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# Leave The Driving To Us: *Florida v. Bostick*

## I. Introduction

You are taking a quick nap while relaxing in the back seat of a Greyhound bus bound from Miami to Atlanta. As the bus makes a temporary stop-over in Ft. Lauderdale, you are suddenly awakened to find two police officers towering over you. Trying to overcome your drowsiness, you hear the officers identify themselves as agents from the Sheriff's Office who state that they are searching out drug traffickers. You are asked some questions about your travel plans, and are requested to produce some corroborating documentation. What is your likely reaction in such circumstances? Would you feel that it was your citizen's duty to give your full cooperation to the officers and voluntarily help them out in any way possible? If so, be sure to congratulate yourself. You have just freely consented to the police encounter, and have relieved the officers of the burden of showing that there was any justification for a seizure under the Fourth Amendment. What's that you say? You're a bit cranky from being disturbed, and not quite in the mood to play helpful citizen just now? How comfortable would you feel about telling those imposing gentlemen blocking your path that you want them to get lost? Is that a realistic option, or might you fear repercussions? Is it actually possible to delineate the point at which such an encounter crosses the line from consensual to coercive?

Distinguishing between when such confrontations are merely harmless casual questioning and when they become coercive enough to reach the level of a seizure<sup>1</sup> under the Fourth Amendment has always been a troublesome task for the United States Supreme Court.<sup>2</sup> Over the past few decades, the Court

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1. For the purposes of this article, the term "seizure" is used generically to apply to those police-citizen encounters that fall within the protection of the Fourth Amendment.

2. See *Terry v. Ohio*, 392 U.S. 1 (1968) (finding a "stop and frisk" to be a permissible seizure), *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (stating that "[w]e adhere to the view that a person is 'seized' only when, by means of physical force or a

has been presented with several cases that led the Court to formulate its test for when a police-citizen encounter reaches the level of a seizure.<sup>3</sup> During the 1990-91 term, the Court was offered yet another opportunity to clarify its position. The case of *Florida v. Bostick*<sup>4</sup> provided the Court with facts similar to the above illustration. Whereas up until now, most cases of investigatory stops had involved individuals being approached in wide open public arenas, such as airport terminals,<sup>5</sup> *Bostick* was the first case to present the issue to the Court where the police-citizen encounter occurred within very confined quarters.<sup>6</sup>

The Supreme Court's decision to remand the case back to the Florida courts left some initial doubt as to whether *Bostick* was actually seized within the ambit of the Fourth Amendment.<sup>7</sup> However, while the Court did not specifically address whether *Bostick* had been seized under these circumstances, it pointed the way for lower courts to find that a seizure does not necessarily occur during investigative stops within close quarters.<sup>8</sup>

This article will examine the ongoing trend of the current Supreme Court to whittle away at individual rights in an attempt to balance these rights against societal needs. Section II contains an historical overview of the existing case law defining

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show of authority, his freedom of movement is restrained."), *Florida v. Royer*, 460 U.S. 491 (1983) (restating the *Mendenhall* "free to leave" test to determine when a seizure had occurred), *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 215 (1984) (finding no seizure where there is a consensual encounter, and noting that "[g]iven the diversity of encounters between police officers and citizens . . . the Court has been cautious in defining the limits imposed by the Fourth Amendment on encounters between the police and citizens."), and *Michigan v. Chesternut*, 486 U.S. 567 (1988) (noting in its unanimous decision that the "free to leave" test requires the objective standard of the reasonable person). The Court in *Royer* specifically noted that there was no "litmus-paper test" to determine when a consensual encounter escalates into a seizure, and that there are too many fact variables to make a hard and fast rule. 460 U.S. at 506. See discussion *infra* part C of this section, outlining the evolution of a definition of a "seizure."

3. See *infra* part II.B.

4. 111 S. Ct. 2382 (1991).

5. See *supra* note 2.

6. Previously, the Court had considered the issue of police-citizen encounters in the context of public areas such as airport lobbies (*United States v. Mendenhall*, 446 U.S. 544 (1980) and *Florida v. Royer*, 460 U.S. 491 (1983) and streets (*Michigan v. Chesternut*, 486 U.S. 567 (1988)). In *Bostick*, the Court was presented with a fact pattern where the individual was seated in the rear of a bus. 111 S. Ct. at 2384.

7. *Bostick*, 111 S. Ct. at 2388-89.

8. *Id.* at 2387-88.

when a seizure occurs for Fourth Amendment purposes. Section III traces the procedural history leading up to the Supreme Court's decision in *Florida v. Bostick* and details the Court's holding. Section IV analyzes the impact of the Court's decision and considers its ramifications on future law enforcement activity. Section V concludes that the conservative majority of the Supreme Court is more intent on viewing the Fourth Amendment as a means to effective law enforcement,<sup>9</sup> than as a protector of personal freedom.

## II. Background

### A. *The Cornerstone of Individual Protection from Seizure: The Fourth Amendment*

The Fourth Amendment declares:

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.<sup>10</sup>

Perhaps more so than any other amendment, the Fourth Amendment was specifically formulated to protect against the evils of colonial rule that the founding fathers found so offensive.<sup>11</sup> The events leading up to the Bill of Rights contain many instances of historic abuse that the Fourth Amendment is designed to protect against.<sup>12</sup> Among all of the safeguards itemized in the Bill of Rights, the Fourth Amendment right to be free from unreasonable searches and seizures is likely the most

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9. This appears especially so to achieve the end of effective drug enforcement.

10. U.S. CONST. amend. IV.

11. See William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REF. 551, 560 (1984) (noting the concern that the new government would "revive the sorts of oppressions that the colonists had experienced under British rule."). A specific fear was the unchecked police power of searches and seizures. *Id.*

12. See generally *Boyd v. United States*, 116 U.S. 616, 624-25 (1886) (explaining the historical events leading up to the inclusion of the Fourth Amendment in the Bill of Rights, such as the colonial practice of issuing writs of assistance for the purpose of searching for smuggled goods and the issuance of general warrants in order to search private homes).

profound.<sup>13</sup> Its formulation was a clear reaction to the founding fathers' distaste of violations of personal privacy, and was among the first limits they sought to impose on the new government.<sup>14</sup>

In order to ascertain if there has been a violation of the Fourth Amendment, the courts must first determine when a particular governmental activity actually falls within the scope of the Amendment.<sup>15</sup> The general assumption is that where the activity can be classified as a "search" or "seizure" it will qualify as falling within the protection of the Amendment.<sup>16</sup> Clearly, in order to make such a classification, the courts need to have a reliable working definition of the terms "search" and "seizure." This has been a difficult task, especially in light of the way this particular area of law is constantly evolving.<sup>17</sup> The background section will focus on recent United States Supreme Court decisions that have attempted to determine when a "seizure" occurs for Fourth Amendment purposes, and how these decisions have led the Court to its holding in *Florida v. Bostick*.

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13. See Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 377 (1974) (commenting that "I can think of few constitutional issues more important than defining the reach of the fourth amendment — the extent to which it controls the array of activities of the police. . . . I can think of few issues more important to a society than the amount of power that it permits its police to use without effective control by law.").

14. See *Olmstead v. United States* 277 U.S. 438 (1928) (Brandeis, J., dissenting). Justice Brandeis stated in his dissent that:

[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

*Id.* at 478; see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (stating that the purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.").

15. See Amsterdam, *supra* note 13, at 388 ("to label any police activity a 'search' or 'seizure' within the ambit of the [fourth] amendment is to impose [those] restrictions on it. On the other hand, if it is not labeled a 'search' or 'seizure,' it is subject to no significant restrictions of any kind."). See also *Florida v. Royer*, 460 U.S. 491, 498 (1983) ("[i]f there is no detention — no seizure within the meaning of the Fourth Amendment — then no constitutional rights have been infringed.").

16. 460 U.S. at 498.

17. See discussion *infra* part B of this section, outlining the evolution of the definition of a "seizure."

## B. *The Evolving Definition of Seizure Prior to Bostick*

### 1. *Reasonable Seizure Without a Warrant or Probable Cause: Terry v. Ohio*<sup>18</sup>

In *Terry*, the Court underscored the definition of seizure by stating that a person is considered seized when the police, "by means of physical force or show of authority, ha[ve] in some way restrained [his] liberty."<sup>19</sup> Prior to *Terry*, courts held that the police must either act pursuant to a warrant, or have probable cause in order for such a seizure to be valid.<sup>20</sup> This requirement had the effect of severely restricting law enforcement activities.<sup>21</sup> The issue of whether the police could detain a suspect without probable cause had never been decisively dealt with.<sup>22</sup> However, the *Terry* Court faced just such a fact pattern, in which a suspect was detained and frisked without a warrant or probable cause.<sup>23</sup> The circumstances of *Terry* provided the Court with an opportunity to examine the Fourth Amendment implications of

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18. 392 U.S. 1 (1968).

19. *Id.* at 19 n.16.

20. *Id.* at 37 (Douglas, J., dissenting) (stating that "police officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. At the time of their 'seizure' without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that 'probable cause' was indeed present."). See also *Henry v. United States*, 361 U.S. 98 (1959) (holding search incidental to arrest invalid where there was no probable cause). The *Henry* court explained that "[i]t is important, we think, that this requirement [of probable cause] be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen." *Id.* at 102. See also *Florida v. Royer*, 460 U.S. 491, 498 (1983).

21. See *Terry v. Ohio*, 392 U.S. 1, 10 (1968) (commenting on the argument that police should be permitted to stop and frisk individuals without probable cause, so as not to be restricted in their handling of potentially dangerous situations). See generally Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 Cornell L. Rev. 1258, 1268 (1990) (noting that "[a] strict reading of precedent by the *Terry* Court would have led to a conclusion unfavorable to the traditional law enforcement community.").

22. See 1 WAYNE R. LAFAYE AND JEROLD H. ISRAEL, *CRIMINAL PROCEDURE*, § 3.8 at 292 (1984) (noting that the right of police to detain a suspect against his will had been both ignored and dealt with ambiguously).

23. 392 U.S. 1. While on routine patrol, a police officer approached the defendant and two other individuals. Based on the officer's many years of experience, he suspected that the three men might be planning to rob a store, so he identified himself and requested that the men provide their identification. The officer then proceeded to grab the defendant and pat him down. When the officer discovered a gun, the defendant was arrested. *Id.* at 5-7.

such a situation.

In its decision, the Supreme Court admitted that the defendant had been seized under the Fourth Amendment,<sup>24</sup> and that the officer lacked probable cause for the seizure.<sup>25</sup> Nevertheless, the Court found the seizure to be reasonable.<sup>26</sup> In doing so, the Court allowed limited pat-downs for the purpose of protecting an officer's safety while continuing an investigation based on less than probable cause.<sup>27</sup> The Court held that where suspicious behavior leads a police officer to conclude that a crime may be in progress, and that the suspect may be armed, the officer may reasonably conduct a limited search for weapons in order to protect himself.<sup>28</sup> This lesser standard is referred to as "reasonable suspicion,"<sup>29</sup> and is predicated on a balancing test that

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24. *Id.* at 19.

25. *Id.* at 22 (explaining that the police officer was properly exercising his investigative function of effective crime prevention, even without having probable cause for arrest, when he first approached Terry).

26. *Id.* at 30.

27. *Id.* (stating that the officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."). See generally *Sibron v. New York*, 392 U.S. 40 (1968) (companion case to *Terry* where the Court held the search of the defendant to be unreasonable since there were no particular facts from which an officer could reasonably infer he was in danger).

28. 392 U.S. at 30. The Court stated that:

[w]e merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

*Id.*

29. The *Terry* court never used the specific term "reasonable suspicion," but stated the standard that "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." 392 U.S. at 29. See also *supra* note 28. However, in the course of later Supreme Court decisions, it became clear that this standard was being referred to as "reasonable suspicion." An example of the Court's use of this phrase is *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), a case dealing with Mexican border patrol stops of vehicles containing possible illegal aliens. There, the Court held that "when an officer's

weighs the need to intrude against the severity of the intrusion.<sup>30</sup>

2. *Encounters With Less Than Reasonable Suspicion: United States v. Mendenhall*<sup>31</sup>

Under the *Terry* rationale, police were able to "seize" an individual on less than probable cause in limited circumstances.<sup>32</sup> The question then arose as to whether police could constitutionally stop and question individuals where even this lesser standard of reasonable suspicion was lacking.<sup>33</sup> In *United States v. Mendenhall*,<sup>34</sup> the Court was presented with a scenario where an individual was approached at an airport terminal on the basis of fitting a "drug courier profile."<sup>35</sup> The Supreme Court was faced with the question of whether the defendant was "seized" when approached by law-enforcement authorities who had neither a warrant nor probable cause to suspect her of drug-

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observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." *Id.* at 881. The *Brignoni-Ponce* Court then went on to state that it was "unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a *reasonable suspicion* to justify roving-patrol stops." *Id.* at 882 (emphasis added). Four years later, the Court declared that unless there is an "articulable and *reasonable suspicion* that a motorist is unlicensed or that an automobile is not registered, . . . stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment." *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (emphasis added). Justice Powell also used the term "reasonable suspicion" in his concurrence in *United States v. Mendenhall*, 446 U.S. 544 (1980), where he stated that "the federal agents had *reasonable suspicion* that the respondent was engaging in criminal activity, and, therefore, that they did not violate the Fourth Amendment by stopping the respondent for routine questioning." *Id.* at 560 (emphasis added).

30. 392 U.S. at 21. The Court noted that the officer "must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant intrusion." *Id.*

31. 446 U.S. 544 (1980).

32. See *supra* text accompanying notes 27-30.

33. See generally *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that officers may stop a vehicle near the Mexican border only where they have reasonable suspicion that illegal aliens are being brought into the country). See also *Brown v. Texas*, 443 U.S. 47 (1979) (holding that where officers lacked reasonable suspicion to believe defendant had engaged in criminal conduct, detaining defendant for identification purposes was an illegal seizure).

34. 446 U.S. 544 (1980).

35. *Id.* at 547 n.1.

trafficking.<sup>36</sup>

Justice Stewart, writing for the majority, concluded that no seizure had occurred.<sup>37</sup> He reasoned that "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."<sup>38</sup> Justice Stewart then went on to find that under this test, given the facts of the case, no such seizure had occurred.<sup>39</sup> Justice Stewart stated that where the encounter took place in a public arena such as an airport, and the defendant was not physically restrained, she would have no reason to feel that she was not free to leave.<sup>40</sup> However, the Court recognized that police-citizen encounters can sometimes take on a coercive air, and accordingly offered examples of behavior that might indicate a seizure even where a defendant makes no attempt to leave.<sup>41</sup> These examples included physical contact, display of weapons, tone of language and threatening language by several officers.<sup>42</sup>

At the time the opinion was written, only Justice Rehnquist specifically joined<sup>43</sup> in the formulation of this "free to leave" test.<sup>44</sup> However, as the Court continued to be presented with cases of this nature and had further opportunities to clarify its position, it soon became apparent that this "test" commanded a

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36. *Id.* at 551. The Court noted the basic facts as follows: Two Drug Enforcement Administrative agents approached the defendant in a crowded airport terminal, identified themselves, and then asked the defendant to produce both proof of her identification and her airline tickets. Upon noticing a discrepancy between the defendant's name on her driver's license, and the name on her airline ticket, the officers asked the defendant to accompany them to their office for further questioning. The defendant agreed, and was then asked to further agree to a body search as well as a handbag search, first being told that she had the right to refuse. The defendant agreed to the search which revealed narcotics, and the defendant was arrested. *Id.* 547-49.

37. *Id.* at 555.

38. *Id.* at 554.

39. *Id.* at 555. Two circuit court decisions involving airport seizures subsequently relied on *Mendenhall* in finding no seizures to have occurred. See *United States v. Berry*, 670 F.2d 583, 595 (5th Cir. 1982); *United States v. Black*, 675 F.2d 129, 133 (7th Cir. 1982).

40. 466 U.S. at 555.

41. *Id.* at 554.

42. *Id.*

43. *Id.* at 545.

44. *Id.* at 554-55.

majority of the Court's support.<sup>45</sup>

3. *Free To Leave Test Gains Support: Florida v. Royer.*<sup>46</sup>

Any doubts as to the validity of the "free to leave" test were resolved in a subsequent airport drug case decided by the Supreme Court. In *Florida v. Royer*,<sup>47</sup> the Court was once again presented with a fact pattern involving drug agents approaching the defendant in the middle of an airport.<sup>48</sup> However, after the initial encounter, the factual similarity with *Mendenhall* ceased.<sup>49</sup> Referring to actions that amounted to a show of official authority, the Court found that a seizure had occurred.<sup>50</sup> In reaching its conclusion, the Court expressly relied on the "free to leave" test set forth in *Mendenhall*,<sup>51</sup> while at the same time, distinguishing the facts of that case.<sup>52</sup> Furthermore, Justice White separated the fact scenario of *Royer* into two levels.<sup>53</sup> He noted that the agent's act of merely approaching Royer and asking for identification was not enough, by itself, to implicate the Fourth Amendment.<sup>54</sup> It was only the additional act of retaining Royer's papers, without any indication that he was free to leave, that caused the situation to escalate into a seizure.<sup>55</sup> Justice

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45. For a chronological overview of cases illustrating the Court's subsequent treatment of this "test" see, e.g., *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion with four Justices relying on the "free to leave" test); *INS v. Delgado*, 466 U.S. 210, 215 (1984) (six Justice majority upholding "free to leave" test); *Michigan v. Chesternut*, 486 U.S. 567 (1988) (unanimous Court noting that the Supreme Court has now embraced the *Mendenhall* test for seizure).

46. 460 U.S. 491 (1983).

47. *Id.*

48. *Id.* at 494. After identifying themselves, the agents asked Royer for permission to speak with him, and Royer consented. Royer was then asked to produce his airline ticket and driver's license and he again obliged. *Id.*

49. Once the defendant, Royer, produced the requested documents, the agents retained them and asked Royer to accompany the agents to another location. *Id.*

50. *Id.* at 501. The agents gave the defendant no indication that his airline ticket or driver's license would be returned. *Id.* See also *Florida v. Rodriguez*, 469 U.S. 1 (1984) (finding no seizure in a consensual encounter that failed to implicate the Fourth Amendment where an officer showed his badge to the defendant and requested that the defendant walk over to other officers for questioning).

51. 460 U.S. at 501-502.

52. *Id.* at 503-04 n.9.

53. *Id.* at 501.

54. *Id.*

55. *Id.* at 501, 503.

White reasoned that the initial consensual encounter had turned into an arrest situation, for all practical purposes.<sup>56</sup>

In its summation, the Court recognized the difficulty of formulating a bright line test for determining when a consensual stop becomes a seizure.<sup>57</sup> Noting that most situations are extremely fact sensitive, the Court declined to issue a narrow rule.<sup>58</sup> Instead, the Court reiterated the *Mendenhall* "free to leave" test.<sup>59</sup>

#### 4. *The "Blame the Victim"*<sup>60</sup> Approach: Immigration and Naturalization Service v. Delgado<sup>61</sup>

In *INS v. Delgado*,<sup>62</sup> the Court examined government action that was aimed at eliminating still another societal problem; that of illegal aliens.<sup>63</sup> Instead of involving a suspect in an open airport terminal, *Delgado* presented a situation in which INS agents questioned workers during the course of their employment at a factory.<sup>64</sup> The workers argued that they were seized

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56. *Id.* at 503.

57. *Id.* at 506 (stating that "[w]e do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop.").

58. *Id.* at 506-07 (stating that "[e]ven in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.").

59. *Id.* at 502. The Court relied on the *Mendenhall* test by noting that there was no problem with the officers approaching Royer and asking for his ticket and identification. However, once Royer was informed that he was suspected of drug-trafficking and asked to go to the police room while the officers retained possession of his airline ticket, "[t]hese circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.'" *Id.* Subsequently, the Court unanimously ratified the *Mendenhall* "free to leave" test adopted in *Michigan v. Chesternut*, 486 U.S. 567 (1988). There, the Court found no seizure when a police car followed alongside the defendant without the police activating sirens or flashers or commanding the defendant to halt. *Id.* at 575. The Court further noted that this test was heavily dependent on the totality of the circumstances, *id.* at 573, and used the objective standard of the reasonable person. *Id.*

60. See Maclin, *supra* note 21, at 1305 (referring to the *Delgado* "blame the victim" approach).

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

62. *Id.*

63. *Id.*

64. *Id.* at 211-12. These "factory surveys" involved agents carrying weapons and

due to the manner in which the survey was conducted.<sup>65</sup> They claimed that the agents created an atmosphere that caused the employees to fear that they were not free to leave.<sup>66</sup>

The Supreme Court held that no seizure had occurred, and stated that the employees had "no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer."<sup>67</sup> The Court gave little weight to the employees' claim that their movements were restricted by the presence of the INS agents.<sup>68</sup> Instead, the Court contended that any such restrictions were brought about by the very nature of the employment itself.<sup>69</sup> Accordingly, the Court classified the questioning as a "classic consensual encounter."<sup>70</sup>

5. *Police-Citizen Encounters Within Close Confines: United States v. Lewis*<sup>71</sup>

In 1990, the Court of Appeals for the District of Columbia Circuit issued a decision that was a consolidation of two cases.<sup>72</sup> Both appeals arose in the context of police-citizen encounters on buses.<sup>73</sup> In each case, police officers boarded buses at interim points as part of a drug interdiction program, and requested passengers to cooperate by producing tickets, responding to questions, and agreeing to searches.<sup>74</sup>

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badges randomly going up and down the aisles questioning factory workers as to their citizenship status while other agents positioned themselves by the factory exits. *Id.*

65. *Id.* at 220.

66. *Id.*

67. *Id.* at 218.

68. *Id.*

69. *Id.* For further illustration of the "blame the victim" approach, see *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (holding that detaining the defendant for 27 hours was reasonable where it was due to her own efforts to resist the "call of nature.").

70. 466 U.S. at 221.

71. 921 F.2d 1294 (D.C. Cir. 1990).

72. This case merged appeals from *United States v. Lewis*, 728 F. Supp. 784 (D.D.C. 1990) with *United States v. Cothran*, 729 F. Supp. 153 (D.D.C. 1990). 921 F.2d at 1295.

73. 921 F.2d at 1295.

74. *Id.* Defendant Lewis was seated on a bus when he was approached by an officer. The officer showed his police identification and asked if he could talk to Lewis. Lewis agreed and produced his ticket. After stating that he had neither luggage nor narcotics, Lewis agreed to be searched. The officer discovered cocaine and Lewis was arrested. *Id.* at 1296. Defendant Cothran was also approached while seated on a bus and agreed to

In each case, the lower court held that the police practices employed rose to the level of an unconstitutional seizure.<sup>75</sup> However, the circuit court concluded that no seizures occurred.<sup>76</sup> In reaching this decision, the court noted that no seizure occurs merely because police officers approach a citizen and request permission to talk with him.<sup>77</sup> The court then considered whether a different finding should result where the encounter takes place on a bus.<sup>78</sup> Noting that the lower courts had found this location to be dispositive,<sup>79</sup> the circuit court decided that the fact that the encounter occurred on a bus should only be considered a relevant factor.<sup>80</sup> The court de-emphasized the importance of the location by suggesting that any constraint on the defendants' ability to leave was due to their choosing this particular mode of transportation.<sup>81</sup> Instead, the court stressed that the proper inquiry should focus on whether each defendant was "free to disregard the police presence and go about his business."<sup>82</sup>

Applying this standard to the facts of the case, the court

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talk with the officer and show him her ticket. The officer also searched her coat and handbag with her permission. Defendant Cothran claimed that her luggage had been checked below. When the officer inquired about a bag in the overhead rack, Defendant Cothran denied that it was hers. When no one else claimed the bag, the officer treated it as abandoned and subjected it to a canine sniff test. When the bag tested positive for narcotics, the officer opened it and discovered evidence linking the bag to Defendant Cothran, who was then arrested. *Id.* at 1296-97.

75. *Id.* at 1296-97.

76. *Id.* at 1300.

77. *Id.* at 1297 (noting that the court is to consider such relevant factors as whether the "officer displayed a weapon or handcuffs, wore a uniform, touched the individual without permission, threatened or physically intimidated him, or retained his identification or travel ticket.").

78. *Id.* at 1298.

79. *Id.* The lower courts had ruled that the defendants were not free to leave because they would have had to squeeze past the police officers and run the risk of being stranded. *Id.*

80. *Id.*

81. *Id.* at 1299 (stating that the "bus passenger has voluntarily placed himself in tight quarters, with a single avenue of exit that is narrow and frequently blocked by people and luggage. For this cramped setting, he cannot blame law enforcement officers."). *Id.*

82. *Id.* (quoting *Michigan v. Chesternut*, 486 U.S. 567, 576 (1988)). The court then referred to *United States v. Flowers*, 912 F.2d 707, 712 (holding that "[i]n this context, freedom to leave means fundamentally the freedom to break off contact, in which case the officers must, in the absence of objective justification, leave a passenger alone.").

reasoned that the defendants should not have felt their " 'business' impeded by the officers' questioning. The officers neither wore badges nor carried visible weapons."<sup>83</sup> The court pointed out that this was in direct contrast to the *Bostick* fact pattern, where the officers not only wore badges and raid jackets, but also carried a weapon.<sup>84</sup> It subsequently held that no seizures had occurred for Fourth Amendment purposes.<sup>85</sup>

6. *Another Close Encounter of the Bus Kind: United States v. Madison*<sup>86</sup>

The Second Circuit decision in *Madison* was handed down one week prior to the Supreme Court's ruling on *Bostick*.<sup>87</sup> The government asked the court of appeals to reverse the district court's finding of a seizure where police officers questioned a bus passenger.<sup>88</sup> Although the geographical locations differed, the factual scenario of *Madison* bore a striking similarity to that of *Bostick*.<sup>89</sup> Both cases involved special drug interdiction programs that operate in bus terminals.<sup>90</sup> As in *Bostick*,<sup>91</sup> the officers approached a passenger seated on a bus about to depart the terminal, and asked for permission to speak with him.<sup>92</sup> However, unlike *Bostick*, the officers in *Madison* observed the suspect at the terminal prior to his boarding the bus, but chose not to approach him until he was seated on the bus.<sup>93</sup>

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83. 921 F.2d at 1299.

84. *Id.*

85. *Id.* at 1300.

86. 936 F.2d 90 (2d Cir. 1991).

87. *Madison* was decided on June 13, 1991. *Id.* at 90. One week later, on June 20, 1991, the Supreme Court decided *Bostick*. 111 S. Ct. 2382 (1991).

88. 936 F.2d at 92.

89. See discussion *infra* part III.A. *Bostick* arose on facts occurring in Fort Lauderdale, Florida, 111 S. Ct. at 2385, whereas *Madison* took place in New York City. 936 F.2d at 91.

90. 936 F.2d at 91. See *infra* part III.A.

91. See *infra* part III.A.

92. 936 F.2d at 91-92. One officer approached Madison, identified himself, and asked to speak with Madison, who agreed. The officer positioned himself behind Madison, and a second officer stood two rows in front of him, partially blocking the aisle. The first officer questioned Madison as to his travel plans and asked about a knapsack laying next to Madison. When Madison denied ownership, the officers inspected the bag and discovered crack. *Id.*

93. *Id.* at 91. Furthermore, Madison's trip initiated at the New York City terminal, whereas *Bostick* was in Fort Lauderdale only on a stopover. *Id.* See also *infra* part III.A.

The Second Circuit concluded that Madison was not seized within the meaning of the Fourth Amendment when he was questioned aboard the bus.<sup>94</sup> The court found that a reasonable person would have felt that he was free to disregard the officers and go about his business.<sup>95</sup> The court supported its finding by noting that the officer questioning Madison never displayed any behavior that would have led Madison to believe that he was under any obligation to cooperate with the officer.<sup>96</sup>

Furthermore, the circuit court specifically discounted the district court's reliance on the confined location of the bus in finding a seizure.<sup>97</sup> The court indicated that it was not concerned with whether Madison had any desire to exit the bus, or whether he would have been inconvenienced by so leaving.<sup>98</sup> On the contrary, the court stated that, "[c]onvenience and desire are not dispositive; rather, the critical issue is whether Madison could reasonably have believed that if he attempted to get off the bus, he would have been prevented from doing so by [Officer] Canale."<sup>99</sup> Madison's options, according to the court, were to voluntarily talk to the officer, leave the bus, or simply "stone-wall" the officer.<sup>100</sup> Had the officer then used coercive tactics to overcome Madison's resistance to questioning, the court admitted that Madison would have no longer been free to go about his business, and would have been considered seized.<sup>101</sup>

The circuit court also noted that the district court below had relied in part on the Florida Supreme Court's holding in *Bostick v. Florida*.<sup>102</sup> The circuit court, however, stated that *Bostick* was distinguishable from the present case because the facts in *Bostick* indicated that there was a "compelling show of

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94. 936 F.2d at 92.

95. *Id.* at 94.

96. *Id.* at 93-94 (noting that the officer never touched the defendant, nor did he display his weapon or speak aggressively).

97. *Id.* at 93-94, 95.

98. *Id.* at 94.

99. *Id.*

100. *Id.* at 95 (stating that, "[i]f he [Madison] did not wish to have further contact with [Officer] Canale, he could have simply refused to answer the officer's questions and continued sitting on the bus in silence, waiting for it to depart.").

101. *Id.* at 94-95.

102. *Id.* at 96 (citing *Bostick v. Florida*, 554 So. 2d 1153 (Fla. 1989), *cert. granted*, 111 S. Ct. 241 (1990)).

authority"<sup>103</sup> which the court felt was absent in *Madison*.<sup>104</sup> Therefore, it speculated that even if the United States Supreme Court were to go ahead and affirm the Florida Supreme Court's holding, "such a ruling would not be dispositive in this case."<sup>105</sup>

C. *Assuming No Seizure: Is Consent to Search Voluntary?*  
*Schneckloth v. Bustamonte*:<sup>106</sup>

In light of the Fourth Amendment's protection of privacy interests, where a person consents to police activity, he no longer has a privacy interest at stake.<sup>107</sup> Consequently, where a valid consent is obtained, the Fourth Amendment is not even implicated.<sup>108</sup> The major case dealing with the issue of valid consent was *Schneckloth v. Bustamonte*,<sup>109</sup> which held that consent is valid where it is given voluntarily and is not the product of duress or coercion, either express or implied.<sup>110</sup> *Schneckloth* involved a police request for permission to search where the party was not informed of his right to refuse.<sup>111</sup>

The issue addressed by the Supreme Court was whether consent to a search is valid if the consentor is not aware that he has a right to withhold such consent.<sup>112</sup> In finding that such awareness is not an absolute requirement, but merely one factor to be considered in the "totality of the circumstances,"<sup>113</sup> the

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103. *Id.* at 96.

104. *Id.*

105. *Id.* The United States Supreme Court subsequently reversed and remanded the decision of the Florida Supreme Court in *Florida v. Bostick*, 111 S. Ct. 2382 (1991).

106. 412 U.S. 218 (1973).

107. See 3 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1 at 148, (2d ed. 1987) (noting that since the Fourth Amendment only prohibits unreasonable searches, where voluntary consent is given, the search becomes reasonable).

108. *Id.*

109. 412 U.S. 218 (1973).

110. *Id.* at 248. The Court further stated that this "is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. Factors to be considered include "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Id.* at 229. Consent will also be considered invalid where it was in response to a "claim of lawful authority." *Id.* at 233.

111. *Id.* at 220. After stopping the vehicle for having a burned-out headlight, the officer sought permission from one of the passengers to search the car's trunk. The passenger replied "Sure, go ahead," and a subsequent finding of stolen checks led to another passenger being charged with theft. *Id.*

112. *Id.* at 223.

113. *Id.* at 227.

Court reasoned that it is not necessary for the party to be informed of his right to refuse.<sup>114</sup> The Court acknowledged that by refusing to require law enforcement personnel to inform a suspect of his legal right to decline, the Court was, in effect, imposing a lower standard of consent for Fourth Amendment issues than for Fifth Amendment issues.<sup>115</sup> The Court rationalized its position by distinguishing between the different rights protected under each Amendment.<sup>116</sup> The Court pointed out the Fifth Amendment right to remain silent (as well as the Sixth Amendment right to have a lawyer available during interrogation) is closely related to the guarantee of a fair trial.<sup>117</sup> The Court conceded that failure to give knowing consent in such instances could ultimately result in the loss of one's personal freedom.<sup>118</sup> In comparison, the Court noted that consent searches often take place in non-custodial settings, so that the coercive element of custody is generally absent and the Fourth Amendment would not be implicated.<sup>119</sup> The Court was also careful to recognize that police might never get voluntary consent if they were forced to inform each individual of his rights along the lines of the *Miranda* warnings.<sup>120</sup>

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114. *Id.* at 231-33 (explaining that it would be too impractical to insist that search subjects be informed of their right to refuse to consent, due to the informal nature of such searches as well as the fact that they often arise without warning).

115. *Id.* at 241 (stating that "[t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.").

116. 412 U.S. at 242-43. The Court reasoned that consent to a search could not be found to be unfair just because the consenter was not fully informed of the right to refuse consent. However, such knowledge was deemed important to the goal of ensuring that a criminal suspect in custody is not denied his fundamental right to refuse to incriminate himself. *Id.* But see *LaFAVE*, *supra* note 107 § 8.1(a), at 153 (stating that the "protections of the Fourth Amendment have to do with privacy rather than accuracy in the guilt-determination process, but it is never explained why unwitting surrender of the right to privacy should not be a matter of concern.").

117. 412 U.S. at 236

118. *Id.* at 241, 244.

119. *Id.* at 247.

120. *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing requirement of warnings to be given in a custodial setting in order to avoid violation of self-incrimination privilege).

III. *Florida v. Bostick*<sup>121</sup>A. *Facts*

In an effort to halt the increase in drug trafficking, Broward County, Florida police officers have developed a program commonly referred to as "working the buses."<sup>122</sup> This program entails a procedure whereby police officers board buses during scheduled stops and randomly ask passengers for permission to search their luggage.<sup>123</sup> During one such operation, two officers from the Sheriff's Office boarded a Greyhound bus during a stop-over in Fort Lauderdale.<sup>124</sup> The bus originated in Miami, with Atlanta being its final destination.<sup>125</sup>

Once the officers were on board, the bus driver left the bus and closed the doors behind him.<sup>126</sup> At that point, the officers walked to the back of the bus where Terrance Bostick was reclining in the last seat.<sup>127</sup> Bostick alleged that he was asleep at the time, and that his feet were touched by one of the officers, causing him to awaken.<sup>128</sup> The officers claimed that he was merely resting.<sup>129</sup> Bostick looked up to find the two officers standing over him and partially blocking the aisle.<sup>130</sup> Bostick further alleged that one of the officers had his jacket open with his hand on what Bostick presumed to be a gun.<sup>131</sup> The officers

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121. 111 S. Ct. 2382 (1991).

122. *Id.* at 2389 (Marshall, J., dissenting) (citing *Bostick v. State*, 554 So. 2d 1153, 1156-1157 (Fla. 1989)).

123. *Id.* at 2389-90 (Marshall, J. dissenting). The technique of "working the buses" has been described as where "a group of state or federal officers will board a bus while it is stopped at an intermediate point on its route. Often displaying badges, weapons, or other indicia of authority, the officers identify themselves and announce their purpose to intercept drug traffickers. They proceed to approach individual passengers, requesting them to show identification, produce their tickets, and explain the purpose of their travels. Never do the officers advise the passengers that they are free not to speak with the officers. An 'interview' of this type ordinarily culminates in a request for consent to search the passenger's luggage . . . These sweeps are conducted in a 'dragnet' style." *Id.*

124. *Id.* at 2384-85, 2392.

125. *Id.*

126. Brief of Respondent at 2 n.1, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717).

127. Brief of Respondent at 2. See also 111 S. Ct. at 2392.

128. Brief of Respondent at 2 n.2.

129. *Id.*

130. *Bostick v. State*, 554 So. 2d 1153, 1157 (Fla. 1989).

131. *Id.*

contended that while both were armed, their weapons were completely concealed.<sup>132</sup>

It was undisputed that the officers had no reasonable suspicion to suspect Bostick, nor any other passenger on board, of any crime.<sup>133</sup> Nevertheless, they identified themselves, asked Bostick where he was going, and if he would show them his bus ticket and some identification.<sup>134</sup> Bostick responded that he was traveling to Atlanta and complied with the officers' request for his documents.<sup>135</sup> Both his ticket and his identification were in order, and neither provided any grounds for heightened suspicion.<sup>136</sup> Nevertheless, the officers continued to stand over Bostick, and asked him for permission to search a red tote bag that his head had been resting on.<sup>137</sup> Bostick again complied, and the search failed to uncover any contraband.<sup>138</sup>

At that point, one of the officers noticed a blue bag in the overhead rack and asked for permission to search that bag also.<sup>139</sup> There is a dispute as to what happened next.<sup>140</sup> The officers maintain that Bostick consented after being informed that he could refuse, while Bostick claims that he was never told that he had a right to refuse, and in fact never consented.<sup>141</sup> In any event, the subsequent search of the blue bag uncovered cocaine, and Bostick was arrested.<sup>142</sup> Bostick argued that he had been seized within the meaning of the Fourth Amendment, and therefore, that any subsequent "consent" to search his bags was tainted as "fruit of the poisoned tree."<sup>143</sup>

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132. Petitioner's Brief on the Merits at 4, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717).

133. 111 S. Ct. at 2386.

134. *Id.* at 2384-85.

135. Brief of Respondent at 4, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. 111 S. Ct. at 2385 (citing 554 So. 2d 1153, 1154-55 (Fla. Dist. Ct. App. 1987) (Letts, J., dissenting in part) (quoting 510 So. 2d 321, 322)).

141. *Id.*

142. *Id.* at 2384-85.

143. *Id.* at 2386, noting that "[t]he State concedes, and we accept for purposes of this decision, that the officers lacked the reasonable suspicion required to justify a seizure and that, if a seizure took place, the drugs found in Bostick's suitcase must be

## B. Lower Court Decisions

### 1. Trial Court Decision<sup>144</sup>

Bostick moved to have the recovered cocaine suppressed in the Circuit Court for Broward County, arguing that it had been obtained in violation of his Fourth Amendment rights.<sup>145</sup> Although there were significant conflicting facts as noted above, the court declined to resolve these inconsistencies. Instead, it simply denied the motion to suppress.<sup>146</sup> Thereafter, Bostick pled guilty while expressly reserving the right to appeal the denial of his motion.<sup>147</sup>

### 2. Florida District Court of Appeal Decision<sup>148</sup>

A court of appeals panel affirmed the trial court decision 2-1.<sup>149</sup> However, it also certified the following question to the Florida Supreme Court: "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

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suppressed as tainted fruit."'). See also Brief of Respondent at 8-9, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717) (stating that [a]ssuming that Bostick was illegally seized, the cocaine found during the search of his bag must be suppressed as 'fruit of the poisonous tree.'"). The doctrine of the "fruit of the poisoned tree" was first illustrated by Justice Holmes in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). He noted that the policy purpose of excluding illegally obtained evidence prevented its use not only in court, but for any purpose, unless such information had been obtained from an independent source. *Id.* at 392. Although Holmes did not use the specific phrase "fruit of the poisoned tree," *Silverthorne* is often cited by courts as originating this concept. See *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). The underlying principal of this doctrine is that once the original evidence, or "tree," is tainted by the means of obtaining it (such as by an illegal seizure), all further evidence or "fruit" derived from that evidence is equally illegal.

144. Fla. Cir. Ct. of the 17th Judicial Circuit, Broward County, Criminal Division, Florida. (Aug. 4, 1986) (Case No.: 85-10543CF) (unreported decision). See Writ of Certiorari to Supreme Court of Florida, Joint Appendix at 2, *Bostick* (No. 89-1717).

145. *Id.*

146. *Id.*

147. Melissa Goodman, *A Long Journey*, LIFE, Fall Special 1991, at 78.

148. *Bostick v. State*, 510 So. 2d 321 (Fla. Dist. Ct. App. 1987).

149. *Id.* at 322. Subsequently, on facts very similar to *Bostick*, the Florida District Court of Appeals found a bus passenger's consent not to have been coerced. *State v. Avery*, 531 So. 2d 182, 186 (Fla. Dist. Ct. App. 1988) (concluding that the defendant's "consent to search is not per se involuntary because obtained by law enforcement officers on board a commercial carrier such as a bus or other similar forms of transportation.").

that he has the right to refuse consent to search?"<sup>150</sup> Since the lower court chose not to address the issue of the contradictory testimony in the case, the court of appeals determined that those issues had been resolved in the State's favor.<sup>151</sup>

### 3. *Florida Supreme Court Decision*<sup>152</sup>

The Florida Supreme Court rephrased the issue as "[d]oes 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 passengers' luggage?"<sup>153</sup> In a divided 4-3 opinion, the court answered the question in the affirmative, and reversed the court of appeals decision.<sup>154</sup>

Once again, the court resolved the conflicting testimony in favor of the State, as being a question of fact decided by the trial judge.<sup>155</sup> Nonetheless, the court held that Bostick had in fact been seized once the officers approached him and questioned him at the back of the bus.<sup>156</sup> The court also found that the seizure was unconstitutional, since there was admittedly neither probable cause nor reasonable suspicion.<sup>157</sup> Therefore, the court reasoned that even assuming Bostick had in fact voluntarily consented to the search of the second blue bag, that consent was not valid since it failed to overcome the taint of the

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150. *Bostick v. State*, 510 So. 2d at 322.

151. *Id.* (Letts, J., concurring in part and dissenting in part).

152. *Bostick v. State*, 554 So. 2d 1153 (Fla. 1989). *Bostick* was the lead case for a series of cases in which the Florida district courts had upheld consensual searches. In *State v. Avery*, 531 So. 2d 182 (Fla. Dist. Ct. App. 1988), the District Court of Appeals upheld consensual searches and certified to the Florida Supreme Court the question: "May consent to search be suppressed by the trial court as 'coerced' upon the sole ground that the officer(s) boarded a bus (or other public transport) and randomly sought consent from passengers?" Subsequent cases certifying the identical question were *Serpa v. State*, 541 So. 2d 799 (Fla. Dist. Ct. App. 1989) and *Shaw v. State*, 543 So. 2d 469 (Fla. Dist. Ct. App. 1989). Two other decisions that followed *Avery* were *Mendez v. State*, 434 So. 2d 774 (Fla. Dist. Ct. App. 1988) and *McBride v. State*, 535 So. 2d 692 (Fla. Dist. Ct. App. 1988). The Florida Supreme Court answered the certified question, as rephrased in *Bostick v. State*, in the affirmative. *Mendez v. State*, 554 So. 2d 1161 (Fla. 1989).

153. 554 So. 2d at 1154.

154. *Id.* at 1154, 1159.

155. *Id.*

156. *Id.* at 1157.

157. *Id.* at 1158.

prior illegal seizure.<sup>158</sup>

In reaching its conclusion, the Florida Supreme Court recognized that whenever there is a police-citizen encounter, there is a conflict between two very important competing interests: the right of the individual to be left alone and the need for law enforcement.<sup>159</sup> The court noted that when there is probable cause or reasonable suspicion that someone has committed a crime, the scale tips in favor of the police, who then have the right, subject to constitutional restrictions, to conduct a search or seizure.<sup>160</sup> The court further stated that in order to determine just when such a search or seizure will be considered reasonable, and therefore constitutional, police activity will be divided into three general categories.<sup>161</sup> The first category deals with arrests, which the court noted requires a finding of probable cause.<sup>162</sup> The second category involves a lesser form of seizure — one that is short of arrest.<sup>163</sup> Cases falling into this category are usually those where there is a short investigatory stop premised on reasonable suspicion.<sup>164</sup> The final category deals with consensual encounters.<sup>165</sup> Regardless of the lack of probable cause or reasonable suspicion, there will be no seizure where an individual agrees without coercion to police activity.<sup>166</sup>

The court noted that in the present case, the State claimed that this was a third category issue.<sup>167</sup> The State's rationale was that since Bostick consented to the search there was no Fourth Amendment violation.<sup>168</sup> Unconvinced, the court dismissed this argument and found that this case really fell into the second category.<sup>169</sup> Since the State conceded that there was neither probable cause nor reasonable suspicion to question Bostick, the court

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158. *Id.*

159. *Id.* at 1155.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1156.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

looked to the *Mendenhall* definition of when a seizure occurs.<sup>170</sup>

In turning its attention to whether "a reasonable person would have believed that he was not free to leave,"<sup>171</sup> the court proceeded to explore what a reasonable bus passenger in Bostick's situation would have believed.<sup>172</sup> The court relied heavily on the fact that Bostick was seated at the very end of the bus, and that his only available exit was, at the very least, partially blocked by the officers.<sup>173</sup> Furthermore, the court argued that even if Bostick had chosen to get up and walk past the officers, he could not be realistically expected to leave the bus.<sup>174</sup> If he abandoned the bus, he would miss his destination, forfeit his bus fare, and find himself stranded in a strange city.

The Court analogized the case to *Alvarez v. State*,<sup>175</sup> another Florida case with striking similarities to *Bostick*.<sup>176</sup> In *Alvarez*, the defendant was approached in his sleeping car on a passenger train that was about to depart.<sup>177</sup> The court looked to see if a seizure had occurred within the *Mendenhall* definition, and found that it had.<sup>178</sup> Since Alvarez was not approached in a public terminal as the *Mendenhall* test presumed, he did not have the realistic option of leaving.<sup>179</sup> Rather, his only other choice was to be aggressive and ask the officers to leave.<sup>180</sup>

The Bostick court also turned its attention to another Broward County seizure case,<sup>181</sup> *State v. Kerwick*.<sup>182</sup> In *Kerwick*, the court found a seizure to have occurred under circumstances where police officers approached the defendant while she was

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170. *Id.* at 1157. See also *supra* part II.B.2.

171. *Mendenhall*, 446 U.S. at 544. See also *supra* part II.B.2.

172. *Bostick v. State*, 554 So. 2d at 1157.

173. *Id.*

174. *Id.*

175. 515 So. 2d 286 (Fla. Dist. Ct. App. 1987).

176. 554 So. 2d at 1157. Both *Alvarez* and *Bostick* arose on facts questioning whether a seizure had occurred within close confines.

177. *Id.* at 287-88. Of added interest is the fact that Officer Joseph Nutt, one of the officers in *Alvarez*, was also one of the two officers in *Bostick*. See 515 So.2d at 287 and Brief of Respondent at 4, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717).

178. 515 So. 2d at 289.

179. *Id.*

180. *Id.*

181. *Bostick*, 554 So. 2d at 1158.

182. 512 So. 2d 347 (Fla. Dist. Ct. App. 1987).

seated in a parked car.<sup>183</sup> The officers positioned themselves by the car door, thereby blocking any possible exit.<sup>184</sup>

The *Bostick* court was particularly swayed by the *Kerwick* majority's frightening prediction of a future reminiscent of the days of Hitler and Stalin, where the average American citizen will be forced to produce papers in order to pass on the streets.<sup>185</sup> Accordingly, the *Bostick* court concluded that while no arrest initially occurred, Bostick was nevertheless illegally seized.<sup>186</sup> The court did not consider whether the seizure could still be considered valid, since the State had previously stipulated that it lacked any basis for suspecting any wrongdoing.<sup>187</sup> Therefore, the seizure of Bostick was held to be unlawful.<sup>188</sup>

The court next addressed the issue of whether under these circumstances Bostick's consent to search his luggage could be considered valid.<sup>189</sup> Relying on its holding in *Norman v. State*,<sup>190</sup> the court reiterated that the only way consent could be found valid under these circumstances is if there is "clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior official illegal action."<sup>191</sup> Having found no such proof here, the court reasoned that the police overstepped their authority, and held Bostick's consent to be invalid.<sup>192</sup>

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183. *Id.* at 347.

184. *Id.* at 348.

185. *Id.* Judge Anstead, writing for the *Kerwick* majority observed: the evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers — in short a *raison d'etre* — is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa.

*Id.*

186. *Bostick*, 554 So. 2d at 1157.

187. *Id.* at 1158.

188. *Id.*

189. *Id.*

190. 379 So. 2d 643, 647-48 (Fla. 1980) (finding consent to search involuntary due to coercive circumstances).

191. *Id.* at 647. See also *supra* note 143 for a discussion of the "fruit of the poisonous tree" doctrine.

192. *Bostick v. State*, 554 So. 2d at 1158.

### C. *The United States Supreme Court Decision*

Justice O'Connor, writing for the majority in a 6-3 opinion,<sup>193</sup> reversed the Florida Supreme Court decision and remanded the case back to the Florida courts to reconsider the issue under the proper legal standard.<sup>194</sup> The Court framed the issue as "whether a police encounter on a bus . . . necessarily constitutes a 'seizure' within the meaning of the Fourth Amendment."<sup>195</sup> The Court rejected what it perceived to be the Florida Supreme Court's adoption of a "per se" rule that "working the buses" is unconstitutional.<sup>196</sup> The Court focused its attention on whether Bostick felt free to terminate the encounter with the police.<sup>197</sup> If he did feel free to terminate, no seizure had occurred, and the encounter was purely consensual in nature.<sup>198</sup> If he did not feel free to terminate, a finding that a seizure had occurred would result in suppression of the cocaine as "tainted fruit," because the State had already conceded that there was no reasonable suspicion to justify a seizure.<sup>199</sup>

Justice O'Connor stated that, "a seizure does not occur simply because a police officer approaches an individual and asks a few questions."<sup>200</sup> Referring back to the Court's decision in *Terry v. Ohio*,<sup>201</sup> Justice O'Connor noted that such exchanges between individuals and police officers only reach the level of a seizure when it is clear that the citizen's liberty has been restricted.<sup>202</sup>

Unlike the Florida Supreme Court, Justice O'Connor explained that it was inappropriate to concentrate on the "free to leave" part of the *Mendenhall*<sup>203</sup> test for seizure.<sup>204</sup> Rather, the emphasis should be on "the principle that those words were in-

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193. *Florida v. Bostick*, 111 S. Ct. 2382, 2384 (1991).

194. *Id.* at 2389.

195. *Id.* at 2386.

196. *Id.* at 2387.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 2386.

201. *See supra* part II.B.1.

202. 111 S. Ct. at 2386.

203. *See supra* note 38 and accompanying text.

204. 111 S. Ct. at 2387.

tended to capture.”<sup>205</sup> She pointed out that the fact that Bostick may not have felt “free to leave” the bus was a result of his own choice in traveling on the bus in the first place.<sup>206</sup> In this regard, she found *INS v. Delgado*<sup>207</sup> to be dispositive.<sup>208</sup> Her reasoning hinged on the concept that the factory workers in *Delgado*, like Bostick, found their movements limited due to their own choices and circumstances, rather than to any police activity.<sup>209</sup> Justice O’Connor reasoned that since Bostick had no desire to leave the bus in the first place, whether or not he was free to leave the bus when the police approached him would not be a legitimate test of the coerciveness of the encounter.<sup>210</sup>

Instead, the majority framed the test as “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”<sup>211</sup> Justice O’Connor reasoned that this was not a radical new test, but merely a reformulation which followed from the Court’s previous decisions. These decisions have held that in order to qualify as a seizure, the police must have indicated to the individual that he could not “ignore the police presence and go about his business.”<sup>212</sup>

In remanding the case back to the Florida courts, Justice O’Connor was careful to point out that the Supreme Court was not making a conclusive finding as to whether or not a seizure had actually occurred.<sup>213</sup> The Supreme Court claimed that it was merely rejecting the Florida Supreme Court’s heavy reliance on the setting of the encounter.<sup>214</sup> The Court reasoned that the cramped setting of the bus should be one of the factors to be considered, but it should not be the entire basis for the decision.<sup>215</sup> The Court directed that the setting of the encounter be looked at in terms of a totality of the circumstances.<sup>216</sup>

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205. *Id.*

206. *Id.*

207. See *supra* notes 61-70 and accompanying text.

208. 111 S. Ct. at 2387.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 2388.

214. *Id.*

215. *Id.* at 2389.

216. *Id.*

Furthermore, the Court noted that the reasonable person test presumes the viewpoint of an innocent person.<sup>217</sup> Justice O'Connor concluded the opinion by reiterating that in determining whether a seizure has occurred, the totality of the circumstances rule applies regardless of whether the encounter transpired on the street or on a bus.<sup>218</sup>

#### D. *The Dissent*

In his dissent, Justice Marshall, joined by Justices Blackmun and Stevens,<sup>219</sup> asserted that the majority's rationale effectively bargained away the rights of individuals in return for an effective means of fighting the war on drugs.<sup>220</sup> The dissent accused the majority of overlooking one of the principal goals of the Fourth Amendment by its willingness to sacrifice individual liberties for what some would call the greater good.<sup>221</sup> He pointed out that the general warrant was indeed an effective measure of law enforcement, yet the framers of the Constitution nevertheless endeavored to limit its use.<sup>222</sup> Not only did Justice Marshall question the success of these "suspicionless police sweep[s] of buses,"<sup>223</sup> but he stated that the effect of this practice is that it "burdens the experience of traveling by bus with a degree of governmental interference to which, until now, our society has been proudly unaccustomed."<sup>224</sup>

The dissent further argued that, although it did not object to the way that the majority stated the test for determining the existence of a seizure for Fourth Amendment purposes, it could

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217. *Id.* at 2388 (citing *Chestnut*, 486 U.S. at 574) (claiming that this presumption ensures that the protections of the Fourth Amendment will not vary depending on the state of mind of each citizen).

218. *Id.* at 2389 (noting that "[t]he Florida Supreme Court erred in adopting a per se rule.").

219. *Id.*

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

221. *Id.*

222. *Id.*

223. *Id.* at 2390.

224. *Id.* Justice Marshall further stated that, "[t]he thought that an American can be compelled to 'show his papers' before exercising his right to walk the streets, drive the highways or board the trains is repugnant to American institutions and ideals." *Id.* (quoting from *Ekstrom v. Justice Court*, 136 Ariz. 1, 6, 663 P.2d 992, 997 (1983) (Feldman, J., concurring)).

not agree with the conclusion reached by the majority.<sup>225</sup> The dissent questioned how Justice O'Connor could doubt whether Bostick had been seized.<sup>226</sup> The dissent agreed that the proper query should be, "whether a passenger who is approached during a sweep would feel free to decline the officers' requests or otherwise terminate the encounter,"<sup>227</sup> However, the dissent had no difficulty in answering "no" based on the facts in this case.<sup>228</sup>

The dissenters reasoned that under the circumstances, Bostick had only two choices: he could have either remained seated while attempting to refuse to cooperate with the officers, or he could have physically removed himself from the presence of the officers.<sup>229</sup> The dissenters indicated that neither option was particularly appealing from Bostick's viewpoint.<sup>230</sup> If Bostick had chosen to ignore the officers' questions, it would have been reasonable to assume that the officers might have then become even more persistent in their interrogation.<sup>231</sup> Furthermore, Bostick might have feared that his failure to cooperate would be held against him, thereby giving the officers the reasonable suspicion they needed to make a valid seizure.<sup>232</sup> Additionally, Justice Marshall explained that had Bostick pursued the second alternative, he would have been forced to aggressively push himself past two armed officers, something that the average citizen is not easily inclined to do.<sup>233</sup>

Moreover, even had Bostick felt that he would have been allowed to leave the bus in order to avoid the presence of the officers, Justice Marshall doubted that Bostick would actually have done so.<sup>234</sup> It was pointed out that the fact that the bus was on a stopover, and due to leave the terminal at any moment

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225. *Id.* at 2391.

226. *Id.*

227. *Id.*

228. *Id.* at 2393.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* See also Brief for Respondent at 15, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717) (pointing out that even had Bostick chosen to push past the officers in order to exit the bus, he would likely have still found himself trapped, since most people lack the requisite knowledge to open a closed bus door).

234. 111 S. Ct. at 2393-94.

added to the coercive element of the encounter.<sup>235</sup> Additionally, the majority's "blame the victim" approach<sup>236</sup> was condemned as a means of singling out interstate bus travelers, when less intrusive means are available to accomplish the same goal.<sup>237</sup> As an example, Justice Marshall noted that the police were always allowed to approach bus passengers where they had reasonable suspicion.<sup>238</sup> Where no basis for suspicion existed, there was still nothing to stop the police from advising the passengers that they had a right to refuse to be questioned.<sup>239</sup>

E. *On Remand: Bostick v. Florida*<sup>240</sup>

Almost six months after the United States Supreme Court reversed and remanded *Florida v. Bostick*<sup>241</sup> back to the Florida Supreme Court to reconsider the issue under the proper test for seizure, the Florida court responded with an approximately 100-word ruling.<sup>242</sup> In its decision, the court held, by a vote of 4-3, that the district court opinion, upholding the trial court's decision to deny Bostick's motion to suppress, should be approved.<sup>243</sup>

Judge Barkett, writing for the dissent, argued that the trial court had made no express findings of fact.<sup>244</sup> Therefore, even though the court was no longer permitted to consider bus searches as "per se" unreasonable, the court was not precluded from finding that the particular facts of the case required a finding that a seizure had occurred.<sup>245</sup> While admitting that there are many police encounter situations where a reasonable person could conclude that he is free to terminate the encounter, Judge Barkett felt that under the facts of this case,

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235. *Id.*

236. *See supra* note 60.

237. 111 S. Ct. at 2394.

238. *Id.*

239. *Id.* at 2394-95.

240. 593 So. 2d 494 (Fla. 1992).

241. *Bostick*, 111 S. Ct. 2382.

242. 593 So. 2d at 495.

243. *Id.*

244. *Id.* (Barkett, J., dissenting).

245. *Id.* *See infra* notes 352-53 and accompanying text (explaining that the Florida state constitution mandates that it must follow decisions of the U.S. Supreme Court on Fourth Amendment issues).

[t]his was not a casual encounter on a street corner where a reasonable person might feel free to treat the police like an encounter with any other citizen. . . . [T]hus I could find that under the totality of the circumstances presented in this case, Bostick "was not free to decline the officers' requests or otherwise terminate the encounter."<sup>246</sup>

#### IV. Analysis

##### A. *The United States Supreme Court's Dilemma: Balancing Individual Liberty Against Efficient Law Enforcement*

It is undisputed that our country is currently facing a drug crisis that has caused law enforcement agents to mount a "war on drugs."<sup>247</sup> It is also understandable that the Supreme Court has no desire to tie the hands of law enforcement authorities in this matter.<sup>248</sup> Therefore, the Court is always faced with a delicate balancing act between the rights of individuals and the need for effective law enforcement.<sup>249</sup>

Over the past few years, the Court appears to have made a conscious effort to tip the scales in favor of police efficiency in an effort to focus on the "common good."<sup>250</sup> Beginning with its decision in *Terry*, the Court allowed for brief detainments with-

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246. 593 So. 2d at 495-46, (quoting *Florida v. Bostick*, 111 S. Ct. at 2389).

247. 111 S. Ct. at 2389 (Marshall, J., dissenting). Justice Marshall began his dissent by stating that "[o]ur Nation, we are told, is engaged in a 'war on drugs.'" See also Stanley Sporkin, *Remark: Address by the Honorable Stanley Sporkin at the American University Law Review Annual Dinner*, 41 AM. U.L. REV. 1, 5 (1991).

248. See generally *Amsterdam*, *supra* note 13, at 370, 395 (explaining how the Court is often torn between the dilemma of upholding Fourth Amendment law and the desire to avoid appearing to "police the police").

249. Justice O'Connor acknowledged the importance of maintaining such a balance by noting that in the "war on drugs," it remains necessary to "respect the rights of individuals, whether or not those individuals are suspected of having committed a crime." 111 S. Ct. at 2389. In this regard, Justice Brennan pointed out that even where it later becomes evident that the defendant was, in fact, "guilty" of the crime, "such post hoc rationalizations have no place in our Fourth Amendment jurisprudence." *United States v. Montoya de Hernandez*, 473 U.S. 531, 559 (1985) (Brennan, J., dissenting). Justice Brennan subsequently pointed out that the Court may sometimes be influenced by a "distaste" for drug activity. See *Florida v. Reilly*, 488 U.S. 445, 463 (1989) (Brennan, J., dissenting) (explaining that nevertheless, the Fourth Amendment does not turn on whether the search reveals legal or illegal activity).

250. See *supra* parts II.B.1-3. However, just how "efficient" these random bus searches are is highly questionable. See generally *United States v. Flowers*, 912 F.2d 707, 710 (1990) (100 sweeps resulting in only 15 seizures and seven arrests).

out the existence of probable cause.<sup>251</sup> Continuing with *Mendenhall* and *Royer*, even a lack of reasonable suspicion was found not to cause a consensual encounter<sup>252</sup> to rise to the level of a seizure.<sup>253</sup> Thus, the Court had paved the way for a very narrow definition of a seizure.<sup>254</sup> Such a narrow definition had the effect of ensuring that now there would be a greater number of situations in which encounters would not be characterized as seizures for Fourth Amendment purposes. Despite warnings to avoid expanding the concept of consensual encounters, it is clear that the Court in *Bostick* has limited the protection of the Fourth Amendment far beyond what these original rulings had intended.<sup>255</sup> The problem with doing so is that Fourth Amendment protection was never designed to be contingent on the severity of the particular evil facing society.<sup>256</sup>

In *Bostick*, the Court appeared to face the seizure dilemma in the context of a two-part analysis. The Court decided to first address the issue of whether *Bostick* had been seized.<sup>257</sup> If it found that he had not been seized, the Court indicated that the next step would be to look at whether *Bostick* had freely consented to the search of his bags.<sup>258</sup>

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251. *Terry v. Ohio*, 392 U.S. 1 (1967) (allowing limited stop and search for weapons based on reasonable suspicion).

252. The term "consensual encounter," as used in this article, denotes a police-citizen encounter wherein the police, with neither probable cause nor reasonable suspicion, randomly approach a citizen.

253. See *supra* parts II.B.2-3.

254. See *supra* parts II.B.2-3.

255. *Florida v. Royer*, 460 U.S. 491, 510-12 (1983), (Brennan, J., concurring in the result) (noting that the *Terry* rationale was intended to be for the very limited purpose of protecting the officer while he goes about his investigation, and that to extend it to enable the officer to discover evidence of a crime was to "swallow the general rule that Fourth Amendment seizures [and searches] are 'reasonable' only if based on probable cause.") (alteration in the original).

256. See Tracey Maclin, *Seeing the Constitution from the Backseat of a Police Squad Car*, 70 B.U. L. REV. 543, 552 (1990) (book review). Professor Maclin notes that while police activity is often focused on dealing with a particular law enforcement problem, and may in fact be the most efficient way to correct such a problem, this was not the purpose of the Fourth Amendment. *Id.* See also 111 S. Ct. at 2389 (J. Marshall, dissenting) (stating that "the effectiveness of a law-enforcement technique is not proof of its constitutionality.").

257. 111 S. Ct. at 2386.

258. *Id.* at 2388.

### B. *Staying True to the Fourth Amendment*

Is the Supreme Court's test for determining whether a seizure has occurred consistent with Fourth Amendment guidelines? The Court does not construe every encounter between the police and an individual as rising to the level of a seizure in the first place.<sup>259</sup> The Court speculates that where a "reasonable person would understand that he or she could refuse to cooperate," there is no need for the protection of the Fourth Amendment.<sup>260</sup> Several arguments have been made in support of this position. To begin with, it would be unfair to argue that it is acceptable for a stranger to approach an individual on the street, while making it unacceptable if that same stranger is dressed in a police uniform.<sup>261</sup> Therefore, so long as there is no intimidation on the part of the police, the encounter will not likely be classified as a seizure.

Secondly, Fourth Amendment jurisprudence does not prohibit all encounters between police officers and citizens; only unreasonable encounters.<sup>262</sup> However, the inquiry cannot end here, because there must be a determination as to when the encounter becomes unreasonable. That is, at what point does an encounter under the Fourth Amendment become a seizure, requiring at least a showing of reasonable suspicion to justify it?

### C. *Defining the Reasonable Person*

An examination of whether Fourth Amendment protection is implicated is heavily dependent on whether the police-citizen encounter is intimidating enough to qualify as a seizure. Pinpointing the exact moment when such an encounter crosses the line from reasonable to unreasonable can be perplexing.<sup>263</sup> It is

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259. 111 S. Ct. at 2386.

260. *Id.* at 2384. The Court further explained that "[t]he encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Id.* at 2386.

261. See Wayne LaFave, "Seizures" *Typology: Classifying Detentions of the Person to Resolve Warrants, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 422 n.29 (1984). See generally Maclin, *supra* note 21.

262. "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . but upon probable cause . . ." U.S. CONST. amend. IV. (emphasis added).

263. *Florida v. Royer*, 460 U.S. 491, 506 (stating that "[w]e do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for

entirely possible to have two identical scenarios where one person would feel intimidated, yet the other would not. Yet, given such instances, it would be grossly unfair to require law enforcement officers to engage in on-the-spot guesswork as to what is going on inside the mind of each individual approached.<sup>264</sup> Hence, the objective "reasonable person" test emerges and a subjective test based on the actual individual involved is discounted.<sup>265</sup>

Admittedly, this eliminates the extremes of both the overly sensitive person who might feel coerced by merely spotting a police officer two blocks away, as well as the thick-skinned individual who doesn't feel intimidated until he is given an order at gunpoint. Nevertheless, even this objective test leaves open the question of influences on individual behaviors.<sup>266</sup>

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determining when a seizure exceeds the bounds of an investigative stop.").

264. See *LaFave*, *supra* note 107, § 9.2(h), at 407-08 (explaining that the "reasonable person" standard does not depend upon the suspect's subjective viewpoint, since that would require the officer to be able to read the suspect's mind. Furthermore, "[a] given set of circumstances, for example, might operate quite differently upon a person with a 'guilty mind' as compared to an 'innocent person.'").

265. *LaFave*, *supra* note 261, at 424-25 (stating that "the confrontation is a seizure only if the officer adds to those inherent pressures [referring to the moral and social pressure to cooperate with police] by engaging in conduct significantly beyond that accepted in social intercourse. The critical inquiry is whether the policeman, even if making inquiries a private citizen would not, has otherwise conducted himself in a manner which would be perceived as a nonoffensive contact if it occurred between two ordinary citizens.").

266. For example, an added consideration of a public encounter is the element of peer pressure. See Bruce Fein, *Bloated Police Powers*, *THE WASHINGTON TIMES*, June 25, 1991, at G1 (commenting on the *Bostick* majority's indifference to the fear of "social stigmatization" as "profoundly disturbing"). Mr. Fein invites the reader to consider the following scenario:

At the Capital Centre, a rock concert attracts 5,000 patrons . . . Before the concert commences, the police deliver the following message over the public address system: "Ladies and gentlemen, this is your local police force. We are dedicated to making our society free of the twin scourges of drugs and guns. We welcome your assistance in these endeavors because curbing illegal drug use or handgun abuse cannot be achieved by the police alone. We require the cooperation of the community. Please lend us your ears for a moment. You enjoy a constitutional right under the Fourth Amendment to decline cooperation in the fight against drugs and firearms. But we would be forever thankful if you would decline to assert that right this evening as a symbol of your abhorrence of illegal drug or gun possession, and of your desire that this evening be a drug-free and gun-free event. We have no reason to believe any of you in the Capital Centre is guilty of drug or firearm crimes. During the next 15 to 20 minutes, unarmed police officers will be seeking your consent to search your person and belongings. Those who wish to consent,

One question that the Court believes needs to be considered is whether the reasonable person is one who is innocent or guilty?<sup>267</sup> Should that even matter? Although our society claims to stand behind the proposition that all individuals are "innocent until proven guilty," we risk ignoring this precept by making that determination initially. Although Justice O'Connor has declared that the courts are to assume the "innocent person" perspective in deciding this issue,<sup>268</sup> that does not necessarily influence the outcome of the reasonable person determination. On the one hand, a "guilty" person may decide to cooperate in order to throw off the police. Yet at the same time, an "innocent" person may be reluctant to offer resistance for fear of appearing guilty. Surely there cannot be many average innocent citizens who would feel comfortable refusing a police officer's request.<sup>269</sup> Since the distinction between these two mindsets can often be blurry, it might be best to avoid such differentiation in the first place.

Since the Court has found that the police need not inform the party that he or she has the right to refuse any requests,<sup>270</sup> the average citizen is unlikely to be aware that this right to refuse to cooperate even exists. Even if one further assumes a hypothetical encounter with a citizen who just happens to have re-

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please remain seated to signify your honorable cooperation with law enforcement. Those who wish to assert their constitutional right to refuse consent, please descend to the Capital Centre floor and stand within one of the two circles that feature either a scarlet D or G. We will respect your right of noncooperation with the noble effort to combat drug and gun abuses."

When the police sermonizing concludes, less than a handful remove themselves to the scarlet D or G, and they are booed by the crowd. The police en masse search the patrons who remain seated and discover scores illegally possessed of drugs or firearms.

*Id.*

267. *LaFAVE*, *supra* note 107, at 411 n.240 (citing *Login v. State*, 394 So.2d 183 (Fla. Dist. Ct. App. 1981) (holding the reasonable person standard to be "innocent of any crime"). *LaFave* noted that "[t]his might well be a step in the right direction." *Id.*

268. 111 S. Ct. at 2388.

269. *LaFAVE*, *supra* note 107, at 410 (quoting from *Illinois Migrant Council v. Piliod*, 398 F. Supp. 882 (N.D.Ill. 1975) (stating that "[i]mplicit in the introduction of the [officer] and the initial questioning is a show of authority to which the average person encountered will feel obliged to stop and respond. Few will feel that they can walk away or refuse to answer.")).

270. *See Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

cently read *Schneekloth*,<sup>271</sup> it is highly questionable whether such a person would truly feel that he or she could terminate the encounter without drawing additional suspicion. Considering that the natural instinct of most people is to try to avoid an unpleasant confrontation with the police, the usual response of a reasonable person is likely to be that they will go along with any request in order to avoid finding themselves in an even greater predicament.<sup>272</sup> Even though the Court has stated as its policy that the refusal of a party to cooperate cannot be used as justifiable grounds for reasonable suspicion,<sup>273</sup> there is no guarantee that this always works in practice. Police officers are likely to assume that one has something to hide if he or she declines to cooperate, and may use that as the basis for continued surveillance.<sup>274</sup> Moreover, there is always the possibility that the officers will deliberately try to provoke resistance and use it as a means of justifying reasonable suspicion.<sup>275</sup>

In addition to mandating that the reasonable person be innocent, the Court implicitly requires that this mythical reasonable person also be knowledgeable and assertive — in other words, just like the Supreme Court Justices.<sup>276</sup> Such an implica-

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271. *Id.* (holding that consent is valid where it is given voluntarily, regardless of whether party is informed of right to refuse such consent).

272. *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (stating that “[t]he citizen’s choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest of [sic] immediate violence.”).

273. *Florida v. Bostick*, 111 S. Ct at 2387 (stating that “[w]e have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”).

274. See generally Stuart Taylor, Jr., *Perspectives; Taking Issue; When Do Tough Cop Tactics Become Outright Coercion?*, CONNECTICUT LAW TRIBUNE, March 11, 1991, at 22 (stating that “[a]t best, travelers who exercise their theoretical right not to be searched are sure to become instant suspects. Police will strain to detect or invent signs of nervousness, which can then be bootstrapped into a ‘reasonable suspicion’ and used to justify an involuntary search if their quarry cannot be bullied into ‘consenting.’ Some officers have said they phone ahead to suggest further scrutiny of uncooperative sorts at the next stop.”).

275. See Herman Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L. & CRIMINOLOGY 433, 453 n.146 (1967) (explaining that police may encourage resistance during detention). See also *infra* part IV.E.

276. Taylor, *supra* note 274. Mr. Taylor hypothesized a perfect encounter that the Justices may have in mind.

First officer (with elaborate courtesy): “Excuse us, my dear fellow, but it would seem drug couriers are about, and we were wondering whether you might be one of them. Would you be so good as to show us your ticket and ID?”

tion is arguably, at best, unrealistic. When was the last time one of the Justices traveled by bus?<sup>277</sup> Moreover, assuming that such a mythical ideal citizen who asserts his right to be left alone is approached by the police, how different would his or her reaction be from the average, uninformed, unaggressive citizen? It is doubtful that he would feel comfortable standing up to authority. Therefore, unless the Supreme Court chooses to equate pressured submission with a finding of no seizure, how can it say with a straight face that the reasonable person would likely feel free to terminate the encounter?<sup>278</sup>

One possible explanation is that the Court does not really believe the scenario of a John or Jane Q. Public feeling perfectly comfortable with telling the police to "take a hike."<sup>279</sup> Nevertheless, the Court hides behind the illusion in order to justify its

Second officer (casually placing hand on pistol): "And while you're about it, would you mind handing over that blue bag there so we can search it for drugs?"

Passenger: "Sorry, gents, but I'm trying to get some rest."

First officer: "Pretty please?"

Passenger: "No way. I don't appreciate being treated like a criminal, I don't want anyone snooping through my toilet kit, and they haven't repealed the Fourth Amendment yet. So kindly move along, or I'll be constrained to go hide in the bathroom."

Second Officer: "Well partner, I guess we'd better do what the man says. You remember *Terry v. Ohio*, 393 U.S. 1, 27."

First Officer: "Righto. See also *Florida v. Royer*, 460, U.S. 491, 502 (plurality opinion). Ever so sorry to have inconvenienced you, sir. Godspeed."

*Id.*

277. See generally *The Bus Stops Here; The Bottom Line on the Fourth Amendment Must Ask Whether Searches are Cost-Effective, as well as Constitutional*, AMERICAN LAWYER MEDIA, L.P. THE RECORDER, Nov. 7, 1991, at 6 (stating that "[t]o put it another way, there are probably not too many constitutional scholars or civil rights lawyers traveling on buses similar to the one on which Bostick was riding when approached by the Broward County Sheriff's Department deputies."). See also James R. Peterson, *Power Play: The New Supreme Court's War on Freedom*, PLAYBOY, Nov. 1991, at 49 (noting that Justice Sandra Day O'Connor probably hadn't been on a bus in decades).

278. See Maclin, *supra* note 256, at 577 (stating that "[i]n the real world, people are afraid of the power of the police and want to minimize the chances of that power being asserted over them. People do not assert their rights because they know the police are not always respectful of those rights."). See also LAFAYE, *supra* note 107, at 411 (stating "[t]hus, if the ultimate issue is perceived as being whether the suspect 'would feel free to walk away,' then virtually all police encounters must in fact be deemed to involve a Fourth Amendment seizure.") (citations and footnotes omitted).

279. Nor is it plausible that the Court really feels that "the typical police-citizen encounter is the equivalent of two old friends greeting each other on the street corner." Maclin, *supra* note 21, at 1301.

position on what it sees as a way to solve a very serious problem.<sup>280</sup> Furthermore, one could believe that even though such an encounter may result in inconvenience or embarrassment, causing the average citizen to yield to authority, such embarrassment or inconvenience does not necessarily make the encounter a seizure. After all, to some extent, we as a society depend on these subtle pressures in order to maintain law and order.<sup>281</sup> Such social and moral pressures on one's conscience are, therefore, not an entirely unwelcome occurrence. However, it cheapens the value of our Fourth Amendment rights if we are willing to trade off some minor intrusions in order to jail more drug traffickers.<sup>282</sup> The Fourth Amendment does not state that citizens are only to be free from major intrusions; once freedom has been restricted or privacy invaded, it should be a seizure, no matter how large or small.

#### D. *Free to Leave versus Free to Terminate the Encounter*

In *Bostick*, the Supreme Court modified the *Mendenhall* test to encompass when a reasonable person would feel free to "terminate the encounter," rather than only feeling "free to

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280. *Id.*

281. *Id.* (stating that "the standard is actually a 'policy' decision that the police should be allowed to rely on the moral and instinctive pressure to cooperate inherent in [police-citizen] encounters by not treating them as 'seizures' for Fourth Amendment purposes.") (citing Yale Kamisar) (emphasis in original). Cf. LaFave, *supra* note 261, at 424, noting that "[i]f 'the moral and instinctive pressures to cooperate are in general sound and may be relied on by the police,' then a street encounter does not amount to a fourth amendment seizure merely because of those pressures — that is, merely because the other party to the encounter is known to be a policeman."

282. Ira Glasser, director of the American Civil Liberties Union and William Kunstler, civil rights attorney, discussed this issue on the Pozner & Donahue show. They speculated that Americans are supportive of aggressive police action because they are frightened of the increase in crime, and because they perceive that "others" will be affected. See *Pozner & Donahue* (Multimedia Entertainment television broadcast, Nov. 1, 1991). Mr. Glasser stated:

when somebody breaks down the door of — of a black person living in a project because they think that there are drugs inside, whether they're right or not and whether they have violated the privacy of an innocent . . . party or not, people think, 'Oh well, that's them. It's not me. I'm not at danger. My children are not at danger.' The problem with rights is that you don't know they're gone until they're gone.

*Id.* at 6.

leave.”<sup>283</sup> While Justice O'Connor claims that this breaks no new ground,<sup>284</sup> that is not necessarily the situation. Even though these two phrases may sound similar on the surface, in practice they denote two distinct types of behavior. When an individual is approached by police officers in an open public forum, that individual need only continue on his original path in order to escape the officers.

Contrast this with an individual who finds himself isolated within the small confines of a bus seat. Even Justice O'Connor agreed that the “free to leave” test was inappropriate in that instance, and under those circumstances, “the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.”<sup>285</sup> Instead, the proper test is proclaimed to be whether the person felt “free to terminate the encounter.”<sup>286</sup> By changing the rules of the game to fit the situation, Justice O'Connor advances a new test that purports to simply be a reformulation from prior cases.<sup>287</sup> However, by changing the test, Justice O'Connor actually adds a new hurdle. Now, instead of continuing on one's way under a “free to leave” approach, the individual is expected to boldly inform the police officers standing over him or her that they should leave, in order to “terminate the encounter.” Assuming that the officers do not leave, at least right away, it can easily become a battle of nerves to see who will break down first. Few would question who would win such a battle. Since the Court has already stated its belief that police officers have the same right as other citizens to approach individuals in public places and initiate conversations, it is highly plausible that the same Court would find no reason why the officers cannot continue to stand in the aisle of a public bus.<sup>288</sup>

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283. *Bostick*, 111 S. Ct. at 2387.

284. *Id.*

285. *Id.*

286. *Id.* In his dissent, Justice Marshall stated that while he agreed that the appropriate test should be whether Bostick was “free to terminate the encounter,” he would find that Bostick was, in fact, not free to do so. *Id.* at 2391 (Marshall, J., dissenting).

287. *Id.* at 2387.

288. See generally Brief of Respondent at 16, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717) (stating that “[t]his argument [that respondent was still free to terminate the encounter] fails to recognize that, so long as the individual and the police remain in close proximity to each other within a confined space, the encounter cannot be

What is the person to do now? Pretend to go to sleep? Develop a sudden case of deafness? As hard as it is for the average citizen to walk away from a police encounter, it is twice as difficult for those with a healthy mixture of respect and fear to demand to be left alone. By ignoring this reality, the majority gives the average citizen far more credit for backbone than he or she deserves and ends up shortchanging all of society.

#### E. *The Consequences of Attempting to Terminate an Encounter*

Just as the Court has noted that police officers are free to approach citizens,<sup>289</sup> the Court has also indicated that citizens have an equal right to ignore such advances.<sup>290</sup> Nevertheless, a judicial pronouncement from the bench is no guarantee that such rights will be protected on the streets. As previously noted, the average citizen will be inclined to acknowledge the presence of an officer and will endeavor to cooperate with him.<sup>291</sup> However, should an individual choose to walk away or terminate the encounter, what can he realistically expect?

If he was out walking in Texas prior to 1979, he might expect to get arrested for refusing to identify himself in response to a police request.<sup>292</sup> If he was a law student at Tulane in New Orleans in the mid-sixties, and decided that he was both knowledgeable and confident enough about his ability to refuse the officers' requests, he would find himself charged with vagrancy, resisting an officer, reviling the police, and disturbing the peace

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considered truly over. And a reasonable person would not have felt free to simply stone-wall the officers' inquiries, because the officers' conduct gave substantial reason for question about how the officers would respond.").

289. *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring) (stating that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.").

290. *Id.* at 32-33 (Harlan, J., concurring) (stating that "ordinarily the person addressed has an equal right to ignore his interrogator and walk away"); see also *Florida v. Royer*, 460 U.S. 491, 498 (1983) (pointing out that an individual who is approached by a police officer "need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.").

291. See *supra* note 269.

292. *Brown v. Texas*, 443 U.S. 47 (1979) (holding that the application of the statute used to detain appellant was an unconstitutional violation of the Fourth Amendment where police officers had no reasonable suspicion).

by assaulting the police officers.<sup>293</sup> It is no small wonder that the average citizen will choose to submit to police questioning rather than find himself faced with unpleasant consequences.<sup>294</sup>

A more recent example of an attempt to terminate an encounter is *U.S. v. Wilson*.<sup>295</sup> Wilson was approached by three Drug Enforcement Agency officers upon his arrival at National Airport.<sup>296</sup> At first he agreed to speak with the officers.<sup>297</sup> He produced identification and told the officers where he was from.<sup>298</sup> In response to further questioning, Wilson stated that he was not carrying any guns and permitted his bag to be searched and his person frisked.<sup>299</sup> However, when Wilson was asked for permission to search two coats that he was holding, he sought to terminate the encounter.<sup>300</sup> Wilson subsequently made at least four attempts to leave the officers, but they persisted in following alongside of him and pressuring him to accede to their request.<sup>301</sup> When Wilson finally gave in, a search of one of the coats revealed cocaine and Wilson was arrested.<sup>302</sup>

The Court of Appeals for the Fourth Circuit first found that the officers lacked reasonable suspicion to question Wilson.<sup>303</sup>

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293. *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (dismissing writ of certiorari where issue was whether individual may properly resist cooperating with police officers). Police officers had stopped a law student on his way for a snack and requested identification. The student told police that he was a law student and gave them his name and address, but stated that his identification was at home. When he was then asked to remove his jacket in order to check for a tattoo (which was supposedly on the left arm of a murder suspect the police were looking for) the student refused. He then attempted to walk away from the officers three times, but was subsequently arrested. *Id.* at 600-01.

294. See *Maclin*, *supra* note 256, at 574, 577. In addition, a Professor of Criminal Procedure has stated that she would feel that any failure on her part to cooperate, no matter how justified, might only result in police harassment. One way or the other, the police would end up searching what it was they came to search, and all she would have to show for her efforts would be that she would be unreasonably delayed, publicly humiliated, or even worse — arrested. Telephone Interview with Barbara Salken, Professor of Law, Pace University School of Law (Sept. 23, 1991).

295. 953 F.2d 116 (1991).

296. *Id.* at 118.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 123.

302. *Id.* at 119.

303. *Id.* at 120.

The court did find that this was a consensual encounter.<sup>304</sup> However, the court held that the consensual nature of the encounter ended when Wilson made it clear that he wished to be left alone, and that the persistent police harassment caused Wilson to be seized for Fourth Amendment purposes.<sup>305</sup> In reaching its conclusion, the court noted that the "freedom to leave means fundamentally the freedom to break off contact, in which case officers must, in the absence of objective justification, leave the passenger alone."<sup>306</sup> Under the facts of *Wilson*, the court found that the actions of the police clearly indicated that a reasonable person was not "free to leave."<sup>307</sup> The court went on to hypothesize that had Bostick been faced with police officers arguing with him while Bostick continued to tell them to leave, the courts in that case might have found that Bostick had been seized.<sup>308</sup> In the end, it is comforting to note that the court did indeed find an illegal seizure to have occurred under these circumstances. However, this may be small consolation to the individual who finds himself arrested and facing the possibility of a long court battle after exerting his right to terminate an encounter.

Another possible concern of many citizens might be that any attempt to terminate the encounter will result in providing the officers with the reasonable suspicion required for a valid seizure. The judicial pronouncement on this issue is otherwise,<sup>309</sup> but as previously noted, reality can often turn the Court's directives into fiction.<sup>310</sup> On the other hand, an argument could be made that should such a refusal to cooperate escalate to the level of a detainment, this would be evidence that the individual was never truly free to leave in the first place, and that an illegal seizure had indeed occurred.

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304. *Id.*

305. *Id.* at 123.

306. *Id.* at 122 (quoting from *United States v. Flowers*, 912 F.2d 707, 712 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2895 (1991)).

307. *Id.* The court also stated that "[d]espite his best efforts, Wilson was unable to 'terminate the encounter,' 'to ignore the police presence and go about his business,' or to 'go on his way.'" *Id.*

308. *Id.*

309. *See supra* note 273.

310. *See supra* notes 274-75.

### F. *Setting The Scene: The Role Location Plays*

The Court also goes to great lengths to play the "blame the victim" game.<sup>311</sup> In answer to those who would point out that the cramped setting of the bus seat should be dispositive in applying the *Mendenhall* "free to leave" test, the Court responds that this confinement was a "natural result of his [Bostick's] decision to take the bus."<sup>312</sup> However, as Justice Marshall points out in the dissent, Bostick's decision to voluntarily confine himself does not cause him to waive his right to be free from seizure.<sup>313</sup> The majority states that the voluntary confinement aspect is a settled point of law, since the facts are similar to those in *INS v. Delgado*, where the court held that the factory workers were not truly free to leave due to their own decision to retain employment.<sup>314</sup>

However, the Court fails to point out the differences that distinguish the facts of *Bostick* from those of *Delgado*. The factory workers in *Delgado* could take advantage of a larger area in which to move around in.<sup>315</sup> Unlike being partially blocked in the last seat of a bus, these workers were still free to move around within the factory quarters, and could probably have excused themselves to go to the bathroom.

How important should the location of the encounter be in determining whether a person has been seized? The Court rejected the Florida Supreme Court's finding of a seizure and stated that the Florida court had incorrectly relied on a "per se" test that all such bus encounters are, by definition, seizures.<sup>316</sup> As part of its rationalization for reversing and remanding this case back to the Florida courts, the majority stated that *Bostick* must be re-analyzed in the context of the totality of the circumstances.<sup>317</sup> The problem is that the Florida Supreme Court never really adopted this "per se" rule. Instead, the court had ex-

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311. *Bostick*, 111 S. Ct. at 2394 (Marshall, J., dissenting) (stating that "the majority blames respondent for his own sensation of constraint."). See also *supra* note 60.

312. 111 S. Ct. at 2387.

313. *Id.* at 2394 (Marshall, J., dissenting).

314. 111 S. Ct. at 2387 (finding *INS v. Delgado* dispositive as indicating no seizure where the individual's lack of freedom to leave is due to factors beyond police control).

315. *INS v. Delgado*, 466 U.S. at 218.

316. *Bostick*, 111 S. Ct. at 2387.

317. *Id.* at 2388.

amined all the facts, and found that the location of the encounter weighed very heavily in its decision.<sup>318</sup>

When looked at from the point of view of the police officers, it becomes clear just how important a role location can play in an encounter.<sup>319</sup> Since the officers in *Bostick* readily admitted that they lacked any basis on which to suspect individual bus passengers of wrongdoing, there appeared to be no sound reason to enter the bus in the first place.<sup>320</sup> Clearly, it would have been just as easy for the officers to station themselves in the bus terminal near the entrance to the bus, and invite passengers to talk to them either prior to boarding, or upon disembarking from the bus. This practice would certainly have the advantage of fully complying with the spirit of the *Mendenhall* seizure test.<sup>321</sup> Unfortunately, from the point of view of law enforcement, such tac-

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318. *Bostick v. State*, 554 So.2d 1153, 1157 (Fla. 1989) (stating that "[t]here also is no doubt that the setting in which the challenged police conduct occurs may provide strong evidence of a 'seizure.'").

319. See generally Brief for Respondent at 11-12, n.9, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717).

The United States [Amicus Brief of the United States] ignores the fact that the officers purposefully chose to question persons who were already seated on a bus that was about to depart — as opposed, for example to persons who were waiting in bus stations or disembarking from buses — presumably because they knew that such persons would be constrained by time and money, among other concerns, from walking away from the encounter.

*Id.* See also *id.* at 13 n.12 (stating that "[t]he United States' [Amicus Brief of the United States] argument entirely ignores the fact that the officers deliberately decided to act on this captive audience, presumably because they believed that their inquiries would be more fruitful if conducted in the restrictive confines of the bus rather than, for example, in the bus station.").

320. *Bostick* 111 S. Ct. at 2386 (noting that "[t]he State concedes, and we accept for purposes of this decision, that the officers lacked the reasonable suspicion required to justify a seizure and that, if a seizure took place, the drugs found in Bostick's suitcase must be suppressed as tainted fruit."). See *United States v. Madison*, 936 F.2d 90 (2d Cir. 1990) (officers suspected defendant in open bus terminal, but waited until he boarded the bus before approaching him). In addition, the very fact that police concentrate on boarding buses to a far greater extent than boarding airplanes is likely a consequence of the perceived status of the individuals using these different modes of transportation. See Jason DeParle, *Some Take the High Road, Some the Bus*, N.Y. TIMES, Dec. 25, 1991 at 1 (stating that "[t]he distance between the croissant counter at National Airport outside Washington and the Burger King inside the city's bus station is one more measure of class differences in America and the routine discomforts endured by those of modest means.").

321. Such an alternative would allow citizens to truly be "free to leave" as well as to "terminate the encounter" by continuing on their way without feeling trapped.

tics would eliminate the inherent advantage of having a captive audience.<sup>322</sup>

If the Court continues to advocate the view that an encounter at the back of a bus is no more coercive than an encounter in an open terminal, one can easily envision this philosophy extending to other close-quarters encounters. Will we soon see investigative stops of seated movie theater patrons and restaurant diners?<sup>323</sup> Before this image is disregarded as being pure hysteria, it should be noted that the Americans for Effective Law Enforcement, Inc., a pro-law enforcement organization, submitted a brief in support of Bostick, in which it stated very similar concerns.<sup>324</sup>

### G. Consent

Once the issue of seizure is dealt with, the matter is not necessarily put to rest. Upon a finding that the defendant in a search and seizure case has not been seized for Fourth Amendment purposes, the court must next examine whether the con-

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322. See *supra* note 319 and accompanying text.

323. Along the same line of thinking, Professor Maclin theorized that using the *Delgado* "blame the victim" approach,

there would presumably be no seizure if police officers questioned subway passengers on a train that was momentarily stopped at a station while other officers positioned themselves in front of the train's doors. Using Justice Rehnquist's analysis, it can be argued that the riders in a subway car are inherently restricted in their movements, not by the actions of the police officers, but by their choice of travel. If the subway riders had wanted true freedom from restraint, they should have walked or driven automobiles.

See Maclin, *supra* note 21, at 1305.

324. Brief Amicus Curiae of Americans for Effective Law Enforcement, Inc., in Qualified Support of Affirmance of the Decision Below at 9, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717) (stating that "[w]e are concerned, however, that if the practices employed by the law enforcement officers in the present case are condoned, similar practices would eventually extend to schoolrooms, places of entertainment, offices and other workplaces."). See also Taylor, *supra* note 274, stating:

The Scalia approach [of seeing the situation as a mere consequence of the party's choice of location] would apparently allow drug-war-crazed police to take their dragnets into airplanes, restaurants, bars, classrooms, public restrooms — randomly knocking on toilet-stall doors, announcing themselves, asking occupants if they'd mind opening up to answer a few questions and to hand over their bags for inspection. So what if the occupant feels a bit cornered? She entered that toilet stall voluntarily, Scalia might say. And besides, Rehnquist might add, what's an officer on the toilet-stall beat supposed to do?

*Id.*

sent to search was valid.<sup>325</sup> Under the *Schneckloth* totality of the circumstances test,<sup>326</sup> the failure of police to advise the suspect of his right to refuse consent to the search is merely one factor to be considered.<sup>327</sup> Of utmost importance is that the consent be voluntarily given, rather than coerced.<sup>328</sup> However, focusing on the voluntariness of the consent can be problematic. Should consent that results from a mixture of fear and respect for authority be presumed coerced? Generally, it is not.<sup>329</sup> Likewise, the fact that a suspect carrying contraband nevertheless gives consent in the hopes of appearing innocent is often not considered to be the result of duress.<sup>330</sup> However, should the consent derive from actual coercion on the part of the officers, such consent would not be voluntary, and any evidence resulting from such a search would have to be suppressed. Therefore, in a case such as *Bostick*, in order for the government to prevail in the admission of any contraband discovered, it must overcome two hurdles: 1) it must prove that the suspect was not illegally seized when approached for permission to search,<sup>331</sup> and 2) it must prove that any consent to search was the product of free will.<sup>332</sup>

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325. See *supra* part II.C.

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

327. See discussion *supra* notes 112-14 and accompanying text.

328. See generally *LAFAVE*, *supra* note 107, § 8.1(a) (providing background information on the nature and scope of consent).

329. See *LAFAVE*, *supra* note 107, at 157 n.31 (citing *People v. Lumpkin*, 64 Mich. App. 123 (1975) where the court rejected the defendant's argument that his consent was not voluntary due to his fear that trouble might result from his refusal). See also *Schneckloth*, 412 U.S. at 234 n.15 (stating that "[w]e found nothing constitutionally suspect in the subjective forces that impelled the spouse to cooperate with the police. Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and the uncertainty as to what course is most likely to be helpful to the absent spouse.") (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971)).

330. Brief for the U.S. as Amicus Curiae Supporting Petitioner at 15-16, *Florida v. Bostick*, 111 S. Ct. 2382 (1991) (No. 89-1717) (stating that "[c]onsent that is given foolishly may nevertheless be given freely. What matters is whether, in light of all the circumstances, the defendant's 'will has been overborne and his capacity for self-determination critically impaired.'").

331. 111 S. Ct. at 2386 (noting that due to the admitted lack of reasonable suspicion needed to justify a seizure, if a seizure is found to have occurred, any drugs subsequently discovered are tainted fruit).

332. See *supra* note 110 and accompanying text. On the other hand, should the suspect be found to have been seized, any subsequent consent to a search will usually not

Accordingly, even though the Supreme Court strongly suggested that the facts of *Bostick* disclosed no evidence of a seizure, and the Florida Supreme Court has since agreed, there remains a missing element of analysis. The Florida Supreme Court decision on remand failed to examine whether Bostick's consent to search his bag was freely given.<sup>333</sup> In light of the finding of a Federal circuit court that the *Bostick* fact scenario contained such coercive components as the bold boarding of a bus during a stop-over, raid jackets, weapon display, and demands for identification,<sup>334</sup> it appears evident that Bostick's consent was the result of duress, and should accordingly have been held invalid.<sup>335</sup>

### G. *Aftermath*

What then, did Justice O'Connor hope to accomplish by remanding this case? A straight reading of the majority opinion implied that the Court had no opinion as to whether or not Bostick was seized.<sup>336</sup> Moreover, Justice O'Connor was careful to state that even though our country is facing a drug crisis, law enforcement authorities must not forget to respect the rights of individuals.<sup>337</sup> It would appear at first glance that the Court was taking a neutral stance.

Nevertheless, despite such claims of impartiality, the hidden message from the highest court of the land seems quite clear on this issue: the facts of *Bostick* should not qualify as a seizure under the revamped *Mendenhall* test.<sup>338</sup> Clearly, the Florida Su-

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overcome the taint of the illegal seizure.

333. In its succinct decision, the court summarized the facts and followed with a single sentence that "[i]n light of the Supreme Court's opinion, we now approve the decision of the district court." (The district court decision had denied Bostick's motion to suppress the cocaine). *Bostick v. Florida*, 593 So.2d 494, 495 (1992). The factors surrounding the encounter were never discussed.

334. *United States v. Madison*, 936 F.2d 90, 96 (2d Cir. 1991). See also *supra* notes 102-105 and accompanying text.

335. *Id.*

336. 111 S. Ct. at 2387 (stating that "we refrain from deciding whether or not a seizure occurred in this case.").

337. *Id.* at 2389.

338. Justice O'Connor noted that the fact that the encounter took place on a bus was a factor to be taken into consideration, but then went on to explain that "[w]e cannot agree, however, with the Florida Supreme Court that this single factor will be dispositive in every case." *Id.* Justice O'Connor also hinted at what the Court would consider a

preme Court has taken the hint and followed the lead of the United States Supreme Court.<sup>339</sup> Even prior to the Florida Supreme Court's reconsideration of *Bostick* under the United States Supreme Court's new guidance, it was clear that this decision was already having an impact in other courts on similar cases around the country.<sup>340</sup>

In a recent Pennsylvania case, a state court relied on *Bostick* to find that no seizure had occurred when a defendant was approached by police at a train station.<sup>341</sup> The Pennsylvania Superior Court stated that "[i]n *Florida v. Bostick*, the Supreme Court held that police may approach persons at random, even on a bus, ask questions, and seek consent to search."<sup>342</sup> Ironically, this sounds very much like the formulation of a per se rule finding all bus encounters to be non-seizures. An overview of several seizure cases involving bus and train encounters that have come to trial subsequent to *Florida v. Bostick* reveals that the courts have increasingly relied on the Supreme Court's apparent directive to find that no seizure had occurred within the meaning of the Fourth Amendment.<sup>343</sup>

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proper result by stating that "[t]he facts of this case, as described by the Florida Supreme Court, leave some doubt whether a seizure occurred." *Id.* at 2387-88.

339. See *supra* part III.E. As in the first Florida Supreme Court decision, the court was split 4-3. While six out of seven of the judges from the first decision continued to view the case in the same way, the "swing" vote appears to have come from a new judge. Judge Ehrlich was the fourth judge in the original supreme court majority. He appears to have been replaced by Judge Harding, who sided with the current supreme court majority in finding that *Bostick* had not been seized. This is a further example of the impact that court personnel changes can have on decisions. *Bostick v. Florida*, 593 So.2d 494, 495 (Fla. 1992).

340. See *infra* notes 341-43 and accompanying text.

341. *Commonwealth v. Lewis*, 595 A.2d 593, 596 (Pa. 1991).

342. *Id.*

343. See *Brown v. State*, 585 So.2d 408 (Fla. Dist. Ct. App. 1991) (upholding defendant's conviction on authority of *Florida v. Bostick*); *State v. Kuntzweiler*, 585 So.2d 1096 (Fla. Dist. Ct. App. 1991) (reversing and remanding case for proceedings consistent with *Florida v. Bostick*); *State v. Brown*, 584 So.2d 656 (Fla. Dist. Ct. App. 1991) (remanding for further consideration in accordance with *Bostick's* rejection of a "per se" rule against boarding buses and randomly asking for consent to search); and *United States v. Springer*, 946 F.2d 1012 (2d Cir. 1991) (finding that *Bostick* requires the court to consider all the circumstances in determining whether a reasonable person would conclude he was free to decline the officer's requests or terminate the encounter, and that no seizure occurred under these facts). But see *In re J.M. v. District of Columbia*, 596 A.2d 961 (D.C. 1991) (finding no seizure when applying the *Bostick* "totality of the circumstances" test to a juvenile defendant not advised of the right to refuse to cooperate).

It does not necessarily follow that all state courts will be bound by the United States Supreme Court decision in *Bostick*. Under our system of federalism, the states are free to provide their citizens with greater rights than those afforded under the U.S. Constitution.<sup>344</sup> This allows states to find that a citizen's rights have been abridged, even in the absence of Supreme Court agreement.<sup>345</sup> Therefore, the possibility remains that some states may have additional state constitutional criteria (or may now consider the addition of such criteria) that require police officers to have at least reasonable suspicion prior to initiating an encounter in confined locations.

One state that has chosen to restrict the ability of police officers to initiate consensual encounters is New York.<sup>346</sup> In *People v. DeBour*<sup>347</sup> the court established two additional categories below the level of reasonable suspicion. In order to approach an individual and request basic information as to identity or destination, the police must demonstrate an "objective credible reason."<sup>348</sup> However, should the police then continue with more intrusive questioning, they must be acting pursuant to "a founded suspicion that criminal activity is afoot."<sup>349</sup> The *DeBour* requirements are still viable today, and were recently clarified by the New York Court of Appeals.<sup>350</sup>

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344. See generally *People v. Dunn*, 564 N.E.2d 1054, 1059 (N.Y. 1990) (noting that the state is free to interpret its state constitution "independently of its Federal counterpart when the analysis adopted by the Supreme Court in a given area has threatened to undercut the right of our citizens to be free from unreasonable government intrusions.").

345. Compare *United States v. Place*, 462 U.S. 696 (1983) (holding that exposure of airport luggage to police canine sniffs does not violate the Fourth Amendment) with *People v. Dunn*, 564 N.E.2d 1054 (N.Y. 1990) (holding that even though under *Place*, the use of a canine sniff test does not implicate the Fourth Amendment, the New York State Constitution has an additional requirement that police have at least reasonable suspicion of contraband prior to investigation).

346. Article I, § 12 provides:

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 searched.

N.Y. CONST. art. I, § 12.

347. 352 N.E.2d 562 (N.Y. 1976).

348. *Id.* at 572.

349. *Id.*

350. See *People v. Troy Hollman*, 590 N.E.2d 204 (N.Y. 1992).

However, the option of providing greater protection than the United States Supreme Court requires was not available to the Florida Supreme Court. In 1982, that state passed a constitutional amendment to Section 12 of the State Bill of Rights.<sup>351</sup> The effect of this amendment was to tie the search and seizure provision of the state constitution into any Supreme Court decisions interpreting the United States Constitution.<sup>352</sup> By the passage of this amendment, Florida citizens have, to some degree, surrendered their right to self-determination.<sup>353</sup> However, if the state finds itself questioning the role of the Supreme Court in dictating state Fourth Amendment policy, it may be time for the legislature to re-examine the situation.

## V. Conclusion

In *Bostick v. Florida*, the Supreme Court moved one step further in the direction of allowing law enforcement authorities more autonomy in their field work. The Court, in building upon the principles of *Mendenhall* and *Royer*, held that police encounters should not be ruled out simply because they take place within the close confines of a bus.<sup>354</sup> While not explicitly stating that the circumstances of this case should not qualify as a seizure for Fourth Amendment purposes, the Court was clearly leading the state courts in the direction it wanted them to go. It

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351. FLA. CONST. art. I, § 12.

352. Included in the new section is the following statement:

This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence 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. art. I, § 12.

353. *State v. Kuntzweiler*, 585 So.2d 1096, 1097 (Fla. Dist. Ct. App. 1991) (Glickstein, J., concurring) (stating that "[w]e 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."). On the other hand, the citizens of Florida can be said to have exercised their right to self-determination by voting not to extend Fourth Amendment protection beyond what is offered by the United States Constitution. Although referring to the amendment as "immensely unwise," Judge Glickstein subsequently notes that, "[m]any, perhaps a majority, of Floridians are as pleased with such limitation almost ten years later as they were in 1982." *Id.* at 1097-98.

354. 111 S. Ct. at 2387.

appeared to make little difference to the Court that Florida, which has the closest contact with the drug problem, had initially chosen to find that a seizure does in fact occur when the encounter is no longer in a wide open space.<sup>355</sup> Courts throughout the country are currently remanding cases to be decided under the new *Bostick* formula, notwithstanding Justice O'Connor's protest that there is nothing really new here.

For Terrance Bostick, the original star of this show, the case effectively ended over two years ago. When Bostick's initial motion to suppress was denied, he accepted a plea bargain with the state.<sup>356</sup> He agreed to plead guilty in return for five years imprisonment with two years probation (far less than a 15-year sentence that might have resulted from a trial conviction<sup>357</sup>). As part of this deal, Bostick preserved his right to appeal the decision.<sup>358</sup> Since under Florida law, drug offenders may not be freed pending appeal, the case proceeded without Bostick's personal presence.<sup>359</sup> Accordingly, by the time the United States Supreme Court agreed to hear the case, it was no longer of any personal consequence to Bostick, who had already completed his sentence with time off for good behavior.<sup>360</sup> In any event, the legacy of the Court's ruling will continue to affect future citizens who are subject to police encounters.

*Linda S. Berman*

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355. *Bostick v. State*, 554 So.2d 1153 (Fla. 1989).

356. Goodman, *supra* note 147, at 76, 78.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* at 80 (stating that "[a]t best, the conviction would be removed from his record.").