Note

The People on the Bus Get Searched and Seized: Why Police Conduct in Suspicionless Bus Sweeps Should Be Circumscribed

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Introduction

During a scheduled bus stop in Tallahassee, Florida, two African-American men found themselves in an unexpected and unpleasant situation.[1] After reboarding the Greyhound bus on which they came and surrendering their tickets to the bus driver, the two men reoccupied their adjacent seats,[2] unaware of what would happen next and unable to do anything about it.

The driver exited the bus.[3] Three police officers—in plainclothes but with their badges visible—boarded in his stead.[4] One officer assumed the driver's seat, perched in a kneeling position with the back of the chair in front of him, facing the bus.[5] The second officer walked

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1 *See* Joshua Fitch, Comment, United States v. Drayton*: Reasonableness & Objectivity—A Discussion of Race, Class, and the Fourth Amendment*, 38 NEW ENG. L. REV. 97, 97–99 (2003).

2 United States v. Drayton, 536 U.S. 194, 197–98 (2002).

3 *Id.* at 197.

4 *Id.*

5 *Id.*

through the aisle to the rear and stationed himself there, facing the front.[6] The third officer accompanied the second to the back and made his way forward, questioning passengers from a position either just behind or next to that passenger's seat.[7] He spoke softly, stating that the officers were conducting a routine drug interdiction, for which they "would like . . . cooperation."[8] When he spoke to the two men, his face was no more than a foot and a half away from theirs.[9] After identifying which luggage belonged to them, the officer searched the bag and found no contraband.[10] Yet he persisted and obtained consent to search both of the men, Christopher Drayton and Clifton Brown, Jr., upon whose persons he eventually found duct-taped bundles of powder cocaine.[11] The two men were charged with possession of cocaine with the intent to distribute and conspiring to distribute cocaine.[12] At trial, Drayton and Brown moved to suppress the cocaine as the product of an illegal search and seizure.[13] The district court denied the motion, and the two were convicted.[14]

Despite the apparent coercion present in this sequence of events—the facts of *United States v. Drayton*[15]—the Supreme Court applied a totality-of-the-circumstances test to the suspicionless bus sweep and found that Drayton and Brown had not been seized.[16] In doing so, the Court established a precedent that improperly maintains that the constitutionality of warrantless bus searches can be fairly analyzed under a totality-of-the-circumstances test, judged according to a "reasonable person" standard. There is no one reasonable person and perpetuating this fiction contravenes the intent of the Fourth Amendment.

This Note argues that the Court should recognize that the analysis for suspicionless bus searches should be aligned with other areas of Fourth Amendment law and should be easier to apply than a totality-of-the-circumstances test. A bright-line rule requiring police to inform passengers of their rights, however, could be as easily avoided in

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6 *Id.* at 198.

7 *Id.*

8 *Id.* at 211 (Souter, J., dissenting).

9 *Id.* at 198 (majority opinion).

10 *Id.* at 199.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 200.

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

16 *See id.* at 203.

practice as the obligation to provide *Miranda* warnings has been.[17] Therefore, the Court should adopt a rule that, should police wish to conduct a suspicionless bus sweep, they must do so within the temporal duration of a scheduled bus stop and must not behave in a way that would suggest they possess control over the bus. They should not be able to prolong a scheduled stop merely to conduct a suspicionless search. In a cramped and confined bus setting, where a passenger believes the bus should be resuming its itinerary at any moment, this would indicate that he is not "free to leave."[18]

This topic is particularly relevant in a time when people are using air travel less frequently and the airline industry is in decline.[19] Airfares are higher than ever, extra service costs for everything from checking luggage to early boarding fees only increase the fiscal burden, and tough economic conditions have caused people to turn to less expensive alternatives.[20] Equally relevant is that security in airports has become a hardship and a hassle,[21] especially in the wake of the attempted airplane hijacking on December 25, 2009.[22] It has become both commonplace and accepted that one will forfeit certain fundamental freedoms when traveling by plane.[23] Bus travel is much cheaper,[24] and one does not have to give up such freedoms to take advantage of ground transportation.[25]

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17 *See infra* Part III.B.

18 This Note does not attempt to address the reasonable person standard or free-to-leave test in any other circumstances, including any other form of public transportation. Its scope is limited to suspicionless searches on commercial buses, most often during drug and weapons interdictions. Notably, however, Justice Souter's dissent in *Drayton* pointed out that there is a significant difference between the types of freedoms one expects to give up when traveling by plane rather than by bus. *Drayton*, 536 U.S. at 208 (Souter, J., dissenting) ("It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand. The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses.").

19 The Travel Insider, Why Are Fewer People Flying? part 1, Jan. 9, 2009, http://www.thetravelinsider.com/airlinemismanagement/shrinkingairlines.htm.

20 *Id.*

21 The Travel Insider, Why Are Fewer People Flying? part 3, Jan. 9, 2009, http://www.thetravelinsider.com/airlinemismanagement/shrinkingairlines3.htm.

22 *See* Independent Traveler.com, Airport Security Q&A, http://www.independenttraveler.com/resources/article.cfm?AID=710&category=1 (last visited Jan. 1, 2010).

23 *Drayton*, 536 U.S. at 208 (Souter, J., dissenting) ("Anyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft.").

24 Matthew Bigg, *Greyhound Bus Trip Provides Snapshot of U.S. Poor*, REUTERS, June 5, 2007, http://www.reuters.com/article/domesticNews/idUSN2324428920070605.

25 *See Drayton*, 536 U.S. at 208 (Souter, J., dissenting).

Part I of this Note provides a more in-depth analysis of the Fourth Amendment and *United States v. Drayton*. Part II explores the problems with *Drayton*, with particular reference to the dissent in that case and racial and socioeconomic factors that the Court has not sufficiently addressed. Part III addresses the oft-proposed solution to this problem—a bright-line rule akin to that adopted by the Court for custodial interrogation in *Miranda v. Arizona*[26]—and why it is not feasible. Part IV proposes that the focus must be instead on proscribing police conduct that extends the duration of a scheduled bus stop or clearly demonstrates control over the bus.

I. Background

According to Fourth Amendment jurisprudence, a seizure occurs when a reasonable person, under the totality of the circumstances, no longer feels "free to leave."[27] This test has been modified for suspicionless bus searches to find a seizure when, under the totality of the circumstances, a person no longer feels free to end the encounter.[28] The Supreme Court built upon this background in *United States v. Drayton* when it held that the defendants were not seized and that bus settings required no further special considerations.[29] This Part discusses the background of seizures under the Fourth Amendment, the free-to-leave doctrine and its extension to suspicionless bus searches, and *Drayton* in more depth.

A. The Fourth Amendment and the Free-to-Leave Doctrine

The Fourth Amendment[30] was included in the Bill of Rights to protect the privacy of both the home and the individual and to guard against abuses of police discretion.[31] Even early in the development

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

27 United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

28 *See* Florida v. Bostick, 501 U.S. 429, 436 (1991) ("[T]he appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.").

29 *See Drayton*, 536 U.S. at 200–03.

30 The Fourth Amendment states:

> 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.

U.S. CONST. amend. IV.

31 *See* Russell M. Gold, Note, *Is This Your Bedroom?: Reconsidering Third-Party Consent*

of this law, the Court noted that "[n]o right is held more sacred, or is more carefully guarded," than that which the Fourth Amendment protects.[32] Over time, as police tactics in ferreting out crime evolved to include stop-and-frisk tactics approved under *Terry v. Ohio*,[33] the Court became more lenient in what it determined was constitutionally permissible.[34] However, the Court defended the protections the Amendment afforded, even if only by acknowledging them and then pushing them aside. Despite allowing police to engage in *Terry* stops, the Court still noted that a person is most assuredly seized whenever a police officer accosts him and restricts his freedom to walk away.[35]

1. Free to Leave

Although *Terry* was a landmark case in Fourth Amendment seizure jurisprudence, the Court did not define what constituted a restraint on freedom to walk away until *United States v. Mendenhall*.[36] In *Mendenhall*, the Court announced the free-to-leave test to determine whether a seizure had occurred: would a reasonable person, under the totality of the circumstances, feel free to leave?[37] The Court laid out several factors to consider in making this evaluation, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[38] The Court adhered to both the free-to-leave test and the *Mendenhall* factors in later cases.[39] Because the Court's analysis involved the totality of the circumstances, however, one could never predict the value each factor might have or whether the presence of one or more would be dispositive.

Searches Under Modern Living Arrangements, 76 GEO. WASH. L. REV. 375, 378 (2008); *see also* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 28 n.55, 31 (Leonard W. Levy ed., Da Capo Press 1970) (1937) (listing seventeenth-century abuses of the general warrant by the British Crown).

32 Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

33 Terry v. Ohio, 392 U.S. 1 (1968). A *Terry* stop permits a police officer on the street "in appropriate circumstances and in an appropriate manner [to] approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22.

34 *Cf. id.* at 12–14 (recognizing that there are severe judicial limitations in controlling the day-to-day interactions between police officers and citizens and no judicial mechanism to guide police in making the snap judgments they often must on the street).

35 *Id.*

36 United States v. Mendenhall, 446 U.S. 544 (1980).

37 *Id.* at 554.

38 *Id.*

39 *See, e.g.*, Kaupp v. Texas, 538 U.S. 626, 631 (2003).

The Court's analysis of these factors has led to a variety of outcomes, often puzzling. In *Florida v. Royer*,[40] two officers approached the defendant at an airport and asked for his ticket and license.[41] They did not return either item and asked him to accompany them to a small room off the concourse.[42] They also obtained his luggage without his consent and brought it into the room.[43] The Court held that the officers' actions, taken together, *without any indication that the defendant was free to depart*, constituted a seizure.[44]

The next year, however, in *INS v. Delgado*,[45] the Court held that no seizure occurred when the Immigration and Naturalization Service ("INS") conducted surveys of the workforce at a garment factory for the purpose of discovering illegal aliens. The Court found the workers were still free to leave despite the fact that multiple INS agents were positioned near the factory exits, while others—wearing badges and carrying firearms—moved throughout the factory, talking to each worker and giving no indication that the workers were free to depart.[46] Admittedly, the circumstances of each case can differ greatly, but police conduct from one situation to the next is often similar, and the Court does not always recognize this fact.

Delgado particularly illustrates the inconsistency among cases, the tension with reality, and the problems with the totality-of-the-circumstances test. Despite the presence of several factors that it articulated in *Mendenhall,*[47] the Court still concluded that the defendants were free to leave.[48] In doing so, the Court ignored the simple question of where the workers would go. It is unlikely that they would just leave or go home during the workday, even if they did not feel deterred by the agents stationed at the exits. Simply stating that a reasonable person would feel free to leave in such circumstances does not make it so. This Note argues that the Court's logic is flawed.

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40 Florida v. Royer, 460 U.S. 491 (1983).

41 *Id.* at 494.

42 *Id.*

43 *Id.*

44 *Id.* at 501.

45 INS v. Delgado, 466 U.S. 210 (1984).

46 *See id.* at 212.

47 United States v. Mendenhall, 446 U.S. 544, 554 (1980) (including the threatening presence of several officers and the display of weapons).

48 *Delgado*, 466 U.S. at 220–21.

2. Suspicionless Bus Searches

The Court later extended the reasonable person test to the commercial bus context during suspicionless bus searches aimed at drug and weapons interdiction. In *Florida v. Bostick*,[49] two officers with badges, one of whom was carrying a gun, boarded a bus during its scheduled stopover.[50] Without articulable suspicion, the officers asked the defendant passenger for his ticket and identification.[51] Even though there was nothing out of the ordinary about either document, the officers continued talking to him.[52] After explaining that they were trying to intercept illegal drugs, they requested the defendant's consent to search his luggage but informed him that he had the right to refuse.[53]

The Florida Supreme Court had been persuaded that, because the defendant was en route to his destination and could not leave the bus, which was only temporarily stopped and soon to depart, a reasonable traveler would not have felt that he was free to leave.[54] In light of the setting, there was no place he might have gone.[55] Therefore, the court effectively held that suspicionless bus searches were per se unconstitutional. This was the primary point with which the United States Supreme Court took issue.[56]

The Court held that a bright-line rule was inappropriate.[57] Instead, the Court remained satisfied with the totality-of-the-circumstances test to determine whether a reasonable person would have felt free to leave. The Court did modify the test in the bus context to whether a reasonable person would feel free to decline the officer's questions or terminate the encounter.[58] This slight change, however, is not enough to remedy the constitutional flaw; in adopting this rule, the Supreme Court perpetuated the reasonable person fiction and extended it to a setting that makes it less realistic.

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

50 *Id.* at 431.

51 *Id.*

52 *Id.* at 431–32.

53 *Id.* at 432.

54 Bostick v. State, 554 So. 2d 1153, 1157 (Fla. 1989), *rev'd*, 501 U.S. 429 (1991).

55 *Id.*

56 *Bostick*, 501 U.S. at 433.

57 *Id.* at 436.

58 *Id.*

B. United States v. Drayton

The facts of *United States v. Drayton* are fairly typical of a suspicionless-bus-sweep case.[59] The defendants observed multiple officers, their badges visible, boarding the bus—one at the front and one at the rear, while the third moved through the aisles to question individual passengers.[60] Although the police officers later testified that the passengers could have declined to cooperate, very few people had chosen to do this over the years.[61] Several of the factors articulated in *Mendenhall* were present.[62] Moreover, bus confines are cramped and passengers are not truly free to leave because they risk missing departure. Yet, the Court still concluded that the defendants had not been seized.[63]

Prior to Supreme Court review, the Eleventh Circuit had reached the opposite conclusion. It held that reasonable persons in the defendants' positions would not have felt free to disregard the officers' requests *without some positive indication that consent could be refused*.[64] The yielding of authority from the driver to the police and the presence of an officer kneeling in the bus driver's seat during a police interdiction, even if not so intended, would make a reasonable person feel that the searches were mandatory.[65]

The main issue before the Supreme Court in *Drayton*, thus, was whether a police officer must inform a passenger that he may refuse to consent.[66] The Eleventh Circuit determined[67] that this would give the passenger some positive indication that the police officer is not unduly restricting his freedom.[68] The Court declined to adopt this per se rule on the basis that such rules are inappropriate in the context of the

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59 *See supra* text accompanying notes 1–14.

60 United States v. Drayton, 536 U.S. 194, 197–98 (2002).

61 *Id.* at 198.

62 For example, the presence of multiple officers, the display of their badges, and language and tone indicated compliance might be compelled. *Id.* at 211 (Souter, J., dissenting).

63 *Id.* at 200 (majority opinion).

64 United States v. Drayton, 231 F.3d 787, 790 (11th Cir. 2000), *rev'd*, 536 U.S. 194 (2002). The court mentioned that it was compelled to reach this conclusion under its precedent of *United States v. Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998), the facts of which are nearly indistinguishable from this case.

65 *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2003 SUP. CT. REV. 153, 177.

66 *See Drayton*, 536 U.S. at 203.

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

68 *Drayton*, 536 U.S. at 201–03.

Fourth Amendment.[69] Instead, it once again held that the totality of the circumstances was the preferred method of analysis.[70]

Under this articulated standard, the Court found that defendants had not been seized.[71] The Court analyzed the circumstances and determined that each action corresponding to a *Mendenhall* factor could be explained away, and none tipped the scale in favor of the defendants.[72] The officers did not give the passengers any reason to believe that they were required to answer questions.[73] When the questioning officer approached Drayton and Brown, his weapon remained hidden and his movements were nonthreatening.[74] He left the aisle free, allowing passengers to exit if they wished.[75] He spoke to each person individually and in a "polite, quiet voice."[76] According to the Court, nothing the officer said would suggest to a reasonable person a requirement to answer the questions or an inability to end the encounter.[77] Had the exchange occurred on the street, it undoubtedly would have been constitutional.[78] That an encounter occurs on a bus does not, without more, transform standard and permissible police actions into illegal seizures.[79]

Although it was easy for the Court to dismiss each factor as falling in favor of finding the police conduct constitutional, it would be just as easy to argue that each factor could support the finding of an illegal seizure—even more so when all are taken together. For example, the Court found that the police officers were careful not to block the aisles or the exit, keeping close to the seats of those passengers they were questioning.[80] But one could just as easily see the questioning officer's leaning over the passengers as a means not of keeping the aisles clear, but of gaining the upper hand with each passenger being questioned—remaining above them, looking down, intimidating them, and invading their personal space. The Court also found that the police officer spoke in a "polite, quiet voice"[81]—but a quiet voice is not

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69 *Id.* at 201.
70 *Id.*
71 *Id.* at 200.
72 *Id.* at 203–04.
73 *Id.* at 203.
74 *Id.* at 203–04.
75 *Id.* at 204.
76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.*

always polite. Whispering, depending on the context, can be more intimidating than shouting.[82] The Court did not, however, find these possibilities persuasive.

The larger problem this demonstrates is that the Court consistently applies the reasonable person test without actually appraising this reasonable person. Furthermore, as the Court has said, the reasonable person presupposes an *innocent* person[83]—but why should this be so? Why should an innocent person be entitled to more constitutional protection than a guilty one?

II. Problems with Drayton

This Part analyzes why the Court's decision in *Drayton* was inconsistent with the Fourth Amendment and why the totality-of-the-circumstances test as applied to suspicionless bus searches needs to be retuned. For all intents and purposes, *Drayton*: (1) ignores the fact that there is no one reasonable person; (2) ignores the effect of the free-to-leave test in practice; (3) fails to take into account social science and socioeconomic factors; and (4) effectively deprives many people of the benefits of the Fourth Amendment. This Note, therefore, urges the Court to reevaluate this decision.

A. The Drayton *Dissent*

Justice Souter, joined by Justices Stevens and Ginsburg, dissented from the majority opinion in *United States v. Drayton*.[84] He did not support adopting the bright-line rule the Eleventh Circuit advocated, which would have required police to affirmatively inform passengers that they were free to decline the officer's questions.[85] Rather, he analyzed all of the factors under the totality of the circumstances and determined that a reasonable person in the defendants' positions would not have felt free to end the encounter.[86]

Beginning with the Court's assertion that, if the encounter had taken place on an open street, it would have been unquestionably constitutional, Justice Souter's dissent put the setting in greater perspective.[87] Hypothetically, if the encounter had taken place in a narrow

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82 *Cf.* Nadler, *supra* note 65, at 186–90 (discussing empirical tests showing that the social context of the speech can be much more important than simply the tone in which the speech is delivered).

83 *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 437–38 (1991).

84 *Drayton*, 536 U.S. at 208 (Souter, J., dissenting).

85 *See id.* at 209.

86 *Id.* at 212.

87 *Id.* at 209–10.

alley, and several police officers had been surrounding the defendant instead of just one, this would paint a different picture than the one on which the Court focused.[88] Reimagining the majority's version of a constitutional street encounter, Justice Souter emphasized how different the bus context is, with respect to the *Mendenhall* factors, from the ordinary context in which these factors are used.[89]

The dissent also emphasized both the perceived and asserted authority of the police officers who boarded the bus.[90] The driver had effectively yielded his position to the three officers.[91] Because of how the police began the bus sweep, the passengers would have reasonably inferred that it was not a consensual exercise: "The scene was set and an atmosphere of obligatory participation was established by this introduction."[92] The police then stationed themselves throughout the bus, continuing to give the impression of police control.[93]

Justice Souter further emphasized the cramped confines of the bus.[94] The aisle was only fifteen inches wide, and the overhead luggage rack constrained the passengers in their seats; the window passenger could not stand up straight.[95] And, because the passengers were seated and the questioning officer approached from the aisle, each passenger had to look up to face the officer towering over him.[96] In light of these facts:

> It is very hard to imagine that either Brown or Drayton would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether. *No reasonable passenger could have believed that*, only an uncomprehending one.[97]

Justice Souter's dissent does more than just illustrate a more sympathetic scene for the defendants than does the majority opinion. That the dissenting opinion in *Drayton* analyzed the same set of facts but came to the opposite conclusion highlights another problem with the state of the law as it is: the lack of consensus among lower courts in how to apply this test and the general lack of consistency in the

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88 *Id.*

89 *See id.* at 210.

90 *Id.* at 210–11.

91 *Id.* at 211.

92 *Id.* at 212.

93 *See id.* at 210–11.

94 *See id.* at 211.

95 *Id.*

96 *Id.*

97 *Id.* at 212 (emphasis added).

caselaw.[98] Because the Supreme Court Justices cannot agree on how to examine any particular factor and conclude that it is dispositive one way or another, or how many factors in one direction should tip the scale in that party's favor, there is not much guidance for other judges.[99] Moreover, before the Supreme Court's decision in *Drayton*, there were a number of lower court cases that analyzed the same issues and found that illegal seizures had occurred.[100] These cases indicate that the current law is out of touch with reality. *Drayton* has done little to sort things out; although it does provide lower courts with precedent, the totality-of-the-circumstances analysis leaves much to be desired in the way of consistency and reliability.[101] The totality-of-the-circumstances test is also hindered by the myth of the standard against which it is judged: whether a reasonable person would feel free to leave.

B. The "Reasonable Person" Fiction

One of the Court's most common standards is that of the "reasonable person."[102] Using this standard, a judge is required to replace his own subjective perceptions and prejudices with objective considerations.[103] In attempting to create a standard that judges can easily identify and apply without regard to the individual applying it, however, the Court has created a touchstone that obfuscates the law and, at times, creates mystifying results. This doctrine arose "out of a need

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98 *See* Marissa Reich, Note, United States v. Drayton*: The Need for Bright-Line Warnings During Consensual Bus Searches*, 93 J. CRIM. L. & CRIMINOLOGY 1057, 1081–82 (2003).

99 *See id.* at 1082.

100 *See* United States v. Stephens, 206 F.3d 914, 917–18 (9th Cir. 2000) (holding that police conduct violated the Fourth Amendment when three officers boarded a bus; positioned themselves at the back, middle, and front; made the narrow aisle difficult to exit through; announced that they were conducting a routine narcotics and weapons investigation; and told all passengers that they were free to leave but did not tell passengers they were free to stay on the bus and terminate the encounter by declining to answer questions); United States v. Felder, 732 F. Supp. 204, 208–09 (D.D.C. 1990) (holding that police conduct violated the Fourth Amendment when three officers boarded a Greyhound bus during a scheduled stop, one officer approached the defendant, another officer stood at the back of the bus, and the third officer stood by the door of the bus—requiring defendant to extricate himself from his seat and negotiate his way in the fourteen-inch aisle past both the officer in front of him and the officer standing in the front of the bus to walk away from the encounter). *But see* Commonwealth v. Smith, 836 A.2d 5, 19 (Pa. 2003) (holding that no seizure occurred when two plainclothes officers boarded a Greyhound bus during a scheduled stop and explained to the passengers the purpose of the interdiction; one searched the restroom for illegal drugs; and the other questioned the passengers but situated himself so that the aisle remained clear and the bus door remained open at all times).

101 *See* Reich, *supra* note 98, at 1082–84.

102 *See id.* at 1081.

103 *See id.*

to impose a set of reasonable limits on police practices given a few basic guideposts . . . and the common facts of police investigations."[104] The practical applications of such doctrinal tests, however, often come out quite different from their theoretical conception.[105]

To begin with, the Court has said that the reasonable person standard presupposes an innocent person.[106] But this is not always the case[107]—and both innocent and guilty people must be afforded equal protection under the law. In terms of the guilt or innocence of the party, the Fourth Amendment is judgment-blind, forbidding every search that is unreasonable and protecting suspected offenders and innocent victims equally.[108] The Supreme Court itself has recognized that it is better that the guilty go free than to subject citizens to easy arrest.[109] This equal protection can be costly, but it is required by the Fourth Amendment.[110] The Court should not, therefore, analyze the reasonable person assuming that he is innocent; the suspected and the guilty are entitled to the same protections.

Moreover, the Court's insistence that its reasonable person standard only allows for consideration of an innocent person undermines the rationale behind its holding in *Drayton*. An innocent person, as the Court presupposes, does not worry that he is not free to acquiesce for the very reason that he is innocent; but one of the only reasons a guilty person in Brown's or Drayton's position would consent to a search is a feeling that he is compelled to do so.[111] Thus, if the Court believed Drayton and Brown were guilty, there is little explanation for the finding that no seizure occurred.

Equally problematic is that the Court has limited the types of behavior considered to be intimidating to its reasonable person by pre-

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104 Orin Kerr, *Pragmatism and Fourth Amendment Law*, posting to The Volokh Conspiracy (May 25, 2007, 12:52 PM), http://volokh.com/posts/chain_1180053817.shtml.

105 *See id.*

106 *See, e.g.*, United States v. Drayton, 536 U.S. 194, 202 (2002); Florida v. Bostick, 501 U.S. 429, 437–38 (1991).

107 In fact, it is almost never the case, as Fourth Amendment challenges such as those analyzed here virtually always occur on appeal from criminal convictions.

108 Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); *see also* Kroska v. United States, 51 F.2d 330, 332 (8th Cir. 1931) ("The Fourth Amendment protects the citizen, whether innocent or guilty, against every unjustifiable intrusion by the government upon his privacy . . . .").

109 Henry v. United States, 361 U.S. 98, 104 (1959).

110 *See id.*

111 *Cf.* Michael J. Reed, Jr., Comment, Florida v. Bostick*: The Fourth Amendment Takes a Back Seat to the Drug War*, 27 New Eng. L. Rev. 825, 854 (1993) (arguing that the fiction of a reasonable person as an innocent person is maintained because it contributes to the effectiveness of bus sweeps as a law enforcement tool in the war on drugs).

supposing him innocent. This has created an "imaginary reasonable person [who] generally feels free to leave unless the police show force, tell him [not] to leave, or physically get in his way."[112] This reasonable person is not a reasonable person at all, but a fiction the Court needed to imagine "to create a useful set of legal rules governing police conduct."[113]

Putting aside the complications of measuring all defendants' perceptions against a fictional, innocent, reasonable person who would feel free to leave absent a showing of force or specific direction to remain,[114] there is another problem with this standard. It is still based on the assumption that all persons will have the same reactions when confronted by police.[115] Essentially, therefore, the standard operates like a bell curve: it captures a better-than-average number of people whose perceptions were in line with what the Court deems reasonable.[116] Of course, this means that there are outliers, including those who believed they were not free to leave when they actually were.[117] Though one might contend that this is merely the best that can be done, Fourth Amendment law is not an area where simply dismissing those individuals who exist outside the standard deviation should be a permissible, much less the preferred, standard. The Court should not adopt such a test merely because it may reach the proper result a good amount of the time.

The reasonable person standard also fails to take into account any of a particular individual's susceptibilities or differences.[118] In fact, one might consider it to be overly objective. Judges are applying it in an attempt to distance themselves from the general population, while the general population itself is unable to weigh in on what its own reasonable behavior would have been in a particular circumstance.[119] Thus, one cannot help but see a court's comparison to a reasonable person in cases such as *Drayton* as struggling to latch onto any measuring stick to which it can objectively refer and against which

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112 Kerr, *supra* note 104.

113 *Id.*

114 *Id.*

115 Fitch, *supra* note 1, at 113–14.

116 *See* Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 San Diego L. Rev. 507, 522 (2001).

117 *See id.* at 523.

118 *Id.* at 522–23.

119 *See id.* at 524–25 (noting that the reasonable person lacks content in constitutional law, where it is being applied by judges, as opposed to its function in tort law, where juries can evaluate and make judgments in each particular case).

it can arbitrarily judge. Part of the struggle is due to some misperceptions of reality, which lead to courts using this standard without considering what the basis is for their assumptions. The reasonable person standard, in short, is based on a conception of common conduct that is anything but reasonable.[120]

C. Race and Socioeconomic Factors

In the same way that the reasonable person excludes individual outliers from its analysis, it also excludes group outliers.[121] The reasonable person—in addition to being innocent and with perceptions in line with the mean of the general population—actually reflects, in the Court's application, "an affluent, educated, white professional."[122] This presumption does not consider race and socioeconomic factors that often play a role for those who are subject to suspicionless bus searches.

1. Race

The Supreme Court's analysis in *United States v. Drayton* ignores the matter of race. The two defendants were African-American.[123] Historical relations between police and minorities, especially African-Americans, change the dynamic in these interactions.[124] African-American men, due to a history of violent interaction with police, may fear that any adverse reaction to the police will trigger more violence and possibly humiliation or abuse.[125]

As a result, the Court should not ignore any effect that the race of a citizen might have on his own experience of the encounter.[126] Although a white male may feel free to decline a police officer's questions in the course of a bus sweep, it is not too far-fetched to say that a black male in the exact same position may not.[127] Yet the Supreme

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120 *See* Barry Crago, Case Note, *Fourth Amendment Search and Seizure—Consensual Encounter or Coerced Questioning?* United States v. Drayton*, 122 S. Ct. 2105 (2002)*, 3 WYO. L. REV. 295, 327 (2003).

121 Steinbock, *supra* note 116, at 523 ("If discrete minorities within the population would not feel free to terminate an encounter where members of the majority would, those distinctions will be ignored.").

122 Fitch, *supra* note 1, at 114.

123 *Id.* at 98.

124 *Id.* at 123–24.

125 Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250–62 (1991).

126 *See id.* at 279.

127 *See* Fitch, *supra* note 1, at 121–22.

Court made absolutely no mention of Drayton's or Brown's race in its opinion.[128]

The effect of race on a civilian's perception of the encounter is not even the result of an educational gap.[129] Racial tension and fear of police have been found to exist within the black community as a whole.[130] "[M]ost black citizens, even those who know their legal rights under the Fourth Amendment, still do not feel free to assert them in the face of police authority."[131] Another set of problems arises when one begins to consider educational gaps and the prevalence of people who do not know their rights because they have never learned them.

2. Socioeconomic Factors

The Court also ignores the average differences between those who choose to travel by bus rather than another form of transportation—namely, air travel. The *Drayton* Court may have analogized to air travel when it stated that many bus passengers may consent to the encounter and the search to enhance their own safety.[132] However, as the dissent pointed out, this comparison is not entirely fair; although it may be universally accepted that one gives up certain freedoms in exchange for certain protections in the context of air travel, such precautions have not yet extended to ground transportation.[133]

A more telling difference than the dissent's explanation of the Court's error in analogy is the socioeconomic factors that come into play. Generally, those who choose to take buses instead of planes or trains are less well-off financially.[134] When those who are less wealthy need to travel, commercial buses are often the only option.[135]

That these travelers are simply less well-off is not, however, the end of the story. Idealism aside, race, ethnicity, nationality, and education are significant factors in determining the financial makeup of this country.[136] Poverty can correspond to a lower level of education

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128 *Id.* at 121.

129 This Note does, however, discuss this gap. *See infra* Part II.C.2.

130 Maclin, *supra* note 125, at 253.

131 Fitch, *supra* note 1, at 124–25.

132 *See* United States v. Drayton, 536 U.S. 194, 205 (2002).

133 *Id.* at 208 (Souter, J., dissenting).

134 *See* Bigg, *supra* note 24.

135 Brief for Appellant at 8, United States v. Drayton, 231 F.3d 787 (11th Cir. 2000) (No. 99-15152-I).

136 Karen Seccombe, *Families in Poverty in the 1990s: Trends, Causes, Consequences, and Lessons Learned*, 62 J. MARRIAGE & FAM. 1094, 1095 (2000).

and, in some cases, a predominantly foreign background.[137] This often means a looser grasp of the English language, which generally corresponds to less knowledge of one's constitutional rights.

These matters would seem only to further distance the Court's conception of the reasonable person from most of the defendants against whom the standard is applied. The *average* person who finds himself aboard a commercial bus and suddenly subject to a random and suspicionless sweep is unlikely to behave according to the Court's standard of reasonableness. He may not have any of the tools that the Court imagines for him, and so the conception of reasonableness is again far from reality.[138]

D. Social Science and Psychological Evidence

The Court has also declined to modify its reasonable person to accord with what many scientific studies have revealed in the way of social science and psychological evidence. A person's behavior is illuminated considerably when one considers how perceptions of authority, use of language, and the role of personal space (or lack thereof) may influence one's actions. Examining such considerations further shows the discord between the Supreme Court's reasonable person and a reasonable person in reality.

1. Compliance with Authority

Persons with authority exert an enormous amount of influence over the decisions of those who perceive them to have authority.[139] Law enforcement officers unquestionably exert this authority and may influence others' reactions.[140] Any interaction between a police officer and a civilian necessarily begins with hesitation—"an air of men-

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137 *See id.* at 1095–96.

138 *See* Crago, *supra* note 120, at 327 ("This reasonable person knows more about his rights than most lawyers and is not afraid to assert his rights in the face of intimidating law enforcement."); Steinbock, *supra* note 116, at 525–26 ("[The reasonable person] is someone who knows his rights and feels free to exercise them. He is not intimidated by the police, whether they are alone or in a group, in uniform or in plain clothes. He knows that when questioned, he can refuse to answer, and when asked for identification, he can decline to comply. He always feels free to end the encounter even if physically constrained by his surroundings and even if the police persist in their attempts to engage him in conversation. He rests secure in the knowledge that no physical harm will result and that the police cannot legally draw an inference of criminality from his refusal to cooperate.").

139 *See* Nadler, *supra* note 65, at 173.

140 *See* Steinbock, *supra* note 116, at 532 ("[L]aw enforcement personnel, through their powers to stop or arrest, to interrogate, to search, and to employ physical or even deadly force, possess the ability to interfere with a person's movement . . . .").

ace"—that colors the civilian's behavior while he or she may be thinking about the threat of detention, prosecution, or physical harm.[141] Adding to this taint is the often subconscious influence that accompanies authority.[142] The decisions that civilians make when faced with such authority are reflexive; they do not require thought, they do not take more than a second, and civilians will almost always cede their own autonomy to the power of the person who possesses more authority.[143]

In *Drayton*, the officers were wearing plainly visible badges.[144] Though the Court accords this little consideration,[145] the influence of this apparent authority on the defendants' behavior may have been great—especially when taken in conjunction with the driver's absence, an officer in the driver's seat, and passenger tickets already having been collected. Effectively, the police officers had commandeered the bus.[146] The passengers had no reason to believe that they would be going anywhere until the officers were satisfied.[147] Drayton's and Brown's participation in the encounter and consent to the subsequent search, despite being contrary to their interests, only reinforces the proposition that there must have been some other influence.[148] Though they might have preferred to refuse, the showing of authority with which they were faced very likely coerced them to comply.

2. Linguistic Considerations

At first glance, the officers' statements in *Drayton* might seem benign. Indeed, that is what the majority opinion indicates.[149] However, as the dissenting opinion demonstrates, it is not so clear that their words were harmless.[150]

One cannot focus on what people say without considering their intent and purpose.[151] Language primarily has to do with people and

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141 *Id.*

142 Nadler, *supra* note 65, at 174–75.

143 *Id.* at 174.

144 *Id.* at 177.

145 *Id.*

146 *Id.*

147 *Id.*

148 Fitch, *supra* note 1, at 118.

149 United States v. Drayton, 536 U.S. 194, 204 (2002) (noting that the questioning officer spoke in a "polite, quiet voice").

150 *Id.* at 211–12 (Souter, J., dissenting).

151 *See* Nadler, *supra* note 65, at 187.

what they mean rather than words and what they mean.[152] When the questioning officer said that he "would like . . . cooperation" and later asked the defendants if they minded if they were searched,[153] it is hard to imagine that Drayton and Brown simply took the words at face value. Thus, the dissenting opinion's view of the officer's language—that it was merely a polite way of phrasing a command[154]—would appear to be more accurate than that of the majority opinion.

Drayton and Brown observed the authority with which the officers entered the bus.[155] Having understood both the role of the police officers and the purpose of their presence,[156] the defendants' perceptions of later interactions were inevitably molded.[157] The later requests for cooperation, which, according to the majority, the defendants should have felt free to refuse at all times, were simply polite ways of phrasing what could only be understood as commands.[158] Because the defendants' interests were contrary to consenting to the encounter, leading language likely played a major role in coercing their participation.

3. Personal Space

As Justice Souter points out in his dissenting opinion, the bus on which the encounter in *Drayton* took place was quite small.[159] The aisle was only fifteen inches wide, the seats were only eighteen inches across, the overhead luggage rack was a mere nineteen inches above the seats, and the police officer questioned Drayton with his face only twelve to eighteen inches away.[160] The passengers could not easily stand up and had to crane their necks to make eye contact with the questioning officer.[161] At trial, the district court even observed, and the questioning officer agreed, that the tactic he used was "kind of 'in your face.'"[162]

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152 Herbert H. Clark & Michael F. Schober, *Asking Questions and Influencing Answers*, *in* QUESTIONS ABOUT QUESTIONS 15, 15 (Judith M. Tanur ed., 1992).

153 *Drayton*, 536 U.S. at 211–12.

154 *See id.*

155 *See supra* Part II.D.1.

156 *See Drayton*, 536 U.S. at 211–12.

157 *See* Nadler, *supra* note 65, at 187.

158 *Id.* at 188.

159 *Drayton*, 536 U.S. at 211.

160 *Id.*

161 *Id.*

162 Brief for Appellant at 11, United States v. Drayton, 231 F.3d 787 (11th Cir. 2000) (No. 99-15152-I).

Invasion of personal space can lead to higher rates of compliance.[163] In one study, participants were more likely to comply with various requests when approached from a distance of twelve to eighteen inches than when approached from a distance of thirty-six to forty-eight inches.[164] The distance of twelve to eighteen inches—the same distance the Court noted was between Drayton and the questioning officer[165]—was chosen specifically to ensure that the participants felt their personal space was being violated.[166] Additionally, the perceived violation of personal space is aggravated when an authority figure is involved.[167] This reinforces the argument that, contrary to the majority's opinion that the questioning officer spoke quietly and positioned himself so as to accommodate the passengers,[168] the officer's actions can be better understood as methods of control, consideration of which should have affected the outcome of the case.[169]

This is hardly an exhaustive list of the physical, social, and psychological factors that can impact the formulation of the reasonable person. This representative list should be illustrative enough, however, to show that "[c]ompliance in the face of discomfort, anxiety, and tension strongly suggests that in bus sweep situations, passengers are coerced to comply with a request that they would prefer to refuse . . . ."[170] The rule of *Drayton*, therefore, should be revisited.

III. The Impracticable Solution: A Bright-Line Rule

Many courts and academics have suggested a bright-line rule requiring police to inform passengers of their right to refuse to cooperate during suspicionless bus searches.[171] The Eleventh Circuit had adopted and applied this rule in its decisions in *United States v. Dray-*

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163 *See* Nadler, *supra* note 65, at 192.

164 Robert A. Baron & Paul A. Bell, *Physical Distance and Helping: Some Unexpected Benefits of "Crowding In" on Others*, 6 J. APPLIED SOC. PSYCHOL. 95, 98–100 (1976).

165 *Drayton*, 536 U.S. at 198.

166 Nadler, *supra* note 65, at 191.

167 *Id.* at 192.

168 *Drayton*, 536 U.S. at 204–05.

169 Nadler, *supra* note 65, at 192 (noting that law enforcement officers are well aware of this and use it to their advantage).

170 *Id.* at 193.

171 *See, e.g.*, United States v. Drayton, 231 F.3d 787, 788 (11th Cir. 2000) (establishing a per se rule that suspicionless bus searches require police to inform passengers of their rights to refuse to cooperate), *rev'd*, 536 U.S. 194 (2002); *see also* Reich, *supra* note 98, at 1058 (arguing that the Supreme Court should overrule *United States v. Drayton* in favor of a bright-line rule requiring police to inform passengers of their rights to refuse to consent to a search during bus sweeps).

ton[172] and *United States v. Washington*.[173] In both cases, the court held that reasonable persons in the defendants' positions would not have felt free to disregard the officers' requests "without some positive indication that consent could have been refused."[174] Such a rule essentially requires police officers to inform the passengers that they do not have to participate. This would, in essence, parallel the rule announced in *Miranda v. Arizona*.[175]

The *Miranda* warnings were created by the Court to protect the Fifth Amendment privilege against self-incrimination.[176] Concerned that the atmosphere of interrogation and the general lack of knowledge of one's constitutional rights were leading to confessions that violated the Fifth Amendment, the Court in *Miranda* required police to inform suspects of their rights.[177] Some have argued that a bright-line rule in bus sweeps, akin to the requirement of *Miranda* warnings for custodial interrogation, would lead to consistency among lower court rulings, eliminate problematic subjectivity with the totality-of-the-circumstances test, account for important factors that have otherwise been ignored by lower courts, and have a minimal impact on officers' ability to conduct effective bus sweeps.[178]

This solution, however, would not solve the problems that *Drayton* exhibits. *Miranda* has not proven to be the practical safeguard that it was originally meant to be for two reasons. First, the Supreme Court has carved out exceptions and limited its scope over time.[179] Second, and more importantly, police have become very adept at circumventing the literal requirements of *Miranda*.[180] Thus, applying a similar solution to suspicionless bus sweeps is not sound.

A. The Miranda *Exceptions*

The body of law following *Miranda v. Arizona*—even limited to Supreme Court cases—is mired in confusion. As Justice Scalia

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172 *Drayton*, 231 F.3d at 790.

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

174 *Drayton*, 231 F.3d at 790; *Washington*, 151 F.3d at 1357.

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

176 *See id.* at 467; *see also* U.S. CONST. amend. V.

177 *Miranda*, 384 U.S. at 478–79 (requiring that a suspect be advised that he has the right to remain silent, that anything he says can and will be used against him in a court of law, that he has a right to an attorney, and that an attorney will be provided if he cannot afford one).

178 Reich, *supra* note 98, at 1058–59.

179 *See*, *e.g.*, New York v. Quarles, 467 U.S. 649, 655–56 (1984) (creating the "public safety" exception to the *Miranda* rule).

180 *See* Andrew E. Taslitz, *Bullshitting the People: The Criminal Procedure Implications of a Scatalogical Term*, 39 TEX. TECH L. REV. 1383, 1388 (2007).

pointed out in his dissenting opinion in *Dickerson v. United States*,[181] there are so many exceptions to the *Miranda* rule and its remedy that to call it a constitutional requirement is almost absurdly contrarian.[182]

To start, as the law now stands, police are only required to give *Miranda* warnings where a suspect is both in custody and police are interrogating.[183] Custody, for *Miranda* purposes, has been held to depend on an objective consideration of "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action."[184] In other words, it would seem that one is in custody when a reasonable person in that position would not feel free to leave. This circular logic illustrates how problematic it might be to apply a *Miranda*-like rule to suspicionless bus sweeps. Requiring a warning in custodial situations would not solve the threshold problem of determining when one is or is not free to leave. This standard would not be any easier for courts to follow.

Additionally, interrogation has been held to be express questioning or its functional equivalent—"any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response."[185] Though this may not seem narrow, the Court has refrained from applying it liberally.[186] Because the Court only finds interrogation in limited circumstances, this aspect of *Miranda* would also be problematic in the bus context. When should an officer have to provide the passengers with the information that they can refuse to consent? When he boards the bus in the first place? What if someone misses the announcement? Should he only have to tell those passengers he questions as he is doing it? This, too, seems impractical.

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181 Dickerson v. United States, 530 U.S. 428 (2000) (holding that *Miranda* is constitutionally required and cannot be repealed by an act of Congress).

182 *See id.* at 453–54 (Scalia, J., dissenting).

183 *See* ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 649 (2d ed. 2003).

184 Stansbury v. California, 511 U.S. 318, 325 (1994) (internal quotation marks omitted).

185 Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

186 For example, in the case in which this standard was announced, the Court held that there was no interrogation where three police officers in a patrol car with the defendant, who was suspected of committing a robbery and then disposing of the weapon—a sawed-off shotgun, discussed amongst themselves what a shame it would be if a little handicapped girl happened to find the weapon and kill herself. *Id.* at 293–95. The Court reasoned that the police officers had no way of knowing that the defendant would then insist that he show police officers where he had hidden the shotgun because he was "peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children." *Id.* at 302.

Additional exceptions to *Miranda* have been created in cases of public safety or exigent circumstances, especially when weapons are involved.[187] In such circumstances, the Court has held, police are making split-second decisions that are primarily instinctive and motivated by concern for their own safety and the safety of others.[188] Many interdiction efforts are aimed at locating illegal drugs and weapons.[189] A public safety exception to a *Miranda*-like rule in bus sweeps may not be justified if the officer suspects a passenger of carrying drugs, but where weapons are involved, the Court may carve out similar exceptions as it did with *Miranda*. And, as with *Miranda*, the exceptions could become more common than the rule. Compounding this issue is the possibility that police could claim they suspected a passenger of carrying a weapon instead of drugs to use this exception. In that case, the requirement again becomes useless by virtue of police creativity in circumventing it.

B. Circumventing Miranda

Police have become quite adept at circumventing the literal requirements of *Miranda*. They can manipulate the warnings required by that case in one of two ways: either by obtaining a confession without ever triggering *Miranda*, or by delivering the warnings in such a way that they are effectively moot.

As this Note discusses above, *Miranda* warnings are only required where a suspect is in "custody" and where police are "interrogating."[190] Consider *Rhode Island v. Innis*[191]: the police were able to have a conversation amongst themselves, provoking the defendant to confess to having possessed an illegal weapon and its location, without even triggering *Miranda* in the first place.[192] If police can do this, surely they can come up with equally creative ways to circumvent a *Miranda*-like requirement in a bus setting. In one Tenth Circuit case, *United States v. Ojeda-Ramos*,[193] all passengers disembarked the bus

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187 *See, e.g.*, New York v. Quarles, 467 U.S. 649, 652 (1984) (allowing both a statement made without *Miranda* warnings regarding the location of a gun and the gun itself to be admitted into evidence where police officers had approached the defendant in a grocery store and noticed his empty holster).

188 *Id.* at 655–56.

189 *See, e.g.*, United States v. Drayton, 536 U.S. 194, 197 (2002).

190 *See* Taslitz & Paris, *supra* note 183, at 649; *supra* Part III.A; .

191 Rhode Island v. Innis, 446 U.S. 291 (1980).

192 *Id.* at 302–03; *see supra* notes 185–88 and accompanying text.

193 United States v. Ojeda-Ramos, 455 F.3d 1178 (10th Cir. 2006).

during a scheduled stop in Oklahoma.[194] A police dog alerted officers conducting suspicionless drug interdiction efforts to a locked suitcase in the cargo bay.[195] After the passengers reboarded the bus, a police officer disguised as a bus company employee told the passengers there was a mechanical problem, and they would have to leave the bus again and claim their luggage.[196] The police were thus able to identify the passenger with the suspicious suitcase and engage him in an encounter thereafter.[197] The Court found that the defendant was not unlawfully "seized" by being tricked to leave the bus and identify his suitcase.[198]

Such a case is illustrative of how police officers could circumvent a bright-line rule during bus sweeps. By luring a passenger off the bus beforehand, police would eliminate the custodial setting that would trigger the bright-line rule. Officers might try to avoid having to inform a passenger of his right to decline to participate in the interaction.

Police have also become adept at delivering *Miranda* warnings without complying with the intent behind the requirement.[199] The warnings can be delivered quickly in a monotone voice.[200] The officer can follow by launching into a description of the evidence against the suspect and the punishments awaiting him if he fails to cooperate, regardless of the accuracy of such evidence.[201] In short, the officer reading the rights will do anything possible to keep his words from fully reaching his audience.[202] These efforts are designed to distract the person to whom the rights are being read from the rights themselves, while conveying the message that the rights exist in theory, but that the police will not honor them.[203] Furthermore, officers spend time building a rapport with a suspect and then encourage the suspect to tell his or her side of the story, de-emphasizing the *Miranda* warnings they have just been read.[204] Officers encourage suspects to waive their

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194 *Id.* at 1179.

195 *Id.*

196 *Id.*

197 *Id.* at 1180.

198 *Id.* at 1183–84.

199 Taslitz, *supra* note 180, at 1388.

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 Andrew E. Taslitz, *Miranda's Protections*, CRIM. JUST., Fall 2002, at 57, 57 (reviewing WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON (2001)).

Miranda rights, claiming that they are acting in the suspect's best interests.[205]

This verbal tactic only emphasizes the importance of linguistic considerations.[206] Speech alone may not illustrate context. Adding a sentence to what police officers say when they board the bus will not detract from any other coercive language or tactics that they use. The manner in which they conduct the sweep matters more than five or six words the police might utter quickly, quietly, and perhaps ostensibly only to follow protocol. As the dissent in *Drayton* pointed out, no reasonable passengers in the defendants' positions would have felt they had free choice in the matter.[207] Thus, requiring police to inform passengers that they are free to refuse to consent will not solve the problem.

IV. The Solution

Suspicionless bus sweeps that occur during drug and weapons interdiction efforts should trigger a standard that avoids the pitfalls of both *Drayton*'s totality-of-the-circumstances rule and a per se rule requiring affirmative police action. During bus sweeps, police investigations that take place without reasonable suspicion or probable cause should be limited within the temporal and spatial confines of a scheduled bus stop. The problems with the invasion of personal space, the use of threatening language, and the likelihood that those being questioned would not grasp their constitutional rights are compounded most egregiously by one thing: a passenger who sits on a bus, having surrendered his ticket and waiting only for it to depart, will not feel free to end an encounter with a questioning police officer because he has nowhere to go.[208]

When a bus stopover is prolonged for the purpose of questioning passengers or looking through their luggage, this is effectively detention of the person or the person's possessions.[209] The Court has recognized the conflict between a person's freedom of movement when

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205 *Id.*

206 *See supra* Part II.D.2.

207 United States v. Drayton, 536 U.S. 194, 212 (2002) (Souter, J., dissenting).

208 Bostick v. State, 554 So. 2d 1153, 1157 (Fla. 1989), *rev'd*, 501 U.S. 429 (1991).

209 Professor Orin S. Kerr recently argued that "[a] seizure of moving or movable property occurs . . . when government action alters the path or timing of its intended possession or transmission." Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 YALE L.J. 700, 721 (2010). This Note argues that a seizure of a person in the context of a suspicionless bus sweep similarly occurs when government action unreasonably alters the path or timing of that person's travel.

traveling and detention of one's person or possessions.[210] The Court has said that, in such cases, "the police conduct intrudes on . . . his liberty interest in proceeding with his itinerary."[211] Even if a person is "technically still free to continue his travels or carry out other personal activities," the person is effectively restrained and subject to the possibility of disruption of his travel plans.[212] Because the Court has recognized that detention of a person or his possessions without probable cause for a prolonged period of time is unconstitutional in other settings,[213] the Court should find that a seizure has occurred when the police extend a scheduled bus stop or appear to take control from the driver solely for the purpose of conducting a suspicionless sweep.[214]

The bus encounter should trigger a standard that is more protective of defendants than the current law, but does not presumptively make the encounter a seizure absent disruption of the itinerary or commandeering control over the bus. The search in *Drayton* suffered from precisely these two flaws. The bus stopped, and the passengers had to disembark for it to be cleaned and refueled.[215] Then the passengers reboarded, gave their tickets to the bus driver, and were ready to continue with their trip.[216] Instead, the driver took their tickets, left the bus, and let three police officers board to begin their questioning.[217] Not only did the police officers prolong the duration of the stop, but they also held the primary positions of authority while the bus driver had disappeared with the passengers' tickets. These considerations should provide the basis for the method of determining whether a seizure has occurred.

A court should look, first, at the planned duration of the stop as compared with the actual duration of the stop. Though this factor should be the primary consideration, it should be flexible. If police officers are questioning passengers while the bus is being cleaned and

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210 *See* United States v. Place, 462 U.S. 696, 708 (1983).

211 *Id.* (referring only to detention of one's possessions but noting that detention of one's person would further subject the person to a "coercive atmosphere" and "public indignity").

212 *Id.*

213 *See, e.g.*, *id.* at 709–10.

214 This Note does not intend to propose the only circumstances under which a seizure might occur in the course of suspicionless bus sweeps. The rule should not prohibit a finding of an unreasonable search or seizure where, even though the bus is in the course of its scheduled stop, the police have engaged in coercive conduct that would otherwise be found to constitute a seizure. The rule is only meant to lower the minimum threshold for finding that a seizure has occurred in the bus context.

215 United States v. Drayton, 536 U.S. 194, 210 (2002) (Souter, J., dissenting).

216 *Id.*

217 *Id.*

refueled and, in wrapping up their conversations, delay the bus's departure by only a minute or two, this should not be considered a seizure. If, however, the officers arrive after the bus has been cleaned and refueled and then insist on questioning the passengers, prolonging the stop by more than a matter of minutes, this should be considered a seizure. This primary factor should also be a prerequisite to finding that a seizure has occurred; the other factors, though instructive, should not be sufficient to find a seizure absent delay of the scheduled departure.

A court should also consider the presence or position of the bus driver during the sweep and whether the passengers' tickets have been collected. These matters should not be considered separately from the question of whether the stopover has been unduly prolonged; rather, they should be instructive on that point. If it is unclear whether the bus's departure has actually been delayed—for example, because there is no set stopover time—then examining these issues would be helpful. If the driver is on the bus, has collected the passengers' tickets, is ready to go, and then officers arrive to ask questions and have the driver leave, under this rule, a seizure has occurred. Considering these factors underscores the purpose behind modifying this rule; whether a person feels free to leave or end an encounter during a bus sweep is heavily influenced by how that person feels his surroundings restrict his freedom. The position of the bus driver and whether a passenger retains or surrenders his ticket are significant in determining whether such freedom has been constrained.

If the police conduct their questioning of passengers during the scheduled stopover period, then their conduct should be presumptively constitutional. If the driver has not reboarded the bus in preparation for departure, or if the passengers have still retained their tickets and are milling about on the bus or outside and waiting to get back on, then a police officer's actions should be assumed to be constitutional. This does not eliminate the possibility that passengers cannot still be seized if police officers, even within the confines of this rule, act coercively; however, when the officers do act within the confines of the rule, it should be assumed at the outset that their actions were not coercive.

This would differ from the Eleventh Circuit's per se rule requiring that police employ some affirmative indication that a defendant is

free to disregard them and go about his business.[218] Although telling a passenger that he or she is free to refuse to talk to the officer or consent to the search may be helpful for the police's case, it should not be a get-out-of-jail-free card (or into jail, as would be the case).[219] Requiring police to inform passengers of their rights is not an alternative to the requirement that police avoid making passengers feel that they are not free to leave or end an encounter during a bus sweep.

This would also differ from the per se rule adopted in *Bostick v. State*[220] that, due to the cramped confines on a bus, the act of questioning alone constitutes a seizure. Police should still be allowed to question passengers and, more generally, conduct suspicionless sweeps as part of drug and weapons interdiction efforts. There is no reason that this very valuable law enforcement tool should be completely eradicated.[221] When this tactic is used, however, it must still be subject to other guidelines governing searches and seizures in Fourth Amendment jurisprudence.

Of course, this test will be subject to the same considerations that arise in other Fourth Amendment contexts. If reasonable suspicion develops at any time, then it should no longer apply. The requirements of reasonable suspicion instead should determine whether a seizure occurred and whether it was reasonable.[222] If, during the course of an interaction with a passenger, a police officer can point to specific and articulable facts that rationally give rise to the inference that something is afoot,[223] there is no reason why the officer should not then be able to prevent a passenger, passengers, or even a bus from leaving its stopover position. The rule this Note proposes is only meant to govern the period of time during which a suspicionless bus sweep remains suspicionless.

The Supreme Court should grant certiorari on a case, perhaps with facts similar to those of *Drayton*. Applying the new rule requires little analysis and would be quite easy and rote. If the Court finds that

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218 *See* United States v. Drayton, 231 F.3d 787, 790 (11th Cir. 2000), *rev'd*, 536 U.S. 194 (2002); United States v. Washington, 151 F.3d 1354, 1357 (11th Cir. 1998).

219 *See supra* Part III.A.

220 Bostick v. State, 554 So. 2d 1153 (Fla. 1989), *rev'd*, 501 U.S. 429 (1991).

221 *But see* Fitch, *supra* note 1, at 132–33 (arguing that a per se ban on suspicionless bus searches should be adopted).

222 The "reasonable suspicion" standard was first articulated in *Terry v. Ohio*, and that formulation still governs. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

223 *See id.*

the police officers, in conducting a sweep, prolonged the duration of the stop or took action indicating that the driver had ceded control of the bus, it should find that any passengers thereafter questioned were "seized" within the meaning of the Fourth Amendment.

A. Application

United States v. Drayton provides an apt basis for illustrating this new rule. Now imagine that the rule in such a case allows police to conduct suspicionless bus sweeps, but only during the course of the scheduled stop. Once the bus has been cleaned and refueled, the window for questioning is over, absent the development of reasonable suspicion or probable cause. As the case unfolded in reality, the proposed standard was violated and the defendants would be considered seized. An example of events that would not be in violation, therefore, is more instructive.

Christopher Drayton and Clifton Brown, Jr., have reboarded the bus during a scheduled stop in Tallahassee. The driver has not yet returned to the bus; perhaps he is making a phone call or making a trip to the vending machine. The bus has been cleaned but is still being refueled. Both Drayton and Brown still have their tickets.

A few police officers step on board. One stands at the front of the bus and addresses the passengers as a whole. "Good afternoon, folks. I'm sorry to take up your time, but I'm here to see if there are any illegal drugs or weapons on the bus. If there are those who don't mind helping me out, I'd like to look through your bags."

Some of the passengers, but not all, reach overhead to grab their bags. Some passengers decide to leave the bus instead; after all, they still have their tickets, the bus is scheduled to remain at the station for another ten minutes, and the weather outside is quite pleasant. An officer makes his way to the back of the bus. He may question the passengers who have elected not to get their bags, asking them if they have any contraband and so forth. However, if they indicate they do not wish to be questioned, he must stop.

Perhaps Drayton and Brown decide to get off the bus—or maybe they decide to stay; they are dressed quite warmly, after all, and the sun is hot. Either in the course of his questioning or in the course of their exit from the bus, the officer notices they are dressed in an awful lot of clothing for such a warm day. He questions them and they participate but give conflicting or dubious answers. At this point he may or may not develop reasonable suspicion and, if he does, he can then proceed to search them. More important than finding contraband,

though, is that the passengers' Fourth Amendment rights have been preserved.[224]

B. Advantages

There are several advantages to using this proposed standard instead of keeping the law as it currently stands or adopting a per se rule. Many of these come out of the problems identified with those alternatives.[225]

First, this standard does not require citizens to know their constitutional rights. This is preferable because most people do not.[226] Therefore, the standard this Note proposes does not perpetuate the fiction that a reasonable person, as viewed by the Supreme Court, is highly educated and comfortable with asserting his or her rights.[227] In addition to being practically preferable—as opposed to a rule that would require educating laypersons about their rights—this also would bring the Court's theoretical conception of the law more in line with reality.

This rule would also reduce the problem of trying to analyze objectively how a reasonable person would react, which arises because there are real, subjective differences among defendants. It might be too cumbersome, however, for a court to consider a defendant's perspective completely subjectively. There is thus an advantage to focusing on wholly objective factors, such as the duration of the stop and the position of the driver, rather than purporting to ascribe one standard of reasonableness to a defendant and basing an analysis on that paradigm. Shifting the focus away from what a reasonable person in the defendant's position would or should feel is a much more manageable way to analyze these situations. This would further eliminate the gap between Fourth Amendment jurisprudence and reality, which was caused, in part, by the assumptions that the Court has made about defendants in these cases.[228]

This standard would also harmonize the status of bus searches with current Fourth Amendment jurisprudence. The Supreme Court has recognized that detention for an unreasonable period of time on

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224 The Court has always acknowledged that the Fourth Amendment has its costs, but these costs are well worth preserving the virtues of the Constitution. *See, e.g.*, Henry v. United States, 361 U.S. 98, 104 (1959) ("It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest.").

225 *See supra* Parts II and III.

226 *See* Fitch, *supra* note 1, at 114–15.

227 *See id.* at 114; *see also supra* Part II.B.

228 *See* Fitch, *supra* note 1, at 114.

anything less than probable cause is a seizure under the Fourth Amendment.[229] This rule would allow for detention if reasonable suspicion develops—but short of that, police must conduct their business in a circumscribed and nonintrusive way.

The approach also does not require courts to develop a new list of factors or some complicated test. In fact, it is very easy to apply—much easier than the law as it now stands. Currently, under the totality-of-the-circumstances analysis, no one factor can be assigned any specific value because everything must be taken into consideration.[230] Thus, it is hard for courts to analyze a set of factors and reach a meaningful conclusion without knowing, for example, that one alone is dispositive, or that three or more factors in the defendant's favor will decide the case that way. The weight each factor is accorded also shifts from case to case, making it hard to establish valuable precedent.[231] Under the new standard, however, analyzing objective factors with a sort of "soft" bright-line rule should lead to a much more unified body of caselaw. Furthermore, this rule's greater simplicity will ease the burden on the courts deciding these cases.

This method will also be easy for police to apply. In the same way that courts will no longer have to weigh, for example, two factors in one party's favor against three factors in the other's, police will not have to question whether some combination of certain actions would be crossing the line and seizing the defendant. Yet police are still free to use bus sweeps as a law enforcement tool. Moreover, if they conduct their questioning within the scope of this rule's confines, their actions are presumed to have been free from coercion. This balance properly weighs the importance of fighting crime with the gravity of ensuring the Fourth Amendment's protections.

C. Problems

No solution is perfect, and there are some practical problems and potential objections to this proposal. However, there are many advantages to the new standard this Note suggests,[232] and most of the issues can be addressed.

The foremost concern is getting around Supreme Court precedent. In other cases, the Supreme Court has held that most of the

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229 United States v. Place, 462 U.S. 696, 708–10 (1983) (finding detention of a person's luggage for ninety minutes, while the police arranged for a canine sniff, to be a seizure).

230 *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980).

231 *See* cases cited *supra* note 100.

232 *See supra* Part IV.B.

prohibited conduct is not enough to make a reasonable person feel that he was not free to leave or otherwise end the encounter.[233] The Court has also held that that such an encounter taking place on a bus does not automatically make it unconstitutional.[234] These decisions, however, are out of tune with reality. The Court's reasonable person is fictitious and paradoxically unreasonable. Furthermore, many decisions holding that the factors to be applied here are not enough to be coercive involved events that did not take place on a bus.[235] The bus setting is simply different than the street, and the courts should begin to recognize that. Instead of requiring a complicated and subjective reevaluation of the reasonable person on a case-by-case basis, this is an entirely new but uncomplicated test. It respects the Court's decision that the bus setting is not per se unconstitutional while also making strides to bring the Court's theoretical bases in line with the practical considerations of law in the real world.[236]

Some may also say that it will be too difficult for police to conduct these sweeps in the short amount of time between when the passengers are allowed back on the bus (where their luggage is) and the bus's scheduled departure. There is no reason, however, why police cannot question passengers as they leave the bus. In conducting sweeps in this manner, police could observe passengers right away, which would let them decide whether to pursue more questioning on board or whether there may even be reasonable suspicion or probable cause at the outset, allowing police officers to delay the bus's departure. Furthermore, any luggage that is stored under the bus could be accessible even before passengers are allowed to reboard.

Along the same lines, some might say that it would be too difficult to determine whether the police officers actually unduly prolonged the bus's stopover if there is no scheduled time for the bus to depart. It is unlikely that their fellow officers would not support their

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233 *See, e.g.*, United States v. Drayton, 536 U.S. 194 (2002).

234 Florida v. Bostick, 501 U.S. 429, 435–36 (1991).

235 *See, e.g.*, INS v. Delgado, 466 U.S. 210 (1984).

236 Though the Court overturns precedent only with great reluctance, it has chosen to do so in certain circumstances. Generally, the Court will look to "whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (citations omitted). As this Note argues, the current rule defies practical workability and has been robbed of significant justification due to changing economic and practical circumstances.

testimony, and then it would be the police officer's word against the defendant's. This might be deterred, though, by the presence of many witnesses in the bus, who can attest that the police either acted within the allowable time frame or not. The Supreme Court itself has recognized the influence that the presence of bus passengers can have on others' actions.[237] This influence can further pressure the police officers to ensure that they are behaving properly and later testifying honestly.

Finally, some might say that this solution is too sympathetic to the defendant and will lead to evidence being lost—either because it is never found or later excluded at trial—and people who are guilty going free. It is true that this rule is more likely to benefit the defendant and the bus passenger who escapes becoming a defendant. And it is true that some evidence may never be discovered or may later be excluded at trial if a court finds that the police have overstepped their bounds. But the police may still develop reasonable suspicion in the course of their sweeps that could allow evidence to come to light. They may still find that some passengers caught unaware consent to searches in which evidence is found. And the ability to prevent evidence from later being excluded at trial is wholly within their control—they need only follow the rules. But even more fundamentally, this may simply be the cost the system has to bear.[238] It is the Fourth Amendment, after all, that imposes the cost,[239] and ensuring that the protections the Constitution provides are intact is an aim more than worth it.

Conclusion

When a bus passenger is subject to a suspicionless bus sweep by the police during drug and weapons interdiction efforts, the totality-of-the-circumstances test is insufficient to determine fairly if a seizure has occurred. The reasonable person test, likewise, is an imagined standard against which the law unfairly measures defendants' perceptions. Because so much statistical, social, and psychological evidence runs contrary to the Supreme Court's adherence to this test in these circumstances, this area of the law should be reevaluated. In light of

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237 *See Drayton*, 536 U.S. at 204.

238 Caselaw based on the Fourth Amendment has come to favor police over suspects overwhelmingly, from *Terry v. Ohio*, 392 U.S. 1 (1968), to *United States v. Drayton*, 536 U.S. 194. This Note simply proposes that it is time to level the playing field, even if only in this one small way.

239 *See* United States v. Leon, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting).

these considerations, the Court should adopt a rule that, if police wish to conduct a suspicionless bus sweep, they must do so within the temporal duration of a scheduled bus stop and must not behave in such a way that would suggest they have control over the bus. Such a standard is simply necessary to ensure that Fourth Amendment protections are preserved.