brief filed by a group such as the American Civil Liberties Union (ACLU).

Professor Marcus, who had read an early draft of my note, suggested that I contact some of the Fourth Amendment scholars whose work I had cited. Even if these scholars were not hired to write the amicus briefs, they would at least know which interest groups were considering filing briefs. Upon returning to the William & Mary campus a few days later, I boned up on my bus sweep expertise, and then e-mailed Professor Wayne LaFave of the University of Illinois. The author of the leading treatise on the Fourth Amendment, he also wrote a comprehensive law review article on the 1991 *Bostick* decision.²⁹ Professor LaFave reported that he would not be working on *Drayton*, but he suggested that I contact Professor Tracey Maclin of Boston University. I was very familiar with Professor Maclin's work and I had cited three of his articles in my note. Professor Maclin responded to my e-mail that the ACLU would probably not file an amicus brief, but that if the organization did, he would likely write it. However, Professor Maclin had been in contact with Ms. Gwendolyn Spivey, the Federal Public Defender in Tallahassee, Florida, who had argued and won *Drayton* in the Eleventh Circuit and who would

²⁷ Justice Kennedy had allowed the Solicitor General to extend the deadline for filing a petition in August 2001, perhaps indicating that the government had not yet decided whether to file one. The petition was filed on October 12, 2001. Appellant's Brief in Support of a Petition for Writ of Certiorari at 1, *United States v. Drayton*, 536 U.S. 194 (2002) (No. 01-631). In explaining why the Supreme Court should hear the *Drayton* appeal, the Solicitor General, whose wife was aboard one of the airplanes hijacked on 9/11, argued, "In the current environment, [bus sweeps] may also become an important part of preventing criminal... activity that involve[s] travel on the nation's system of public transportation." *Id.* at 22.

²⁸ These "amicus curiae briefs," or simply "amicus briefs," are legal briefs non-party interest groups often file in Supreme Court cases. As it turned out, the one amicus brief filed on our side cited my note. Brief for Amicus Curiae National Association of Criminal Defense Lawyers at 8, *United States v. Drayton*, 536 U.S. 194 (2002) (No. 01-631).

²⁹ See LaFave sources cited *supra* note 18.

be arguing the case before the Supreme Court. Professor Maclin commented favorably on my note (I had given him the citation in my initial e-mail), and he had forwarded my e-mail to Ms. Spivey.³⁰

Nothing happened for a week or so, and in that interim I approached the Cato Institute, a libertarian think tank in Washington, D.C. which occasionally files amicus briefs in Fourth Amendment cases. I had worked for Cato the previous summer and I hoped I could convince my former colleagues to file a brief in *Drayton*. They gave my proposal serious consideration, but ultimately decided that the case was not a good fit for them. At this point, I had reached a dead-end and had resigned myself simply to following the case and perhaps writing a short law journal article on it following the Supreme Court decision.

F. First Contacts

A week or so after my exchange of e-mails with Professor Maclin, on Friday, January 18, 2002, I received a phone call from Gwen Spivey. She had read my detailed e-mail Professor Maclin had forwarded to her, as well as part of my note. Ms. Spivey had some background questions on the Supreme Court's approach to consent searches, and we talked for about two hours, during which I covered most of the analysis in my note.

Of course, during this initial phone call I volunteered to do anything Ms. Spivey wanted me to do on the case. I was delighted that she took me up on the offer. That afternoon she e-mailed the two briefs she had filed in the Eleventh Circuit and the brief she had filed in opposition to the government's petition for certiorari in the Supreme Court. Though they are public documents, federal appeals court and certiorari briefs are not widely available, so these briefs presented my first inside look at the case. I spent the entire weekend studying these seventy-five pages of briefs, and I wrote Ms. Spivey a long e-mail of comments on Sunday evening. I had no inkling that this would be the first of hundreds of e-mails we would exchange over the next three months.

G. Early Involvement

In the e-mailed comments I sent Ms. Spivey, I asked her to send me a copy of the trial transcripts from the case. I was quite surprised at the size of the FedEx envelope that arrived at my door two days later — there were about 300 pages of transcripts! Bus sweep cases can turn on minute details of how the bus sweep in

³⁰ Though I found it awkward to do so, I found it beneficial to promote my note once it was published. See EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, AND SEMINAR PAPERS* 151–53 (2003) (describing strategies to tastefully promote one's published note).

question transpired, and the transcripts are the resource from which all the important facts are mined. In our system of appellate review, the testimony and facts gathered at trial remain fixed throughout the appeals process, but the legal arguments stressed by each side based on these facts can change as the case enters different levels in the appeals process.

Having likely read more post-*Bostick* bus sweep opinions than anyone else, I knew what to look for in the suppression hearing transcript. I found it contained many nuggets of information that would support arguments before the Supreme Court that had not been fully developed in the Eleventh Circuit proceedings. In addition, whereas the focus of the Eleventh Circuit's inquiry was on the voluntariness of the consent to search, the Supreme Court seemed more concerned with determining whether a seizure occurred before the officers requested permission to search. The change in the issue in turn changed the factual focus. A few days later I sent Ms. Spivey another long e-mail with my comments.

By this time, I was really starting to feel like I was part of the process of preparing the argument for the Supreme Court. Gwen and I were exchanging e-mails every day and I had participated in strategy session conference calls with the team she had put together to help her prepare the case. The team included a few partners from a Washington, D.C. law firm, Sidley Austin, whose pro bono work is to help counsel for indigent defendants write their Supreme Court briefs and otherwise prepare their cases.

Among the topics covered in these conference calls were (1) deciding what portions of the trial transcripts we wanted included in the Joint Appendix (the supporting documentation both parties agree should be made into a bound paperback book for the Justices because the Justices would not want to read the entire 300 pages of transcripts); (2) determining the rough outline of our brief (our side's argument, capped at fifty pages; the Justices decide cases based much more on the briefs the parties submit than the arguments counsel make during the one-hour oral argument); and (3) creating the research plan to support the brief writing.

That I was participating in these conference calls and making arguments on each of the topics from my increasingly paper-strewn apartment in Williamsburg was somewhat surreal. Two weeks earlier I would have been ecstatic to help on an amicus brief, so I could not get over the good fortune I was enjoying in becoming part of the team representing the actual party going before the Supreme Court.

F. The Case-Poaching Nightmare

The research for our respondent's brief was going well when, on February 1st, Gwen received a fax from a lawyer in Chicago.³¹ A Mr. Koch had contacted

³¹ The information in this paragraph is contained in Respondent's Motion to Strike and Objection to Attempted Substitution of Counsel, *United States v. Drayton* (No. 01-631) (Feb. 2, 2002), and its supporting affidavits (on file with author).

Drayton and had asked him to sign a retainer stating that Koch would be Drayton's Supreme Court lawyer. Because the Supreme Court hears less than two percent of the cases it is asked to hear, Koch's apparent *modus operandi* was to wait until the Court granted certiorari in a Fourth Amendment case involving an indigent defendant, and then to try to woo them as a client. Koch reportedly told Drayton the suspect assertions that he would do a better job than Gwen and that he already had nine lawyers working on the case. Gwen called other Federal Public Defenders who had argued Fourth Amendment cases before the Supreme Court, and learned that Koch had tried to poach some of their clients and had succeeded once.

Though it is an undeveloped area of legal ethics for the obvious reason that lawyers do not often vie to represent indigent defendants, contacting a party who is already represented by counsel seems to be an ethical violation only if it is done for pecuniary gain. Koch was going to represent Drayton for free. However, when one considers the millions of dollars lobbyists spend to gain access to politicians, the time and money Koch would spend preparing the case for the Supreme Court would be a small price to pay for the glory, publicity, and influence of having the Supreme Court Justices read his 50-page brief and listen to his oral argument, and for being able to advertise himself as a repeat Supreme Court practitioner.

Things looked bleak for our side for a couple of weeks. As disappointed as I was by the prospect of no longer being involved in the case, I felt worse for Gwen. Though she attended Harvard Law School, had been a top appellate advocate for twenty years, and had argued in the Eleventh Circuit over thirty times, this was her first Supreme Court case. Gwen was not about to go down without a fight, however. She collected the information about Koch's questionable, if perhaps not technically unethical, method of operation. Gwen then filed a "Motion to Strike and Objection to Attempted Substitution of Counsel" with the Supreme Court. Koch filed a reply motion defending his actions. This episode was reported in the legal newspapers and one commentator called it the "most rancorous dispute between lawyers brought to the Court's attention in decades."³² We were in limbo for a few weeks before the Supreme Court decided who would represent Mr. Drayton. In the meantime, we kept researching, but it was not with the same energy as before. If the motion to strike were not granted, all our work would be for naught.

In mid-February, Gwen received an entirely unexpected call from Drayton saying that he had wanted Gwen to be his lawyer all along. On March 4, 2002, the Supreme Court made it official by granting the motion to strike. We had lost a lot of time, but we were back on the case!

³² Tony Mauro, *Lawyers Spar for Control of Case: High Court to Decide Who'll Handle Argument*, LEGAL TIMES, Mar. 4, 2002, at 1.

G. The Merits Brief

The merits briefs are the parties' main opportunity to persuade the Supreme Court Justices. The Government's brief was filed on February 19th, and our Respondent's brief was due March 21st. Due to the case-poaching crisis we had fallen behind our writing schedule and had to pick up the pace. Throughout February Gwen and I had been exchanging about one e-mail per day, but after the motion to strike was granted our e-mail traffic increased to about five per day and would stay at about that level until our brief was submitted.

I had been working on an argument for the brief to the effect that any delay of a bus's departure caused by drug interdiction officers conducting consent searches constitutes impermissible Fourth Amendment seizures of all the passengers.³³ This was not the main issue below and such an argument had never been addressed directly by a federal appeals court. Also, the trial record strongly suggested, but did not conclusively establish, that the bus on which Drayton was traveling had in fact been delayed by the officers. Just the same, I thought the argument was valid and merited consideration for inclusion in the brief. I submitted a detailed memo of the argument to Gwen on March 6, 2002. Gwen, the Sidley Austin lawyers, and I debated several times whether to include this argument in the brief. Ultimately, because of the weak foundation of the argument (its novelty and the holes in the trial record on the point), we decided that little of my eight-page single-spaced "delay equals seizure" argument would make it into the brief. In the final version this argument shrunk to two paragraphs and a footnote, though of course I did not know then that even this much of my memo would survive the final cut.³⁴

Continuing my incredible run of good fortune, my spring break was the ten days leading up to our internal deadline of March 10th for completing a full first draft of our brief. I had e-mailed Gwen an outline of how I thought we should present our legal argument, and I offered to take the first crack at it. Her reply that I should feel free to "go for it" was all the encouragement I needed. My spring break was an exciting and surreal time. By this time I had created walking paths through the sea of documents that covered my apartment floor. Though I have never worked longer and harder in my life, drafting the legal argument for the brief was indescribably exhilarating. From 8 a.m. to 2 a.m., almost non-stop, I honed

³³ Under Supreme Court precedent, in order to detain a citizen (by force or by the citizen's submission to lawful authority), police need at least a reasonable, articulable suspicion that the suspect is carrying contraband. *Terry v. Ohio*, 392 U.S. 1, 16–19 (1968). Because bus sweep consent searches are conducted absent any such particularized suspicion, I reasoned Supreme Court precedent indicates that officers whose bus sweeps delay the bus's departure necessarily seize all the passengers in violation of the Fourth Amendment.

³⁴ I still believe "delay equals seizure" is a winning argument if the crucial facts are established at trial. *See infra* Part II.

my research, wrote, edited, and re-edited the brief according to the outline I had presented to Gwen the week before. On the Sunday night ending my spring break, I was still a tan-less, pasty-faced grad student, but I had e-mailed my ten-page, single-spaced draft of the legal analysis to Gwen.

While I worked on my submission, Gwen wrote the statement of the facts. She then edited and combined the sections the Sidley Austin lawyers and I had written, and wrote transitions linking the sections to create a logical narrative flow. Gwen was to e-mail the entire draft to the group by March 13th. I expected that, like my “delay equals seizure” section, little of my submission would make it into the final product, but I hoped that the occasional paragraph would survive. I was stunned — though guardedly confident of my analysis — when I saw that the draft Gwen circulated to the group included virtually my entire submission. I knew that at this late date, there was not enough time to substantially rework the legal analysis from scratch and that much of the final brief would therefore have been written on my computer in Williamsburg. When the editing was completed and the brief submitted on March 21, 2002, I had written about twenty of its forty-five pages and most of the legal analysis.

H. Oral Argument Preparation

Some Supreme Court watchers consider the oral arguments to be mere spectacle. I think this view is too harsh. It is more likely that one can lose a close case, but not win a losing one, during oral argument, and that a great oral argument coupled with a weak performance by the other side can sway a Justice who is on the fence to your side of an issue.

Once the brief was finalized, I suffered a bit of “postpartum depression.” Though my studies certainly could have used some attention, I found it very difficult to concentrate on them for any length of time before my thoughts turned to bus sweeps. My emotional letdown was not long-lived because Gwen soon began e-mailing me with questions and topics of discussion to help her prepare for the oral argument on April 16th. Gwen’s big day was a Tuesday, and she had scheduled preparatory moot courts at Sidley Austin and at Georgetown Law Center in Washington, D.C. on the Thursday and Friday before the oral argument. Gwen asked me to attend the moot courts and of course I was very happy to oblige. After dozens of phone calls and hundreds of e-mails, Gwen and I finally met each other at the Thursday moot court at Sidley Austin.

I could tell immediately that Gwen is a superb oral advocate. Her thirty-plus trips before the Eleventh Circuit were on display as she skillfully responded to the questions posed by the moot court panel two beats faster than I could even think of a decent answer. A few months before I had been the bus search expert, but Gwen was a quick study and had every relevant case nailed. Gwen clearly enjoys

appellate oral advocacy, and I realized at that first moot court that she and I made a great team because I am happy to research and write, leaving the courtroom advocacy to others.

Gwen called me in Williamsburg on Saturday, April 13th to talk through a few points, and she asked if I could drive up on Sunday in order to help her prepare on Monday, the day before the argument. I did not know what to expect that day, but I assumed she would have a group of experts with us for the homestretch. As it turned out, we were indeed performing without a net. She and I spent about ten hours together that day and there were no last-minute “ringers” brought in. She practiced getting her main points in as I, in the role of a Supreme Court Justice, asked her questions intended to throw her off-script; and we analyzed hypothetical situations we thought the Justices might pose the next morning. Gwen was thoroughly prepared for her big day and was clearly “peaking” for the argument.

1. The Oral Argument

The seating area of the Court is surprisingly small, but the courtroom is impressive in its stateliness. Gwen’s family, who I had met the day before, and I talked nervously as Gwen chatted with her co-counsel and opposing counsel, and she came back to our seats a couple of times to talk. The room fell silent a few minutes before 10 a.m. — the scheduled time of the oral argument — and soon “All Rise” was called out. The Court addressed two matters before the oral argument. Former Justice Byron White had died the day before, and Chief Justice Rehnquist began the day with some remarks about his former colleague. Next, the Court handed down a much-anticipated First Amendment decision, and Justice Kennedy took the unusual step of discussing the majority opinion he authored for several minutes. After these preludes, Chief Justice Rehnquist called for argument in *United States v. Drayton* to begin.

Deputy Attorney General Larry Thompson (second in the Department of Justice hierarchy behind Attorney General John Ashcroft) was arguing the case for the Government, and as counsel for the petitioning party, he argued first. A polished speaker, he tried to focus on the policy arguments for overturning the Eleventh Circuit’s decision. The Justices — particularly Justices Souter and Stevens — asked Mr. Thompson some tough questions, and a couple of the Justices seemed a bit incredulous and exasperated with some of his answers.

Fourth Amendment cases typically create a “hot bench,” and by the time Gwen stepped to the podium the Justices were warmed up. Chief Justice Rehnquist and Justices Scalia and Kennedy asked the most pointed questions, many of which centered on the importance of the lack of warnings and the degree to which the Court can expect citizens to assert their constitutional rights in a consent search

situation.³⁵ Just as she had in the moot courts, Gwen had sharp, quick answers for each question, and at one point she achieved the seeming impossibility of silencing Justice Scalia. When he made a factual error, Gwen politely but humorously pointed it out.³⁶ A highlight for me occurred when Justice Kennedy held up respondent's brief and read from a section I had written, some of the terms of which originated in my student note.³⁷

I met Gwen in the lobby outside the Court with well-deserved congratulations and we proceeded down the impressive granite steps facing the Capitol Building. Gwen had done a great job at oral argument, and I was honored to be a part of it.

J. Drayton Decided

The story goes that Justice Brennan used to start every course he taught by asking, "What is the first rule of the Supreme Court? You have to get five."³⁸ The Supreme Court decided *Drayton* on June 17, 2002, and if Justices merely vote rather than explain, then we lost 6–3. For several reasons, I did not expect to win,³⁹

³⁵ The theory undergirding these questions is that the Constitution is invigorated when citizens learn and invoke their rights (here to refuse a search request), but weakened when the Court creates prophylactic rules to give effect to constitutional provisions, thereby creating a disincentive for citizens to know and assert their rights. See Oral Argument Transcript at 44, *United States v. Drayton*, 2002 WL 1305729 (U.S. Apr. 16, 2002) (No. 01–631) [hereinafter Oral Transcript] (Question by Justice Kennedy) ("It — it seems to me this world you're creating for us [by advocating that a *Miranda*-like warnings requirement is necessary to validate bus sweeps] is — is not strong for the Constitution. It seems to me a strong world is when officers respect people's rights and — and people know what their rights are and — and assert their rights.").

³⁶ This rare event was noted by Supreme Court beat reporters. See, e.g., Linda Greenhouse, *Justices Hear Arguments on Searches of Buses*, N.Y. TIMES, Apr. 17, 2002, at A19.

³⁷ See Oral Transcript, *supra* note 35, at 43–44.

³⁸ Hon. Abner Mikva, *What Justice Brennan Gave Us to Keep*, 32 LOY. L.A. L. REV. 655, 656 (1999).

³⁹ I had feared a rout was a greater possibility than winning five votes. First, although I think the Eleventh Circuit decided *Washington* and *Drayton* correctly as a matter of policy, under the Fourth Amendment jurisprudence of the Rehnquist Court and most post-*Bostick* bus sweep cases, the two Eleventh Circuit decisions were doctrinal outliers. Second, in "counting Justices," it was extremely difficult to get to Justice Brennan's "magic number" of five votes. Justice O'Connor, often the swing vote between the conservative and the moderate Justices, wrote the majority opinion in *Bostick* and would not likely distinguish *Drayton* from her earlier decision. Also, Justice Breyer, usually a more moderate Justice, tends to side with the more conservative Justices in Fourth Amendment cases. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 832 (2002) (5–4 decision) (Justice Breyer in the majority holding that high school drug testing policy did not violate the Fourth Amendment); *Wyoming v. Houghton*, 526 U.S. 295 (1999) (6–3 decision) (Justice Breyer in the majority holding that probable cause to search an automobile extends to a passenger's personal belongings capable

but I was still disappointed. There are a few aspects of the majority opinion with which I agree, and I suppose I should be thankful that it was not a rout. The approach taken by both the *Drayton* majority and the dissent validates the approach we took in the brief in that both opinions are heavily fact-dependent. The Justices in the majority simply seem to have been more disposed to stress facts favoring a law-and-order outcome than those facts supportive of individual liberties.

Thankfully, the majority opinion did not stretch consent search law too much in *Drayton*, and as a result the majority's reasoning likely will not be exported to future cases. The previously established rule that police need not inform citizens of their Fourth Amendment rights in open areas⁴⁰ and during vehicle stops⁴¹ now explicitly applies to bus searches, too.

Neither opinion in *Drayton* mentioned the most heinous result urged by the Government. In the Government's brief, the Solicitor General had tried to shoe-horn into general consent search precedent an ill-fitting defective warrant case from thirty years earlier. In *United States v. Watson*,⁴² the consent of the person arrested under an invalid warrant was upheld despite the fact that the consent was given while the citizen was under arrest.⁴³ Citing *Watson*, the Solicitor General argued that even if *Drayton* were considered "seized," he could nonetheless grant valid consent to search his person.⁴⁴ If the Supreme Court had adopted such a

of concealing contraband). Third, due in large part to its discretionary docket, the Supreme Court has a tendency to "correct" mistakes by lower courts, and reverses about three-quarters of the decisions it reviews. See Lower Court Reversal Rates for Cases Producing Slip Opinions: Supreme Court of the United States, October Term, 2002, at http://www.centerforindividualfreedom.org/legal/reversal_rates.pdf (last visited, Sept. 20, 2004) (indicating that the Court reversed or remanded in fifty-nine of eighty cases, or seventy-four percent that Term). Fourth, the Government applied for certiorari in *Drayton* only a month after the September 11, 2001 terrorist attacks, and *Drayton* was the first civil liberties-related case that the Solicitor General asked the Court to hear. Historically, there has been an interplay between the degree to which American society has viewed itself as threatened domestically and the interpretive breadth granted constitutional civil liberties by the judiciary. Writing as an academic historian, Chief Justice Rehnquist has acknowledged "the role of public opinion in balancing, on the one hand, accepted principles of civil liberties drawn from somewhat ethereal constitutional provisions in peacetime with, on the other hand, the encroachment on those principles in times perceived as more dangerous." Dennis J. Callahan, Book Review, 49 FED. LAW 65, 67 (May 2002) (reviewing WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998)). In Fall 2001 and Spring 2002, the scales of public opinion tipped toward encroachment on civil liberties principles. See Kenneth W. Starr, Editorial, *The Anthrax Term*, WALL ST. J., July 5, 2002, at A12 (discussing *Drayton* as one of the Solicitor General's "unbroken string of victories" in Fourth Amendment cases).

⁴⁰ *Schnecko v. Bustamonte*, 412 U.S. 218, 233 (1973).

⁴¹ *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996).

⁴² 423 U.S. 411 (1976).

⁴³ See *id.* at 424.

⁴⁴ Brief for United States at 32 n.5, *United States v. Drayton*, 536 U.S. 194 (2002).

rule, police could physically detain random citizens on the street and ask for their consent to a search. According to the Solicitor General's argument, if the citizen consented to a search after being detained, the search would be considered reasonable under the Fourth Amendment.

Justice Souter's dissent was just the type of opinion we hoped four Justices would join. The dissenting Justices read the interaction as I strongly suspect it transpired — police subtly (or not so subtly) coercing passengers to elicit "consents" to search and later giving lopsided, self-serving testimony concerning the interaction. The *New York Times* and other major metropolitan newspapers ran editorials condemning the majority decision for this reason.⁴⁵ Justice Souter's opinion and the media response give reason to hope that a Supreme Court fifteen, twenty, or thirty years from now will adopt the dissent's more realistic view of police-citizen interactions.⁴⁶

I am also a bit gratified at the dissent's use of psychology. Justice Souter similarly applied many of the same psychological concepts used in my Note — such as the bus driver ceding authority to police,⁴⁷ the officers' coercive use of space,⁴⁸ and the applicability of speech act theory to bus sweeps (i.e., that a

Tellingly, the Solicitor General did not ask the Court to apply the "attenuation exception" to the exclusionary rule in which "the product of illegal police conduct may be admitted if it has become so distanced from the underlying illegal police conduct as to dissipate the taint of the illegal search or seizure." *United States v. Goodrich*, 183 F. Supp. 2d 135, 145 (D. Mass. 2001) (citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). None of the three factors — temporal proximity, intervening circumstances, and the purpose of the official's misconduct — used to determine whether a suspect's consent was so attenuated as to break the causal chain were present in *Drayton's* case. See *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975). First, if a seizure had taken place, very little time elapsed between the seizure and the subsequent consent request. Second, there were no intervening circumstances to purge the taint of the illegal seizure, such as a warning. Third, the purpose of the interdicting officers was to elicit consents to search, so discovering the narcotics could not have been inadvertent.

⁴⁵ Editorial, *Civil Rights on a Greyhound*, N.Y. TIMES, June 18, 2002, at A22; Richard Pretorius, Editorial, *A Bus for Justice Kennedy*, WASH. POST, June 22, 2002, at A19.

⁴⁶ See CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 71 (2003) (noting that Supreme Court dissents have become law over 130 times and observing that dissenting opinions "give a signal to posterity, and also a stock of reasons for coming out the other way").

⁴⁷ Compare *United States v. Drayton*, 536 U.S. 194, 211 (2002) (Souter, J., dissenting) ("[T]he driver . . . had yielded the custody of the bus and its seated passengers to three police officers"), with Callahan, *supra* note 4, at 410 & n.217 (applying Professor Stanley Milgram's obedience to authority experiments to situations in which "the bus driver disembarked before the bus sweep commenced, leaving the officers without a competing authority figure and focusing passengers' natural obedience to authority onto the agents").

⁴⁸ Compare *Drayton*, 536 U.S. at 209–11 (Souter, J., dissenting) (likening the interdicting officers' use of the confines of a bus to a situation in which three officers surround a citizen in an alley in order to leverage consent to search), with Callahan, *supra* note 4, at 399–402 (subheading "Coercion, Confines, and Consent").

passenger would understand an interrogative search request from a police officer as a demand)⁴⁹ — that were included in our Respondent's Brief.⁵⁰

It was a fun ride, the fight was a just one, and although we lost, I think our arguments limited the damage that could have been done in this case. Further, our arguments may serve as a foundation for the Supreme Court to decide the issue differently in future consent search cases.

K. Lasting Impressions

On the steps of the Supreme Court immediately following the oral argument, Gwen gave me one of the two quill pens that are given as souvenirs to each advocate who argues before the Supreme Court. I was truly touched by this gesture, and it is a perfect symbol for the memories and lessons from the experience I hold dear. The first lesson of this experience is humility. Gwen did not have to champion my involvement on the case — she could have done a fine job writing the brief on her own or she could have recruited a renowned Fourth Amendment scholar. However, Gwen welcomed my input at every turn. Though I was not a lawyer yet, she treated me as a colleague.

Second is equality of opportunity. Whether due to elitism or simply the handiness of proxies when one is under time pressure, I think lawyers can tend to consider the source of an opinion to be more important than the logic of the opinion itself. Gwen ignored the proxies and trusted her own judgment by weighing my input on its merit. That I was a student did not matter to her.

The third lesson is the importance of luck. So many events had to fall in place for me to have the level of involvement on the case I enjoyed — the timing of the publication of my Note and the Supreme Court's grant of certiorari were perfect, someone as humble and open-minded as Gwen had to be arguing *Drayton*, and no renowned Fourth Amendment scholar stepped forward to help write the brief. I realize that I was extremely fortunate and that many attorneys, law professors, and law students put themselves in a similar position by knowing one small area of the law very well, but never get to work on a Supreme Court case. I hit the lottery my first try.

The last and strongest memory and lesson concerns collegiality and friendship. Of course, working on the brief and helping to prepare any attorney for a Supreme

⁴⁹ Compare *Drayton*, 536 U.S. at 212 (Souter, J., dissenting) ("Later requests to search prefaced with 'Do you mind...' would naturally have been understood in the terms with which the encounter began."), with Callahan, *supra* note 4, at 402–07 (discussing the disconnect between the text of bus sweep officers' "requests" to search and the contexts in which the "requests" are made).

⁵⁰ See Brief for Respondents at 35–36, *United States v. Drayton*, 536 U.S. 194 (2002) (No. 01–631) (obedience to authority); *id.* at 27, 33 (officers' coercive use of space); *id.* at 42–43 & n.34 (speech acts).

Court argument would have been a thrill. But the working relationship and friendship Gwen and I built made the experience thoroughly enjoyable. I think that is why I was not really sad after the oral argument — my involvement in this case may be over, but I have gained a trusted colleague and friend with whom I hope to collaborate again.

II. SUSPICIONLESS DELAYS AS IMPERMISSIBLE SEIZURES

The *Drayton* majority so cabined the reach of Fourth Amendment protections in bus sweep cases that in federal courts applying *Drayton*, and in state courts which hold their states' constitutional search and seizure protections to be coextensive with the Fourth Amendment,⁵¹ little room remains to argue that a defendant's motion to suppress should be granted in a case arising from a paradigmatic bus sweep. However, this Part illustrates that under recent Supreme Court precedent, and consistent with *Drayton*, in the significant subset of bus sweeps that extend past the scheduled departure of the bus before the police discover contraband, the officer-induced delay, however brief, effects an impermissible seizure of all passengers, thereby invoking the exclusionary rule. In many bus sweep cases, likely including the one in *Drayton*, such police-induced delay of the bus's departure in fact occurs, but is not conclusively established at trial. This Part also argues that the same rubric should be exported to initial police-citizen encounters made as part of consent searches conducted in open areas, thus limiting law enforcement's ability to accost citizens at will for the purpose of searching them.

Unlike its earlier bus sweep decision in *Florida v. Bostick*, which reversed and remanded the case back to the lower court to apply the articulated standard,⁵² on very similar facts the majority in *Drayton* concluded that the defendant's Fourth Amendment rights were not violated.⁵³ Although the Court's decision that, as a matter of law, *Drayton* was neither seized by police during the initial encounter nor coerced into consenting to a search seems out of touch with the dynamics of police-citizen encounters,⁵⁴ the majority's clarity regarding the two-stage

⁵¹ See Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. LAW & CRIMINOLOGY 63, 92 (1996) (calculating that "47 of the 50 states have established or enlarged federal search and seizure rights on state constitutional grounds").

⁵² 501 U.S. 429, 437 (1991) (finding insufficient findings of fact necessary to apply the correct legal standard).

⁵³ *Drayton*, 536 U.S. at 203, 206.

⁵⁴ See *id.* at 210 (Souter, J., dissenting) (commenting that the majority's opinion showed "little sign" of the common understanding that police "may overbear a normal person's ability to act freely"); Charles Lane, Transcript, *Supreme Court: The New Term*, WASH. POST, Oct. 17, 2003, <http://www.washingtonpost.com/wp-dyn/articles/A30364-2003Oct15.html> (citing *Drayton* as an example of the Court's "certain lack of a common person's perspective").

approach should be taken by subsequent courts as welcome guidance.⁵⁵ Whereas the *Bostick* majority had been somewhat unclear on the two-step approach courts should take in analyzing bus sweeps,⁵⁶ the *Drayton* majority analyzed first the initial police-citizen encounter to determine whether Drayton was “seized” in violation of the Fourth Amendment⁵⁷ before turning to the second prong of the analysis, whether Drayton’s consent to search was given voluntarily.⁵⁸

The Court’s *seriatim* approach of analyzing the initial police-citizen encounter before addressing the search request reflects a more explicit embrace of the forerunner of consent search jurisprudence, *Terry v. Ohio*’s reasonable suspicion analysis.⁵⁹ The *Drayton* majority’s refocusing of *Terry*’s principles, by separating the analysis of the initial encounter from that of the subsequent search request, offers courts a more complete methodology for understanding the police-citizen dynamic at play in a consent search scenario.⁶⁰ This Part analyzes officers’ initial encounters with citizens involving passenger vehicles and intercity buses for the purpose of conducting consent searches to uncover evidence of criminal wrongdoing. In order to reanimate *Terry*’s principle that, at a minimum, a police

⁵⁵ This Part urges a closer examination of initial police-citizen encounters within the Court’s precedent, and thus avoids the trap of simply bashing the majority opinion in *Drayton*. See RICHARD A. POSNER, *OVERCOMING LAW* 87 (1995) (“The law reviews reek of the smell of cordite from the salvos with which today’s law professors bombard today’s Supreme Court Justices.”).

⁵⁶ The question the Florida Supreme Court was to answer on remand was “whether Bostick chose to permit the search of his luggage.” See *Bostick*, 501 U.S. at 438. This question obscures the two-pronged analysis necessary in consent search cases, risking a conflation of the analyses of the approach (i.e., the seizure question) and the search (i.e., the voluntariness of the consent question) into a nebulous “sense of the encounter” question. See Callahan, *supra* note 4, at 377–80.

⁵⁷ *Drayton*, 536 U.S. at 203–05.

⁵⁸ *Id.* at 206 (“We turn now from the question whether respondents were seized to whether they were subjected to an unreasonable search, i.e., whether their consent to the suspicionless search was involuntary.”). The Court then noted that “[i]n circumstances such as these, where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts.” *Id.* In this assessment, the Court was not entirely faithful to its precedents, as the voluntariness of a consent to search considers the subjective characteristics of the defendant, such as his age, education level, and whether he knew that he had a constitutional right to refuse the request. *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973); see *Drayton*, 536 U.S. at 208–09 n.1 (Souter, J., dissenting).

⁵⁹ Under *Terry*, a reviewing court analyzes first whether the police had a reasonable, articulable suspicion to stop a suspect before determining whether the scope of the frisk remained within allowable bounds. *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968).

⁶⁰ However, the *Terry* framework remains a poor fit for analyzing police-initiated searches based on consent, because *Terry* effectively relegates a wide variety of encounters into one undifferentiated subconstitutional mass. This problem is addressed in the Conclusion. See *infra* notes 196–209 and accompanying text.

stop of a citizen must be based on the officer's reasonable suspicion of criminal behavior, any police action at the initial encounter stage of an attempted consent search that delays a citizen should be considered an impermissible seizure under the Fourth Amendment, thus triggering the suppression of evidence so discovered. This is the case regarding vehicle stops and bus-delaying interdiction procedures, and these holdings should inform the trickier case of consent searches which take place in open areas, such as parking lots and sidewalks.

A. *The Terry Standard for Police Stops of Citizens*

A traveler "who has given no good cause for believing he is engaged in [illegal] activity is entitled to proceed on his way without interference."⁶¹ When articulated by the Supreme Court, this principle applied to anyone for whom the police did not have probable cause to detain, and is best characterized as a "right to locomotion."⁶² This right is vitiated when police are granted unfettered license to inquire into a citizen's routine conduct absent any investigatory purpose,⁶³ a power police did not have for the Fourth Amendment's first 170 years.⁶⁴ Given the widespread use of consent searches today,⁶⁵ it is easy to forget that only a generation ago police needed probable cause to accost citizens for the purpose of uncovering possible criminal wrongdoing, and that the lowering of the threshold

⁶¹ *Brinegar v. United States*, 338 U.S. 160, 177 (1949); see also *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (declaring that a foundational premise of the Fourth Amendment is that Americans enjoy "the right to be let alone," free from government interference).

⁶² See Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 *passim* (1990).

⁶³ See *id.* at 1266 (questioning the existence of a common law "right-to-inquire rule, [under which] law enforcement officers are free to inquire about the public comings and goings of individuals"). Professor Maclin concludes that prior to *Terry*, "a majority of the Court . . . remained committed to the view that citizens' fundamental right of free movement cannot be interrupted unless there is probable cause to believe a crime has been committed." *Id.* at 1268.

⁶⁴ The pre-*Terry* minority position was that an aspect of a police officer's duty was to "accost" (in the sense of "approach and speak to . . . without having first been spoken to") and question citizens. *Id.* at 1268, 1264 n.23 (quoting WEBSTER'S THIRD NEW UNABRIDGED DICTIONARY 12 (Unabridged ed. 1981)). Since *Terry*, the Court has implicitly reversed itself so that the power of police to accost citizens goes virtually unquestioned in consent search cases.

⁶⁵ RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES* 19 (1985) (noting that consent searches comprise up to ninety-eight percent of all police searches).

to reasonable suspicion in *Terry* was a very contentious decision⁶⁶ that continues to draw condemnation.⁶⁷

By its terms, *Terry* empowers police to seize⁶⁸ and frisk persons who they reasonably and articulably believe may be contemplating criminal acts and who may be armed, thereby posing a danger to the police.⁶⁹ This “bright line” view of *Terry* is tolerable. However, *Terry*’s departure from the probable cause standard for detaining a citizen served as a wedge for the Supreme Court’s reexamination of police-citizen encounters when suspicion is absent, and *Terry* now forms the crest of a slippery slope in which the formerly restrained right of officers to inquire

⁶⁶ See *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (Harlan, J., concurring) (explicitly conditioning the officer’s right “to interrupt Terry’s freedom of movement and invade his privacy . . . only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime”); *id.* at 38 (Douglas, J., dissenting) (decrying the abandonment of the probable cause standard as “a long step down the totalitarian path”).

⁶⁷ See, e.g., Wayne R. LaFave, “*Street Encounters*” and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 40 *passim* (1969); Debra Livingston, *Gang Loitering, the Court, and Some Realism about Police Patrol*, 1999 SUP. CT. REV. 141, 177–78 (“*Terry v. Ohio* . . . may be the Court’s single most important Fourth Amendment case in terms of its role in constituting a legal environment broadly supportive of the street-level discretion of officers on patrol.”). Some have countered these criticisms by arguing that *Terry* has been interpreted too broadly by its critics. See, e.g., Earl C. Dudley, Jr., *Terry v. Ohio, The Warren Court, and the Fourth Amendment: A Law Clerk’s Perspective*, 72 ST. JOHN’S L.J. 891, 895 (1998) (arguing that *Terry* addressed only the power to frisk and “did not necessarily involve approval of the much more amorphous and troublesome power to ‘detain’ a person for purposes of investigation on less than probable cause to arrest”).

⁶⁸ The concept of actual, physical detention or submission to an assertion of legal authority having that effect has become the bright line defining seizures triggering Fourth Amendment scrutiny. *Terry*, 392 U.S. at 19 n.16 (“Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”); see also *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (“An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.”).

⁶⁹ See *Terry*, 392 U.S. at 24 (empowering an officer without probable cause to take necessary action when the officer believes that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others). Interestingly, the *Brinegar* Court had disavowed lowering the quantum of proof needed to support a stop nineteen years earlier. See *Brinegar v. United States*, 338 U.S. 160, 177 (1949) (reaffirming the probable cause standard and noting that drivers may not be “stopped and searched at the officers’ whim, caprice or mere suspicion”). Much like the drug interdiction roadblock detentions at issue in *Indianapolis v. Edmond*, 531 U.S. 32 (2002), discussed below, the police tactic eschewed in this portion of *Brinegar* involved suspicionless vehicle stops of potential bootleg liquor runners. *Brinegar*, 338 U.S. at 177 n.17 (“It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.”) (quoting *Carroll v. United States*, 267 U.S. 132, 153–54 (1925)).

into the activities of citizens has been removed from the purview of Fourth Amendment scrutiny.⁷⁰

By definition, initial police-citizen encounters in consent searches are not supported by probable cause or reasonable suspicion. Comparing bus sweeps to these unsupported stops highlights that an illegal seizure occurs whenever a sweep delays a bus's departure, no matter how briefly.⁷¹ Subpart 1 below explores the impermissible seizures which occur when vehicles are stopped absent probable cause, and then likens traffic stops which extend past their justified duration to departure-delaying bus sweeps. This Subpart then compares pretextual vehicle stops to their consent search analog — police selectively choosing (or “profiling”) the targets of their consent search efforts. Whereas pretextual vehicle stops are nonetheless constitutional because supported by probable cause, that police can selectively target citizens for consent searches suggests that initial police-citizen encounters involve a citizen's submission to authority, not merely a citizen's willing engagement with the officer, and thus may violate the Fourth Amendment.

The roadblock cases discussed in Subpart 2 hone the analysis. These temporary seizures made absent reasonable suspicion are allowed only for particular purposes. The Court's purposes-based balancing test for roadblocks supports the argument

⁷⁰ Maclin, *supra* note 62, at 1272–77 (tracing how the progression from *Terry* and *United States v. Mendenhall*, 446 U.S. 544 (1980), which created the “free to leave” principle later transformed into a “free to ignore” principle in *Bostick*, and their progeny “moved the right-to-inquire entirely out of fourth amendment scrutiny”). The Supreme Court's increasingly myopic view of the Fourth Amendment over the thirty-five years, precipitated by *Terry*'s abandonment of the probable cause standard, continued with its determination in *Drayton* that as a matter of law a reasonable bus passenger would have felt free to disregard the three officers surrounding and peppering him with questions. Cf. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1112 (2003) (describing how legal rules “vague at the margins” get stretched over a series of opinions by successive appellate panels due to “small change tolerance slippery slopes”).

Bostick's “free to ignore” principle is most clearly isolated in baggage abandonment cases. The analysis parallels that of consent searches, only here courts examine whether a passenger's disavowal of ownership of their bag found to contain contraband was voluntary, or rather, was the product of duress or coercion. *United States v. Austin*, 66 F.3d 1115, 1118 (10th Cir. 1995). In *United States v. Fulani*, 277 F. Supp. 2d 454 (M.D. Pa. 2003), a passenger did not respond to an officer's request to search the bag or cooperate in any way with the agent. *Id.* at 456. The officer searched the bag, which was tagged with the passenger's identification. *Id.* The court found the search impermissible because police could not infer abandonment from Fulani's complete non-responsiveness to the agent's questions. *Id.* at 459–60.

⁷¹ In *Terry*, for instance, the Court noted that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” *Terry*, 392 U.S. at 16. Just as one's freedom to walk away is restrained in the moment it takes to grab a passerby, a permissible bus sweep transforms into an unsupported and illegal seizure the instant the officers delay the bus.

that suspicionless police-initiated drug interdiction encounters which delay citizens before consent to search can be granted or denied constitute impermissible seizures under the Fourth Amendment. That is, drug interdiction bus sweeps do not involve the particular circumstances noted by the Court which tip the balance in favor of validating some roadblocks.

Subpart 3 addresses bus sweeps directly. This Subpart shows that many bus sweeps delay the departure of a bus, and explains the crucial but largely unexamined significance of this fact. Though the Supreme Court has not addressed the issue directly, this Subpart concludes that bus sweeps which delay the bus's departure constitute impermissible seizures of all passengers.

1. Traffic Stops

Similar to *Terry*, the Supreme Court applies a two-pronged framework to vehicle stops. Tracking the *Terry* determination that the "stop" portion of a "stop-and-frisk" is a seizure, the stopping of a vehicle likewise constitutes a seizure.⁷² At the search prong, just as under *Terry* reasonable suspicion justifies only a pat-down search for weapons (whereas probable cause will support a more comprehensive search), the Court has established a line of decision that links the situational factors surrounding a vehicle search, such as its duration and location, to the level of justification needed to support the search.⁷³

*Delaware v. Prouse*⁷⁴ involved a random stop of a vehicle. The officer had no particularized justification for the traffic stop; he simply had nothing better to do than to pull the car over.⁷⁵ Following the vehicle stop, the officer smelled marijuana smoke in the car, and a subsequent search revealed the drug.⁷⁶ "At a hearing . . . the patrolman testified that prior to stopping the vehicle he had observed neither traffic nor equipment violations nor any suspicious activity, and he made the stop only in order to check the driver's license and registration."⁷⁷ The Court

⁷² *Colorado v. Banister*, 449 U.S. 1, 4 n.3 (1980) ("There can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment.") (citing, *inter alia* *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

⁷³ JOHN WESLEY HALL, JR., 1 SEARCH AND SEIZURE § 17.1 (2d ed. 1991) ("Vehicle stops as seizures can be viewed as a sliding scale — the greater the stop and intrusiveness, the greater the justification needed . . ."); *see id.* ("[A seizure] which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.") (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

⁷⁴ 440 U.S. 648 (1979).

⁷⁵ *Id.* at 650–51.

⁷⁶ *Id.* at 650.

⁷⁷ *Id.*

reasoned that “[t]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure,”⁷⁸ and invalidated the stop, thus suppressing the evidence of the narcotics possessed by the driver.⁷⁹

Prouse informs the proper analysis of consent searches in two ways. First, the Court remarked that the Fourth Amendment was invoked “because stopping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention quite brief.”⁸⁰ *Prouse* therefore teaches that a seizure attaches immediately upon the driver’s submission to legal authority. Accordingly, every stop of a vehicle constitutes a seizure for constitutional purposes. Similarly, whenever police accost citizens in open areas and where the citizen’s engagement with the officer — no matter how brief — results from the citizen’s reaction to or respect for the patrolman’s official position, the encounter should be considered a seizure under the Fourth Amendment.

As noted above, the Court uses a “submission to lawful authority” formulation to locate the point at which a citizen is seized for Fourth Amendment purposes.⁸¹ Applying *Terry* stop analysis to police-citizen encounters on the street, it might be helpful to consider others who accost pedestrians. Are police akin to lost tourists asking for directions? Or are police more like pamphleteers trying to press advertising upon passersby, many if not most of whom avoid the pamphleteer or reject his flyer? It seems reasonable to posit that police who attempt to engage citizens for the purpose of conducting consent searches are more like the unwelcome pamphleteer, though one with legitimate authority, than they are the empathy-inducing tourist — even for the innocent person presupposed in *Bostick*.⁸²

⁷⁸ *Id.* at 661.

⁷⁹ *Id.* at 663 (holding that vehicle stops not based on “at least articulable and reasonable suspicion . . . are unreasonable under the Fourth Amendment”).

⁸⁰ 440 U.S. at 653.

⁸¹ See *supra* note 68 and accompanying text.

⁸² *Florida v. Bostick*, 501 U.S. 429, 437–38 (1991) (rejecting the argument that all searches are seizures “because no reasonable person would freely consent to a search”). The *Drayton* majority’s hypothesis that people consent to searches because they “know that their participation enhances their own safety and the safety of those around them,” *United States v. Drayton*, 536 U.S. 194, 205 (2002), was rightly decried by the dissent as having “an air of unreality,” *id.* at 208 (Souter, J., dissenting). A citizen who is not carrying illegal drugs or weapons — *Bostick*’s reasonable innocent person — knows his security is not heightened by consenting to a hopeless search for nonexistent contraband. More likely, many who “consent” to a futile search either feel violated by the police, think that the police would search them whether or not they consented and wanted to avoid the hassle of saying “no,” or feel disappointed in themselves for not asserting their rights to the authority figures they have been taught to obey their entire lives. See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 201–03 (presenting survey evidence

The degree to which a citizen would be more reluctant to ignore or brush off a police officer than they would a pamphleteer — and common sense suggests the difference in relative reluctance is significant⁸³ — is a reaction to the lawful authority of the police and is rightly considered “submission.”⁸⁴

The second way *Prouse* informs the proper analysis of consent searches is that despite the widely-noted “vehicle exception” to the Fourth Amendment,⁸⁵ the *Prouse* Court concluded that vehicle stops to conduct license and registration checks made on the chance that the officer might discover criminal wrongdoing during the stop are not warranted absent an observable safety, registration, or moving violation.⁸⁶ To be sure, such a stop and check would take at least a few minutes to complete, but even brief delays of the few seconds it takes to ask a single question can rise to a constitutional violation.⁸⁷ That a trivial unsupported delay is an illegal seizure is highlighted by cases in which a legal vehicle stop is extended in order to conduct a suspicionless consent search of it, a situation analytically indistinguishable from departure-delaying bus sweeps.⁸⁸

collected from motorists who consented to post-stop searches of their vehicles that support each of the above propositions).

⁸³ Indeed, many jurisdictions have legally distinguished police officers from other citizens in other contexts, such as by broadening a municipality’s respondeat superior liability for intentional torts committed by its police officers. *See Doe v. City of Chicago*, 360 F.3d 667, 671 (7th Cir. 2004) (collecting cases and reasoning that because an officer “is an authority figure trained to develop and project an intimidating aura,” municipalities should use special care when choosing to hire someone for the job).

⁸⁴ The *Drayton* majority, perhaps unwittingly, indirectly acknowledged that citizens’ encounters with police *are* different and that citizens must summon some measure of fortitude to deny a police request. The majority reasoned that “because many fellow passengers are 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.” *Drayton*, 536 U.S. at 204. If reasonable citizens were no more deferential to drug interdiction officers than to pamphleteers, there would be no reason to “have to feel secure” in order to “not to cooperate with police.”

⁸⁵ *See* Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 UTAH L. REV. 751, 754 (citing several examples of Supreme Court decisions recognizing a “vehicle exception” to the Fourth Amendment).

⁸⁶ *Delaware v. Prouse*, 440 U.S. 648, 661–63 (1979).

⁸⁷ Recall that under *Terry*, a stop must be justified at the moment of its initiation, and “the scope of the search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J. dissenting)).

⁸⁸ *See United States v. Dortch*, 199 F.3d 193, 198–99 (5th Cir. 1999) (holding that an impermissible Fourth Amendment seizure occurred when a vehicle was detained for some “moments” after the reason supporting the probable cause-backed stop had terminated); *see also United States v. Jones*, 234 F.3d 234, 241 (5th Cir. 2000) (holding that delaying a vehicle for three minutes after the traffic citation had been issued was impermissible).

By the same token, open-area consent searches undertaken by narcotics interdiction officers are conducted absent any particularized suspicion and have no greater purpose than to discover routine violations of the law.⁸⁹ Even “quite brief”⁹⁰ consent search encounters, then, should be closely scrutinized by courts to assure that they are not in fact stops in which law enforcement officers leverage their office to achieve compliance with their aims.

United States v. Whren,⁹¹ the leading “pretextual stop” case, illuminates the argument presented here, though the case is not usually considered to be in the “vehicle exception” class of cases.⁹² In *Whren*, the officers were vaguely suspicious of the occupants of a vehicle, but did not have the quantum of suspicion necessary to make a stop. The police trailed the vehicle until the driver committed a minor traffic violation. The officers then made the traffic stop, not to issue a traffic citation, but to conduct a “plain view” search of the vehicle.⁹³ The Court refused to inquire into the subjective motives of the officers and upheld the stop based on the probable cause that the driver made a moving violation.⁹⁴

Police-initiated encounters in open areas do not have a direct analog to the pretextual stops of vehicles, but police often follow citizens they think are acting in a vaguely suspicious manner, or who fit a broad drug courier profile,⁹⁵ and select

⁸⁹ Moreover, encounters with pedestrians do not involve the factors which form the rationale for the “vehicle exception” (i.e., that vehicles are highly regulated as an initial matter, and can be used as weapons or as a means of escape), however valid one finds the exception.

⁹⁰ See *Prouse*, 440 U.S. at 653.

⁹¹ 517 U.S. 806 (1996).

⁹² *Whren* falls outside of the “vehicle exception” class of cases because the validity of the stop had less to do with the fact that a car was involved than it did with the fact that a citizen committed a minor, though arrestable, infraction. Compare *Atwater v. Lago Vista*, 532 U.S. 318, 326 (2001) (upholding a vehicle stop and arrest for a seat belt infraction), with *Hedgpeeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004) (upholding the stop, arrest, and search of a twelve-year-old girl for eating a single french fry on a subway platform).

⁹³ *Whren*, 517 U.S. at 808.

⁹⁴ *Id.* at 812 (“We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification.”).

⁹⁵ See Charles D. Adler, Remarks, *Is Our Drug Policy Effective? Are There Alternatives?*, 28 FORDHAM URB. L.J. 3 (2000) (citations omitted):

What is profiling but a pseudo-scientific cover for searches based on a hunch? Agents have often used the ‘drug courier profile,’ stopping airport passengers because they were either the first or last person off the plane, or because they were concealed in the middle; because they were dressed well or shabbily; because they were traveling alone or with others.

Id. at 94; see also *United States v. Va Lerie*, 2003 WL 21956437, at *5 (D. Neb. Aug. 14, 2003):

This court has heard every imaginable basis for searching so-called

to initiate encounters with those citizens for the purposes of conducting consent searches.⁹⁶ This type of “target selection” ultimately leads to the police engaging the citizen, the same result as with a pretextual vehicle stop. Just as the officers in *Whren* were determined to investigate their targeted vehicle and were willing to follow it until a pretext for the a stop arose,⁹⁷ there is reason to suspect that a drug interdiction officer will find a way to force a “consensual” encounter onto their target citizens.⁹⁸ However, though the *Whren* Court would not inquire into the officers’ motives for making probable cause-backed vehicle stops, police who accost citizens for the purpose of conducting consent searches by definition do not have the quantum of evidence to support the stop. If courts were to consider more

“suspicious” luggage: it is old, it is new; it had a handwritten identification tag or it did not; it is a soft bag, a garment bag, a duffel bag; the possessor is too nervous, too self-assured, too calm, too jittery; the bags are overstuffed or they are underpacked.

Id.

⁹⁶ See *Petition for a Writ of Certiorari, United States v. Mendenhall*, 446 U.S. 544 (1980) (No. 78–1821):

The operation of the airport surveillance program typically involves — as it did in this case — three principal and recurring features: (1) the initial contact with the suspect for questioning and identification, based in large part on characteristics and patterns of behavior that the agents, through their collective experience, have learned to associate with drug couriers; (2) a request that the suspect move from the public areas of the terminal to a nearby office if the agents believe that further questioning is appropriate; and (3) a request in the office for a consent to search the suspect’s effects or person.

Id.

This general scenario for selecting citizens for consent searches, found not to be a seizure for Fourth Amendment purposes because *Mendenhall* was “free to leave” at any time, appears to be standard operating procedure for narcotics interdiction agents today. See, e.g., Motion to Suppress Transcript, at 29, 30, *United States v. Drayton*, Case No. 4:99CR15-WS (N.D. Fla. Mar. 16, 1999) [Hereinafter *Suppression Transcript*] (on file with author). Investigator Lang testified that he identified Drayton for a consent search when Lang noticed Drayton wearing a “large jacket [] and baggy pants” in warm weather, the style of dress being significant because “people have been known to conceal weapons or narcotics on their person.”

⁹⁷ Common sense tells us that their wait would not be long. See David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 582 (1997) (“Any time we use our cars, we can be stopped by the police virtually at their whim because full compliance with traffic laws is impossible.”).

⁹⁸ For example, in *United States v. Chacon*, 330 F.3d 323, 325 (5th Cir. 2003), a customs agent testified that he sought to re-engage bus passengers whose citizenship he had already verified, but whose conversation was “awkward,” stating, “I figured before I asked for consent of the bags, I’ll talk to them a little longer and establish maybe a little more suspicion.”

closely the initial police-citizen encounter in a typical consent search scenario, rather than let it pass under the constitutional radar, they might find that seizures — however brief — result, but for which there is no supporting probable cause or reasonable suspicion.⁹⁹

2. Roadblocks

The Supreme Court's roadblock detention jurisprudence illustrates an exception to the rule that police stops and delays of citizens must be supported by a founded suspicion of criminal wrongdoing. In determining the reasonableness of a given roadblock, the Court weighs the purpose for the roadblock against the citizens' interest in traveling free of governmental interruption. In other words, the analytical focus of the stop shifts from the reasonableness of the stated suspicion an officer had of an individual citizen to a balancing of the official purpose for the stop and search and the level of intrusion on the citizen.

Roadblock cases are particularly instructive in that the detentions are analytically analogous to detentions from departure-delaying bus sweeps. Because stopping at roadblocks is not optional, the stops result in Fourth Amendment seizures, the reasonableness of which the Court has determined calls for a situation-specific balancing test.¹⁰⁰ Roadblock detentions are prohibited unless the governmental interest involved overrides the individual's liberty interest to be free from official intrusions. If the balance tips toward the government, the permissible duration of the delay lasts only so long as it takes to satisfy the purpose; any longer delay of the citizen for another purpose transforms the

⁹⁹ See *United States v. Childs*, 277 F.3d 947, 950 (7th Cir. 2002) (en banc) ("Approaching a person on the street (or at work, or on a bus) to ask a question causes him to stop for at least the time needed to hear the question and answer (or refuse to answer); that delay could be called a 'seizure,' though it has not been."). Alternatively, a state can erect a framework of judicial scrutiny to protect citizens from invasive, but subconstitutional, police-initiated encounters, as illustrated in the Conclusion.

¹⁰⁰ The use of balancing tests in the context of the Fourth Amendment has been predictably controversial. Civil libertarians call for bright-line Fourth Amendment protections while opposing scholars maintain that absolute rules are unworkable in the Fourth Amendment context. Compare George M. Dery III, *Are Politicians More Deserving of Privacy than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 40 ARIZ. L. REV. 73, 88 (1998) (condemning Fourth Amendment balancing as "not truly analysis at all. It merely demonstrates whether or not as few as five members of the Court value a particular government action.") with, William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 *passim* (1995) (contending that balancing is necessary, but advocating a shift away from privacy-based balancing toward a substantive review of police use of force). This Article does not enter this debate, but merely acknowledges balancing as a feature of the Fourth Amendment landscape.

seizure from legal to illegal. Courts should subject departure-delaying bus sweeps conducted for the purpose of interdicting drugs to the same analysis.

In *United States v. Martinez-Fuerte*,¹⁰¹ the parties stipulated that the brief checkpoint stops to detect illegal aliens were seizures under the Fourth Amendment.¹⁰² To determine whether reasonable suspicion is a prerequisite to a valid stop, the Court balanced the government's interest in controlling immigration against the "motorists' right to 'free passage without interruption.'"¹⁰³ Finding that "[w]hile the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited," the Court held that brief Border Patrol checkpoint stops within one hundred miles of the Mexican border could be made absent reasonable suspicion.¹⁰⁴ Similarly, in *Michigan v. Sitz*,¹⁰⁵ sobriety checkpoint stops which delayed motorists an average of twenty-five seconds were deemed seizures made absent reasonable suspicion.¹⁰⁶ The Court then balanced the interests of the parties to determine whether the sobriety checkpoints were constitutional.¹⁰⁷ Weighing the significant state interest in eradicating drunk driving against the slight intrusion on motorists, the Court found the program consistent with the Fourth Amendment.¹⁰⁸ However, absent reasonable suspicion, a permissible roadblock seizure becomes a Fourth Amendment violation as soon as a vehicle is delayed beyond the time necessary to satisfy the permitted inquiry.¹⁰⁹

Unlike *Martinez-Fuerte* and *Sitz*, the governmental interest in detecting narcotics through bus interdictions which detain passengers without reasonable suspicion is not sufficient to overcome the passengers' interest in traveling freely. Similarly, police-initiated encounters of citizens in open areas for the purpose of conducting consent searches are undertaken without the quantum of suspicion necessary to support a stop. As these roadblock cases instruct, the length of

¹⁰¹ 428 U.S. 543 (1976).

¹⁰² *Id.* at 556. The Border Patrol had erected a checkpoint to detect illegal aliens approximately fifty miles north of the Mexican border. All vehicles were required to stop, and all occupants asked to produce evidence of their citizenship status. *Id.*

¹⁰³ *Id.* at 557–58 (citation omitted).

¹⁰⁴ *Id.* at 557.

¹⁰⁵ 496 U.S. 444 (1990).

¹⁰⁶ *Id.* at 448.

¹⁰⁷ *Id.* at 451–54.

¹⁰⁸ *Id.* at 455.

¹⁰⁹ *Martinez-Fuerte*, 496 U.S. at 567; see *United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001) (noting in the context of immigration checkpoints that the "permissible duration of the stop is limited to the time reasonably necessary to complete a brief investigation of the matter within the scope of the stop"). Although the Fifth Circuit would not parse the individual questions asked by agents in the process of ascertaining the occupants' nationality, the court noted that once the purpose of the checkpoint was satisfied, any further detention must be supported by reasonable suspicion. *Id.* at 434.

detention is immaterial to the analysis — a Fourth Amendment seizure attaches the moment a vehicle is stopped or its departure is delayed without reasonable suspicion after the legal purpose for the roadblock lapses.

In the roadblock at issue in *Indianapolis v. Edmond*,¹¹⁰ cars were stopped for an average of “five minutes or less” at narcotics checkpoints located according to crime statistics and traffic flow data.¹¹¹ Searches of the stopped cars were conducted by consent, or based on the particularized suspicion raised by a drug-sniffing dog.¹¹² Balancing the occupants’ interest in unimpeded travel against the government’s interest in intercepting crime, the Court ruled the narcotics checkpoint detentions unconstitutional because their “primary purpose” was “to uncover evidence of ordinary criminal wrongdoing.”¹¹³

Edmond presents a clear tipping point which places on the unreasonable side of the scale police “stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.”¹¹⁴ Similarly, departure-delaying bus interdiction detentions should not be sustained merely because they may turn up contraband, nor should courts countenance open area consent searches conducted in a way such that an average citizen would view the encounter as mandatory. In such cases, the government has not demonstrated that narcotics interdictions serve a purpose other than general crime detection and control. The window of opportunity for engaging in consensual encounters on buses, then, lapses at the point the bus is detained from departing by the interdiction officers and no governmental interest of overriding importance can be summoned to fill the void left by the absence of reasonable suspicion. Likewise, a police-initiated encounter of a pedestrian that a reasonable citizen would feel obliged to engage in should be considered an impermissible seizure for Fourth Amendment purposes.

3. Bus Sweeps

Bus sweeps allow one to isolate the initial encounter stage of a typical consent search scenario for two reasons. First, unlike consent searches conducted in open areas or attendant to vehicle stops which may arise spontaneously and be more variable, bus interdictions are scripted, routinized events, and therefore, the officers’ initial approach of seated passengers varies little from case to case.¹¹⁵

¹¹⁰ 531 U.S. 32 (2000).

¹¹¹ *Id.* at 35.

¹¹² *Id.* The Court has consistently held that a canine sniff is not a “search” under the Fourth Amendment. *Id.* at 40.

¹¹³ *Id.* at 42.

¹¹⁴ *Id.* at 44. The *Edmond* reasoning thus tracks that of *Prouse*. See *supra* notes 74–79 and accompanying text.

¹¹⁵ See Callahan, *supra* note 4, at 396–97 n.156.

Second, and more important for this analysis, bus searches that delay the departure of the bus necessarily engender passenger delay. Should the Supreme Court be squarely presented with the issue, its precedents dictate that interdiction officers “seize the bus” and all its passengers at the moment the bus is delayed from departing. Such a seizure rule can be exported to open area consent searches, causing courts to scrutinize all police-initiated encounters more closely to determine whether even a brief delay of a pedestrian is the result of the officer leveraging his authority.

The bus in the first of the two Supreme Court bus sweep cases, *Florida v. Bostick*,¹¹⁶ was described as being “about to depart”¹¹⁷ and “scheduled to depart,”¹¹⁸ but there was no indication that the officers in fact delayed the bus. The *Bostick* majority therefore sidestepped the issue¹¹⁹ and analyzed the case solely on the subconstitutional plane of police-citizen encounters.¹²⁰ Although Drayton made the “delay equals seizure” argument¹²¹ and, as discussed below, the factual record indicated that it was more likely than not that the police delayed the departure of the bus, the Supreme Court again ignored the issue. The Court, then, has not yet decided whether drug interdiction agents who delay a bus’s departure thereby seize the passengers for Fourth Amendment purposes. However, every federal court that has addressed the issue, both pre- and post-*Bostick*, has indeed indicated that an impermissible seizure occurs in such situations.

A trio of pre-*Bostick* cases recognized that a police-imposed delay of a bus departure implicates the Fourth Amendment. Three years before *Bostick*, in *United States v. Rembert*,¹²² the court denied the motion to suppress evidence procured during a bus sweep on finding that the agents did not delay the bus, though it accepted the magistrate’s legal determination that if “the police conduct at this point caused fare-paying passengers to be delayed from proceeding on their established journey, [it would] constitute[] a seizure of their persons and effects.”¹²³ Similarly, in denying a motion to suppress, the Eleventh

¹¹⁶ 501 U.S. 429 (1991).

¹¹⁷ *Id.* at 435.

¹¹⁸ *Id.* at 436.

¹¹⁹ The Supreme Court traditionally does not decide constitutional issues not placed squarely before it, preferring to exercise the “passive virtue” of restraint. *See* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 79 (1961) (emphasizing “the wide area of choice open to the Court in deciding whether, when, and how much to adjudicate”). This self-restraint is believed to guard the Court’s legitimacy by cabining its role to adjudication, leaving policymaking to the elected branches of government.

¹²⁰ *Bostick*, 501 U.S. at 434 (noting that such encounters “will not trigger Fourth Amendment scrutiny unless [they] lose [their] consensual nature”).

¹²¹ Brief for Respondents at 29–30, *United States v. Drayton*, 536 U.S. 194 (2002) (No. 01–631).

¹²² 694 F. Supp. 163 (W.D.N.C. 1988).

¹²³ *Id.* at 175.

Circuit in *United States v. Fields*¹²⁴ noted that a seizure occurs if “the officer is delaying the *progress* of the bus, and interfering with the public’s right to travel, a right long recognized in this country as fundamental.”¹²⁵ In *United States v. Flowers*,¹²⁶ the Fourth Circuit panel found that “the officers did not delay the bus beyond its customary layover . . . and that any deviation from its written schedule of departure was caused by the bus company.”¹²⁷ However, the court later noted that:

Flowers’ freedom to leave thus encompassed not only the freedom to depart from the bus, but the freedom to depart with the bus, which police officers in the absence of some articulable suspicion must allow. To hold otherwise would begin to transform this free society into one where travelers must present papers or proffer explanations to be on their way.¹²⁸

Shortly after *Bostick*, the Ninth Circuit highlighted the distinction between bus interdictions which engender delay and those which do not. In *United States v. Gonzalez*,¹²⁹ the court found that no seizure occurred when an officer boarded the bus at a red light and conducted consent searches on the moving bus because no passengers were “prevent[ed] . . . from going on their way.”¹³⁰ Conversely, police encounters with passengers on a bus which prevent the bus from departing or continuing on its scheduled route should be considered “seizures” conducted without reasonable suspicion, prompting a Fourth Amendment balancing test of the bus sweep’s reasonableness. Therefore, bus-delaying interdictions conducted for the “primary purpose” of “uncover[ing] ordinary criminal wrongdoing”¹³¹ — that is, all bus sweeps — would not survive the balancing test under *Edmond*.¹³²

¹²⁴ 909 F.2d 470 (11th Cir. 1990).

¹²⁵ *Id.* at 474 n.2.

¹²⁶ 912 F.2d 707 (4th Cir. 1990).

¹²⁷ *Id.* at 711.

¹²⁸ *Id.* at 712.

¹²⁹ 979 F.2d 711 (9th Cir. 1992).

¹³⁰ *Id.* at 713. Though illustrative of the “delay equals seizure” argument, the *Gonzalez* decision strains the “free to leave” principle of *Mendenhall*, 446 U.S. 544 (1980). To avoid an encounter with an interdiction officer, a passenger approached on a moving bus would not have the option of deboarding until the interdiction was completed. The passenger would be forced to remain seated and ignore the questioning officer standing over him, and would still not be considered “seized” for Fourth Amendment purposes.

¹³¹ *Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000).

¹³² See *supra* notes 110–114 and accompanying text.

*United States v. Barrett*¹³³ is directly on point. In *Barrett*, the court invalidated a narcotics interdiction procedure because it caused the bus to be delayed a short time. Judge Carr wrote:

I find that it is more likely than not that the bus was due to depart as the encounter between Sgt. Ellenwood and the defendant was occurring. In light of that finding, I also find that but for the delay caused by that encounter, the bus would have departed before the encounter was completed. As a consequence of the instruction to the driver [not to depart until the police procedure was completed], I find, accordingly, that the defendant and the other passengers were “seized,” as that term is used in the Fourth Amendment.¹³⁴

Likewise, in *United States v. Ellis*,¹³⁵ a border patrol agent, working from front to back, satisfied himself that all of the bus passengers were legally in the country.¹³⁶ A slight delay for this purpose was allowable under *Martinez-Fuerte*.¹³⁷ On the way out, the agent turned to drug interdiction, using a “squeeze and sniff” technique on the carry-on bags in the overhead racks. The Fifth Circuit held that this suspicionless delay of the bus’s departure, though only “trivial,” became impermissible under *Edmond* once the agent’s “primary purpose” turned to drug interdiction.¹³⁸

Departure-delaying bus sweeps are in no way isolated or uncommon occurrences. Indeed, such bus sweeps may be the rule rather than the exception. Interdiction officers have three opportunities in which to conduct bus sweeps: (1) upon a bus’s arrival at a depot, before passengers disembark; (2) at short layover depots, after departing passengers have exited and new passengers have boarded; and (3) at longer layover depots, after passengers have reboarded. The first scenario presents the *Guapi* problem in which the Eleventh Circuit feared that the interdiction officers acted as gatekeepers, allowing only searched passengers to disembark,¹³⁹ and thus appears to be the least constitutionally palatable of the three.

¹³³ 976 F. Supp. 1105 (N.D. Ohio 1997).

¹³⁴ *Id.* at 1108.

¹³⁵ 330 F.3d 677 (5th Cir. 2003).

¹³⁶ *Id.* at 680.

¹³⁷ *Id.* at 679–80.

¹³⁸ *Id.* at 681; see *United States v. Chacon*, 330 F.3d 323, 328–39 (5th Cir. 2003) (concluding that an agent may not re-engage a passenger whose immigration status was already established to inquire about drugs — questions that could be asked in a matter of seconds).

¹³⁹ *United States v. Guapi*, 144 F.3d 1393, 1396 (11th Cir. 1998) (noting as a significant factor that the interdicting officer blocked the egress of passengers who were naturally “eager

The second and third scenarios offer only short windows of time for officers to conduct bus sweeps. Common sense holds that passengers will want to minimize the amount of time they are in the cramped confines of a bus, and will therefore either get off the bus (if in the second scenario the layover is long enough to do so) or wait until a few minutes before departure to reboard (the third scenario). The interdiction in *Drayton* is typical of bus sweeps following the third scenario, and a detailed review of the factual record indicates the important facts to be established at future bus sweep trials.

The *Drayton* interdiction began at approximately 12:40 p.m.¹⁴⁰ The scheduled departure time for the bus was 12:45 p.m.,¹⁴¹ so the agents had about five minutes in which to conduct the interdiction before their presence would delay the departure of the bus. Investigator Lang, the lead interdiction officer, testified that the agents were on the bus for fifteen to twenty minutes which was “just long enough to check . . . two or three people.”¹⁴² Accordingly, each consent search took five to ten minutes to complete. The agents approached three passengers, searching two of them, before approaching Drayton.¹⁴³ Lang further testified that the three encounters and the two searches were conducted consecutively; the next passenger was not approached until the prior encounter and search was completed.¹⁴⁴ Investigator Blackburn, an agent who did not testify, made the first contact and search, and “[i]n the meantime, [Lang] was standing there waiting until [Blackburn] got finished.”¹⁴⁵ Lang then spoke briefly with a second passenger, and after deciding that he “didn’t want to check that particular person,” Lang made contact with a third passenger and conducted a consent search of that passenger’s luggage.¹⁴⁶ To this point, the bus interdiction, begun at 12:40 p.m. of a bus with a scheduled departure of 12:45 p.m., had entailed two five-to-ten-minute searches made consecutively, sandwiched around a brief discussion with a third passenger.

Drayton and his co-defendant were the fourth and fifth passengers approached by the narcotics interdiction team.¹⁴⁷ Lang’s contact with Drayton, then, most likely began between 12:50 p.m. and 1:00 p.m. That is, before encountering Drayton the officers had delayed the bus’s departure between five and fifteen

to depart as quickly as possible”). The Supreme Court’s *Drayton* decision did not abrogate this aspect of *Guapi* in any way.

¹⁴⁰ Offense Reporting Form, at 3 (on file with author). This is the record of Drayton’s arrest completed by the arresting officers.

¹⁴¹ This was the departure time noted on Drayton’s ticket, which was lodged with the Supreme Court (on file with author).

¹⁴² Suppression Transcript, *supra* note 96, at 39.

¹⁴³ *Id.* at 17–19.

¹⁴⁴ *Id.* at 16.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 17–20.

¹⁴⁷ *Id.* at 19–20.

minutes. Although Lang testified that he never remains on a bus so long as to delay its departure,¹⁴⁸ he contradicted this assertion by noting that sometimes the bus driver is standing beside the bus when the officers get off and that “[w]hen we see the driver coming up, we are *usually about finished, or we’re getting ready to get off the bus anyway.*”¹⁴⁹ Given the short amount of time the officers had to complete the interdiction before its scheduled departure and the number of passengers contacted and searched before Drayton was approached, the interdicting officers very likely detained the bus a minimum of several minutes before Lang began his encounter with Drayton.

The Supreme Court did not address the bus-delaying aspect of *Drayton* because Drayton’s trial attorney was unable to conclusively establish that fact either in his cross-examination of Lang or through documentary evidence.¹⁵⁰ The defense had only Lang’s testimony which suggested that the bus sweep probably delayed the departure, and Lang stated that the interdiction did not delay the bus. Lang did not take witness statements from other passengers, and there were no passenger manifests from which defense counsel could identify potential witnesses.¹⁵¹ Neither

¹⁴⁸ *Id.* at 38.

¹⁴⁹ *Id.* at 48 (emphasis added).

¹⁵⁰ *People v. Caballes*, 802 N.E.2d 202 (Ill. 2003), *cert. granted*, 72 U.S.L.W. 3451 (U.S. Apr. 5, 2004) (No. 03–923), which the Supreme Court will hear during the October 2004 Term suffers similar ambiguity. In *Caballes*, after a motorist stopped for speeding refused to consent to a search of his car, a second officer arrived with a canine unit to sniff the exterior. While the officer was writing a warning ticket, the dog alerted on the trunk, and a subsequent search revealed marijuana. 802 N.E.2d at 203. It is unclear whether the involvement of the canine unit prolonged the stop. The Illinois Supreme Court, which “has construed the search and seizure language found in section 6 [of the Illinois Constitution] in a manner that is consistent with the Supreme Court’s fourth amendment jurisprudence,” *Fink v. Ryan*, 673 N.E.2d 281, 288 (Ill. 1994), applied *Terry* and ruled that the dog sniff impermissibly broadened the scope of the stop because there were no articulable facts to support the use of a canine unit. *Caballes*, 802 N.E.2d at 204–05.

Whether the use of the canine unit prolonged the stop was not conclusively established, so the only question granted certiorari was: “Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.” See Brief for Petitioner at i, *Caballes* (No. 03–923). Every current Supreme Court Justice, save Justice Thomas, who has not addressed the issue, agrees that a dog sniff of a car is not a Fourth Amendment search. *Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (6–3 decision) (“The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search.”); *id.* at 52–53 (Rehnquist, C.J. & Scalia, J., dissenting on other grounds); *id.* at 56 (Thomas, J., dissenting and not reaching the issue). Because probable cause supported the traffic stop and because a dog sniff is not a search, the facts of *Caballes* do not implicate either *Terry* prong directly. The Supreme Court will very likely reverse the Illinois Supreme Court, perhaps unanimously.

¹⁵¹ Suppression Transcript, *supra* note 96, at 18.

the bus driver nor any other employee or official of the bus company was available to testify whether the bus sweep delayed the departure of Drayton's bus before Lang discovered the narcotics.

As discussed above, all prior federal case law indicates that at the moment an interdiction procedure delays the departure of a bus beyond its scheduled departure time, the interdiction transforms from a series of consent-based police-citizen encounters to an impermissible seizure of all of the passengers. Therefore, defense counsel in future bus sweep cases should endeavor to establish that the interdiction in question delayed the bus's departure, and if successful, argue that such delay tainted any subsequent discovery of contraband.

B. Summary

The bus locus is unique among the settings in which a consensual police-citizen encounter may culminate in a search request because, unlike encounters which take place in open areas, at one's place of work, or attendant to a stop of a motor vehicle, police often delay bus passengers from their travels as a group, in effect "seizing" individuals, some of whom the police have not yet approached. Distinguishing consensual encounters, which do not implicate the Fourth Amendment, from *Terry* stops, which are Fourth Amendment seizures and must be supported by a reasonable, articulable suspicion of criminal activity, or have a primary purpose that outweighs citizens' liberty interests, is derived from a fact-intensive analysis. Analogously, once a bus interdiction passes from a pre-departure procedure to a departure-delaying exercise, the business of the passengers changes from waiting for departure to progressing to their destination. Thus, at the point the presence of interdiction officers blocks the bus's departure and progress, they necessarily "seize" all the passengers and do so absent reasonable suspicion.

In the context of a police-initiated encounter in an open area, "[t]he person approached . . . need not answer any question put to him; indeed he may decline to listen to the questions at all and may go on his way."¹⁵² The above discussion has shown that the same cases which teach that impermissible seizures attach the moment a bus is delayed by police conducting a bus sweep suggest that even trivial police-initiated delays of citizens in open areas, if the result of the officer's leveraging of his position of authority, should invoke constitutional scrutiny.

III. PERCEPTIVE QUIRKS IN SUPPRESSION HEARINGS

The previous Part explored one of the last remaining windows for bus sweep defendants in federal court, or in state courts whose search and seizure rules are

¹⁵² *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (plurality opinion) (citing *Terry v. Ohio*, 392 U.S. 1, 32-33 (1968)).

coextensive with the United States Supreme Court's consent search jurisprudence, to be granted a motion to suppress. By contrast, this Part will be of use only to defense counsel in state courts which interpret their respective state constitutional search and seizure provisions to be more restrictive of police actions in conducting consent searches.¹⁵³ This Part discusses the perceptive mechanisms at play in consent search scenarios, and seeks to reconcile the seemingly diametrically opposed views of the tenor of on-bus encounters held by drug interdiction officers and those of the drug carrying passengers caught by them. This Article concludes by applauding New York State's approach to suspicionless police-initiated encounters with citizens as a more nuanced appreciation of the "deviously subtle"¹⁵⁴ official coercion police can exert on citizens to elicit their consent to a search request.

To be sure, self-interest plays a large role in how one portrays an encounter on the witness stand. Officers portray the encounters as friendly and consensual in order to validate the arrest, and drug couriers naturally attempt to characterize the police behavior as coercive. However, psychological research suggests that more than bald self-interest is at play, and that each of the three players — defendants, judges, and police — face perceptive hurdles which impede an accurate understanding of a given encounter. Quirks in human perception tend both to amplify the degree to which an observer (judge) attributes an actor's (defendant-passenger) consent to his inherent characteristics rather than to the situation surrounding the police-citizen encounter, and to blunt the officer's self-perceived level of coercion he exerts on passengers. An understanding of these psychological mechanisms in consent search encounters provide avenues of argument for defense counsel and considerations for state court judges' decision making under state constitutional provisions.

A. Attribution Theory and the Perspective of Defendants and Judges

During the oral argument in *Bostick*, Justice Marshall asked: "[W]hy do dope pushers plead guilty . . . I mean when I have got dope on me, and I say search me, am I not pleading guilty?"¹⁵⁵ Justice Marshall addressed his rhetorical question in his dissent, reasoning that *Bostick*'s on-bus "guilty plea" was elicited by

¹⁵³ See Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 CRIM. L. & CRIMINOLOGY 789, 803 (2003) (discussing case books' treatment of the states as "laboratories of experimentation" in criminal procedure); see generally BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* ch. 1 (1991) (discussing the evolution of "adequate state grounds doctrine" by which the Supreme Court must accept state courts' interpretations of their own laws).

¹⁵⁴ *People v. Gonzalez*, 347 N.E.2d 575, 577 (N.Y. 1976).

¹⁵⁵ Transcript of Oral Argument, *Florida v. Bostick*, 501 U.S. 429 (1991) (No. 89-1717).

coercive interdiction officers.¹⁵⁶ Though my student note agreed with Justice Marshall's decision, it posited an alternative answer to his question at oral argument. Applying the results of controlled consent search research studies which found college students did not realize the legal consequences of consenting to a search,¹⁵⁷ I reasoned that drug couriers simply "do[] not grasp the legal implications of consenting to a search. It is entirely possible that drug-transporting bus passengers mistakenly believe that by voluntarily turning the drugs over to police, they either can not, or will not, be prosecuted."¹⁵⁸

Although fundamental unawareness of the contours of the Fourth Amendment likely is a significant factor when drug couriers grant consent to search, attribution theory offers an equally compelling answer to Justice Marshall's question. According to attribution theory, whereas defendant "actors" are inclined to attribute their consent to situational factors such as the location of the search or the behavior of the police officer, "observer" courts are more likely to validate the consent by attributing it to the personal characteristics of the defendant.¹⁵⁹ That is, whereas drug couriers attribute their consent to the situation — such as the confines of a bus, the presence of multiple officers conducting the sweep, the model of fellow passengers consenting to searches, and fear of being left behind and separated from their luggage if they disembark — judges are more likely to attribute a courier's consent to the disposition of the accused. Thus, attribution theory not only answers Justice Marshall's question at oral argument, it suggests a more nuanced alternative to Bostick's argument that "no reasonable person would freely consent to a search of luggage that he or she knows contains drugs."¹⁶⁰ The

¹⁵⁶ *Bostick*, 501 U.S. at 446, 450 (Marshall, J., dissenting) (observing that the interdiction in question "exhibit[ed] all of the elements of coercion associated with a typical bus sweep" and concluding that "the Fourth Amendment clearly condemns the suspicionless, dragnet-style sweep of buses").

¹⁵⁷ Professor Kagehiro found that although ninety-six percent of the study participants understood the concept of a search warrant and ninety-two percent understood that absent a search warrant, the police could conduct a search only with the participants' consent, only forty-nine percent of the subjects understood that any contraband discovered would be admissible evidence in court. Dorothy K. Kagehiro, *Perceived Voluntariness of Consent to Warrantless Police Searches*, 18 J. APPLIED SOC. PSYCHOL. 38, 45-46 (1988). Apparently, the subjects of the study reasoned — incorrectly — that if they freely disclosed contraband, the police would "reward" them by not using the contraband as evidence in court, that such use would be "unfair" given the cooperation the subjects had shown.

¹⁵⁸ Callahan, *supra* note 4, at 397 n.157.

¹⁵⁹ See Thomas C. Monson & Mark Snyder, *Actors, Observers, and the Attribution Process*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 89, 91-93 (1977) (tracing the development of attribution theory and recapping the results of studies in the field).

¹⁶⁰ *Bostick*, 501 U.S. at 438. The majority rejected this argument noting that the "reasonable person" test presupposes an *innocent* person." *Id.* This reasoning seems inapposite. Given the low "hit rate" interdiction officers achieve, and that presumably few

alternative suggested by attribution theory is that due to police-created situational factors, a reasonable person *would* consent to a search he knows will reveal drugs.

At first glance, it may be easy to accept a court's denial of a motion to suppress evidence claimed to be the result of police coercion, the claim being self-serving on the part of the defendant or simply arguments in the alternative forwarded by defense attorneys. Attribution theory reconciles the disconnect between the defendant's perception of coercion and a court's determination that consent was granted voluntarily.¹⁶¹ The lengthy sentences defendants often face if their motions to suppress fail¹⁶² tend to exacerbate the actor-observer disconnect concerning both the perceived freedom of choice of the defendant¹⁶³ and the attribution of

passengers would prefer to be frisked than to be left alone by police, reasonable innocent persons no doubt give dubious "consent" to search in much greater numbers than do reasonable guilty persons. See Suppression Transcript, *supra* note 96 at 36, 50 (Lang testifying that he had found contraband on passengers about thirty times in the thousands of searches he conducted over three years).

¹⁶¹ See Monson & Snyder, *supra* note 159, at 91. "[T]here is a pervasive tendency for actors to attribute their actions to situational requirements, whereas observers tend to attribute the same actions to stable personal dispositions." *Id.* (quoting E.E. JONES & R.E. NESBETT, *THE ACTOR AND THE OBSERVER: DIVERGENT PERCEPTIONS OF THE CAUSES OF BEHAVIOR* 80 (1972)). This finding is especially damaging to a defendant's claim since "misattribution experiments have consistently shown that both actors and observers tend to overestimate the degree with which decisions are based on dispositional factors and underestimate the pull of situational conditions on behavior." *Id.* at 94. This disconnect is analogous to the "argentic shift" experienced by subjects in Professor Stanley Milgram's famous obedience experiments. An argentic shift occurs when a subject no longer views his actions as self-determined, but rather as a result of the wishes of an authority figure. See STANLEY MILGRAM, *OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 132-34 (1969); see also *id.* at 41 (noting that observers consistently underestimated the obedience exhibited by subjects even though the observers were fully aware of all the situational factors of the experiment being conducted); Dorothy K. Kagehiro & Ralph B. Taylor, *Exploring the Fourth Amendment: Searches Based on Consent*, in *HANDBOOK OF PSYCHOLOGY AND LAW* 24 (Dorothy K. Kagehiro & William S. Laufer eds., 1992) (finding in a controlled study of third-party consent searches that "consent may be attributed by the consensor to the coerciveness of the situation and may be attributed by an observer (the judge) to the voluntary willingness of the consensor").

¹⁶² See, e.g., *United States v. Stephens*, 206 F.3d 914, 916 (9th Cir. 2000) (noting district court sentence of 240 months in prison for bus passenger caught transporting cocaine); *United States v. McDonald*, 100 F.3d 1320, 1324 (7th Cir. 1996) (120 months in prison and five years probation for the same offense).

¹⁶³ See John H. Harvey et al., *Actor-Observer Differences in the Perceptions of Responsibility and Freedom*, 32 J. PERSONALITY AND SOC. PSYCHOL. 22, 24-27 (1975). The researchers found "strong support" for the hypothesis that the greater the consequence of an actor's (defendant's) behavior, the less freedom of choice he would perceive having while finding "directional support" for the hypothesis that observers (courts) would perceive the actor as having greater freedom of choice as the consequences became more severe. *Id.*

responsibility for that choice.¹⁶⁴ Thus, when asked to consent to a search that may ultimately result in a lengthy prison sentence, the voluntary nature of a defendant's consent is jeopardized on two fronts. As perceived by the defendant, his consent becomes more predicated on external situational conditions; from the bench's perspective, the consent is more likely to be perceived as resulting from the disposition of the defendant. In other words, precisely the same factors that lead a judge to perceive consent as having been voluntarily given also cause a defendant to have felt coerced into acquiescing to an officer's search request.

Furthermore, that a defendant chose to take a bus does not necessarily change the equation under attribution theory, as the Supreme Court has suggested it does.¹⁶⁵ The Court made much of the fact that Bostick chose to travel by bus, and that therefore he brought upon himself the coercion he claimed in being confined by the cramped interior.¹⁶⁶ In concluding "Bostick's freedom of movement was restricted by a factor independent of police conduct,"¹⁶⁷ the majority acknowledged that Bostick's consent was, at least in part, due to this situational factor.¹⁶⁸ Nonetheless, by remanding the case the Court was willing to accept that Bostick's consent was voluntary.¹⁶⁹ Conversely, the *Bostick* dissent tacitly applied attribution theory more directly by recognizing the importance of the situational factor independent of the fact that it was Bostick's choice to travel by bus.¹⁷⁰ The same divide occurred in *Drayton*, with the majority going so far as to posit that a

¹⁶⁴ See *id.* at 24–25. The researchers reported "strong evidence" that as the consequences of the behavior became more severe, the actor would be more likely to attribute the decision to situational factors while noting a "general tendency" for observers to attribute more responsibility to the disposition of the actor as stakes rise. *Id.*

¹⁶⁵ See Monson & Snyder, *supra* note 159, at 96–102. The researchers note: "Individuals normally have considerable freedom to choose where to be, when and with whom. Thus, the situational factors to which they respond are often of their own making, although these factors may still powerfully constrain the behavior of the actor once in the situation." *Id.* at 97–98 (citation omitted).

¹⁶⁶ *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (concluding that any duress felt by Bostick due to the bus's confines "was the natural result of his decision to take the bus"); accord *United States v. Broomfield*, 201 F.3d 1270, 1275 (10th Cir. 2000) (concluding that the passenger's "freedom of movement was the natural result of his choice of transportation and seat assignment, not a result of [the agent's] conduct").

¹⁶⁷ *Bostick*, 501 U.S. at 436.

¹⁶⁸ See *id.* at 439 ("The cramped confines of a bus are one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary.").

¹⁶⁹ See *id.* at 440.

¹⁷⁰ See *id.* at 450 (Marshall, J., dissenting) (charging that it is unacceptable "for the police to force an encounter on a person by exploiting his 'voluntary decision' to expose himself to perfectly legitimate personal or social constraints"); see also *United States v. Stephens*, 206 F.3d 914, 918 n.3 (9th Cir. 2000) (finding significant that the drug interdiction agents had spotted the defendant in the bus terminal because "the STING officers could have approached Stephens in a less confined, and therefore less coercive, environment").

passenger may more readily deny a search request on a bus than in an open area¹⁷¹ while the dissent likened the interdiction officers' decision to confront Drayton on the bus to three officers accosting a pedestrian in a narrow alley.¹⁷²

Attribution theory encompasses a consensor's perceptions of relative attractiveness and certainty of outcomes,¹⁷³ timing,¹⁷⁴ and risk¹⁷⁵ to help to explain why, when a search is virtually certain to reveal narcotics in one's luggage, a passenger may nonetheless consent to a search.¹⁷⁶ From an actor's perspective, the higher the degree of certainty, the greater the disparity of attractiveness between outcomes, and the less time the actor takes in making a decision, the more constrained the actor's perceptions of freedom of choice become.¹⁷⁷ In the paradigmatic bus sweep scenario, all of these factors align to create a situationally driven response on the part of the passenger. It seems (1) certain that the searching officer will find the contraband, (2) being allowed to continue one's bus trip is much more attractive than being arrested and facing ten years or more in prison, (3) bus searches happen quickly, necessitating on-the-spot decisions by travelers, and (4) as for risk, if getting caught transporting drugs is perceived as a "low-probability event, it [is] basically ignored and [is] not guarded against."¹⁷⁸ This helps explain why passengers often seem so unprepared to deny police requests to search luggage. From an attribution theory perspective, the usual context and procedure of bus sweeps adds to an already-formidable situationally driven perceived lack of choice on the part of a passenger. The lessons of attribution theory are usually lost on post-*hoc* appellate courts focused on the "'reasonable person' test [which] presupposes an innocent person."¹⁷⁹

¹⁷¹ United States v. Drayton, 536 U.S. 199, 204 (2002).

¹⁷² *Id.* at 210 (Souter, J., dissenting).

¹⁷³ See John H. Harvey & Shawn Johnston, *Determinants of the Perception of Choice*, 9 J. EXPERIMENTAL SOC. PSYCHOL. 164, 171 (1973) (finding a greater perceived choice where there is a smaller difference in outcomes).

¹⁷⁴ See *id.* ("[P]erceived choice will be greater the more time a person takes in selecting an action.").

¹⁷⁵ See Kagehiro & Taylor, *supra* note 161, at 28–30.

¹⁷⁶ See, e.g., United States v. Harvey, 961 F.2d 1361, 1362 (8th Cir. 1992) (finding voluntary consent to search suitcase containing five pounds of marijuana); Pennsylvania v. Vasquez, 703 A.2d 25, 28 (Pa. 1997) (finding voluntary consent to search backpack containing 29.3 grams of cocaine and a digital scale).

¹⁷⁷ See Harvey & Johnston, *supra* note 173.

¹⁷⁸ Kagehiro & Taylor, *supra* note 161, at 28.

¹⁷⁹ Florida v. Bostick, 501 U.S. 429, 438 (1991) (emphasis omitted). The Court raised the innocent person standard in response to Bostick's claim that his consent must have been coerced because no reasonable person carrying contraband would have consented. However, having confronted the standard knowing that Bostick was indeed carrying drugs centered attention on Bostick and perhaps crystalized a finding on remand that his consent was due to dispositional factors. Additionally, it also may have deflected attention from the possibility that even a "reasonable innocent person" would have felt coerced to consent to a search. See

To be sure, if attribution theory were applied forcefully across-the-board, every consent to search granted during a bus sweep would be considered the product of unconstitutional situationally driven coercion. Whether such a result would be wise,¹⁸⁰ attribution theory should be considered in the precise work demanded in case-by-case adjudication. A general awareness of attribution theory on the part of defense counsel and judges may be enough to tip decisions in defendants' favor in close cases.

B. Self-Perceived Application of Force and Drug Interdiction Officers

Justice Kennedy wrote in *Drayton* that in order to have a vigorous Constitution, citizens sometimes have to assert their rights to police. He reasoned that "[i]t reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding."¹⁸¹ Justice Kennedy's tacit assessment that passengers can freely reject a police request seemed plausible given that the Supreme Court accepted the district court's finding that "[t]here was nothing coercive, there was nothing confrontational" about the encounter between Investigator Lang and Drayton.¹⁸² Because the legality of consent search encounters turns on the coerciveness with which officers interact with passengers,

Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 801–02 (1992) (criticizing the reasonableness inquiry in *Bostick* as a "legal abstraction" which de-emphasized the coerciveness of the *Bostick* bus sweep and suggesting that the coercive factors highlighted in Justice Marshall's dissent would pressure any targeted person, guilty or innocent). This is precisely the result reached on similar facts by the Ninth Circuit in *Stephens*: "What we conclude is that no passenger, innocent or guilty, would have felt free to refuse to answer the officers' questions while remaining on the bus." *United States v. Stephens*, 206 F.3d 914, 917 n.2 (9th Cir. 2000).

¹⁸⁰ Even the *Bostick* majority questioned the effectiveness of the war on drugs. "If that war [on drugs] is to be fought, those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime. By the same token, this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful." *Bostick*, 501 U.S. at 439.

¹⁸¹ *United States v. Drayton*, 536 U.S. 194, 207 (2002) (citation omitted). To the degree that Justice Kennedy's formulation assumes that police and citizens are on equal footing in consent search encounters, he is likely mistaken. Law enforcement are prototypical authority figures in society and are the repeat-playing experts in bus searches. Police assigned to bus depots conduct several bus sweeps every day whereas even regular bus passengers will be infrequent targets. See *Suppression Transcript*, *supra* note 96, at 50 (Investigator Lang testifying that he had been conducting bus sweeps on about twenty-eight buses per week for three years by the time he searched Drayton). If a vigorous Constitution needs to be nourished by knowledge periodically, then requiring police to inform passengers of their Fourth Amendment rights during scripted, routinized bus searches seems to be as good an opportunity as any to start.

¹⁸² *Drayton*, 536 U.S. at 200.

however, officers have a great incentive to portray their encounters with citizens as friendly and nonconfrontational. To that end, at Drayton's suppression hearing, Lang testified about his demeanor when engaging passengers:

Well, I'm talking to the gentleman, or whoever I'm in contact with at that time. I'm talking to that particular person. I'm not trying to talk to everybody else. My total focus is to that particular person. I'm not talking loud. I'm being as friendly and courteous, and I'm using, "How you doing?" This type of — the tone of voice that I'm using. I'm not trying to be coercive — trying to sound like I'm a big, bad cop or anything like that. I'm just talking to them in a nice tone of voice.¹⁸³

Recent research suggests that more than conscious obfuscation may be involved when officers give such self-serving testimony. Because human brains may be wired to perceive self-generated forces as weaker than those of the same magnitude generated by others,¹⁸⁴ in their suppression hearing testimony police may be truthfully and conscientiously reporting their self-perceived demeanor during an encounter with a citizen as having been friendly, while the citizen may have perceived the same demeanor as threatening.

To test perceptions of self-generated versus external force, neuroscientists at the University College London placed torque motors exerting a constant force to volunteers' left index fingers, and asked the participants to match that amount of force with their right index fingers by pressing a measuring device.¹⁸⁵ Every one of the participants overestimated the force required to match that of the torque motor.¹⁸⁶ That is, though the participants perceived the force they exerted as matching the force they received, in fact every participant projected more force than they endured.

When police are conducting bus sweeps, their mission is to root out drugs and identify drug couriers by getting people to consent to searches. Applying the finding from the torque motor experiment to bus sweeps such as the one in *Drayton*, when Lang puts his "total focus" on a "particular person" in doing his job, though he perceives his own demeanor as "friendly and courteous," it may be perceived by a passenger as closer to the demeanor of a "big, bad cop" intent on

¹⁸³ Suppression Transcript, *supra* note 96, at 26.

¹⁸⁴ Sukhwinder S. Shergill et al., *Two Eyes for an Eye: The Neuroscience of Force Escalation*, 301 SCIENCE 187 (July 11, 2003), available at www.sciencemag.org/cgi/content/Full/301/5630/187.pdf.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

accomplishing his goal.¹⁸⁷ To be sure, this perceptive quirk by itself will not be dispositive of the coerciveness of the interdiction officer's demeanor in a particular bus sweep, but again, an awareness of this natural tendency could tip a court's seizure determination in close cases.

The disconnect in relative perceptions of force the neuroscientists identified tends to escalate over multi-stage encounters. In a follow-on experiment, the researchers asked pairs of volunteers to take turns pressing a lever with the same force that had just been exerted on them. Even though the "instructions were designed to achieve parity," "[i]n all cases, the forces escalated rapidly."¹⁸⁸ That is, with every pair of participants, the initial force exerted by Participant 1 was exceeded by Participant 2 on his first turn, which in return was exceeded by Participant 1 in round 2, and so on. The researchers concluded that in these "tit-for-tat exchanges," "both sides are reporting their true percept and that the escalation is a natural by-product of neural processing."¹⁸⁹ The researchers posited that this mental glitch explains why physical conflicts, such as playground disputes, tend to escalate as each child thinks the other hit him harder.¹⁹⁰

In the bus sweep context, it seems reasonable to assume that passengers are skeptical of the police presence on a bus, at least initially.¹⁹¹ Faced with mild reluctance from passengers, police will naturally, and imperceptibly to themselves, ratchet up the urgency with which they ask for consent.¹⁹² The multi-round nature of police questioning in bus sweeps can be seen in the increasingly intrusive series of search requests officers often make to passengers,¹⁹³ of which *Drayton* is a prime example.¹⁹⁴ As a consent search progresses and becomes more intrusive,

¹⁸⁷ See Suppression Transcript, *supra* note 96, at 50.

¹⁸⁸ Shergill et al., *supra* note 184 (finding a "38% mean escalation on each turn" over eight turns).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See Suppression Transcript, *supra* note 96, at 59. Lang testified that "[o]n that bus people don't like giving out their name and don't like giving out information in reference to what they're doing." *Id.*

¹⁹² See *id.* at 40. Lang posited that when faced with a nonconsenting passenger, he might respond, "I understand, and we would like for your cooperation, but you don't have to." *Id.*

¹⁹³ See, e.g., *United States v. Lewis*, 728 F. Supp. 784, 788 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990) (describing such a series of questions directed at raising the passenger's level of "anxiety and duress" and concluding that "most citizens . . . cannot, given the circumstances, say 'No' or otherwise refuse to comply with a police officer's request").

¹⁹⁴ Suppression Transcript, *supra* note 96, at 27-31. Lang first asked whether Drayton had any luggage before asking to search Drayton's bag. Lang then asked to check Drayton's person. Lang started with Drayton's upper torso and chest before asking Drayton to lean forward so Lang could search lower. Only then did Lang search Drayton's waist, hips, and groin area. *Id.*

the neuroscience of force escalation teaches that an officer will naturally become more insistent in his questioning if he is confronted with resistance from the passenger at any stage. And here is the key: the officer will not even perceive that his behavior is becoming more coercive. Therefore, he can honestly testify at the suppression hearing that his demeanor did not change from the friendly baseline he perceived it to be at the start of the encounter.

CONCLUSION: THE NEW YORK MODEL FOR SUBCONSTITUTIONAL POLICE-INITIATED ENCOUNTERS

Part III illustrated one psychological quirk affecting the perspective of each of the three players in a suppression hearing — judge, defendant, and officer — that tend to fog a clear picture of the tenor of a police-initiated consent search encounter with a citizen. Importantly, each works to influence the court to deny a defendant's motion to suppress. Consistent with attribution theory, a judge is more likely to attribute a defendant's consent to a search to the defendant's disposition, indicating the consent was voluntary, whereas the defendant is more likely to attribute his consent to situational factors surrounding the encounter, most of which are chosen by interdiction officers, indicating the "consent" was coerced. And consistent with the force escalation findings, police naturally underestimate, and therefore truthfully under-report on the witness stand, the amount of force they exert on a given passenger.

Part II showed that, unlike consent searches that take place on buses, at roadblocks, or following traffic stops, all of which give rise to unconstitutional seizures the moment police detain citizens without proper cause, consent searches in open areas lack such a definitive demarcation point. Due to self-serving bias in testifying, perceptive quirks, and myriad other hurdles to accurately re-creating the tenor of a given consent search in the antiseptic environs of a courtroom, courts have few guideposts to help them determine whether citizens acquiesced to the coercive authority of an officer requesting consent to search, or voluntarily consented to a search request.¹⁹⁵

Further hindering a richer understanding of consent searches in federal courts and state courts which have adopted the federal rules of decision, is that *Terry* is a binary switch which affords no nuance below the high constitutional threshold it sets. The result under the Court's narrow interpretation of the word "seizure" to mean "submission to lawful authority" and not mere deference shown to these

¹⁹⁵ Part II posited that one could profitably conceptualize the level of a citizen's submission to police authority as a measure of the marginal difference in obligation to interact that a reasonable, innocent person would sense between facing a normal pamphleteer and one wielding legitimate authority, with the voluntary consent pole likened to the willingness with which one would give directions to a lost tourist.

authority figures, is that police have wide berth to accost citizens and ask pointed, invasive questions, including a request to search the person and his belongings, without invoking the Constitution.

Into the consent search breach left by the Supreme Court's tolerant creation of a huge sea of "below *Terry*" police-initiated encounters, New York State's highest court, quite sensibly, has detailed two subconstitutional tiers "for evaluating the propriety of encounters initiated by police officers in their criminal law enforcement capacity."¹⁹⁶ The New York Court of Appeals realizes that police-initiated encounters with citizens are fundamentally different from encounters between citizens. Therefore, it singles out encounters for the purpose of crime prevention for the most rigorous judicial scrutiny because "this function is highly susceptible to subconstitutional abuses."¹⁹⁷ The Court of Appeals does not rely on federal or state constitutional grounds. Rather, the court's decisions "reflect[] [its] judgment that encounters that fall short of Fourth Amendment seizures still implicate the privacy interests of all citizens and that the spirit underlying those words required the adoption of a State common-law method to protect the individual from arbitrary or intimidating police conduct."¹⁹⁸

In *People v. Hollman*, the Court of Appeals differentiated simple police requests for information from the more intrusive common-law right of inquiry.¹⁹⁹ Under *Hollman*, police who have any "objective, credible reason, not necessarily indicative of criminality,"²⁰⁰ can approach citizens and ask "basic, nonthreatening questions regarding, for instance, identity, address or destination."²⁰¹ New York courts thus allow police to approach citizens almost at will, as police elsewhere do, in choosing targets for consent searches. For instance, under the low "request for information" threshold, the fact that Drayton was wearing a large, bulky jacket on a warm day²⁰² surely would have been a credible enough reason for an officer in New York to approach Drayton and ask "a few general, nonaccusatory questions."²⁰³ In this vein, the Court of Appeals has noted that a person "permitting others to board a bus ahead of him on two occasions, looking around

¹⁹⁶ *People v. Hollman*, 590 N.E.2d 204, 205 (N.Y. 1992) (citing *People v. DeBour*, 352 N.E.2d 562 (N.Y. 1976)).

¹⁹⁷ *DeBour*, 352 N.E.2d at 569.

¹⁹⁸ *Hollman*, 590 N.E.2d at 212. Of course, relying on the search and seizure provision of its state constitution, a state's highest court could grant citizens broader protection against intrusive consent search questioning by lowering the threshold of what constitutes a seizure to a level below the *Terry* standard — restraint by show of authority — established by the Supreme Court under the Fourth Amendment. See *supra* note 51.

¹⁹⁹ *Hollman*, 590 N.E.2d at 205–06.

²⁰⁰ *Id.* at 205.

²⁰¹ *Id.* at 206.

²⁰² Suppression Transcript, *supra* note 96, at 77.

²⁰³ See *Hollman*, 590 N.E.2d at 211.

while doing so, and then patronizing a snack bar” may have supported a “request for information,” but no more.²⁰⁴

The second subconstitutional level, which the Court of Appeals has called “a wholly separate level of contact,” is a “common-law right of inquiry, [which] is activated by a ‘founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion.’”²⁰⁵ The *Hollman* panel repeatedly emphasized that an officer’s search request must be supported by such “founded suspicion,”²⁰⁶ because “[n]o matter how calm the tone of narcotics officers may be, or how polite their phrasing, a request to search a bag is intrusive and intimidating and would cause reasonable people to believe that they were suspected of criminal conduct.”²⁰⁷

New York’s framework for analyzing subconstitutional police-initiated encounters thus addresses many of the shortcomings inherent in applying the reasonable suspicion-backed “*Terry* stop” model to the fundamentally different situation presented by suspicionsless consent search scenarios.²⁰⁸ Though New York’s approach may not eliminate unwarranted police questioning, it should dampen the use of dragnet-style bus sweeps and random police-initiated encounters with citizens for the purposes of conducting consent searches.

Recognizing that “[d]ue to the tendency to submit to the badge and our belief that the right to be left alone is ‘too precious to entrust to the discretion of those whose job is the detection of crime,’”²⁰⁹ the Court of Appeals has fashioned workable measures that protect all citizens from random, invasive police questioning. New York’s rule that requests to search must be supported by “founded suspicion that criminal activity is afoot” may temper the biases related to attribution

²⁰⁴ *In re Antione W.*, 556 N.Y.S.2d 560, 561 (N.Y. App. Div. 1990); *but see* *People v. Saunders*, 173 A.D.2d 239 (N.Y. 1991).

²⁰⁵ *Hollman*, 590 N.E.2d at 205 (quoting *DeBour*, 352 N.E.2d at 571).

²⁰⁶ *Hollman*, 590 N.E. 2d at 206 (“Once the officer asks more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer’s investigation, the officer is no longer merely seeking information.”); *id.* at 210 (“Once the police officer’s questions become extended and accusatory and the officer’s inquiry focuses on the possible criminality of the person approached, this is not a simple request for information.”).

²⁰⁷ *Id.* at 210. Under New York’s two-tiered approach, although the police could have approached Drayton and made “nonaccusatory” inquiries, they could not have made a more intrusive request to search because Drayton’s choice to wear a heavy jacket in Florida was susceptible to the innocent interpretation that the bus was destined for Indianapolis, Indiana. *See DeBour*, 352 N.E.2d at 567 (“[I]nnocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand.”).

²⁰⁸ New York retains *Terry*’s threshold for police to effect a short seizure and limited search, thus the analysis in Part II showing that even brief seizures made absent reasonable suspicion constitute Fourth Amendment violations holds in New York as well.

²⁰⁹ *DeBour*, 352 N.E.2d at 569 (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948)).

theory presented in Part III.A by enabling courts to better scrutinize the initial encounters between police and citizens that occur antecedent to a search request. Perhaps more importantly, the main beneficiaries of the two-tiered "below *Terry*" framework will be the innocent citizens who constitute the vast majority of all citizens subjected to drug interdiction officers' intrusive questioning and unwitting application of force during bus sweeps and other police-citizen encounters which culminate in intrusive search requests, but who are invisible to courts. This benefit is also the best argument for other states to adopt their own variant of New York's subconstitutional model for analyzing consent searches.