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The Long Distance Remand: Florida v. Bostick and the Re-Awakened Bus Search Battlefront in the War on Drugs

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NOTES

THE LONG DISTANCE REMAND: *FLORIDA V. BOSTICK* AND THE RE-AWAKENED BUS SEARCH BATTLEFRONT IN THE WAR ON DRUGS

The War on Drugs has led to the development of innovative police tactics¹ in much the same way that conventional wars have produced technological and medical breakthroughs.² To keep pace with law enforcement, the Supreme Court has been scrambling to set the boundaries of Fourth Amendment protection against “unreasonable searches and seizures”³ in dozens of drug interdiction cases.⁴ These cases have involved the entire run of Fourth Amend-

1. See, e.g., *California v. Ciraolo*, 476 U.S. 207, 209, 213-14 (1986) (detailing the story of the industrious marijuana grower who hid his crop by building a six-foot outer wall around a ten-foot inner wall only to be thwarted by a police officer who secured the use of an airplane to take aerial photographs. The Court upheld the aerial surveillance and the search warrant obtained on the basis of the photographs.); *United States v. Badru*, 97 F.3d 1471, 1475 (D.C. Cir. 1996) (finding valid a consent to search obtained through the “Rolling No’s” technique, whereby the officer elicits a string of negative responses from a suspect before phrasing the request to consent to a search in the negative, in this case, “You don’t mind if we search your car, do you?”, to which the suspect answered “no”).

2. E.g., MARTIN VAN CREVELD, *TECHNOLOGY AND WAR* (1989) (postulating that war drives technological advances); cf. Richard M. Garfield & Alfred I. Neugut, *The Human Consequences of War*, in *WAR AND PUBLIC HEALTH* 27 (Barry S. Levy & Victor W. Sidel eds., 1997) (finding that war-related casualty levels are a function of evolving weaponry and advances in health care).

3. U.S. CONST. amend. IV. The Fourth Amendment reads in full:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

4. The Court’s last term showed no slowdown at the intersection of the Fourth Amendment and the War on Drugs. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, ___, 121 S. Ct. 1536, 1557 (2001) (allowing searches incident to arrest when police stop a citizen for a fine-only violation); *Ferguson v. City of Charleston*, 532 U.S. 67, ___, 121 S. Ct. 1281, 1292-93 (2001) (holding that testing pregnant women for cocaine use without either consent

ment issues, including what constitutes reasonable suspicion to conduct a search,⁵ a traveler's reasonable expectation of privacy,⁶ the extent of searches,⁷ asset forfeiture,⁸ and standing.⁹

One popular tactic in the domestic theater of the drug war¹⁰ is drug-interdiction bus sweeps. The typical bus sweep scenario begins with police officers boarding intercity buses at scheduled stops and announcing themselves as officers searching for illegal narcotics,¹¹

or probable cause, and then turning the results over to police, constitutes an impermissible search); *Illinois v. McArthur*, 531 U.S. 326, ___, 121 S. Ct. 946, 950 (2001) (holding that police may briefly prevent a person from reentering his home while a search warrant is being prepared).

5. *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (concluding that unprovoked flight from police in a high crime area raises a reasonable suspicion to justify a police stop and investigation of that person).

6. *Bond v. United States*, 529 U.S. 334, 337-39 (2000) (holding that an officer's exploratory manipulation of a bus passenger's bag violates a passenger's reasonable expectation of privacy).

7. *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) (holding that the probable cause established to search an automobile extends to the belongings of passengers and any other containers large enough to contain the object of the search).

8. *Florida v. White*, 526 U.S. 559, 561, 566 (1999) (upholding the Florida asset forfeiture law that enables police to seize the automobile of an arrested drug dealer without a warrant even though the dealer was not using the car at the time of his arrest and there is no probable cause to otherwise search the vehicle).

9. *Minnesota v. Carter*, 525 U.S. 83, 90-91 (1998) (holding that because short-term business visitors to an apartment have no legitimate expectation of privacy, they have no standing under the Fourth Amendment to object to police observing them through drawn window blinds).

10. The United States has expanded the drug war to many foreign fronts. "Drug interdiction" has arguably become the magic word for foreign governments seeking military aid from the United States. See, e.g., Pedro Ruz Gutierrez & E.A. Torriero, *Military Contractors Line Up for U.S. Drug War in Colombia*, CHI. TRIB., Sept. 24, 2000, at C5 (discussing U.S. backing of Colombia's war against drugs: \$1.3 billion for the purchase and operation of military helicopters and airplanes, and 500 active duty U.S. military personnel to serve as trainers); Clifford Krauss, *Pentagon to Help Peru Stop Drug Traffic on Jungle Rivers*, N.Y. TIMES, Feb. 3, 1997, at A3 (announcing an agreement in which the United States would support Peruvian drug interdiction efforts by providing military ships, aircraft, communications gear, and personnel); Boonthan Sakanond, *U.S. Bull in the Burma Ship*, INTER PRESS SERV., Apr. 22, 2001, available at LEXIS, News Library (discussing the simulated drug interdiction exercises involving 11,000 U.S. and Thai troops along the Thai-Burma border and concluding that "the location of the exercise is clearly meant to send a message to the generals in Rangoon"); Justin Sparks et al., *East Europeans Angered by FBI "Invasion"*, SUNDAY TELEGRAPH (London), Apr. 2, 2000, at 33 (noting that plans to establish FBI field offices in Budapest, Prague, and Warsaw, ostensibly to combat drug trafficking by the Russian mafia, have been criticized as a continuation of the Cold War because the United States is attempting to counteract the continuing influence of the KGB in those cities).

11. Sometimes officers cast their interdiction nets beyond illegal narcotics and announce

and ends with either a generalized or passenger-by-passenger request to conduct a consent search of the passengers' carry on luggage. After years of conflicting opinions in lower courts,¹² in 1991 the Supreme Court addressed bus sweeps in *Florida v. Bostick*.¹³ Over a vigorous dissent by Justice Marshall,¹⁴ the Court rejected what it viewed as the Florida Supreme Court's per se rule prohibiting bus sweeps¹⁵ and, in doing so, seemed to send the message "that lower courts are expected not to interfere with bus sweep procedures."¹⁶ Although the Supreme Court chose to remand the case for the application of its own analysis,¹⁷ the dire pronouncements from commentators that the Court had chosen to restrict citizens' Fourth Amendment protections in favor of the government's interest in fighting the drug war¹⁸ were reflected in lower court opinions throughout most of the 1990s.¹⁹

that they are looking for multiple types of contraband. See, e.g., *United States v. Guapi*, 144 F.3d 1393, 1394 (11th Cir. 1998) (quoting agent's announcement that he was checking carry on luggage for "illegal contraband such as alcohol, narcotics, weapons, or explosives"); *United States v. Manuel*, 992 F.2d 272, 273 (10th Cir. 1993) (discussing a situation in which an agent asked a passenger "if he was carrying any weapons, large amounts of cash or illegal drugs").

12. Compare *United States v. Flowers*, 912 F.2d 707, 712 (4th Cir. 1990) (holding that the bus sweep procedure did not amount to a "seizure" of the bus), and *United States v. Rembert*, 694 F. Supp. 163, 176 (W.D.N.C. 1988) (same), with *United States v. Felder*, 732 F. Supp. 204, 207-09 (D.D.C. 1990) (holding that the police conducting the bus sweep had "seized" the bus prior to questioning the accused).

13. 501 U.S. 429 (1991).

14. *Id.* at 440-51.

15. *Id.* at 439-40.

16. Wayne R. LaFave, *Pingitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729, 752; see also William R. O'Shields, Note, *The Exodus of Minorities' Fourth Amendment Rights into Oblivion: Florida v. Bostick and the Merits of Adopting a Per Se Rule Against Random, Suspicionless Bus Searches in the Minority Community*, 77 IOWA L. REV. 1875, 1889 (1992) ("As a result of the Court's decision in *Bostick*, arbitrary intrusions into the lives of bus passengers are judicially condoned.").

17. *Bostick*, 501 U.S. at 440.

18. See Bruce A. Green, "Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term, 70 N.C. L. REV. 373, 400 (1992) (explaining the result in *Bostick* as "the Court's preference for the societal interest in having suspects provide 'voluntary cooperation' to criminal investigators over the interest of individuals in being free from coercive encounters with the police") (footnote omitted); LaFave, *supra* note 16, at 752 (predicting that although "the optimistic side of [him] would like to think" that a post-*Bostick* court could apply the reasoning of the decision and "conclude that a bus passenger ... was seized ..., [he] doubt[s] this will be the case").

19. E.g., *United States v. Manuel*, 992 F.2d 272, 273-75 (10th Cir. 1993) (finding that a bus passenger accosted by police upon disembarking who had thrice refused to consent to a search of a package demonstrated his knowledge that he could refuse consent, therefore

After seven years of unremarkable application of the Supreme Court's *Bostick* analysis, which invariably led to the admissibility of evidence seized during bus sweeps,²⁰ in 1998 the Eleventh Circuit in *United States v. Guapi*²¹ fired the first salvo in a renewed skirmish over bus sweeps. By applying the Court's *Bostick* analysis to a routine bus sweep, but finding that an impermissible seizure had occurred,²² the Eleventh Circuit touched off a powderkeg of tension that had lain dormant for several years.

This Note first tracks the Supreme Court's development of the consent search exception to the Fourth Amendment's warrant requirement and then discusses the exceptions used in the context of bus sweeps.²³ The detailed treatment given to the procedural history of Terry Bostick's case before and after the Supreme Court's decision serves to illustrate the complexity of the constitutional questions posed by bus sweeps. This part contends that the polarization between the majority and dissenting opinions in *Bostick* was unnecessary and served to stunt a nuanced development of bus-sweep jurisprudence. Further, this part argues that rather than disparaging the majority opinion of *Bostick* as granting the police carte blanche in conducting bus sweeps, civil libertarians should embrace the opinion as opening a second avenue by which defendants can suppress evidence seized during bus sweeps. This section then analyzes the Eleventh Circuit's application of *Bostick* to a series of recent bus sweep cases and outlines the circuit split that has developed concerning the tactic.²⁴

indicating that the consent given in response to a fourth request to search his person was not coerced, but voluntary); *United States v. Gonzales*, 979 F.2d 711, 712-13 (9th Cir. 1992) (upholding Border Patrol drug interdiction procedure in which an officer would board a bus and conduct consent searches while the bus was in motion because "[t]he boarding of the bus did not affect the ability of ... passengers to ignore the officer and go about their business, which at the moment was to ride down the street").

20. *E.g.*, *United States v. Wright*, No. 96-4415, 1997 U.S. App. LEXIS 1254 (4th Cir. Jan. 27, 1997) (per curiam); *United States v. Phillips*, No. 94-5113, 1995 U.S. App. LEXIS 9541 (4th Cir. Apr. 26, 1995) (per curiam); *United States v. Rivera*, No. 93-3077, 1995 U.S. App. LEXIS 2411 (D.C. Cir. Jan. 25, 1995) (per curiam); *United States v. Hammond*, No. 92-3174, 1993 U.S. App. LEXIS 23048 (D.C. Cir. Aug. 27, 1993) (per curiam); *Gonzales*, 979 F.2d 711.

21. 144 F.3d 1393 (11th Cir. 1998).

22. *Id.* at 1397.

23. See *infra* notes 27-86 and accompanying text.

24. See *infra* notes 87-141 and accompanying text.

The next part examines the psychological backdrop of bus sweeps and argues that an inquiry into psychological coercion forms the fabric of the Supreme Court's *Bostick* standards.²⁵ To determine whether a police-passenger encounter was consensual and whether a passenger's consent to search was given voluntarily, then, requires courts to ascertain whether the initial encounter or the consent to search was the result of impermissible psychological coercion by the police. This part identifies three psychological theories which should inform courts in examining bus sweeps and applies the theories to the Eleventh Circuit's recent bus-sweep decisions. The analysis supports the Eleventh Circuit's application of the *Bostick* standards.²⁶

THE LEGAL ANALYSIS

The Approach

In protecting "[t]he right of the people to be secure ... against unreasonable searches and seizures,"²⁷ the Supreme Court has developed three broad categorizations of the "protean variety of ... encounter[s]"²⁸ between citizens and police. Searches conducted pursuant to a warrant issued by a magistrate and supported by probable cause are the traditional searches contemplated by the text of the Fourth Amendment.²⁹ The second category, brief stop-

25. See *infra* notes 143-60 and accompanying text.

26. See *infra* notes 161-241 and accompanying text.

27. U.S. CONST. amend. IV.

28. *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

29. See *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.") (footnotes omitted). In addition to the consent and stop-and-frisk exceptions to the probable cause-backed warrant requirement discussed in this Note, the Supreme Court has recognized at least four other excepted searches: those made (1) incident to arrest; (2) pursuant to the "hot pursuit" doctrine; (3) pursuant to the "plain view" doctrine; (4) under "exigent circumstances." Jacqueline J. Warner, *The Exigent Circumstance Exception to the Warrant Requirement of the Fourth Amendment: What Criteria Must Be Met?*, 33 HOW. L. J. 425, 425 n.3 (1991). With at least six exceptions to the original text, one is reminded of Edwin Meese III's warning that an awareness of "the necessary distinction between the Constitution and constitutional law ... is essential to maintaining our limited form of government." Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 981

and-frisk detentions and searches based on an officer's reasonable and articulable suspicion of a crime, are considered "seizures" of citizens under the Fourth Amendment and therefore trigger its protection.³⁰ If a court finds that a suspect's arrest or stop-and-frisk detention was an improperly supported seizure, the evidence discovered as a result of the search will not be admissible at trial.³¹ The third category involves mere encounters between police and citizens during which an officer is free to approach a citizen and the citizen is likewise free to engage the officer or ignore him altogether.³² Incident to such a consensual encounter, an officer is free to ask the citizen for consent to search the citizen's person or belongings and, again, the citizen is free to grant or deny consent to the search.³³ "[A]s long as the police do not convey a message that compliance with their requests is required,"³⁴ these encounters are not seizures and do not implicate the Fourth Amendment.³⁵ Evidence obtained as a result of a citizen's voluntary consent to search is admissible in court.³⁶

Since the Supreme Court addressed the Fourth Amendment implications of bus sweeps in 1991, the federal courts of appeal have adopted a common methodology for analyzing this drug

(1987).

30. *Terry*, 392 U.S. at 16-19; *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (declining to find a public safety exception to the reasonable suspicion standard and holding that brief, suspicionless roadblocks with the primary purpose of drug interdiction constitute impermissible seizures under the Fourth Amendment).

31. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to criminal trials in state courts and thereby setting the minimum threshold of Fourth Amendment protections in all search and seizure cases).

32. *Michigan v. Chesternut*, 486 U.S. 567, 576 (1988) (concluding that no seizure takes place as long as a citizen is "free to disregard the police presence and go about his business").

33. *Florida v. Royer*, 460 U.S. 491, 501 (1983) (plurality opinion).

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

35. *Id.* at 434.

36. *Royer*, 460 U.S. at 497:

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

The Court went on to remark that evidence found during a search to which one voluntarily consented would be admissible. *Id.* at 501.

interdiction tactic.³⁷ By definition, bus sweeps are random encounters—conducted without reasonable suspicion—that make a *Terry*-based intrusion on passengers.³⁸ Accordingly, a search conducted during a bus sweep must be grounded in the passenger's consent to the search. To establish valid consent, the government must first prove that the bus-sweep procedure in question did not constitute a "seizure," the test being "whether a passenger who is approached during a sweep 'would feel free to decline the officers' requests or otherwise terminate the encounter.'"³⁹ Second, if the on-bus encounter is not a "seizure," the prosecution must show that, taking all the surrounding circumstances into account, the consent to search was voluntarily given and was not the product of police coercion.⁴⁰ If a court finds that the consent given was the result of police coercion, then the consent is invalid and any evidence discovered will be inadmissible as the product of an unreasonable search.⁴¹ Though it is a relevant factor in the analysis, a suspect

37. See *infra* notes 87-88 and accompanying text.

38. Police have often tried to justify the bus sweep tactic by claiming that they target buses emanating from police-defined "source cities" of narcotics. Standing alone, the "source city" factor does not rise to the level of reasonable suspicion, but it appears to be relevant to some courts. See *United States v. Smith*, 201 F.3d 1317, 1323 (11th Cir. 2000) (finding a bus's departure from the "source city" of Miami to be "not an insignificant factor" creating a reasonable suspicion for officers to search a suspect) (quoting *United States v. Bowles*, 625 F.2d 526, 534 (5th Cir. 1980)); *United States v. Lewis*, 921 F.2d 1294, 1296 (D.C. Cir. 1990) (including New York as one of the "drug-source cities" from which bus passengers were interviewed); *United States v. Flowers*, 912 F.2d 707, 708 (4th Cir. 1990) (claiming that "Detroit was known by [the arresting officer] to be a source city for narcotics"). Also, Justice Marshall noted a possible racial component of bus sweeps by suggesting officers pressed for time may be more likely to single out blacks for questioning. *Bostick*, 501 U.S. at 442 n.1 ("[T]he basis of the decision to single out passengers during a suspicionless sweep is less likely to be *inarticulable than unspeakable*."); see also Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1462 (2000) ("Police hunches in drug interdiction all too often reduce to racial stereotypes, and consent is extracted from those who historically have had the most to fear from refusing police requests.").

39. *Bostick*, 501 U.S. at 444 (Marshall, J., dissenting). In agreeing that this is the appropriate "seizure" test, the dissent made this standard unanimous.

40. *Id.* at 438 ("Consent" that is the product of official intimidation or harassment is not consent at all."); see also *United States v. Mendenhall*, 446 U.S. 544, 557 (1980) (explaining in the context of an encounter in an airport which led to a consent search that "[t]he question whether the [suspect's] consent ... was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances ... and is a matter which the government has the burden of proving").

41. *Schneekloth v. Bustamonte*, 412 U.S. 218, 233 (1973).

does not have to know that he has the right to refuse consent for a court to determine that the consent was nonetheless "voluntary."⁴²

The bus sweep tactic of drug interdiction dates to the early 1980s.⁴³ As with many innovations within law enforcement or elsewhere, the nuances of bus sweeps came into focus only after several years' experience with the tactic. After roughly eight years of lower court treatment, the Supreme Court, in its 1991 *Bostick* opinion, set the standards for analyzing bus sweeps under the Fourth Amendment. In the wake of *Bostick*, the federal courts of appeal moved cautiously, arriving at a consensus on methodology for applying the *Bostick* standards and invariably finding no constitutional violations. However, seven years after *Bostick* and nearly two decades after bus sweeps came into being, the Eleventh Circuit, guided by the Supreme Court's standards and supported by the methodological consensus, gave nuanced treatments to a series of bus sweep cases, finding Fourth Amendment violations in each. The subtle clarity of the Eleventh Circuit's vision is best appreciated through a thorough review of the historical trajectory of bus sweep jurisprudence.

Florida v. Bostick

During a scheduled stopover in Ft. Lauderdale, the bus on which Terry Bostick was riding from Miami to Atlanta was the

42. See *Bostick*, 501 U.S. at 432 (finding the fact that Bostick had been informed that he could refuse consent to be "particularly worth noting"); *Schneekloth*, 412 U.S. at 249 (noting that "while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent"). For a critique of the Court's reasoning allowing uninformed consent, see Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 792-95 (1992).

43. Apparently, the bus sweep technique was developed in Broward County, Florida. See Kenneth W. Starr, Oral Argument on Behalf of the United States as Amicus Curiae, 1991 U.S. Trans. LEXIS 156, *16-17, *Florida v. Bostick*, 501 U.S. 429 (1991). The fact that Solicitor General Starr appeared before the United States Supreme Court to support the State of Florida in *Bostick* is not surprising as the bus sweep tactic was created in the wake of President Reagan's declaration of the War on Drugs in the fall of 1982. See President Ronald Reagan, Radio Address to the Nation (Oct. 2, 1982), in 18 WEEKLY COMP. PRES. DOC. 1249, 1250 ("The mood towards drugs is changing in this country, and the momentum is with us. We're making no excuses for drugs—hard, soft, or otherwise. Drugs are bad, and we're going after them.").

site of a random bus sweep conducted by two Broward County sheriff's deputies.⁴⁴ "[C]omplete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol," the officers approached Bostick and asked to see his ticket and identification.⁴⁵ After the documents were returned to Bostick as "unremarkable," the officers explained that they were on a drug interdiction assignment and asked Bostick to consent to a search of his carry on luggage.⁴⁶ Bostick claimed that he had not consented to the subsequent search which revealed cocaine, but the trial judge found that the bus sweep did not amount to a "seizure" and that Bostick had consented to the search.⁴⁷

Bostick's petition for a rehearing of the facts was denied, but while affirming the trial court's decision, the Florida appeals court certified the question of the legality of consent search bus sweeps to the Florida Supreme Court.⁴⁸ In granting review of the

44. *Bostick v. State*, 510 So. 2d 321, 322 (Fla. Dist. Ct. App. 1987) (Letts, J., dissenting).

45. *Id.* (footnote omitted).

46. *Id.*

47. *Id.* ("Inherently, the trial judge's [denial of the motion to suppress] was tantamount to a holding that a consensual police encounter took place rather than an illegal intrusion equivalent to a seizure."). Bostick's contention that he did not consent to the search was a question of fact decided in the State's favor by the trial judge. *Id.*

48. *Id.* at 322. In effect, the certified question was a modified version of Bostick's motion to suppress the cocaine. Notably, the question certified to the Florida Supreme Court encompassed both the seizure and the consent to search. It read: "May the police without articulable suspicion board a bus and ask at random, for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?" *Id.*

The lone dissent from the per curiam decision was vehement in answering the certified question in the negative. Judge Letts presciently applied the *Chestnut* "free to leave" test, later recrafted by the Supreme Court as a "free to decline the officer's requests" test, to find that Bostick was seized by the deputies:

[M]y version of common sense tells me that a paid and ticketed passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary stopover, while two policemen, one with a pouched gun in his hand, are standing over him in a narrow aisle asking him questions and requesting permission to search his luggage. It is not a question of whether he actually was free to leave, as all of us trained lawyers know he was. The test is whether a layman would reasonably be expected to believe he was free to leave under these circumstances. I conclude he would not.

My having decided that the defendant was not free to leave, it follows that the police questioning under the facts of this case constituted an illegal detention and seizure.

Id. at 323.

procedure, the Florida Supreme Court rephrased the certified question to focus entirely on the prerequisite seizure analysis, effectively reading the voluntariness of a passenger's consent out of the equation.⁴⁹ The court, weighing all of the circumstances surrounding the bus sweep, "ha[d] no doubt that the Sheriff's Department's standard procedure of 'working the buses' is an investigative practice implicating the protections against unreasonable seizures of the person."⁵⁰ The court realized that its per se prohibition of bus sweeps would hamper drug interdiction efforts to a degree, but nonetheless reasoned that "[t]he intrusion upon privacy rights caused by the ... policy [was] too great for a democracy to sustain."⁵¹ Due to a change in the Florida Constitution

49. As rephrased by the Florida Supreme Court, the certified question read: "Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage?" *Bostick v. State*, 554 So. 2d 1153, 1154 (Fla. 1989). This rephrasing is significant because it implicitly accepts that Bostick's consent to search was given voluntarily. As evidenced by the district court's emphasis on the fact that the deputies had advised Bostick that he could refuse to grant consent to search, the consent question had not been settled. *See supra* note 40. In foreclosing the consent to search issue, the Florida Supreme Court decided to decide too little; in doing so it decided too much. Its decision to change the certified question paved the way for its per se ruling that all bus sweeps are seizures. Determining that the deputies did not have a reasonable suspicion to believe that Bostick was engaging in an illegal activity, the court ended its inquiry. *Bostick*, 554 So. 2d at 1158. The consent to search analysis was never reached except for the formality of concluding that Bostick's consent to search never "overcame the taint of the illegal police conduct." *Id.*

50. *Id.* at 1156. In determining that Bostick had been "seized," the court noted the restraining setting of a bus and the "very intimidating" actions of the officers including that they wore raid jackets, stood over Bostick, blocked the aisle, and that one carried a recognizable gun pouch in his hand. *Id.* at 1157-58.

51. *Id.* at 1158. The court continued with a flourish:

Without doubt the inherently transient nature of drug courier activity presents difficult law enforcement problems. Roving patrols, random sweeps, and arbitrary searches or seizures would go far to eliminate such crime in this state. Nazi Germany, Soviet Russia, and Communist Cuba have demonstrated all too tellingly the effectiveness of such methods. Yet we are not a state that subscribes to the notion that ends justify means. History demonstrates that the adoption of repressive measures, even to eliminate a clear evil, usually results only in repression more mindless and terrifying than the evil that prompted them. Means have a disturbing tendency to *become* the end result.

Id. at 1158-59.

a few years earlier, however, Terry Bostick's third court appearance would be far from his last.⁵² The State of Florida appealed the

52. That the decision of the Florida Supreme Court was appealable to the U.S. Supreme Court may have been the unkindest cut of all for Terry Bostick. Prior to a 1982 amendment to the Florida Constitution, the language of its Article 1, Section 12 was in substance identical to that of the Fourth Amendment to the U.S. Constitution. That these search and seizure provisions read the same, however, did not mean that they were interpreted identically by the respective high courts. The United States Supreme Court had determined that the federal Constitution establishes only the minimum level of individual liberties states must accord their citizens and that states are encouraged to interpret analogous provisions in their own constitutions to grant citizens broader protections. *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980); see also William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."). In 1982, Article I, Section 12 of the Florida Constitution was amended to include provisions that the State's search and seizure protections "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court" and that evidence gathered in violation of the right would not be admissible in court "if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution." FLA. CONST. of 1968, art. I § 12 (amended 1982). Prior to the 1982 amendment, the Florida Supreme Court's decision prohibiting bus sweeps would not have been appealable to the United States Supreme Court and would have become the law in Florida, subject only to new constitutional amendment explicitly authorizing the technique or a subsequent decision by the Florida Supreme Court overturning the per se rule.

In a bus sweep case coming on the heels of the Supreme Court's *Bostick* decision, and again involving the Broward County Sheriff's Department, a Florida appeals court chief judge bemoaned the fact that his hands were tied in having to overturn a motion to suppress granted by the trial court prior to the United States Supreme Court's *Bostick* decision: "We Floridians, however, because of a constitutional amendment in 1982, abandoned any claim we might have for self-determination in Fourth Amendment cases by voting to add limiting language to our then inviolate section 12 of our Declaration of Rights" *State v. Kuntzwiler*, 585 So. 2d 1096, 1097 (Fla. Dist. Ct. App. 1991) (Glickstein, C.J., concurring). The chief judge later added that "the decision was immensely unwise; and the subsequent majority decision of the United States Supreme Court [in *Bostick*] ... gutting the "Per Se" rule, proves my point—at least to me." *Id.* at 1098.

By contrast, the Commonwealth of Pennsylvania operates exactly as Chief Judge Glickstein envisioned. Article 1, Section 8 of the Pennsylvania Constitution mirrors that of the Fourth Amendment. However, the Pennsylvania Supreme Court has interpreted its "search and seizure" protections to be broader than that of the Federal Constitution. *E.g.*, *Commonwealth v. Edmunds*, 586 A.2d 887, 894-95 (Pa. 1991) (discussing and emphasizing factors to be considered in analyzing Pennsylvania's constitution and noting that states are permitted and indeed encouraged to provide broader protections than the federal government). In a bus sweep in which the officers' conduct reflected their "aware[ness] of the need to maintain a non-coercive atmosphere," and the facts of which were demonstrably less intimidating than those that ensnared Terry Bostick, a Pennsylvania appeals court held that officers conducting bus sweeps in effect "seize the bus" and only a finding that a reasonable

ruling, and the United States Supreme Court agreed to hear the case during its 1991 Term.⁵³

Writing for the six-Justice majority, Justice O'Connor noted early in her decision that the Florida Supreme Court had "rephrased and answered the certified question so as to make the bus setting dispositive in every case."⁵⁴ O'Connor correctly recognized that by answering the rephrased question in the affirmative, "[t]he Florida Supreme Court thus adopted a per se rule that the ... practice of 'working the buses' is unconstitutional."⁵⁵ Justice Marshall, writing for the dissent, took a different view of the Florida Supreme Court's decision by characterizing it not as a per se rule, but as a decision which "drew heavily" on the facts established by the district court.⁵⁶ Whereas the majority read the certified question on its face,⁵⁷ Justice Marshall incorporated the underlying facts into his analysis of the question presented.⁵⁸

Neither the majority nor the dissenting opinion was entirely consistent with their respective framings of the issue. The majority cast the issue as necessitating a narrow analysis of whether the deputies seized Bostick but later reanimated the consent analysis, thus allowing a flexible, more encompassing application sensitive to all of the circumstances surrounding particular bus sweep procedures.⁵⁹ The dissent viewed its analysis as resting on factual premises, but in fact *did* want a strict per se rule prohibiting bus sweeps.⁶⁰

suspicion existed will support such a search. *Commonwealth v. Vasquez*, 703 A.2d 25, 28, 32 (Pa. Super. 1997).

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

54. *Id.* at 433.

55. *Id.*

56. *Id.* at 445-46 (Marshall, J., dissenting).

57. The majority viewed the "sole issue presented" to be a determination of whether the bus sweep procedure at issue "necessarily constitutes a 'seizure' within the meaning of the Fourth Amendment." *Id.* at 433.

58. Justice Marshall chastised the majority for "treat[ing] as irrelevant the analysis of facts that the parties neglected to cram into the question presented in the petition for certiorari." *Id.* at 446 (Marshall, J., dissenting).

59. See *infra* notes 67-72 and accompanying text.

60. See *Bostick*, 501 U.S. at 444 (Marshall, J., dissenting) (disagreeing with the majority's suggestion that "the suspicionless, dragnet-style sweep of buses ... is perfectly compatible with the Constitution").

In analyzing the initial on-bus encounter, the Court analogized bus sweeps to the random INS factory checks for illegal aliens at issue in *INS v. Delgado*.⁶¹ Just as the workers in *Delgado* may have felt confined to stay at their work stations due to their "voluntary obligations to their employers" and were not restricted by the actions of INS agents,⁶² the Court reasoned that Bostick's claimed sense of being confined "was the natural result of his decision to take the bus" and that "it says nothing about whether or not the police conduct at issue was coercive."⁶³ The Court did not decide whether the initial encounter constituted an impermissible "seizure" of Bostick; rather it advised the Florida Supreme Court to answer the question taking into account all of the circumstances of the encounter.⁶⁴ If the deputies' conduct was such that a reasonable person would not have felt free to ignore their presence, Bostick would have been considered impermissibly "seized" under the Fourth Amendment.⁶⁵ The Court was not explicit on the point, but presumably the fact that the encounter took place in the confined space of a bus remained a relevant factor.⁶⁶

61. 466 U.S. 210 (1984).

62. *Id.* at 218.

63. *Bostick*, 501 U.S. at 436. The majority's analysis, focused on the actions of the officers, might have been different had the deputies waited for Bostick to reboard the bus at the end of a lengthy stopover before initiating the encounter, thus taking advantage of the setting. This sweep, however, took place during a brief stop and "through" passengers did not have time to exit the bus during the stopover. *See id.* at 435-36.

64. *Id.* at 437.

65. *Id.* (citing *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

66. This Note does not argue that the Supreme Court wrongly decided *Bostick*. Rather, it contends that whether police notify passengers that they can refuse to engage in an on-bus encounter and deny a search request is a particularly important consideration for courts analyzing bus sweeps, and that such an approach is consistent with *Bostick*. *See id.* at 432, 433 (identifying the "sole issue presented for ... review" whether the bus sweep "necessarily constitute[d] a 'seizure' within the meaning of the Fourth Amendment and finding it 'particularly worth noting ... [that] police specifically advised Bostick that he had a right to refuse consent.'" (emphasis added)).

At the initial encounter stage, for instance, *Miranda*-like warnings would serve as a bridge between the "free to leave" principle of *Chesternut* and the "free to terminate the encounter" standard the Court set in *Bostick*. That is, whereas *Miranda*-like warnings may not be necessary in dynamic open settings where courts can weigh a greater range of objective criteria in determining whether a reasonable person would have felt "free to leave," in static bus sweep scenarios, *Miranda*-like warnings are the best way for police to compensate for passengers "confined" on a bus. Therefore, the absence of warnings is a strong indication to courts that a reasonable passenger would not have felt "free to terminate the encounter" with

The Court could have remanded the case at the point it established the standard for determining whether the initial on-bus encounter constituted a "seizure," but to its credit the Court revived the analysis concerning the voluntariness of the consent to search.⁶⁷ It is this second question that the Florida Supreme Court had eliminated in its rephrasing of the certified question from the district court.⁶⁸ Citing *Florida v. Royer*⁶⁹ and other consent search cases, Justice O'Connor again determined that "all the circumstances surrounding the encounter"⁷⁰ should be weighed, having earlier stressed the lower court finding that "the police specifically advised Bostick that he had the right to refuse consent."⁷¹ Significantly, here the Court made explicit the importance of the bus setting: "The cramped confines of a bus are one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary."⁷² Taken as a whole, the majority's position, though decried by the dissent as sacrificing citizens' liberty interests in favor of facilitating the drug war,⁷³ provided ample opportunity for the Florida Supreme Court to find that Bostick either had been impermissibly seized by the deputies at the initial encounter stage of the interdiction or that his consent to the search was not voluntary, but rather was the product of police coercion. This seriatim approach gave Bostick two bites at the apple—even if the Florida Supreme Court determined that the initial on-bus encounter was consensual, Bostick's motion to suppress would still

police.

67. See *id.* at 438. The majority noted that "a bus passenger's decision to cooperate with law enforcement officers authorizes the police to conduct a search without first obtaining a warrant *only* if the cooperation is voluntary." *Id.*

68. See *supra* notes 48-49 and accompanying text.

69. 460 U.S. 491 (1983) (plurality opinion). *Royer* captured in a single sentence the seriatim approach courts must take by analyzing first whether an initial police-citizen encounter was consensual, then whether the consent to search was granted voluntarily: "[I]f the events in this case amounted to no more than a permissible police encounter in a public place or a justifiable *Terry*-type detention, *Royer's* consent, if voluntary, would have been effective to legalize the search of his two suitcases." *Id.* at 501.

70. *Bostick*, 501 U.S. at 439.

71. *Id.* at 432.

72. *Id.* at 439.

73. See *id.* at 440 (Marshall, J., dissenting) ("Our Nation, we are told, is engaged in a 'war on drugs.' ... But the effectiveness of a law-enforcement technique is not proof of its constitutionality.").

be granted if his subsequent consent to the search was found to be the involuntary product of police coercion.

The dissent criticized the majority for reaching the voluntariness of the consent to search issue, the discussion of which would have been obviated had the majority found an impermissible seizure at the initial encounter stage.⁷⁴ To Justice Marshall, "the issue [was] not whether a passenger in respondent's position would have felt free to deny consent to the search of his bag, but whether such a passenger ... would have felt free to terminate the antecedent encounter with the police."⁷⁵ The Florida Supreme Court had unwisely foreclosed the consent to search question in rephrasing the certified question, and the dissent here is similarly guilty of stunting a full analysis of both issues. The dissent neglected the possibility that the majority opinion, while rejecting the *per se* rule that under the Fourth Amendment officers may never approach citizens on buses for the purpose of conducting consent searches, left the constitutionality of the initial encounter open to a case-by-case determination *and* reanimated the possibility of invalidating the on-bus search by finding coerced consent. Focusing solely on the initial encounter, the dissent hypothesized that police could avoid a determination that they had illegally seized a passenger if the officers first advised those confronted that they could decline to be questioned.⁷⁶ By obviating the need to reach the voluntariness of the consent to search analysis, Justice Marshall missed the opportunity to instruct courts that they could grant a motion to suppress based on the latter half of the two-stage analysis.

On remand, the question put to the Florida Supreme Court was "whether Bostick chose to permit the search of his luggage."⁷⁷ Answering the remanded question required the Florida Supreme Court to first apply Justice O'Connor's adapted "free to leave" test to evaluate the permissibility of the initial on-bus encounter. Only if it found the initial encounter to have been consensual would the

74. See *id.* at 447 (Marshall, J., dissenting) (arguing that the voluntariness question "[was] completely irrelevant ... if [Bostick] was unlawfully seized when the officers approached him and initiated questioning").

75. *Id.* at 447 (Marshall, J., dissenting).

76. See *id.* at 450 (Marshall, J., dissenting).

77. *Id.* at 438.

Florida Supreme Court have had to confront "stage two," the voluntariness of the consent to search. A finding that Bostick voluntarily consented to the search of his luggage at this second stage of the analysis would mean that the search was allowable under the Fourth Amendment.

Thus, the two-stage analysis offered two opportunities for the Florida Supreme Court to grant Bostick's motion to suppress. First, if on remand the court found that police conduct at the initial encounter stage was such that Bostick could not reasonably have felt at liberty to decline or end the encounter with police, Bostick would have been considered impermissibly "seized" at that point and his motion to suppress the evidence found in the subsequent search would be granted. This "seizure" determination would have obviated the need to determine whether the consent to search was voluntary. If, however, the initial encounter between Bostick and the deputies was found to be consensual, the court would then have had to determine whether Bostick's consent to search was given voluntarily. This is the second bite at the apple. If the Florida Supreme Court had applied Justice O'Connor's analysis and, considering the totality of the circumstances, found that Bostick's consent to the search was coerced, his motion to suppress would have been granted at this stage. The Florida Supreme Court would have been forced away from its *per se* rule only slightly.⁷⁸

Further illustrating the closeness of the constitutional questions posed by the bus-sweep tactic, a change in the composition of the Florida Supreme Court appears to have swung the balance against Mr. Bostick.⁷⁹ In the two years since Bostick's first appearance before the Florida Supreme Court, Chief Judge Ehrlich, who had been in the majority that established the *per se* rule prohibiting bus sweeps, had left the court.⁸⁰ His replacement, Judge Harding, joined by the original three dissenting judges, voted to deny Bostick's

78. The result could have been a rule akin to a rebuttable presumption that police-initiated encounters on buses constitute seizures, or alternatively, that the procedure and confines of a bus are so inherently coercive that defendants would be granted a rebuttable presumption that the consent to search was involuntary.

79. That Bostick's fate turned on a personnel change on the Florida Supreme Court also furthered his incredible run of bad legal luck that began with the change in the Florida Constitution. See *supra* note 52 and accompanying text.

80. *Bostick v. State*, 593 So. 2d 494, 495 (Fla. 1992) (*per curiam*).

motion to suppress.⁸¹ The three judges who had joined Chief Judge Ehrlich two years earlier comprised the dissent on remand.⁸²

The four-judge majority, on remand, inexplicably abdicated its responsibility to apply the tests laid out by the Supreme Court and, in what was essentially a one-line per curiam opinion devoid of any analysis, approved the district court's denial of Bostick's motion to suppress lodged five years earlier.⁸³ Judge Barkett, the author of the majority opinion two years earlier, acknowledged the Supreme Court's rejection of his per se rule, but nonetheless dissented.⁸⁴ He applied the totality of the circumstances test as dictated by the Supreme Court and found that, "under the specific facts of this case," Bostick had been illegally seized before he consented to the search.⁸⁵ Judge Barkett's analysis indicated that the dissent indeed viewed the Supreme Court's opinion as calling for a seriatim approach and that a motion to suppress could succeed at either the initial encounter or request to search stage.⁸⁶

The Eleventh Circuit

The Supreme Court's decision in *Bostick* precipitated a lull on the bus-sweep front of the drug war as the few reported federal circuit court cases found the encounters to be permissible nonseizures and the consents to search voluntary.⁸⁷ To the degree that anything can

81. *Id.*

82. *Id.*

83. *Id.* After a terse recitation of the procedural history of the case, the majority rendered its decision. It read in full: "In light of the Supreme Court's opinion, we now approve the decision of the district court." *Id.*

84. *Id.* at 496 (Barkett, J., dissenting) ("I am mindful that under certain circumstances, a reasonable person may feel free to terminate an encounter with the police when confronted in the confines of a bus, but I do not find those circumstances to exist here.").

85. *Id.* at 495 (Barkett, J., dissenting) (emphasis omitted). Factors that indicated to the dissent that Bostick had been seized included: (1) the presence of multiple officers wearing jackets bearing the insignia of their department; (2) that the officers proceeded directly to Bostick at the rear of the bus; (3) the recognizable gun pouch one deputy carried; (4) that the officers blocked the aisle; and (5) the persistent questioning of the deputies. *Id.*

86. *See id.* (Barkett, J., dissenting) (noting that a reasonable person in Bostick's situation "would not have felt free to ignore the police or to decline to consent to a search") (emphasis added). This language is similar to that of the "initial encounter" test of *Bostick*, but clearly bifurcates the analysis into "initial encounter" and "consent to search" components.

87. *See supra* note 20 and accompanying text. In contrast, the years leading up to *Bostick* produced many lengthy and often rancorous opinions concerning the bus sweep tactic. *E.g.*,

be read into the fact that many of these opinions were unpublished, one may suspect that denials of motions to suppress in bus sweep cases had become pro forma. This lack of analysis can be traced through the one-line opinion by the Florida Supreme Court majority on remand to Justice Marshall's dissent.⁸⁸ Both of these opinions failed to acknowledge that Justice O'Connor's decision, though it vacated Florida's per se rule, in fact created a seriatim approach offering suspects caught in bus sweeps two opportunities to suppress evidence found during the sweeps.⁸⁹ A suspect could either show that he was impermissibly seized at the initial encounter stage or he could prove that his consent to search was involuntarily coerced. On remand, the Florida Supreme Court's dissent was methodologically instructive, though drowned out by the majority's

United States v. Madison, 936 F.2d 90 (2d Cir. 1991); United States v. Lewis, 921 F.2d 1294 (D.C. Cir. 1990); United States v. Flowers, 912 F.2d 707 (4th Cir. 1990); United States v. Fields, 909 F.2d 470 (11th Cir. 1990); United States v. Hammock, 860 F.2d 390 (11th Cir. 1988).

88. Early in his dissent, Justice Marshall lamented that he "[could] not understand how the majority could possibly suggest an affirmative answer" to the question of whether a passenger in Bostick's position "would feel free to ... terminate the encounter" with police. *Florida v. Bostick*, 501 U.S. 429, 444-45 (1991) (Marshall, J., dissenting). The conclusiveness of this statement seemed to deflect Justice Marshall's reasoning away from a fuller consideration of the majority's two part analysis. Instead of focusing solely on the initial encounter, the dissent's opinion would have been more instructive—not to mention encouraging to lower courts disposed to finding bus sweep procedures violative of the Fourth Amendment—had it applied the voluntariness test to the circumstances surrounding Bostick's granting of consent to search and found that consent to have been the involuntary product of police coercion.

89. In his defense, Justice Marshall may have noted the majority's two stages of analysis, but simply decided the case by finding that Terry Bostick had been impermissibly seized at the initial encounter stage. In any event, the Florida Supreme Court majority on remand deserves the lion's share of the blame because it failed to apply any of the analysis supplied by Justice O'Connor. With its one-line opinion, the majority abdicated its "duty of responsiveness" that the "[w]riting [of] judicial opinions imposes on the writer," and seemed to stunt not only its own deliberative judgment, but also that of courts in subsequent bus sweep cases. See ANTHONY T. KRONMAN, *THE LOST LAWYER* 330 (1993); see also GEORGE WYTHE, *DECISIONS IN CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY* 88 (1795), quoted in IMOGENE E. BROWN, *AMERICAN ARISTIDES* 263 (1981) (commenting sarcastically on the "mature deliberation" of a court of appeals that dismissed his "lengthy, meticulously defined, decision in one sentence with no explanation": "This specimen of refutation seemeth not less happy than compendious. 1, it is economical, for by it are saved the expenses of time and labour requisite, in a dialectic investigation, which is sometimes perplexed with stubborn difficulties.").

summary disposal of the case.⁹⁰ Its value lay in fleshing out the seriatim approach indicated by Justice O'Connor and in showing that if one applies the analysis, the constitutionality of a bus sweep is an open question.

Even though the post-*Bostick* courts reached the same result in bus sweep cases, the few detailed opinions were significant in that, like the Florida Supreme Court dissenters in the *Bostick* remand, they employed a seriatim approach by analyzing the initial encounter and then the request to search as separate issues.⁹¹ A series of recent decisions by the Eleventh Circuit, however, has reinvigorated the debate over the bus sweep technique for interdicting drugs.⁹² In these cases, the Eleventh Circuit has cemented the view that the Supreme Court in *Bostick* indicated that the initial encounter and the consent to search call for distinct analyses. More radically, the Eleventh Circuit has applied the Supreme Court's tests to routine bus sweeps and has concluded that the encounter was either an illegal seizure or that the consent to search had not been given voluntarily, but rather was the result of police coercion. Motions to suppress have been granted at both stages.

In *United States v. Guapi*,⁹³ the Eleventh Circuit determined that considering all of "the circumstances in which the consent was obtained, [the defendant's consent] was not an uncoerced, voluntary

90. The Florida Supreme Court's one-line reinstatement of the trial court's denial of *Bostick*'s motion to suppress may be explained best by game theory. See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 85 (2000) (describing the game of tit-for-tat as a "series of periods in which one player tries to cooperate while the other is retaliating for wrong done in a previous period") (citation omitted). The new majority may have been retaliating against the original majority's rephrasing of the certified question two years earlier which, when answered affirmatively, was dispositive in all bus sweep cases. Now holding the upper hand, the new majority asserted its power in a similarly conclusory manner.

91. See, e.g., *United States v. Gonzales*, 979 F.2d 711, 712-15 (9th Cir. 1992) (considering separately whether "the Constitution permitted the border patrol agent to speak with Gonzales" and whether a "request to a passenger's baggage in a routine bus sweep is permitted by the Constitution"); see also *In re J.M.*, 619 A.2d 497, 504 (D.C. 1992) (holding that the initial on-bus encounter was not a seizure, but remanding on the consent to search issue).

92. See *United States v. Drayton*, 231 F.3d 787 (11th Cir. 2000); *United States v. Smith*, 201 F.3d 1317 (11th Cir. 2000); *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998); *United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998).

93. 144 F.3d 1393 (11th Cir. 1998).

consent as is required to validate such a warrantless search."⁹⁴ Writing for the unanimous court, Judge Roney reasoned that under the circumstances of the case, "a reasonable person in the defendant's position would not have felt free to disregard [the officer's] requests without some positive indication that consent could have been refused."⁹⁵ Central to this finding was the bus setting,⁹⁶ the behavior of the police given the setting,⁹⁷ and that, unlike in *Bostick*, the police here did not advise the passengers that they could decline the search.⁹⁸ The court was not willing to create a per se rule that a bus sweep absent notification to passengers of the right to refuse a search request necessarily taints the search, but it remarked that the notice is an "important factor."⁹⁹ Looking to other factors surrounding the encounter, the court noted four additional circumstances which pointed to the court's conclusion that the search was "constitutionally unreasonable."¹⁰⁰ Each of

94. *Id.* at 1393.

95. *Id.* at 1395.

96. *Id.* ("As this case graphically illustrates, the cramped confines of a bus create an environment uniquely susceptible to coercive police tactics.").

97. *Id.* (finding that rather than merely avoiding "egregiously abusive police tactics," the police have an affirmative duty to "behave in a manner calculated to convey to a reasonable person that cooperation with law enforcement is voluntary").

98. *Id.*

99. *Id.* The court continued: "Providing a simple notification to bus passengers is perhaps the most efficient and effective method to ensure compliance with the Constitution." *Id.*

The notion that a consent to search must be considered voluntary in order to be valid has its roots in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The *Schneckloth* Court considered the possibility of police advising the accused of his right to refuse consent, but dismissed this idea as "thoroughly impractical" because consent searches "normally occur ... under informal and unstructured conditions" and "may develop quickly or be a logical extension of investigative police questioning." *Id.* at 231-32. Even if one were to concede this point in the context of a roadside stop or questioning of potential witnesses to a crime, the "impracticality" does not hold in routine drug sweeps of buses in which police announce their identity, purpose, and procedures from a script. See *infra* notes 149-50 and accompanying text. The Eleventh Circuit realized that adding a one-line general warning that passengers have the right to refuse consent to a search would only take a few seconds.

Interestingly, the per se rule the Eleventh Circuit narrowly averted by considering the lack of a warning an "important factor" mirrors the original question the Florida appeals court had certified to the Florida Supreme Court eleven years earlier, but which the Florida Supreme Court rephrased. See *supra* notes 48-49 and accompanying text.

100. *United States v. Guapi*, 144 F.3d 1393, 1395-96 (11th Cir. 2000). The court noted a fifth factor—testimonial evidence by a bus driver who regularly worked the route and thought passengers were not free to leave the bus without being searched—supported a conclusion that a passenger may not have felt free to leave the bus until the bus sweep was

these factors was implicated either directly or by analogy in the Supreme Court's *Bostick* analysis and was likewise noted by the Florida Supreme Court dissenters on remand. The Eleventh Circuit in *Guapi* noted that: (1) the bus was on a layover during which the passengers naturally wanted to stretch their legs;¹⁰¹ (2) the bus driver disembarked, leaving the officers as the only authority figures present;¹⁰² (3) the officers' announcement of the bus sweep was rapid and mumbled, indicating that cooperation was expected;¹⁰³ and (4) the officers blocked the aisle.¹⁰⁴

The bus sweep at issue in *Guapi* was a particularly offensive procedure that allowed the Eleventh Circuit to get its foot in the door in re-examining bus sweeps. Unlike the paradigmatic bus sweep in which officers mount the bus, announce themselves, and then conduct individualized questioning, the officers in *Guapi*,

completed. See *id.* at 1396-97. However, the *Guapi* analysis has been followed by the Eleventh Circuit in *Washington* and *Smith*, *supra* note 92, absent such testimony.

101. *Id.* at 1397. Even though the police in *Bostick* boarded the bus during a short layover during which passengers were not expected to exit, the Supreme Court nonetheless invoked the spirit of *Chesternut*'s "free to leave" test by adopting a "free to ignore" standard. The Court reaffirmed its adherence to *Chesternut* by expanding its reach. See *supra* note 65 and accompanying text. On remand the Florida Supreme Court dissent reasoned that the *Bostick* bus sweep "was not a casual encounter" in which a citizen could ignore the police. *Bostick v. State*, 593 So. 2d 494, 495-96 (Fla. 1992) (*per curiam*) (Barkett, J., dissenting).

102. *Guapi*, 144 F.3d at 1395. The Supreme Court majority in *Bostick* specifically rejected the dissent's categorization of the holding as allowing police to gain "consent" to search through an "intimidating show of authority." *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (citation omitted). The Court implied that the police cannot manufacture a consent search situation in such a way as to leverage the inherent authority of being a law enforcement officer. The Florida Supreme Court dissent on remand noted the sheriff's department insignia on the raid jackets of the deputies, the implication being that the deputies were using the authority of their jobs to gain consent. See *Bostick*, 593 So. 2d at 495 (Barkett, J., dissenting).

103. *Guapi*, 144 F.3d at 1395. The Supreme Court in *Bostick* made clear that police can ask an individual for consent to search their luggage only "so long as the officers do not convey a message that compliance with their requests is required." *Bostick*, 501 U.S. at 437. On remand the Florida Supreme Court dissent found the deputies' demeanor significant in two ways: First, they proceeded directly to *Bostick*'s seat upon boarding the bus, and second, they persisted in their questioning even after *Bostick*'s ticket and identification were found to be acceptable. *Bostick*, 593 So. 2d at 495 (Barkett, J., dissenting).

104. *Guapi*, 144 F.3d at 1396. Even though the Supreme Court had obviated the need to make such a determination by adopting the "free to ignore" test in a bus sweep in which a passenger would not otherwise wish to disembark, the Florida Supreme Court dissenters on remand nonetheless registered the fact that the officers "stood in the aisle in front of *Bostick* and questioned him." *Bostick*, 593 So. 2d at 495 (Barkett, J., dissenting).

immediately after announcing themselves, asked all of the passengers to take their luggage from the overhead racks and hold it open for inspection as the officers walked up and down the aisle.¹⁰⁵ This technique led the Eleventh Circuit to conclude that the "unambiguous message [was] that the attention and cooperation of all passengers [was] required."¹⁰⁶ Though the court arguably could have obviated the need to reach the consent to search analysis by finding the police tactic employed here to be so egregious as to conclude the officers had in effect "seized the bus" at the onset of the encounter,¹⁰⁷ the court sidestepped that option and decided *Guapi* on the voluntariness of the consent-to-search line of cases.¹⁰⁸

Just two months after the *Guapi* decision, the Eleventh Circuit in *United States v. Washington*¹⁰⁹ again granted a motion to suppress in a bus-sweep case. Significantly, the court did so not because the consent to search was coerced, but because the encounter with the suspect was itself a seizure.¹¹⁰ Judge Roney,

105. *Guapi*, 144 F.3d at 1394.

106. *Id.* at 1396.

107. Judge Roney noted the fact that the officer stood in front of the passengers and only let them off the bus after they had revealed the contents of their luggage. *Id.* at 1396. The analysis of this point would not have been reached had the court found the initial encounter (that is, at the time of the boarding and "request" by the officers for passengers to retrieve and display their luggage) to be a seizure.

108. The court cited *Florida v. Royer*, 460 U.S. 491 (1983), and *United States v. Mendenhall*, 446 U.S. 544 (1980), for the proposition that police can approach people in public places and ask to conduct consent searches as long as a reasonable person in the situation would understand that they were free to decline consent and go about their business. *Guapi*, 144 F.3d at 1394. The Eleventh Circuit then noted its own precedent of *United States v. Fields*, 909 F.2d 470 (11th Cir. 1990) and *United States v. Hammock*, 860 F.2d 390 (11th Cir. 1988), in which consent searches on buses were prefaced by notices that passengers had the right to refuse the requests to search. *Guapi*, 144 F.3d at 1394-95. The court reiterated the point that, here, the notification was lacking at the request to search stage. *Id.* at 1395 (noting the "complete lack of any notification to the passengers that they were in fact free to decline the search request" and later "eschew[ing] the notion of a *per se* rule requiring bus passengers be informed of their constitutional rights prior to a search") (second emphasis added).

109. 151 F.3d 1354 (11th Cir. 1998). *Guapi* was decided on June 29, 1998; *Washington* on August 28, 1998.

110. See *Washington*, 151 F.3d at 1357. One may argue that a contention of this Note, that the Supreme Court opinion in *Bostick* created a two-tiered analysis, is a distinction without a difference and that *Guapi* and *Washington* both ultimately involved impermissible seizures interwoven with tainted consents to search and that keeping them conceptually disentangled is misplaced effort. A recent Fourth Amendment standing case from the Tenth Circuit, however, highlights the importance of the distinction. See *United States v. Twilley*, 222 F.3d

again writing for the court, indicated that the seizure in *Washington* would turn on a *Terry*-like analysis at the initial encounter stage:

The Constitution does not permit police officers, without probable cause or reasonable suspicion, to restrain the liberty of American citizens. The well-established test is that if, by physical force or show of authority, a reasonable citizen would not believe that he is free to ignore police questioning and go about his business, he has been unconstitutionally seized.¹¹¹

In applying this test, the court pointed to the fact that the bus sweep began with a "show of authority" in which the officers announced themselves and held their badges over their heads.¹¹² That this case was decided based on the initial encounter stage is sealed by the court's distinguishing the bus sweep from consent searches pursuant to vehicle stops upheld by the Supreme Court: "[I]n this case the agents conducting the search stated no legitimate reason to detain any passengers on the bus. In [the car search cases], police obtained consent to search a vehicle only after lawfully detaining the occupants pursuant to a traffic stop."¹¹³ The Eleventh Circuit then deftly avoided the per se rule eschewed by the Supreme Court in *Bostick* by not prohibiting bus sweeps, but strongly encouraging a warning by police stating that a passenger can ignore the initial encounter and, by doing so, can avoid the

1092, 1097 (9th Cir. 2000) (holding that although an automobile passenger did not have standing to contest a consent search of a vehicle during which narcotics were found, the passenger did have standing to contest the stop. In other words, in a car stop scenario, the passenger had standing to object to the equivalent of the initial encounter stage of a bus sweep, but did not have standing to object to the analog to the voluntariness of the consent to search stage of a bus sweep.). In a bus sweep context, the distinction may be crucial. For instance, in a co-defendant case, if the police show of authority upon boarding is deemed to amount to a seizure, the evidence against both defendants would be suppressed. If the initial encounter is not a seizure, however, then the individual search requests would be analyzed. At this point it would be possible that the totality of the circumstances as to one defendant could indicate coerced consent, whereas against the other, voluntary consent could be found.

111. *Washington*, 151 F.3d at 1357 (citing *Florida v. Bostick*, 501 U.S. 429, 439 (1991); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

112. *Washington*, 151 F.3d at 1357.

113. *Id.* (citing *Ohio v. Robinette*, 519 U.S. 33 (1996); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)).

request to search altogether.¹¹⁴ Tellingly, the wording of Judge Roney's hypothesized warning was similar to that posited in *Guapi*, but here the notification applied to the initial encounter, not the request for consent to search.¹¹⁵ The Eleventh Circuit's application of a warning requirement to the initial encounter stage of bus sweeps strikes a workable balance by allowing the tactic, but tempering the coercive effect inherent in the confines of a bus. In effect, the warning levels the playing field by facilitating a passenger's avoidance of the encounter, an option available to citizens in airports and on sidewalks, but not on buses.¹¹⁶

The Eleventh Circuit cemented its decisions in *Guapi* and *Washington* in a pair of 2000 cases, *United States v. Smith*¹¹⁷ and *United States v. Drayton*.¹¹⁸ In *Smith*, the court determined that there was "no important distinction between the conduct of the bus check in this case and the conduct of the bus check in *Washington*."¹¹⁹ The Circuit affirmed its recognition in *Washington* that absent a warning that a passenger could ignore an encounter, "the bus check ... amounted to a 'seizure.'"¹²⁰ Accordingly, the court again did not reach the consent to search analysis, but it added one piece to the puzzle not addressed in *Washington*—that bus sweeps absent a warning as to the initial encounter are like *Terry* stops and

114. *Id.*

115. *Compare id.* ("It seems obvious to us that if police officers genuinely want to ensure that their encounters with bus passengers remain absolutely voluntary, they can simply say so.") (emphasis added), with *United States v. Guapi*, 144 F.3d 1393, 1395 (11th Cir. 1998) ("Providing a simple notification to bus passengers that they are free to decline a search is perhaps the most efficient and effective method to ensure compliance with the Constitution.") (emphasis added).

116. The warning requirement serves to answer the concerns of several commentators who rightly observed that officers can leverage the confines of a bus to force encounters onto unwilling passengers. See, e.g., LaFave, *supra* note 16, at 750-51; Maclin, *supra* note 42, at 801-12; James F. Heuerman, Note, *Florida v. Bostick: Abandonment of Reason in Fourth Amendment Reasonable Person Analysis*, 13 N. ILL. U. L. REV. 173, 191-95 (1992).

The dissent in *Washington* misplaced the majority's warning requirement by applying it to the consent to search, not the initial encounter. *Washington*, 151 F.3d at 1358 (Black, J., dissenting) (applying the "totality of the circumstances" test to the search stage, an exercise the majority did not reach, and concluding that "[s]hort of telling the passengers of the right to refuse consent, it is difficult to conceive of any actions these officers could have taken to make this search more reasonable").

117. 201 F.3d 1317 (11th Cir. 2000).

118. 231 F.3d 787 (11th Cir. 2000).

119. *Smith*, 201 F.3d at 1322.

120. *Id.*

only require a reasonable suspicion to validate a police search.¹²¹ *Drayton* is significant because unlike *Smith*, the encounter here occurred after the *Guapi* and *Washington* decisions, and the police appear to have tried to temper their actions to accord with those decisions, notably in not making a "show of authority" upon boarding and in not asking passengers to display their tickets and identification prior to requesting consent to search the luggage.¹²² The Eleventh Circuit was not persuaded by the government's contention that these differences distinguished *Drayton* from *Guapi* and *Washington*, and the court reaffirmed the necessity for police to inform passengers that they have a right to refuse the encounter altogether and consent to refuse to search once an encounter begins.¹²³

In toto, through this series of cases the Eleventh Circuit firmly established two criteria governing the application of the *Bostick* standards to bus sweeps. First, the analysis is to take a seriatim approach, analyzing first the initial encounter and then the request to search. Second, absent notification to passengers that they have the right to decline the initial encounter with police, the encounter itself will be deemed a seizure and any evidence subsequently found will be suppressed. Regarding "stage two," the search request following the consensual encounter, notification to passengers that

121. *Id.* at 1323. The court found that the officers had a reasonable suspicion to search the luggage of the defendant based on their observation of him. *Id.* Based on the reasonable suspicion, the court did not have to address the consent issue of whether Smith voluntarily abandoned his luggage. *Cf. Washington*, 151 F.3d at 1357 (noting that "the agents conducting the search stated no legitimate reason to detain any passengers on the bus"). *Smith* highlights a significant danger inherent in bus sweeps and a common criticism of the Exclusionary Rule. Whereas drug couriers will have the evidence of their crimes suppressed, innocent passengers who feel compelled to comply with intrusive police search requests are left without a remedy. In this case, the Fourth Amendment rights of every passenger on the bus except Smith were violated as the agents "got their man." *See infra* notes 132-33, 170 and accompanying text. A federal district court in the Eleventh Circuit has recently upheld a bus search based on *Smith's* reasonable suspicion analysis. *United States v. Ozuna*, 129 F. Supp. 2d 1345, 1353-54 (S.D. Fla. 2001) (citing *Smith* and noting the four factors observed by the officer that amounted to a "reasonable suspicion" to conduct a search).

122. *Drayton*, 231 F.3d at 790-91.

123. *Id.* at 790 (finding that absent a reassurance that one could ignore the initial encounter, a passenger-by-passenger "show of authority" is no less coercive than a general announcement (citing *Washington*, 151 F.3d at 1355), and noting that the officers in *Guapi* had not first asked to examine tickets and identification (citing *United States v. Guapi*, 144 F.3d 1393, 1393-94, 1397 (11th Cir. 2000))).

they have a right to decline consent is a significant factor in determining whether the consent was voluntary or coerced.¹²⁴

The Ninth and Tenth Circuits Split Over Washington

The dearth of notable circuit court bus sweep opinions in the wake of *Bostick* belied the contentiousness of the bus-sweep procedure. Since the Eleventh Circuit fired the first salvos in the renewed skirmish over this drug interdiction technique, the Ninth and Tenth Circuits have each filed lengthy bus-sweep opinions.

The Ninth Circuit, in *United States v. Stephens*,¹²⁵ followed *Washington* by joining "the Eleventh Circuit [in finding] an unconstitutional seizure occurred under very similar facts."¹²⁶ In *Stephens*, the officers announced themselves upon boarding the bus and included a warning: "No one is under arrest, and you are free to leave. However, we would like to talk to you."¹²⁷ The court criticized the warning for indicating to passengers that they had only two choices—leave the bus or remain on board and consent to a search.¹²⁸ By not informing passengers "that they were free to remain on the bus and terminate the encounter by declining to answer [the officers'] questions,"¹²⁹ the police presented passengers with a "Hobson's choice because by getting off the bus, a passenger ran the risk of giving the ... officers reasonable suspicion to stop him."¹³⁰

124. It is unclear at this point whether a separate notification should be given at the time the police ask for consent to search, or whether one notice covering passenger rights as to the encounter and the request to search would be sufficient.

125. 206 F.3d 914 (9th Cir. 2000).

126. *Id.* at 918 (citing *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998)).

127. *Stephens*, 206 F.3d at 916.

128. *Id.* at 917.

129. *Id.* This is precisely the type of warning the Eleventh Circuit called for in *Washington*, as discussed *supra* notes 107-09 and accompanying text, and called for by Justice Marshall in *Bostick*. See *Florida v. Bostick*, 501 U.S. 429, 450 (1991) (Marshall, J., dissenting) (suggesting that "advising the passengers confronted of their right to decline to be questioned [would begin to] dispel the aura of coercion and intimidation that pervades [bus] encounters").

130. *Stephens*, 206 F.3d at 917. The Ninth Circuit arrived at the "Hobson's choice" by citing the recent Supreme Court case of *Illinois v. Wardlow*, in which the Court held that the combination of unprovoked flight in a neighborhood known for having high drug activity amounted to reasonable suspicion. *Id.* (citing *Illinois v. Wardlow*, 506 U.S. 976 (2000)). The interesting leap the court made in the hypothetical case of a bus passenger who exits the bus

While the *Stephens* majority legitimized the Eleventh Circuit's approach to bus sweeps, the dissent is also important because it discussed bus sweeps not as an isolated police practice but as a "drug war" tactic that must balance the need to enforce drug laws against the need to protect the rights of all citizens under the Fourth Amendment.¹³¹ Judge Sneed's dissent rejected *Washington* as creating a per se rule inconsistent with *Bostick*, and he noted the effectiveness of the bus-sweep technique.¹³² Judge Sneed placed the normative question undergirding the conduct of the drug war in high relief: "An innocent person may be inconvenienced but a guilty person frequently will give himself away."¹³³ In Judge Sneed's view, then, the Supreme Court has indicated that the balance tips in favor of enforcing drug laws.¹³⁴ Although the majority of his

in order to avoid the police rests on the premise that a court could find that intercity buses are known high-drug activity areas, an argument only suggested to this point in police claims that a particular bus was targeted for a sweep because it emanated from a source city of narcotics.

131. See *Stephens*, 206 F.3d at 918 (Sneed, J., dissenting) ("Within this nation there is an enduring tension between the common needs of all and the separate and distinct needs of individuals.").

132. See *id.* at 919 n.2 (Sneed, J., dissenting) (rejecting the necessity of a "*Miranda*-like warning incorporating the advice that all passengers, including the defendant specifically, could stay on the bus and refuse to answer any questions"). In an interesting bit of dicta, Judge Sneed hypothesized that the result of requiring such a warning would be that police would subject all bus luggage to canine sniff tests. *Id.* This imagined result indicates a bias for the "common need" to perpetuate the war on drugs, whereas blanket warnings or a scaling back of bus sweeps altogether emphasizes the "distinct needs of individuals." See *supra* note 131.

133. *Stephens*, 206 F.3d at 920 (Sneed, J., dissenting). Judge Sneed's frank recognition of the stakes rests on the premise that police bus sweeps engender coercion. For the innocent, coercion is allowed as long as it is only "inconvenient." For the guilty, coercion is needed to make the drug courier "give himself away." Judge Sneed's calculation ignores the social costs that are part and parcel of dragnet-style drug sweeps. See Sandra Guerra, *Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. CRIM. L. & CRIMINOLOGY, 1109, 1139-40 (1992):

[B]ecause the freedom to travel about in public without unjustified official interference is one of our most cherished liberties, the extent to which the police operations may intrude officiously into the private lives of innocent people who have done nothing to draw suspicion onto themselves should be considered of overriding importance.

Id. (citation omitted).

134. In this regard, Judge Sneed has much company in the academic community. See Maclin, *supra* note 42, at 811-12 (criticizing the Supreme Court's analysis in *Bostick* for "show[ing] contempt for individual liberty and the Fourth Amendment" because the Court "apparently believes that this sort [of] police practice is necessary, and therefore,

brethren on this Ninth Circuit panel agreed with the Eleventh Circuit that the Fourth Amendment protection of citizens outweighs the law enforcement needs on the close question of bus sweeps absent express warnings, Judge Sneed's view holds sway in the Tenth Circuit.

In *United States v. Broomfield*,¹³⁵ the Tenth Circuit read *Bostick* as rejecting "[a]ny analysis approaching a per se rule" in the context of the Fourth Amendment.¹³⁶ The defendant in *Broomfield* cited both *Guapi* and *Washington* in arguing that his motion to suppress should be granted due to the coercive nature of the officers' conduct during the bus sweep as exacerbated by the confines of the bus.¹³⁷ The court recited the facts of *Guapi* and agreed with the Eleventh Circuit's analysis and conclusion that the totality of the circumstances surrounding the *Guapi* bus sweep "understandably warranted a finding of coercion."¹³⁸ In the procedure at issue in *Broomfield*, the officers did not make a general announcement upon boarding; rather, they approached and questioned passengers individually.¹³⁹ Crucial to the defendant's claim was that the officers did not warn him that he had the right to refuse the initial encounter and, given the authoritative police actions, "no reasonable person would [have felt] free to refuse [the] search request."¹⁴⁰ The Tenth Circuit found the lack of such notification to

reasonable"); Heuerman, *supra* note 116, at 196-99 (concluding that the *Bostick* Court chose to allow the police to zealously pursue the war on drugs at the expense of "inconveniencing countless bus travelers"). Other commentators imply that the supposed Supreme Court bias favoring drug interdiction efforts over civil liberties has filtered down to the cop on the beat. See MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* 161 (1988) (arguing that the use of "police-initiated actions" such as "the frequent use of field interrogations" are employed because police believe "the deterrent effect of aggressive patrol often takes precedence over other objectives"); Guerra, *supra* note 133, at 1160-61 (likening inquisitorial drug sweeps to the internment of Japanese-Americans during World War II in concluding that recent "Supreme Court[] Fourth Amendment jurisprudence provides only the most minimal protection from intrusive police actions").

135. 201 F.3d 1270 (10th Cir. 2000).

136. *Id.* at 1274 (citing *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991)).

137. *Id.* at 1273.

138. *Id.* at 1274.

139. *Id.* at 1275. In this regard, the procedure here was most closely analogous to that of *Drayton*. In the Eleventh Circuit's view, a passenger-by-passenger questioning was no less coercive than one begun with a general announcement, and still requires a notification. See *supra* notes 122-23 and accompanying text.

140. *Id.* at 1273 (claiming that the officer "did not act to defuse the anxiety of the situation or in any way advise him he had a right to refuse consent").

be "dispositive in *Washington*, thus creating a per se rule that authorities must notify bus passengers of the right to refuse consent before questioning those passengers ... [which] render[ed] the soundness of the *Washington* opinion questionable."¹⁴¹

Declaring the soundness of another circuit's opinion "questionable" is a judicial euphemism for an outright rejection of that court's reasoning. The question becomes one of judicial line drawing. That those lines are only now being drawn, ten years after the Supreme Court addressed bus sweeps, is the essence of *Bostick's* "long distance remand." The Eleventh and Ninth Circuits have adopted the view that, absent *Miranda*-like warnings, on-bus consent searches will be presumptively invalid. The Tenth Circuit has countered that the approach of the Eleventh and Ninth Circuits amounts to the type of per se rule the Supreme Court has repeatedly rejected in the Fourth Amendment context, and that paradigmatic bus sweeps, absent warnings, can produce legal consent searches.

As this part has shown, case law addressing bus-sweep procedures reveals that the tactic raises extremely close constitutional questions calling for a nuanced, fact-specific analysis. The seminal case involving Terry Bostick produced 4-3 decisions on its first two trips to the Florida Supreme Court, and the six-Justice majority in the United States Supreme Court faced a vigorous and well-regarded dissent by Justice Thurgood Marshall. The conspicuous absence of federal circuit court opinions applying the *Bostick* standards to bus sweeps suggests that the Florida Supreme Court's abdication of its responsibility to apply the *Bostick* standards on remand chilled judicial review of the tactic across the board. Through most of the 1990s, the circuit courts seemingly followed the Florida Supreme Court's view that *Bostick* was a stamp of approval of bus sweeps from the nation's highest court.

The Eleventh Circuit's 1998 decision in *Guapi*, however, refocused judicial attention on bus sweeps. The circuits have agreed on the factor-by-factor analysis of the search request in *Guapi*, but

141. *Id.* at 1275. The Tenth Circuit would go no further than agreeing that notification was a relevant fact to consider. *Id.* The court then concluded that in this case the absence of notification was overwhelmed by other circumstances which indicated that Broomfield had neither been illegally seized at the initial encounter stage nor was his consent to search the product of impermissible police coercion. *Id.*

have split 2-1 on the arguably per se encounter warning requirement of *Washington*. Yet, even while rejecting *Washington* as inconsistent with Supreme Court precedent, the Tenth Circuit conceded the closeness of the question: "[E]stablish[ing] a per se rule that authorities must either notify bus passengers they have the right to refuse consent or, due to the unavoidable space constraints, refrain altogether from questioning passengers ... might arguably constitute good policy"¹⁴²

The next section explores the bus sweep tactic through the lens of psychological theory and argues that the Eleventh Circuit was correct to recognize the psychological force drug interdiction officers can exert on passengers to yield "consent." Specifically, the next section contends that the confines of a bus are an especially ripe setting for police coercion, that police "requests" to search are often thinly-veiled demands, and that citizens are inclined to obey police "requests." Because police are able to leverage on-bus encounters to elicit "consent" from citizens who find it difficult to defy authority, the Eleventh Circuit was right to require police to notify passengers of their Fourth Amendment rights.

THE PSYCHOLOGY OF BUS SWEEPS

Psychological coercion is at the core of the Fourth Amendment analysis concerning both the initial encounter and the request-to-search stages of bus sweeps. Indeed, the Supreme Court in *Bostick* viewed the confines of a bus as psychologically coercive by noting that "[t]here is no doubt that if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure."¹⁴³ Because bus sweeps are

142. *Id.*

143. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). The Court here used the terms "encounter" and "seizure" in the broad sense to encompass the initial approach and the request to search. As discussed previously, the Court rightly separated the analysis of the two stages by concluding that even if the initial encounter was consensual, an impermissible seizure could still occur if the totality of the circumstances surrounding the search request indicated that the passenger's consent to search was involuntary. The Eleventh Circuit highlighted this crucial point by finding an impermissible initial encounter in *Washington* and an impermissible request to search (following an initial encounter deemed by the court to be a permissible nonseizure) in *Guapi*. For the purpose of clarity, this Note employs "encounter" and "seizure" to apply only to the initial police-citizen encounter and "request

warrantless searches lacking the reasonable, articulable suspicion to support a *Terry* stop-and-frisk, the constitutionality of a given bus sweep is analyzed under the rubric of consent searches.¹⁴⁴ To comport with the standards of this judicially created exception to the warrant requirement, the initial encounter between the police and bus passengers must remain consensual and the consent to search must be given voluntarily.¹⁴⁵ If an officer conducts himself in such a way that the citizen he approaches will not feel free to ignore him, the citizen is considered impermissibly "seized" under the Fourth Amendment and any incriminating evidence found during a subsequent search will be suppressed in court. Likewise, if after agreeing to interact with an officer, a citizen's compliance with a search request is deemed to have been the result of police-induced duress or coercion, the consent to search is invalidated and any evidence found during the search will be inadmissible in court.

The Supreme Court has applied the proscription against unsupported seizures broadly. Most significant for analyzing bus sweeps, the Court has determined that a citizen need not desire to leave the site of the encounter to be considered impermissibly seized¹⁴⁶ and that police-generated "subjective intrusion[s]" which elicit "concern or even fright" on the part of travelers likewise indicate a seizure.¹⁴⁷ In neither case was the "seizure" predicated on physical contact; psychological coercion exerted under the auspices of legal authority rose to the level of a Fourth Amendment violation.

The voluntariness determination of a consent to search is grounded in *Miranda v. Arizona*¹⁴⁸ and subsequent confession cases, all of which "assessed the psychological impact on the accused."¹⁴⁹ The Supreme Court applied the psychological principles developed

to search" and "involuntary" to apply to the consent to search.

144. See *supra* notes 38-42 and accompanying text.

145. *Florida v. Royer*, 460 U.S. 491, 497-501 (1983) (plurality opinion).

146. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (indicating that a court can find an impermissible seizure "even where the person did not attempt to leave").

147. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976).

148. 384 U.S. 436 (1966).

149. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (collecting cases); *Miranda*, 384 U.S. at 445-58 (citing police tactics in eliciting confessions and stressing that "the modern process of in-custody interrogation is psychologically rather than physically oriented").

in the confession context in formulating the consent search standard set forth in *Schneckloth v. Bustamonte*.¹⁵⁰ *Schneckloth* balanced "the legitimate need for such searches and the equally important requirement of assuring the absence of coercion."¹⁵¹ Under its reasonableness inquiry, the Court concluded that an officer is not obligated to receive a waiver of rights from a suspect before conducting a search.¹⁵² As long as the consent to search is deemed "voluntary" under the totality of the circumstances, it will be considered "reasonable" for Fourth Amendment purposes.¹⁵³ To arrive at this conclusion, the Court compared the custodial warnings mandated by *Miranda*¹⁵⁴ to noncustodial search requests and determined that due to the "informal and unstructured conditions" which usually surround search requests, they are "immeasurably far removed from 'custodial interrogation'" and are less susceptible to the psychologically coercive interrogation practices which the *Miranda* warnings are intended to counteract.¹⁵⁵

Even if one were to concede that the car search at issue in *Schneckloth* was not a situation prone to police-coerced "consent," on-bus encounters are more akin to custodial interrogations in that the confines of a bus create a ripe setting for psychologically coercive police practices. Unlike driver-prompted automobile stops which have innumerable variations, bus sweeps are planned, routinized, and police-dominated events.¹⁵⁶ Because bus sweeps are

150. 412 U.S. 218 (1973).

151. *Id.* at 227.

152. *Id.* at 241-45.

153. *Id.* at 248-49.

154. The Supreme Court has determined recently that *Miranda* was not merely a prophylactic measure ensuring a suspect's protection against self-incrimination, but that it declared a constitutional rule grounded in the Fifth Amendment. See *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000). The constitutionalizing of *Miranda* may strengthen the foundation of its warnings to the degree that the prophylactic search warnings rejected in *Schneckloth* will have a stronger foothold if the Court revisits consent searches in the context of bus sweeps.

155. *Schneckloth*, 412 U.S. at 232; see also Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 231-32 (discussing the Supreme Court's reluctance to extend its presumption of psychological coercion in custodial interrogations to noncustodial searches).

156. Compare *United States v. Cuevas-Ceja*, 58 F. Supp. 2d 1175, 1179-80 (Or. 1999) (detailing the local sheriff department's eighteen-point guideline for conducting bus sweeps),

substantially similar and predictable, the officers who conduct them may learn to apply subtle yet impermissibly coercive techniques that appear to elicit voluntary consents to search. A *Miranda*-like consideration of psychologically coercive factors in the context of bus sweeps is, therefore, appropriate.¹⁵⁷ Further, the Eleventh

with *Schneckloth*, 412 U.S. at 231-32 (considering it "thoroughly impractical" to require warnings to precede consent searches because they "normally occur on the highway ... and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly").

157. See generally *Miranda*, 384 U.S. at 448 (stressing that modern-day "in-custody interrogation is psychologically rather than physically oriented" and that the Court "ha[d] recognized that coercion can be mental as well as physical") (citation omitted). Of the four warnings which comprise a suspect's "*Miranda* rights," the "right to remain silent" is analogous to the informed waiver of a passenger's right to decline the on-bus encounter and the consent to search critical to the Eleventh Circuit's analyses in *Guapi* and *Washington* and supported in this Note. See *id.* at 479.

The second of the *Miranda* warnings, that "anything [a suspect] says can be used against [the individual] in a court of law," also leads to an interesting analysis in the bus sweep scenario. See *id.* During the oral arguments 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?" Justice Thurgood Marshall, Oral Argument Before the Supreme Court of the United States (Feb. 26, 1991), in Transcript of Oral Argument at *14, 1991 U.S. Trans. LEXIS 156, *Florida v. Bostick*, 501 U.S. 429 (1991). Based on the dissenting opinion he authored, it is most likely that Justice Marshall accepted *Bostick*'s claim that the search must have been the product of a coercive seizure "because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs." *Bostick*, 501 U.S. at 437-38. This view is coterminous with the proposition that drug couriers traveling by bus "consent" to searches because of police coercion. See *id.* at 450 (Marshall, J., dissenting) (arguing that police had developed the bus sweep tactic because it forced passengers to choose between consenting to a search or possibly being stranded mid-journey, a "choice" Justice Marshall saw as "no 'choice' at all").

An empirical study of consent searches, however, offers another explanation—that drug traffickers who consent to a search they know will reveal drugs, may not also know that the contraband will be used to convict them at trial. See Dorothy K. Kagehiro, *Perceived Voluntariness of Consent to Warrantless Police Searches*, 38 J. APPLIED SOC. PSYCHOL. 38, 45-46 (1988) (finding that although 96% of the study participants understood the concept of a search warrant and 92% understood that absent a search warrant, the police could conduct a search only with the participants' consent, only 49% of the subjects understood that any contraband discovered would be admissible evidence in court and only 28% understood that the evidence would be admissible even if police did not inform the consenter of their right to refuse). Professor Kagehiro's study of college-educated subjects suggests that even though one understands the difference between searches grounded on warrants and those based on consent, he does not necessarily 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 cannot, or will not, be prosecuted.

The *Miranda* Court indicated that this lack of awareness of the consequences of confessing (or analogously, consenting to a search) formed the crux of *Miranda*'s second warning: "This warning is needed in order to make him aware not only of the privilege, but also of the

Circuit's recent treatment of the bus sweep drug interdiction tactic is faithful to the Supreme Court's recognition that police can exert psychological pressure on bus passengers to elicit consents to search¹⁵⁸ and that *Miranda*-like warnings are an appropriate antidote to the coercion.

The following discussion of coercion as it relates to one's use of space and the subtly coercive ways in which police can leverage the confines of a bus to elicit consents to search focuses on the request to search stage of a bus sweep.¹⁵⁹ This stage has been selected for illustrative purposes only; the discussion would apply equally to seizure determinations based on the initial police-citizen encounter.¹⁶⁰

consequences of foregoing it." *Miranda*, 384 U.S. at 469. Interestingly, though no bus-sweep cases have mentioned that this type of extended warning was given, a leading police manual used by hundreds of departments nationwide includes just such a warning in its suggested request-to-search phrasing. See JOHN G. MILES, JR. ET AL., *THE LAW OFFICER'S POCKET MANUAL* § 7:16-17 (Thomas J. O'Toole, Jr. ed., 1998) (recommending officers of departments requiring a "search and seizure warning" to say: "If you do consent, any evidence we find may be used in a criminal prosecution.").

158. See *Bostick*, 501 U.S. at 438-39 (finding the "cramped confines of a bus are one relevant factor" in determining whether the consent was granted voluntarily and noting that "[c]itizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse").

159. In directing courts to consider the "totality of the circumstances" in determining whether an on-bus police-citizen encounter rose to a Fourth Amendment violation, the Supreme Court reiterated its century-old admonition to courts to be wary of subtle, but nonetheless illegal, police practices. See *Boyd v. United States*, 116 U.S. 616, 635 (1886) ("It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.").

160. Compare *United States v. Mendenhall*, 446 U.S. 544, 557 (1984) (establishing the "free to leave" test as "whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances"), with *Schneckloth*, 412 U.S. at 248-49 (requiring the prosecution to prove that "consent was in fact voluntarily given, and not the result of duress or coercion, express or implied" and that "[v]oluntariness is a question of fact to be determined from all the circumstances"). The *Mendenhall* test, adapted to bus sweeps in *Bostick* as a "free to decline the encounter" test, is substantially similar to the consent to search voluntariness test. Both tests seek to determine where a particular citizen's motivations fall on the spectrum between voluntary and coerced actions and both look to the totality of the surrounding circumstances in making the determination.

Coercion, Confines, and Consent

In *Schneckloth*, whether coercion tainted the consent to search in a given case was seen as a fact-specific determination to be gleaned from the "totality of all the circumstances,"¹⁶¹ including "the environment in which [the request to consent to a search] took place."¹⁶² In fastening upon the environmental factor by finding that the facts of the case "graphically illustrate[d that] the cramped confines of a bus create an environment uniquely susceptible to coercive police tactics,"¹⁶³ the Eleventh Circuit in *Guapi* recognized the implications of the Latin roots of "coercion." By way of the noun "*arctum*" (a box, or more ominously, a coffin) and the verb "*arcere*" (to confine), "coercion" is derived from "*coercere*" (to restrain).¹⁶⁴ In its purest sense, then, "coercion" relates to restrictions or limitations on one's use of space.¹⁶⁵ Directly applicable to the bus sweep context, "[c]oercion characterizes a situation when one or more persons are restrained by one or more others from using a space in some way, providing that the coerced person planned to use the space in the manner that is being prevented, and the coercer expressly intended to prevent that use."¹⁶⁶ For a bus passenger, the planned use of the space is to travel free of police questioning. Becoming the target of a suspicionless bus sweep prevents that use.¹⁶⁷

161. *Schneckloth*, 412 U.S. at 227.

162. *Id.* at 247.

163. *United States v. Guapi*, 144 F.3d 1393, 1395 (11th Cir. 1998).

164. OXFORD ENGLISH DICTIONARY (2nd ed. 1989).

165. See Michael A. Weinstein, *Coercion, Space, and the Modes of Human Domination*, in COERCION 63, 66 (J. Roland Pennock & John W. Chapman eds., 1972) (arguing that at "the center of coercion is effective control of space").

166. *Id.* at 65.

167. Though the characterization of a passenger's intended use as including freedom from police questioning likely injects a consideration which is not consciously weighed by the vast majority of bus passengers, it is nonetheless valid. It is the extraordinary passenger who would welcome police to board a bus to search one's carry on luggage. Even though the "reasonable person" standard "presupposes an *innocent* person," *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (quoting *Florida v. Royer*, 460 U.S. 491, 519 n.4 (1983)) (Blackmun, J., dissenting), the Supreme Court has noted recently that bus passengers are especially sensitive to divulging the contents of their carry on items. *Bond v. United States*, 529 U.S. 334, 337-38 (2000) (noting in the context of a bus sweep that "travelers are particularly concerned about their carry-on luggage; they generally use it to transport personal items that, for whatever reason, they prefer to keep close at hand"); see also *Michigan Dep't of*

A second aspect of coercion that is especially telling in the context of suspicionless bus sweep searches is that "coercion" is ... an achievement word; it denotes success.¹⁶⁸ Because one only becomes a coercer at the point that the coerced person is made to act in a particular way, "attempted coercion" can be considered an oxymoron.¹⁶⁹ That coercion denotes success masks the true nature of suspicionless drug sweeps in two ways. First, because an "attempted coercion" can exist only in one's imagination, a grant of consent to search one's carry on luggage is more likely to be viewed as a product of the consent-giver's choice. In other words, because denials of requests to search by definition preclude coercion, they are the product of free choice. Because judges never see either search-request deniers or consent-search granters who were not carrying incriminating items, any claim of coercion by one who consented to a search will be viewed as suspect by a court. After all, in order to find a consent to search to be the product of coercion, judges must reconcile the perfect correlation between the small subset of bus passengers who carry contraband and who consent to a search with the subset of bus passengers who were coerced by police. Second, the harm done to "innocent" bus passengers who are asked to consent to a search is diffuse; although a passenger may feel "put out" by the request, he is not likely to invest much energy in pursuing a complaint.¹⁷⁰

State Police v. Sitz, 496 U.S. 444, 465 (1990) (Stevens, J., dissenting) ("Unwanted attention from the local police need not be less discomfiting simply because one's secrets are not the stuff of criminal prosecutions.").

168. Michael D. Bayles, *A Concept of Coercion*, in COERCION 16, 19 (J. Roland Pennock & John W. Chapman eds., 1972).

169. See *id.* at 19-20.

170. See Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 244 (1993) (arguing that "individuals subjected to [suspicionless bus] searches are not likely to complain because it is probably not worth the bother"); see also BROWN, *supra* note 134, at 179 (positing that from the perspective of police officers, the danger of aggressive search practices is not that the evidence will be suppressed in court, but that unsupported searches "inevitably lead[] to resentment from the community"); HOWARD S. COHEN & MICHAEL FELDBERG, *POWER AND RESTRAINT: THE MORAL DIMENSION OF POLICE WORK* 48-53 (1991) (arguing that although innocent people subjected to unnecessary searches seldom file complaints, the searches tend to weaken the social contract by straining the public trust which relies on police restraint in enforcement practices); D.F. GUNDERSON & ROBERT HOPPER, *COMMUNICATION AND LAW ENFORCEMENT* 25 (1984) (positing that although coercion "is a fairly effective means of behavior modification over the short term," it can have the effect of reinforcing negative attitudes about the police); Guerra, *supra* note

Further, the subset of "innocent" passengers who have the gumption to complain are caught in a Catch-22: if they deny a request to search they—by definition—have not been coerced; if they consent and complain, they admit to folding in the face of the agents.¹⁷¹ It seems logical to posit that passengers who would deny

133, at 1110 (arguing that "operations that effectively place every person investigated under suspicion until they convince the police of their innocence tend to alienate the public"); cf. Lee D. Ross, *Situationist Perspectives on the Obedience Experiments*, 33 CONTEMP. PSYCHOL. 101, 102 (1988) (finding it troubling that "no subject in ... the obedience experiments ever undertook the task of exposing the experimenter's excesses to responsible authorities").

This discussion mirrors a major criticism of the Exclusionary Rule—that it provides no remedy for "unlawful searches ... of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts ... never hear." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). See Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather Than an 'Empirical Proposition'?*, 16 CREIGHTON L. REV. 565, 665 (1983) (calling for legislation to provide a remedy for innocent people subjected to unconstitutional searches as a supplement to the Exclusionary Rule).

171. LaFave, *supra* note 16, at 751 (arguing that it is only the unusually thick-skinned passenger who could refuse to cooperate with the police by denying consent to search because "the dynamics of the [bus sweep] situation make a nonconforming refusal to cooperate an especially unlikely choice").

That intercity bus passengers tend to be poor minorities contributes to the lack of an organized resistance to the procedure has not been lost on at least one court. *United States v. Lewis*, 728 F. Supp. 784, 789-90 (D.D.C.), *rev'd* 921 F.2d 1294 (D.C. Cir. 1990) (recounting that the Constitution protects the "freedoms and liberties" of "all our citizens whether or not they are in a privileged position or indeed even have the desire to protest"). The *Lewis* trial court went on to suggest that the "deprivation of rights" inherent in the typical narcotics bus-sweep situation had escaped great public scrutiny because intercity buses "are utilized largely by the underclass of this nation who, because of greater concerns (such as being able to survive), do not often complain about such deprivations." *Id.* Several commentators have noted suspicionless drug sweeps' disproportionate impact on the minority community. Tracy Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. L. REV. 243, 248 (1991) (contending that on an interpersonal level race and the "mistrust that surrounds encounters between black men and police officers" are "hobgoblin[s] lurking in the shadows" of the Supreme Court's *Bostick* decision and that by ignoring the element of race in its Fourth Amendment seizure analyses, "the Court hides behind a legal fiction"); O'Shields, *supra* note 16, at 1901-06 (1992) (noting that ridership statistics which show that poor blacks make up a disproportionate share of intercity bus passengers are comparable to arrest statistics which reveal that the percentage of narcotics arrests of African-Americans is more than three times greater than their percentage of the general population. O'Shields concludes that buses are used as a proxy for race and serve to mask the racist action of targeting intercity buses.); see also Christopher Quinn, *Poor Are Targeted in Searches on Buses; All Riders Treated Like Drug Smugglers, Lawyer Charges*, THE PLAIN DEALER, Apr. 6, 1999, at 1A ("The class of people [drug interdiction agents] are dealing with in buses tend to be poor and more compliant.... Can you imagine if they boarded a businessman's flight out of Cleveland Hopkins [International Airport]?") (second brackets in original) (quoting Case Western Reserve University law professor Louis Katz); cf. Oliver, *supra* note 38, at 1422-25 (conducting a

a request to search while the vast majority of fellow passengers consent are the same individuals who would have the wherewithal to pursue a complaint.¹⁷² Having denied consent to search, though, by definition the complaining passenger would not have been coerced and seemingly would have little to complain about.

Revealing intercity bus passengers to be especially susceptible to the use of psychological coercion by police and showing that such coercion may reside in a judicial "blind spot" does not prove that the bus sweep tactic itself is inherently coercive to the point of necessitating *Miranda*-like warnings. After all, the psychologically coercive interrogation police *practices* in the custodial setting moved the Court to mandate the warnings.¹⁷³ The remainder of this part examines police actions in implementing the tactic by proceeding from the bus setting to the police-citizen interaction during bus sweeps. The psychological theories of speech acts and obedience to authority are effective vehicles to understanding the police-citizen dynamic in the bus sweep setting. Though not explicitly cited, these theories informed the Supreme Court's *Bostick* decision, and the Eleventh Circuit was correct to tacitly recognize their applicability in granting the motions to suppress in *Guapi* and *Washington*.

Speech Acts

The Supreme Court in *Bostick* noted that officers may ask a bus traveler for consent to search his luggage "as long as the police do not convey a message that compliance with their requests is required."¹⁷⁴ The *Bostick* majority realized that to correctly

statistical analysis of the disproportionate number of minorities stopped for traffic violations). See generally BROWN, *supra* note 134, at 176-79 (arguing that the disproportionate percentage of arrests of minorities is due in part to the biased perspective with which police view innocuous actions by minorities).

172. The vast majority of citizens police ask to search allow them to do so. *E.g.*, United States v. Guapi, 144 F.3d 1393, 1396 (11th Cir. 1998) (noting officer's testimony that in conducting "28 on up" bus sweeps per week over the course of a year, the officer could only recall "several times" passengers refused to permit searches); United States v. Felder, 732 F. Supp. 204, 205 (D.D.C. 1990) (recording officer testimony that only three or four out of eighty-five passengers had refused consent to an interview).

173. See AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 56 (1997) (describing *Miranda* as "purport[ing] to establish propriety in police-station interrogation" and "promis[ing] to open up the black box of the police station").

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

understand the essence of a police request to conduct a consent search, jurists must separate the text of the request from the subtext of its delivery.¹⁷⁵ By recognizing the need to affect this separation in order to ascertain the true voluntariness of the consent granted, the Court tacitly applied speech act theory to bus sweeps.

Speech act theory posits that conversation has both direct "locutional" and indirect "illocutional" components.¹⁷⁶ For instance, the locution "Can you turn out the light?" in its direct sense asks whether one has the ability to flick the switch or pull the chain.¹⁷⁷ The illocutional component, or "speech act," is the request to turn the light off; but it may also be a romantic invitation from one sweetheart to another or a warning from a parent to a reluctant child at bedtime.¹⁷⁸ The degree to which the addressee interprets the interrogative as a request or a warning which "yields a conveyed meaning that does not coincide with its literal meaning" is a function of context.¹⁷⁹ Bypassing the literal to address the implication of the locution is so common and necessary that the translation becomes automatic: the speaker and addressee instantaneously recognize the interrogatory locution as a form of invitation or warning.¹⁸⁰ This unmediated translation is key to

175. By recognizing that a "request" in the form of an interrogatory sentence may in fact be closer to a police command, the *Bostick* Court was instructing judges to be aware of the potential for bus sweeps to present a formidable, situationally driven perceived lack of choice to a passenger, a consideration often lost in the sanitized setting of post-hoc courts. See Dorothy K. Kagehiro & Ralph B. Taylor, *Exploring the Fourth Amendment: Searches Based on Consent*, in HANDBOOK OF PSYCHOLOGY AND LAW 21, 28 (Dorothy K. Kagehiro & William S. Laufer eds., 1992).

In other federal circuit bus-interdiction cases finding that the requested consent was voluntary, courts have likewise focused on the delivery as well as the text of the police request. *United States v. Hill*, 199 F.3d 1143, 1149 (10th Cir. 1999) (citing uncontroverted testimony that the manner of questioning was "very friendly"); *United States v. Lewis*, 921 F.2d 1294, 1296 (D.C. Cir. 1990) (noting the officer's "low, conversational tone"); *United States v. Flowers*, 912 F.2d 707, 711 (4th Cir. 1990) (finding it significant that the questions were delivered with a "non-threatening ... demeanor").

176. MICHAEL L. GEIS, *SPEECH ACTS AND CONVERSATIONAL INTERACTION* 3 (1995).

177. See *id.* at 8.

178. See *id.* at 3.

179. Herbert H. Clark & Peter Lucy, *Understanding What Is Meant from What Is Said: A Study in Conversationally Conveyed Requests*, 14 J. VERBAL LEARNING & VERBAL BEHAV. 56, 57 (1975).

180. See *id.* at 57, 70.

properly understanding the officer-passenger dynamic of the search request of a bus sweep.

That law enforcement officers are "engaged in the often competitive enterprise of ferreting out crime"¹⁸¹ creates an incentive for police to structure consent search requests in such a way that passengers will indeed consent and that any evidence uncovered will be admissible in court by a determination that the consent was voluntary.¹⁸² In *Bostick*, the Court took note of the Florida trial court's finding that "the police specifically advised Bostick that he had the right to refuse consent" before "request[ing] [Bostick's] consent to search his luggage."¹⁸³ However, the Court was not willing to accept this finding at face value—whether this was a legitimate "request" rather than a "demand" for consent was not addressed in the record and became a question of fact to be sorted out by the Florida courts on remand.¹⁸⁴ Rather than praise the

181. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

182. This is the essence of the balancing test announced in *Schneckloth*. "[T]wo competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). More than fifty years ago, Justice Robert Jackson was wary of the ability of police to manipulate Supreme Court dictates by complying with the letter of the law while circumventing the intent of the applicable Fourth Amendment rule: "We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

Two aspects of the courtroom reconstruction of bus sweeps should be mentioned here. First, testimonial recreations of a particular bus sweep may serve to sanitize the encounter because they lack the immediacy of on-bus encounters, the coercive dynamics of which may be lost in the translation. Second, officer testimony is typically relied upon to set the scene of the bus sweep in question. That the determination of coercion often turns on the minute details of an officer's testimony of his own actions leads one to wonder whether "the principal effect of the Supreme Court's carefully crafted interpretations of the Constitution on the behavior of those to whom their words are directed is to teach the police what they should say on the witness stand rather than what they should do in the streets." H. RICHARD ULLIVER, *TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE* 116 (1988); see also JONATHAN RUBINSTEIN, *CITY POLICE* 392 (1973) (noting that even for officers who testify truthfully, there is little to dissuade them from coercive searches because officer testimony "that reveals he conducted an illegal search ... is not chastised or punished; if he confiscated drugs or a weapon, he may feel that he has served a useful purpose").

183. *Florida v. Bostick*, 501 U.S. 429, 431-32 (1991).

184. See *id.* at 437. As explained in the previous Part, the Florida Supreme Court on remand inexplicably abdicated its responsibility to determine the context and, therefore, the meaning of the "request."

Court for recognizing the applicability of speech act theory in adjudicating bus sweeps, the dissent seemed to condemn the Court for not taking the next step of applying the theory itself.¹⁸⁵ For the Court to have done so despite the lack of a trial court finding of fact on the context of the request, however, would have been antithetical to the very theory the Court was promoting.

Disappointingly, in its summary reversal of its decision two years earlier, the Florida Supreme Court did not accept Justice O'Connor's invitation to determine the illocutional component of the officer's request to search. By contrast, the Eleventh Circuit in *Guapi* took up the mantle of speech act theory and, given the robust report of the federal magistrate judge, was able to apply it as well. Early in its opinion, the *Guapi* court indicated that it would engage not only the facts in the record of the case, but the context in which those facts arose.¹⁸⁶ At the outset of the *Guapi* bus sweep, a police officer mounted the bus and asked for passengers' "consent and cooperation" during the interdiction.¹⁸⁷ The court noted that the officer "apparently made his announcement very quickly" and that even when the officer was testifying to the wording of his announcement during the hearing before the magistrate, it was difficult to understand what he was saying.¹⁸⁸ In the Eleventh Circuit's view, though the locutional element of the announcement was in the form of a request, the "unambiguous message [was] that the attention and cooperation of all passengers [was] required."¹⁸⁹ Despite the officer's agreeable wording, then, the Eleventh Circuit concluded that a passenger "in *Guapi*'s position would not have felt free to decline [the officer's] request to search on-board luggage."¹⁹⁰

185. See *Bostick*, 501 U.S. at 447 (Marshall, J., dissenting) (noting that passengers are unlikely to refuse a police "request" to consent to a search because "such behavior would only arouse the officers' suspicions and intensify their interrogation"). Similar sentiments were later echoed by some commentators. See *supra* note 170; Maclin, *supra* note 42, at 812 n.338 (criticizing *Bostick* while noting that "[t]o the person in the street ... the distinction between a police 'request' and 'demand' is likely to be illusory").

186. *United States v. Guapi*, 144 F.3d 1393, 1395 (11th Cir. 1998) (declaring that "police must do more than simply avoid a laundry list of the most egregiously abusive police tactics.... [They] must behave in a manner calculated to convey to a reasonable person that cooperation with law enforcement is voluntary").

187. *Id.* at 1394.

188. *Id.* at 1396.

189. *Id.*

190. *Id.* at 1397.

Accordingly, Guapi's consent to the search was invalidated as the involuntary product of police coercion.¹⁹¹

Similarly, the Eleventh Circuit in *Washington* perceived a disconnect between the text of the agent's "request" upon boarding¹⁹² and the manner in which the "request" was made.¹⁹³ Though the locutional component of the officer's request to enter into a consensual encounter with the passengers was in the form of an interrogatory, the court interpreted the agent's illocutional speech act to be an "announce[ment of] what he wanted the passengers to do, and what he was going to do."¹⁹⁴ The majority's analysis here offered a slight twist on the Supreme Court's *Bostick* opinion, but was entirely faithful to *Bostick*'s "totality of the circumstances" analysis. Whereas the Supreme Court had prohibited police from "convey[ing] a message that compliance with their requests is required"¹⁹⁵ in the context of the request to search, the Eleventh Circuit applied the prohibition to the request to engage in the initial police-citizen encounter. In applying the speech act component at the initial encounter stage, the Eleventh Circuit enforced the "free to leave" principle stressed in *Bostick*¹⁹⁶ in the context of an on-bus encounter in which the passenger wished to refuse the encounter while remaining seated.¹⁹⁷

191. *Id.*

192. *United States v. Washington*, 151 F.3d 1354, 1355 (11th Cir. 1998) (quoting the announcement of Agent Perkins which contained the word "please" three times in a single sentence: "[I]f we could please see your bus ticket, some photo identification if you have some with you, please, and if you would please identify which bag[] is yours") (alteration in original).

193. *See id.* at 1357 (finding that the bus sweep "was consciously designed to take full advantage of a coercive environment").

194. *Id.*

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

196. *See id.*

197. *Washington*, 151 F.3d at 1357. Quoting Judge Black's dissent in *Washington*, the Tenth Circuit in *Broomfield* contended that, contrary to the Supreme Court's avoidance of per se rules in Fourth Amendment contexts, and though such a rule may be wise policy, the *Washington* majority created a per se rule that bus searches absent warnings constitute impermissible seizures. *United States v. Broomfield*, 201 F.3d 1270, 1275 (10th Cir. 2000) ("Although we agree such notification is a relevant fact to consider, it cannot be dispositive of the reasonableness inquiry."). Speech act theory helps to answer the "difficult" challenge posed by the Tenth Circuit "to imagine how authorities could ever conduct a reasonable search [absent warnings]." *Id.* Indeed, the Tenth Circuit addressed its own challenge when it noted that even though the drug interdiction agent "did not inform Mr. Broomfield of his right to refuse consent, he spoke to him in an even tone of voice ... and made no coercive or

Speech act theory provides a framework for understanding the way in which police, while maintaining the appearance of a consensual encounter and nonthreatening request to search, can make it clear to passengers that they would strongly prefer passengers' cooperation.¹⁹⁸ This understanding, however, only extends to an officer getting his message across. The question remains: Why do contraband-transporting passengers "plead guilty" by granting an officer's request?¹⁹⁹ Obedience theory furnishes a model for exploring this question, and more importantly, it helps determine the point at which a consensual encounter or voluntary consent becomes the product of impermissible police coercion.

Obedience Theory

Professor Stanley Milgram's famous experiments on obedience to authority are a valuable vehicle for studying the police-passenger dynamic during bus sweeps.²⁰⁰ Milgram's experiments and analysis

threatening gestures or comments." *Id.* Rather than engage in a head-on confrontation with the Eleventh Circuit by accusing the *Washington* majority of creating a per se rule, the Tenth Circuit could have distinguished the cases by applying speech act theory. The Tenth Circuit could have noted that unlike the text-manner disconnect in *Washington*, in the case at hand the illocutional component matched the officer's locutional requests and that this particular bus sweep procedure did not rise to a Fourth Amendment violation. By doing so, the Tenth Circuit would have avoided determining whether the Eleventh Circuit mandates warnings during bus sweeps or only strongly prefers them.

Of course, this Note supports *Miranda*-like warnings and considers the great importance given them by the Eleventh Circuit to be in line with the Supreme Court's *Bostick* standards and the Court's admonition against per se rules. The lack of any warnings in *Broomfield*, therefore, when coupled with the facts that the agent proceeded directly to Broomfield's seat and began the encounter by displaying his badge, under a *Washington* analysis, indicated that Broomfield had been impermissibly "seized" before the agent asked to search his carry-on luggage. *See id.* Absent these secondary factors, however, this bus sweep may have been allowable under *Washington*.

198. This is not to suggest that an officer "working the buses" is aware of speech act theory as such, but through trial and error an officer may develop a knack for eliciting what appear to be voluntary consents, but which the application of speech act theory suggests are in fact, products of coercion. *See, e.g.,* *Burton v. United States*, 657 A.2d 741, 750 (D.C. 1994) (Schwelb, A.J., dissenting) ("The detectives who conducted this search were not born yesterday. They were surely aware that it would not be easy, within the confines of that bus, for a passenger to defy them and to withhold his consent.").

199. *See supra* note 157.

200. STANLEY MILGRIM, *OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1969). Milgram's findings have been applied generally to consent searches, but have not been explored in the unique context of consent searches conducted during bus sweeps. *See* Oliver,

help to flesh out the *Bostick* test that requires courts to "consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter."²⁰¹ The circumstances combined by the Eleventh Circuit to determine that the on-bus encounters in *Guapi* and *Washington* amounted to Fourth Amendment violations can be best understood as real-world applications of Milgram's analysis.

In Milgram's experiments, the subject would be instructed to deliver ever-stronger electrical shocks to a hidden shill "victim" every time the shill incorrectly answered a question posed by the subject.²⁰² As the voltage supposedly was raised, the "victim" reacted with an increasingly intense series of protests ranging from minor grunts of discomfort to agonizing screams and pleas to stop, and the experiments continued past the point at which the "victim" no longer responded.²⁰³ Whenever a subject would turn to the experimenter for guidance, the experimenter would reply with one of a series of scripted "prods" to continue, each more strongly worded than the last.²⁰⁴ Contrary to predictions by several groups that "virtually all subjects [would] refuse to obey the experimenter,"²⁰⁵ the principle finding was "the extreme willingness of adults to go to almost any lengths on the command of an authority," regardless of the ramifications.²⁰⁶ That the subjects continued to shock the shills at the prompting of the experimenters even though it apparently inflicted great pain may explain why bus passengers obey authority by "consenting" to a search when doing so will undoubtedly reveal narcotics and will likely result in stiff penalties.²⁰⁷ Though the police do not use overt verbal prods to

supra note 38, at 1465-67; Barrio, *supra* note 155, at 233-38.

201. *Bostick*, 501 U.S. at 439.

202. MILGRAM, *supra* note 200, at 17-20.

203. *Id.* at 23.

204. *Id.* at 21.

205. *Id.* at 31. The groups polled included psychiatrists, undergraduate and graduate students, faculty, and middle-class adults. *Id.* at 30-31.

206. *Id.* at 5.

207. See Samuel L. Gaertner, *Situational Determinants of Hurting and Helping Behavior*, in *SOCIAL PSYCHOLOGY: AN INTRODUCTION* 111, 119 (Bernard Seidenberg & Alvin M. Snadowsky eds., 1976) ("The parallels between Milgram's research and real-life events are

coerce bus passengers to consent to a search, a request made by an authority may have the force of a demand, or "prod."²⁰⁸ Given the apparent difficulty for many citizens to defy authority, a *Miranda*-like warning to a passenger that he can either refuse the initial encounter with police or deny the search request may help defuse the potential for coercion produced by a request made by a legitimate authority in the confined space of a bus.²⁰⁹ Specific warnings informing a passenger of his rights would offer him a choice other than either exposing his luggage to a search or coming under increased police scrutiny for denying the officer's requests.

Milgram noted that in the hierarchical structures people use to organize society, "authority [is] mediated by symbols."²¹⁰ The *Schneckloth* Court attempted to differentiate between consent searches granted voluntarily from those "coerced ... or granted in submission to a claim of lawful authority"²¹¹ and the Supreme Court in *Bostick* noted the coercive effect of officers who mount buses "displaying badges, weapons or other indicia of authority."²¹² The

disturbingly tangible. Apparently, in some situations, many normal, decent people faced with the commands of legitimate authority tend to obey, regardless of the content of the act."). The Eleventh Circuit opinions do not contain the punishments imposed by the district courts in their recent bus-sweep cases, but other circuits have noted the prison sentences imposed on drug-transporting bus passengers under the Federal Sentencing Guidelines. *United States v. Stephens*, 206 F.3d 914, 916 (9th Cir. 2000) (noting the district court sentence of 240 months in prison for possession with intent to distribute charge); *United States v. McDonald*, 100 F.3d 1320, 1324 (7th Cir. 1996) (120 months in prison plus five years probation and a fine for same offense).

208. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1299 n.198 (1990) ("The so-called difference between a police 'request' and 'demand' is another example of the 'wordsmanship' police departments have become so adept at in describing their investigatory activities.") (citing Yale Kamisar, Book Review, 76 HARV. L. REV. 1502, 1503 (1963)).

209. See ULLIVER, *supra* note 182, at 80-81 ("Commonly ... police invoke the myth of consent—the idea that a suspect waives his rights if he doesn't actively assert them—to justify their exercise of authority over the liberty of some person who is not independently motivated to cooperate.").

210. MILGRAM, *supra* note 200, at 123.

211. *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973).

212. *Florida v. Bostick*, 501 U.S. 429, 441 (1991) (Marshall, J., dissenting); see also *id.* at 434 (quoting approvingly the Court's determination in *Terry* that a seizure can result from a "show of authority"); Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47, 47, 58-59 (1974) (declaring that a uniform is a recognized symbol of authority carrying "a degree of legitimacy" and positing that it is "highly probable that uniformed governmental authorities have even more legitimate social power [than uniformed private actors] ... to manipulate citizens").

Eleventh Circuit made similar observations in its recent bus-sweep opinions. In *Washington*, the court found a "show of authority" when the police officer held his badge over his head while announcing himself;²¹³ and the *Guapi* court noted that at the onset of the bus sweep the "bus driver exit[ed] and [was] replaced by a uniformed police officer."²¹⁴ These symbols set the groundwork for coerced consents in two ways. First, they identify the agent as an established authority figure. Second, they confront passengers with a salient reminder that the agent has the authority to take a passenger's liberty.²¹⁵

The Eleventh Circuit found it significant in both *Guapi* and *Washington* that the bus driver disembarked before the bus sweep commenced, leaving the officers without a competing authority figure²¹⁶ and focusing passengers' natural obedience to authority onto the agents.²¹⁷ The *Guapi* panel explicitly addressed this issue

213. *United States v. Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998).

214. *United States v. Guapi*, 144 F.3d 1393, 1396 (11th Cir. 1998) (emphasis added).

215. See *Schneckloth*, 412 U.S. at 233-34 (collecting cases in which the Court had invalidated searches on finding that the consent was "coerced by threats or force"); see also *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion) (noting that the burden is on the government to prove that a consent to search was voluntarily given, "a burden that is not satisfied by showing a mere submission to a claim of lawful authority").

216. *Washington*, 151 F.3d at 1355 (noting that the bus driver remained in the terminal while the officers conducted the bus sweep); *Guapi*, 144 F.3d at 1396 (same); see also *United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000) (finding that the officers' use of the on-bus public address system conveyed their authority to the passengers).

217. See MILGRAM, *supra* note 200, at 138-40. Milgram explains that people expect structured situations to include a controlling authority figure. See *id.* at 139. On intercity buses, the driver is the usual uniformed controlling figure who, by their acquiescence, cede authority to uniformed drug interdiction agents. See *id.* at 139-40 (discussing uniforms as "external accouterments" of authority and explaining that the absence of competing authorities serves to reinforce that the person claiming authority in a given situation "is the right man").

Milgram tracks obedience to authority from our earliest inculcation in the family setting, through institutions such as schools or job markets, and he notes the rewards society bestows on those who work within societal frameworks; that is, society rewards those who obey authority. See *id.* at 135-38. One may argue that drug couriers by definition are lawbreakers who operate outside of societal frameworks and are therefore unlikely to obey authority. Drug couriers, however, are people who engage in one type of (arguably) victimless crime, but who are likely otherwise societal conformists, or by association, "authority obeyers." For an individual arrested during a bus sweep, for instance, apart from carrying contraband, he also bought a ticket, carried government-issued identification, remained nondisruptive during the journey, etc. In other words, by operating within the societal framework, he obeyed authority. In this light, then, it may not be so surprising that such a passenger would obey authority and "consent" to a search "request" from police.

by remarking that while the police made their initial announcement, the bus driver, "Braggs—the only other potential figure of authority—exited the bus."²¹⁸ Likewise, whereas Milgram's experimenters were not backed by the force of law and yet managed to induce sixty-five percent of subjects to deliver the maximum shock,²¹⁹ police officers are endowed with the coercive power of arrest, and may wield that legitimate authority in exacting obedience to conduct searches predicated on a citizen's "consent."²²⁰

Apart from suggesting that people are predisposed to obey authority in general, perhaps more pronounced when the authority is in the form of a narcotics agent displaying the trappings of his office, the Milgram studies also suggest that the situation or context of an interaction exerts a powerful influence on the level of obedience to authority.²²¹ Relative to the distinction drawn in *Schneckloth* between the inherently coercive environment surrounding custodial interrogations and noncustodial search requests determined to be less susceptible to coercion, one can infer from the obedience studies that the bus setting can be leveraged by police to induce "consent."²²² The confines of the bus coupled with ques-

218. *Guapi*, 144 F.3d at 1396.

219. MILGRAM, *supra* note 200, at 33.

220. See, e.g., *id.* at 93, 96-97 (finding that when the experimenter was presented as an "ordinary man" rather than as an "authoritative source," subjects were much less obedient); Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions*, 60 J. PERSONALITY & SOC. PSYCHOL. 398, 399, 409 (confirming through later studies that the social arrangement between the authority figure and the subject can determine the level of obedience and that overall "people are much more prone to obey the orders of a legitimate authority"); see also Maclin, *supra* note 207, at 1337 n.215 (reviewing other commentators on the subject and concluding that "because the officer manifests the authority and power of the state, it is no surprise that the citizen readily complies with the requests of the officer").

221. See MILGRAM, *supra* note 200, at 149-152; Blass, *supra* note 220, at 399-402; Gaertner, *supra* note 207, at 112 (collecting studies and concluding that situational factors are stronger determinants of behavior than personality variables).

222. Professor Milgram found that the nearness of the authority to the subject had a significant positive effect on the obedience of the subject to the authority's verbal prods. MILGRAM, *supra* note 200, at 59-62. Later research isolated the proximity variable from overt coercion on the part of the experimenter and found "proximity ... to the legitimate authority significantly affects the performance of a nonhostile attack initiated by the command of legitimate authority." Gaertner, *supra* note 207, at 118. The confines of a bus during a drug sweep necessitate that police be in close proximity to passengers when making the individual requests to consent to a search. See, e.g., *Florida v. Bostick*, 501 U.S. 429, 446 (1991) (Marshall, J., dissenting) (highlighting the fact that Bostick was in the rearmost seat and the

tioning from an authority figure advance along the continuum toward the custodial interrogation pole and thus should require *Miranda*-like warnings to be delivered upon boarding and as part of the consent to search request. The Supreme Court in *Bostick* found it "particularly worth noting ... [that] the police specifically advised Bostick that he had the right to refuse consent."²²³ No such warning was given in either *Guapi* or *Washington*.²²⁴ The *Washington* panel, though it explicitly followed the Supreme Court's dictate against per se rules in the Fourth Amendment context,²²⁵ was especially clear that it viewed the combination of an on-bus encounter with an absence of warnings as a presumptive indication of a Fourth Amendment violation.²²⁶

A telling feature of Milgram's obedience experiments is their graduated nature. The initial shocks delivered by the subjects were mild, as were the verbal "prods" of the experimenter.²²⁷ As the experiments progressed, the shocks increased in intensity as did the feedback from the experimenter when the subject began showing

officers were near enough that they partially blocked the aisle). Some officers conducting bus sweeps have closed the distance between themselves and passengers to an even greater degree than necessitated by the confines of the bus. *United States v. Hill*, 199 F.3d 1143, 1146 (10th Cir. 1999) (officer testifying that even though the aisle was only three and one half feet wide, he would lean in to the seats as he questioned passengers); *United States v. Lewis*, 921 F.2d 1294, 1298 (D.C. Cir. 1990) (noting in companion cases the routine police practice of leaning over passengers to question them, so that even though the officer stood behind the passenger, the passenger would have to brush against the officer in order to leave the seat); see also LaFave, *supra* note 16, at 750 (noting that even if police do not block the aisle, thus not technically prohibiting a passenger's freedom to leave, the situation is nonetheless coercive because the passenger is still within arm's length of the officer). Also, the coercive pressure exerted by the overwhelming authority of the officers may be exacerbated by their vertical superiority over seated passengers. See Brief Amici Curiae of the American Civil Liberties Union et al. at 5, *Florida v. Bostick*, 501 U.S. 429 (1991) (No. 89-1717) ("The drug interdiction officers] stand in or partly in the narrow aisles, towering over the seated passenger.").

223. *Bostick*, 501 U.S. at 432.

224. *Washington*, 151 F.3d at 1356-57 (comparing the lack of notification to passengers that they had a right to refuse consent in *Guapi* and the instant case with earlier Eleventh Circuit bus sweep cases in which such a warning was given and no Fourth Amendment violation was found).

225. See *id.* at 1357 (citing *Ohio v. Robinette*, 519 U.S. 33 (1996); *Bostick*, 501 U.S. at 435-37).

226. *Washington*, 151 F.3d at 1357 ("Looking at the circumstances of this case, we feel that a reasonable person in the defendant's position would not have felt free to disregard [the officer's] requests without some positive indication that consent could have been refused.").

227. MILGRAM, *supra* note 200, at 17-22.

signs of doubt about continuing.²²⁸ This stepwise progression solidified the subject's state of complicity with the experimenter and made it more difficult for the subject to justify breaking off his obedience.²²⁹ Likewise, the officers conducting the bus sweeps in *Bostick* and *Washington* asked to check the passengers' tickets and identification before requesting consent to search carry-on luggage.²³⁰ A passenger who initially accedes to engage in a seemingly innocuous consensual encounter with police, and then complies with a request to show his ticket and identification, must then shift gears if he is to deny permission for police to conduct a search of his luggage, thereby breaking from the role of compliant passenger²³¹ and possibly raising the suspicions of the officers.²³² The difficulty of asserting an unwillingness to continue granting gradually more intrusive requests by legitimately authoritative officers goes to the core lesson of Milgram's experiments—that

228. *Id.*

229. *Id.* at 149; Ross, *supra* note 170, at 102-03 (explaining the "psychological dilemma" faced by the subject in stopping the experiment midway because in doing so he would have to justify "how it could be illegitimate to deliver the next shock but legitimate to have delivered one of only slightly lesser magnitude moments before").

230. *Bostick*, 501 U.S. at 431-32; *Washington*, 151 F.3d at 1356. Posing informal questions and asking to see identification prior to requesting to search a passenger's carry-on luggage appears to be a standard bus sweep operating procedure. See, e.g., *United States v. Smith*, 201 F.3d 1317, 1320 (11th Cir. 2000).

231. See MILGRAM, *supra* note 200, at 162-64 (summarizing the psychological mechanisms subjects use to justify their continued complicity and explaining the many psychological barriers a subject must overcome to disobey); see also *United States v. Lewis*, 728 F. Supp. 784, 788 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990) (describing an "increasingly more intrusive" series of questions directed at a bus passenger as 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").

232. See *supra* notes 128-30 and accompanying text; LaFave, *supra* note 16, at 751 (positing that bus passengers are unlikely to refuse an initial engagement with officers because a "reasonable person would perceive such stonewalling as a course which would make him an object of suspicion and thus a subject of further attention by the police team involved in the sweep"); Maclin, *supra* note 42, at 810 (concluding that because it is "unrealistic" to think bus passengers have any control over a bus sweep, it is unrealistic to think they would feel "free to terminate the encounter or to decline the officer's requests"). Though it is a passenger's right to withdraw or place limits on their grant of consent to search, it is unlikely that they will do so. See *Burton v. United States*, 657 A.2d 741, 751 (D.C. 1994) (Schwelb, J., dissenting) (chastising the majority for ignoring the actions of a bus passenger indicating a withdrawal of consent to search which "[t]o a lay observer ... would surely come across as an action designed to thwart a search"); Kagehiro, *supra* note 157, at 45 (finding that only 43% of the subjects understood that one who consents to a search can place limits on its scope).

"relatively few people have the resources needed to resist authority."²³³ In joining *Washington*, the Ninth Circuit in *Stephens* echoed this lesson by concluding that "no passenger, innocent or guilty, would have felt free to refuse to answer the officers' questions while remaining on the bus."²³⁴

To refuse the search requests of a police officer in an open environment in itself would constitute a break from the norm²³⁵ and, accordingly, many people consent to police searches.²³⁶ It is clear from *Royer* that *Miranda*-like warnings are not required when police approach citizens in open settings,²³⁷ and though it is a factor to be considered in the "totality of the circumstances" test of voluntariness, police are not required to warn citizens of their constitutional rights before requesting consent to search.²³⁸ To refuse a search request in the close confines of a bus with seemingly no escape,²³⁹ while the vast majority of your fellow passengers are

233. MILGRAM, *supra* note 200, at 6. Milgram's experiments were intended to investigate the psychological bases of German citizens' complicity in the Nazi extermination of Jews. *Id.* at 2; see also Ross, *supra* note 170, at 103 ("[M]any subjects ... were obedient to the bitter end because they didn't really know how to disobey effectively, that is, exactly what one had to say or do to terminate the experiment....").

234. *United States v. Stephens*, 206 F.3d 914, 917 n.2 (9th Cir. 2000).

235. *United States v. Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998) (noting in dicta that "[m]ost citizens, we hope, believe that it is their duty to cooperate with the police"); William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1215 (1998) (arguing that "ordinary people never feel free to terminate a conversation with a police officer").

236. See RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES* 19 (1985) (finding that most searches are premised on consent or are conducted incident to arrest and noting that one officer interviewed suggested that consent searches accounted for up to 98% of the searches he conducted); Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 190 (1991) (noting that even police are surprised at the level of compliance by citizens and that "judging from the numerous appellate cases upholding consent searches, their use generally is quite frequent").

237. *Florida v. Royer*, 460 U.S. 491, 497-98 (1983).

238. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).

239. See *Florida v. Bostick*, 501 U.S. 429, 448 (1991) (Marshall, J., dissenting) (indicating that a passenger would not want to exit a bus during a sweep for fear of being stranded at the bus station); *Stephens*, 206 F.3d at 916 (suggesting that the officers boarded the bus at its scheduled departure time in order to heighten the coerciveness of the bus sweep); LaFave, *supra* note 16, at 749 (proposing that "the police dominance manifested in a bus sweep has a profound impact upon bus travelers because they, unlike pedestrians or travelers confronted in an airline terminal, have limited means for avoiding or ending the contact"). The inability of bus passengers to retreat from questioning officers may add to their perceived pressure to obey. See Cheryl A. Albas & Daniel C. Albas, *Meaning in Context: The Impact of Eye Contact and Perception of Threat on Proximity*, 129 J. SOC. PSYCHOL. 525, 530 (1989) (finding that subjects stood farther away from experimenters in situations where the

cooperating,²⁴⁰ is especially difficult. Professor Milgram and his adherents likely would agree that buses present a situation uniquely susceptible to subtle police manipulations which lead to consents to search based more on obedience to authority than true voluntariness.²⁴¹ The Eleventh Circuit has rightly determined that the Constitution demands that bus sweeps include prophylactic warnings, the absence of which creates a presumption of coercion which, if not rebutted, taints the consent and renders inadmissible any evidence discovered as a result of a search.

CONCLUSION

The foregoing analyses have endeavored to establish two premises. First, a standard narcotics bus sweep poses very close Fourth Amendment questions. Appellate courts at every level have wrestled with slight variations of the tactic. In addition to the federal circuit court split between the Eleventh and Ninth Circuits

subjects felt threatened); Michael J. Strube & Carol Werner, *Interpersonal Distance and Personal Space: A Conceptual and Methodological Note*, 6(3) J. NONVERBAL BEHAV. 163, 168 (1982) (finding that "both interpersonal distance and personal space were increased by subjects who anticipated that the other person would attempt to control them during the interaction").

240. See *United States v. Felder*, 732 F. Supp. 204, 205 (D.D.C. 1990) (noting the arresting officer's testimony that "only 3 or 4" out of eighty-five passengers refused to consent to an interview); *Stubbs v. State*, 661 So. 2d 1268, 1269 (5th Fla. Dist. Ct. App. 1995) (recording the testimony of an officer who claimed most passengers would grant her permission to search); *State v. Kerwick*, 512 So. 2d 347, 349 (4th Fla. Dist. Ct. App. 1987) (noting that one officer, "in the name of 'voluntary cooperation' with law enforcement ... had searched in excess of three thousand bags" in a nine-month period); see also MILGRAM, *supra* note 200, at 113-22 (describing conformity and obedience as "abdication[s] of initiative to an external source").

241. MILGRAM, *supra* note 200, at 205 ("[O]ften, it is not so much the kind of person a man is as the kind of situation in which he finds himself that determines how he will act."); Ross, *supra* note 170, at 103:

What the Milgram experiments offered was an unparalleled demonstration of the degree to which it is specific, often subtle, *details* of the situation that matter most and yet go unnoticed and unappreciated. Milgram's demonstrations challenge us to look at the situation closely, taking care to appreciate the subjective viewpoint of the actor, especially when we must try to explain behavior that seems inexplicable.

Id.; see also Blass, *supra* note 220, at 399 ("There is no question that modifications in the physical ... arrangements in the setting of the obedience experiment can have powerful effects.").

on one side and the Tenth Circuit on the other,²⁴² the uncertain constitutionality of bus sweeps has resulted in a perverse situation in Florida, the state where bus sweeps were developed.²⁴³ As it stands, if a narcotics-transporting passenger is caught during a routine bus sweep in Florida, the contraband seized (usually the only tangible evidence brought out in trial) will be admitted in state court, but suppressed in the encompassing federal court.²⁴⁴ This situation is antithetical to the founding principle that the federal Constitution sets the threshold of the individual liberty protections that states must secure for citizens, although states are encouraged to grant broader protections.²⁴⁵ Second, police-initiated encounters and attendant search requests conducted in the close confines of a bus engender psychological pressures on passengers to comply and can result in grants of consent to search that are not voluntarily given, but are in fact the product of police coercion.²⁴⁶ In 1998, the Eleventh Circuit recognized the circumstances of the paradigmatic bus sweep as a situation police could leverage to force encounters onto unwilling citizens and elicit consents to search of questionable voluntariness. The court moved to remedy this imbalance by wisely adopting the view that bus sweeps conducted without *Miranda*-like warnings informing passengers that they could decline the initial encounter and refuse to consent to a search would give rise to a presumption that the bus sweep in question violated the Fourth Amendment prohibition against unreasonable searches and seizures.

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242. See *supra* notes 125-42 and accompanying text. A defendant in the Fourth Circuit cited *Washington* in an effort to suppress the narcotics seized during a bus sweep, but the claim was summarily dismissed as distinguishable on the facts of the case. *United States v. Whitfield*, No. 99-4316, 1999 U.S. App. LEXIS 23331 (4th Cir. Sept. 24, 1999) (per curiam).

243. See *supra* note 43.

244. Compare *United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998) with *Mondestin v. State*, 760 So. 2d 1062, 1063 (4th Fla. Dist. Ct. App. 2000) (per curiam) (rejecting the defendant's argument that *Guapi* required that the officers inform citizens of their rights before conducting a bus sweep and concluding: "We recognize that this is not the appropriate court to reexamine *Bostick*.").

245. See *supra* note 52.

246. See *supra* notes 143-241 and accompanying text.