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NO NEED TO SHOUT: BUS SWEEPS AND THE PSYCHOLOGY OF COERCION

In the last two decades, the Supreme Court repeatedly has examined consensual encounters between citizens and police that lead to searches. Law enforcement agencies rely heavily on the consensual encounter technique to discover evidence of ordinary criminal wrongdoing, especially narcotics trafficking. But police-citizen encounters and requests to search pose challenges to the boundaries of the Fourth Amendment. When is an encounter between a citizen and a police officer a consensual one, and when does such an encounter rise to the level of a seizure? When a citizen gives a police officer permission to search his or her bags or person, under what circumstances is such permission considered voluntary, and under what circumstances is such grant of permission no longer voluntary but instead mere acquiescence to legitimate authority?

The police tactic of approaching and requesting to search in the absence of individualized suspicion is reportedly an important law enforcement tool,[1] and in some localities it is used quite frequently.[2] These encounters typically take place in one of a few

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[1] Amicus Brief of Washington Legal Foundation and the Allied Educational Foundation as Amici Curiae in Support of Petitioner, *United States v Drayton*, 122 S Ct 2105 (2002).

[2] For example, one officer testified that he searched more than 3,000 bags over the course of nine months. *Florida v Kerwick*, 512 So2d 347, 349 (1987) (noting that in the Florida

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settings: during the course of a traffic stop, in the waiting rooms of airports or train stations, or on board intercity (Greyhound) buses. In the last decade the Court has focused its attention twice on the last category, otherwise known as "bus sweeps," in which the police conduct suspicionless searches of bus passengers and their possessions pursuant to the passengers' consent. Typically, the police board a Greyhound bus during a scheduled stopover,[3] and make known to passengers their mission of conducting "drug interdiction."[4] While on the bus, police approach individual passengers, sometimes ask for information about destination and ask to see identification, and then ask the passenger to identify his or her carry-on baggage. The officers then sometimes ask the passenger for consent to search the passenger's bag or person or both.

In bus sweep cases there are commonly two Fourth Amendment issues. The first is whether the passenger has been seized within the meaning of the Fourth Amendment. The second is whether the passenger's consent to the officers' request to search was voluntary. In the bus sweep situation, these two questions are often intertwined, as I will discuss in more detail below.

The Court's most recent pronouncement about the bounds of seizure and consent came this past term in a bus sweep case, *United States v Drayton*.[5] Eleven years earlier, in *Florida v Bostick*[6]—a case with very similar facts—the Court ruled that police requests to search bus passengers are not coercive per se. In *Bostick*, however, the police had informed passengers of their right to refuse the search request; in *Drayton* the police gave no such warnings. Nonetheless, *Drayton*'s holding—that despite the failure of police to advise passengers of their right to refuse, there was no seizure and

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county in question, police officers approach every person on board buses and trains ("that time permits") and ask for consent to search luggage). Id. An appellate court in Ohio noted that police requests for consent to search during routine traffic stops had become standard practice in Ohio. *Ohio v Retherferd*, 639 NE2d 498, 503 (Ohio 1994).

[3] This is typically arranged in advance with the driver or done pursuant to an ongoing agreement. Sometimes, police pay cash to the bus driver in exchange for permitting the search. See Tom Gibb, *Bus Stop Drug Searches Getting Mixed Reviews*, Pittsburgh Post-Gazette B1 (Apr 19, 2000) (reporting that one officer testified that he had paid the bus driver $50 after a search uncovered illegal drugs).

[4] Police make their mission known to passengers either by way of a general announcement or during the course of conversation with individual passengers.

[5] 122 S Ct 2105 (2002).

[6] 501 US 429 (1991).

that the search in question was reasonable—is not particularly surprising, given *Bostick* and the Court's prior consent search decisions.

What is remarkable, however, is the ever-widening gap between Fourth Amendment consent jurisprudence, on the one hand, and scientific findings about the psychology of compliance and consent on the other. Ever since the Court first applied the "totality of the circumstances" standard to consent search issues in *Schneckloth v Bustamonte*[7] in 1973, it has held in case after case, with only a few exceptions, that a reasonable person in the situation in question either would feel free to terminate the encounter with police, or would feel free to refuse the police request to search. By contrast, empirical studies over the last several decades on the social psychology of compliance, conformity, social influence, and politeness have all converged on a single conclusion: the extent to which people feel free to refuse to comply is extremely limited under situationally induced pressures. These situational pressures often are imperceptible to a person experiencing them; at the same time, they can be so overwhelming that attempts to reduce them with prophylactic warnings are insufficient.

The question of whether a citizen feels free to terminate a police encounter depends crucially on certain empirical claims, as does the question of whether a citizen's grant of permission to search is voluntary. These questions cannot reliably be answered solely from the comfort of one's armchair, while reflecting only on one's own experience. An examination of the existing empirical evidence on the psychology of coercion suggests that in many situations where citizens find themselves in an encounter with the police, the encounter is not consensual because a reasonable person would not feel free to terminate the encounter. Furthermore, such evidence suggests that often the subsequent search is not in fact voluntary, because a reasonable person would not be, under the totality of the circumstances, in a position to make a voluntary decision about consent. This is especially true in the bus sweep situation, as I will demonstrate in detail.

Even worse, the existing empirical evidence also suggests that observers outside of the situation systematically overestimate the

[7] 412 US 218 (1973).

extent to which citizens in police encounters feel free to refuse. Members of the Court are themselves such outside observers, and this partly explains why the Court repeatedly has held that police-citizen encounters are consensual and that consent to search was freely given. In fact, the Court's focus in *Drayton* on the desirability of *Miranda*-type warnings in situations potentially implicating the Fourth Amendment is misplaced, because it is likely that citizens attach virtually no meaning whatever to these warnings.

In light of mounting empirical evidence, it is remarkable that the "totality of the circumstances" standard has nearly always led the Court to the conclusion that a reasonable person would feel free to refuse the police request to search. Fourth Amendment consent jurisprudence is now at a point where the Court's reasoning must struggle against scientific findings about compliance. The majority opinion in *Drayton* is filled with assertions that are implausible in light of research on social influence (e.g., "the presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon").[8] Thus, the Court's Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a fiction of the crudest sort—a mere device for attaining the desired legal consequence.

The direction the Court has taken in this area is likely to lead to several unwelcome consequences. First, the fiction of consent in Fourth Amendment jurisprudence has led to suspicionless searches of many thousands of innocent citizens who "consent" to searches under coercive circumstances. Perhaps the systematic suspicionless searching of innocent citizens is a worthwhile price to pay in exchange for effective law enforcement, but the Court has not engaged in this analysis in any of its Fourth Amendment consent search or seizure cases. Second, the Court's repeated insistence that citizens feel free to refuse law enforcement officers' requests to search creates a confusing standard for lower courts, because it is unclear in new cases how to weigh the "totality of the circumstances" if the "correct" result is virtually always that the encounter and search were consensual. Incorporation of empirical findings on compliance and social influence into Fourth Amend-

[8] *Drayton*, 122 S Ct at 2112.

ment consent jurisprudence would help to dispel the "air of unreality"[9] that characterizes current doctrine.

I. Drayton and Fourth Amendment Consent Jurisprudence

Christopher Drayton and Clifton Brown, two young African-American men, boarded a Greyhound bus in Fort Lauderdale, Florida, intending to go to Indianapolis. About 10 hours into the trip, the bus made a scheduled stop in Tallahassee, Florida, where the passengers disembarked from the bus during the 45-minute stopover. About five minutes prior to the scheduled departure, after the passengers had reboarded, the driver took the passengers' tickets and went inside the bus terminal building to complete paperwork. At that point, three plainclothes police officers from the Tallahassee Police Department Drug Interdiction Team boarded the bus. One officer knelt backward in the driver's seat, where he could observe everyone on the bus. Another officer stood at the back of the bus. A third officer, Officer Lang, began questioning passengers individually. Officer Lang approached individual passengers from the rear, leaned over their shoulder, placed his face 12–18 inches from theirs, and held up his badge. He introduced himself as Investigator Lang from the Tallahassee Police Department and informed them that he was conducting bus interdiction to make sure there were no drugs or weapons on the bus. He told them that he would like their cooperation and asked them to identify their carry-on baggage. Sometimes he asked permission to search a passenger's baggage.

After speaking with three passengers, and searching the bag of one of those passengers, Officer Lang approached Drayton and Brown. In response to Officer Lang's request to identify their baggage, Drayton and Brown pointed to a bag in the overhead compartment. Officer Lang asked for permission to search it, and Brown agreed. The bag was searched and no contraband was found. The officer then asked Brown for permission to check his person for weapons, which Brown gave. Officer Lang noticed hard objects in Brown's upper thigh area that were "inconsistent with the human anatomy."[10] Those objects turned out to be two pack-

[9] Id at 2114 (Souter dissenting).

[10] *United States v Drayton*, 231 F3d 787, 789 (11th Cir 2001).

ages of cocaine taped to Brown's thighs. After handcuffing Brown and escorting him off the bus, police then asked Drayton's permission to search his person, and similar cocaine packages were found on Drayton's person. The two men were convicted in federal court of narcotics offenses.

Prior to trial, Drayton and Brown moved to suppress the cocaine on two grounds. First they claimed that they had been unlawfully seized by police and the search was a fruit of the unlawful seizure. Second, they claimed that even if they had not been seized, they had not consented voluntarily to the search. The trial judge denied the defendants' motion to suppress, ruling that they had not been seized, and that their consent was voluntarily given. The Eleventh Circuit reversed the convictions. It held that when Drayton and Brown consented to the search of their persons, that consent was coerced and not voluntary, and as a result the cocaine should have been suppressed. In finding that the defendants' consent had been coerced, the Eleventh Circuit noted several facts. These included the officers' show of authority in approaching passengers at a distance of 12–18 inches with badge displayed, the intimidating presence of the officer in the driver's seat of the bus, and, notably, the absence of "some positive indication that consent could have been refused."[11] The Eleventh Circuit did not address the issue of whether the defendants had been unlawfully seized.

The Supreme Court granted certiorari and reversed. Two issues were before the Court: whether Drayton and Brown were seized within the meaning of the Fourth Amendment, and whether Drayton and Brown voluntarily consented to the search that uncovered the narcotics taped to their bodies. Justice Kennedy, writing for the majority, held that Drayton and Brown had not been seized because a reasonable person in the situation would have felt free to terminate the encounter with the police. Further, the Court concluded that Drayton and Brown's permission to search their persons had been voluntarily given under the totality of the circumstances. The Court noted that the police officers did not command passengers to answer their questions; instead they spoke in polite, quiet voices, and asked permission first before searching bags or persons. The Court concluded that the passengers cooper-

[11] Id at 790.

ated not because they were coerced but because they knew that doing so would enhance their own safety.

Justice Souter, who was joined by Justices Stevens and Ginsburg, dissented. The dissent concluded that the two men had indeed been seized for purposes of the Fourth Amendment, that the seizure was unreasonable in light of the absence of individualized suspicion of wrongdoing, and that the cocaine discovered should have been suppressed as the fruit of an unlawful seizure. The dissent argued that the three police officers had established an "atmosphere of obligatory participation" so that a reasonable person would not have felt free to end the encounter with the officers. (The dissent did not reach the issue of whether Drayton and Brown consented voluntarily to the search.)

The stage had been set for the decision in *Drayton* by *Florida v Bostick*, a remarkably similar case decided 11 years earlier. In *Bostick*, the defendant was on board a bus during a stopover when police officers boarded the bus and asked him for his ticket and identification. After inspecting the documents, the police asked Bostick for permission to search his bag and advised him that he had a right to refuse. A search of the bag revealed cocaine. The Supreme Court, although refraining from deciding whether a seizure had actually occurred, held that the standard is whether, considering all of the circumstances surrounding the encounter, a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. One of the surrounding circumstances in *Bostick* was that the police advised Bostick that he need not agree to the search. The Florida courts took the Court's hint and found on remand that no seizure had occurred, and that the subsequent consent to search was voluntary.

With the war on drugs well under way, law enforcement agencies capitalized on the *Bostick* decision by stepping up their efforts to root out drug trafficking on interstate buses. But confusion ensued among lower courts in deciding similar bus sweep cases. Some courts ruled that the bus sweep encounter in question was consensual, following the *Bostick* Court's warning that there is no seizure "so long as the officers do not convey as message that compliance with their requests is required."[12] Other lower courts, however,

[12] *Bostick*, 501 US at 437.

attached significance to the absence, in some subsequent cases, of police advice to bus passengers of their right not to cooperate, and held that under these circumstances the encounter cannot be deemed consensual.

The confusion in the lower courts following *Bostick* arose from differing interpretations of the totality of the circumstances standard. The *Bostick* majority accused the Florida courts of finding all police-citizen encounters on buses nonconsensual by positing inherent coercion in the bus setting. Whether the Florida courts actually had adopted a per se rule was the subject of considerable debate among members of the Court in *Bostick*. Justice Marshall, writing for himself as well as Justices Blackmun and Stevens, argued that the Florida courts had done no such thing, but had instead considered all of the details of the encounter, just as the standard requires. In the end, the dissent agreed with the standard set out by the majority (under the totality of the circumstances, whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter). "What I cannot understand," Justice Marshall said, "is how the majority could possibly suggest an affirmative answer to this question."[13]

The "free to terminate the encounter" test evolved from the basic proposition that the Fourth Amendment does not prohibit law enforcement officers from approaching citizens on the street and asking questions, even in the absence of individualized suspicion.[14] So long as the encounter remains consensual, then no Fourth Amendment interests are implicated.[15] Both *Bostick* and

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[13] Id at 445 (Marshall dissenting).

[14] See *Terry v Ohio*, 392 US 1, 19 n 16 (1968); *United States v Mendenhall*, 446 US 544, 557–58 (1980); *Florida v Royer*, 460 US 491, 501 (1983); *INS v Delgado*, 466 US 210, 216 (1984).

[15] See *Florida v Rodriguez*, 469 US 1, 5–6 (1984). In *Terry v Ohio*, the Court noted that "not all personal intercourse between policemen and citizens involves 'seizures' of persons," and that a seizure has occurred "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." 392 US at 19 n 16. The Court later clarified this standard by declaring that a person has been seized within the meaning of the Fourth Amendment if a reasonable person in the totality of the circumstances would believe "he was not free to leave." *United States v Mendenhall*, 446 US at 554–55. Though this test was articulated in a plurality opinion, it was later endorsed by a majority in *INS v Delgado*, 466 US at 216. Subsequently, in *Bostick*, the Court held that the "free to leave" standard is "inapplicable" to a bus passenger (who does not desire to leave), and that "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 US at 436–37.

Drayton concluded that there is no real difference between police-citizen encounters that take place on buses and those that take place on the street, and so the fact that an encounter occurs on a bus does not transform police questioning into an illegal seizure.

Beyond the question of whether a seizure occurred, there is a separate, related question of whether the citizen's subsequent consent to search was voluntary. The voluntariness of consent analysis is very similar to the seizure analysis, and ultimately turns on similar (if not identical) facts. As originally articulated in *Schneckloth v Bustamonte*,[16] the question of whether a citizen's consent to search was voluntary, or instead was the product of duress, must be determined from the totality of the circumstances. In *Schneckloth*, the Court modeled its Fourth Amendment definition of voluntariness on the Court's earlier (pre-*Miranda*) analysis of voluntariness of confessions under the Fifth Amendment. The Court said in *Schneckloth* that the voluntariness analysis must balance "the legitimate need for such searches and the equally important requirement of assuring the absence of coercion."[17] Whether coercion was present must be determined from the totality of the circumstances, including the nature of police questions as well as the vulnerability of the citizen who is the target of police attention, and whether the citizen knows that he has a right to refuse the officer's request. Unlike the Fifth Amendment analysis, however, *Schneckloth* stopped short of holding that the police are required to advise citizens of their right to refuse a request for consent to search. Instead, whether the citizen knew his right to refuse is simply one factor to be considered in the totality of circumstances analysis. Unfortunately, aside from specifying that the voluntariness analysis should consider the totality of the circumstances, the Court did not further illuminate the terms "voluntariness" or "coercion," so lower courts were left to their own devices.

Over the years, lower courts applying *Schneckloth* tended to focus their inquiry about the voluntariness of consent to search on police misconduct, rather than on characteristics of the suspect that might increase the likelihood that consent was involuntary.[18]

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[16] 412 US 218 (1973).

[17] Id at 227.

[18] See Marcy Strauss, *Reconstructing Consent*, 92 J Crim L & Criminol 211, 221–22 (2002). *Schneckloth* listed several potential relevant "subjective" factors that might be considered in

Bostick and *Drayton* continued in this vein. *Bostick* emphasized that for consent to be voluntary it must not be the product of official intimidation. "Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse."[19] Thus, a citizen who prefers to refuse a police request to consent but is intimidated into saying yes will be deemed to have been coerced and the consent involuntary.[20] *Drayton* ultimately concluded that Drayton and Brown's consent to search their persons was voluntary because the manner in which the police requested consent "indicat[ed] to a reasonable person that he or she was free to refuse." Thus, in *Drayton* the Court implicitly adopted the same "free to refuse/terminate" test for deciding voluntariness of consent to search that has been used since *Bostick* for deciding the seizure question. These two questions—seizure and voluntariness of search—have essentially merged in *Bostick* and *Drayton*. The *Schneckloth* Court's emphasis on balancing order and liberty has receded into the background. The test is now stated in much more definite terms: free to refuse or terminate.[21]

This standard demands both consideration of the totality of the circumstances and a determination of the citizen's voluntary con-

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determining voluntariness, including the suspect's age, intelligence, and amount of schooling. Even when lower courts do consider an individual suspect's characteristics, they generally still find that the consent was given voluntarily. And where consent was found to be involuntary it was usually because there was egregious police misconduct, such as threats or an extreme show of force. Id at 223.

[19] *Bostick*, 501 US at 438.

[20] Though both *Bostick* and *Drayton* focused mostly on the question of whether the defendants had been seized, the majority opinions in each case also briefly addressed the question of whether defendant's consent to search was voluntary. The Court applied essentially the same standard to both inquiries. "Where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts." *Drayton*, 122 S Ct at 2113.

[21] It may be that the Court is still implicitly engaging in a balancing of "the legitimate need for such searches and the equally important requirement of assuring the absence of coercion" when it decides consent search issues in cases like *Bostick* and *Drayton*. *Schneckloth*, 412 US at 227. Indeed, some commentators argue that *Schneckloth* used the term "voluntariness" as a term of art—that is, as a "placeholder for an analysis of the competing interests of order and liberty." Tracey L. Meares and Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J Crim L & Criminol 733, 738 (2000). While this may be true, the Court certainly speaks in its opinions as if it is engaging in a completely different kind of analysis when it decides consent search issues. If it is true that the Court is implicitly using an analysis that is at odds with its announced rationale, we must examine the possible implications of such a discrepancy. As I argue later (in Section IV), this incongruity in Fourth Amendment consent jurisprudence is both undesirable and unnecessary.

sent: either consent to engage in the encounter or consent to have the police search. The standard thus requires an examination of the following question: How would a reasonable person in these circumstances feel? Would a reasonable person, seeing what the bus passengers saw, hearing what the bus passengers heard, and knowing what the bus passengers knew, feel free to terminate the encounter, or to say no to the request to search? Note that the question of whether a reasonable person would feel free to terminate the encounter, or refuse the request to search, must necessarily be answered from the perspective of the citizen. By necessity, to answer the "free to refuse" question, the focus cannot be on the police perspective, and what the police did or could have done differently, and whether what the police did seems reasonable. The police could honestly view their actions as restrained and discreet in a situation where, at the same time, a reasonable person would feel coerced.

This distinction between citizen perspective and police perspective is a crucial one. As I shall demonstrate later, the Court's analysis in *Bostick* and in *Drayton* is at bottom based on a judgment about the reasonableness of police conduct under the circumstances. In both cases, the Court's real (but unstated) concern was whether the police conduct was acceptable (in a general policy sense) under the circumstances (no guns drawn, no explicit threats uttered). Having been satisfied implicitly that the police did not engage in abusive conduct, the Court then directly concluded that there must have been no seizure and no unconsented search.

Although the police conduct in *Bostick* and *Drayton* may have been reasonable under the circumstances, it does not follow that there was no seizure and no unconsented search for Fourth Amendment purposes. The standard for determining whether a citizen has been seized or subjected to an involuntary search focuses on whether a reasonable person in the situation would feel free to refuse the police requests. As I argue later, empirical evidence suggests that reasonable citizens in the same situation in which Drayton and Brown found themselves would not, in fact, feel free to refuse the police requests. Thus, the Court's unstated concern—that the police be permitted to engage in suspicionless seizures and consentless searches so long as they avoid abusive or overly coercive tactics—is masked by its stated holding that citizens are not seized or involuntarily searched within the meaning

of the Fourth Amendment if they feel free to refuse police requests. The Court's conclusion that a reasonable person in Drayton and Brown's position would have in fact felt free to refuse police requests is implausible in the face of empirical findings that I discuss later.[22] This implausible conclusion makes more sense, however, if we understand the Court to be doing something other than what it says it is doing. Specifically, instead of analyzing the voluntariness of the encounter and of the consent to search, the Court is simply passing judgment on the reasonableness of the police conduct under the circumstances. The problem here, of course, is that in the absence of voluntary consent given by the bus passengers, the police search of those passengers violated the Fourth Amendment, however pleasant the police officers' demeanor and however reasonable the nature of their requests.[23] Similarly, if the police effected a suspicionless seizure of the bus passengers, such a seizure violated the Fourth Amendment, regardless of whether the police conduct seems otherwise reasonable. Unfortunately, the Court's failure to acknowledge explicitly its true concern is likely to exacerbate the confusion that *Bostick* triggered in the lower courts 11 years earlier.

Observers generally have viewed *Drayton*'s ruling that police warnings are not necessary to initiate consensual bus passenger searches as the crucial aspect of the Court's decision.[24] In some respects, the Court's explicit refusal to require a *Miranda*-type warning in Fourth Amendment situations is indeed significant, especially after *Dickerson v United States*.[25] Nevertheless, I will argue that *Drayton*'s holding regarding police warnings is a red herring that only serves to distract attention from the real issue: the fiction of consensual encounters and consensual searches. The disagreement between the majority and the dissent in both *Drayton* and

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[22] A few of these findings were brought to the attention of the Court in the Respondents' brief. Brief of Respondents at 42 n 4.

[23] See *Indianapolis v Edmond*, 531 US 32 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.").

[24] See *Civil Rights on a Greyhound*, New York Times A22 (June 18, 2002); Jan Crawford Greenberg, *Justices Strengthen Police Search Power*, Chicago Tribune 1 (June 18, 2002); Patty Reinert, *Court: Warnings Unnecessary in Searches of Buses and Trains*, Houston Chronicle A10 (June 18, 2002); Lyle Denniston, *Justices Broaden the Right to Search*, Boston Globe A1 (June 18, 2002).

[25] 530 US 428 (2000) (holding that *Miranda*'s warning regime arises from constitutional requirements).

Bostick was whether a reasonable bus passenger approached by police feels free to say, "I don't want to talk, and you may not search me." Members of the Court have had difficulty agreeing on an answer to this question because they are approaching the question incorrectly. They are trying to answer a question with a crucial empirical component[26] using only intuitive reflections on their own experience and about the imagined experience of other citizens. But people's intuitions differ about the question of whether a bus passenger feels free to say no to a police officer; these differences in intuitions are not particularly surprising, or important. The important point is that casual intuitions are, at best, irrelevant in answering this question. In fact, as I will argue, attempts to address this question from intuition alone will produce answers that are skewed in the direction of inferring more voluntariness on the part of the citizen than is warranted.

II. Feeling Free to Refuse and the Reasonable Person: The Evidence from Social Science

The two issues that were decided in *Drayton* were, first, whether the encounter between the defendants and the officers was consensual, and second, whether the defendants' consent to search was given voluntarily. The standards for resolving these issues revolve around what a reasonable person[27] would feel free to do in

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[26] The question of whether a bus passenger feels free to refuse police requests is arguably itself an empirical question. That is, the extent to which a person feels free to refuse is a psychological state that is, at least in principle, measurable in the same way that questions about the extent to which someone feels hungry or feels happy or feels anxious are measurable. The Court's test (whether a reasonable person would *feel* free to refuse police requests) thus turns only on how a reasonable person would react psychologically under the totality of the circumstances. If a reasonable person would not feel free to refuse, then that person has been seized (or has given consent involuntarily). But what does it mean to feel free to refuse? Interestingly, the language of the *Bostick* opinion provides some guidance: "Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse." *Bostick*, 501 US at 438. Thus, if a reasonable person feels constrained to cooperate with police because of a strong internal sense of civic duty, that person has not been subjected to an involuntary search because they are not complying with a request that they would prefer to refuse. But if a reasonable person feels constrained to cooperate with police because the situation makes them feel intimidated, that person's consent indeed has been vitiated because they have complied with a request that they would prefer to refuse.

[27] The Court has emphasized that this standard presumes a "reasonable innocent person." *Florida v Bostick*, 501 US at 437–38. This standard thus rules out the argument that the search was coercive because coercion is the only explanation for why a person carrying enough illegal drugs to send them to prison for decades would voluntarily consent to a

the situation. Specifically, as to the seizure question, *Bostick* set out a very simple, specific test for determining whether a seizure has occurred in the course of a citizen-police encounter: would a reasonable person in this situation feel free to terminate the encounter? As to the search question, the standard (as articulated in *Bostick* and *Drayton*) is similar: was the consent involuntary, in the sense that the citizen was forced to comply when he or she would have preferred to refuse?[28] Notably, the *Drayton* Court attempted to discern whether a reasonable person would feel free to terminate the encounter in the circumstances in the case at hand simply by thinking hard about each specific circumstance that characterized the encounter and then answering, based on the Justices' own imagined thoughts and feelings of a reasonable person.[29]

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search. The argument is that no rational (guilty) person in that position would voluntarily consent to a search, and therefore the consent must have been coerced. Of course, there are a number of explanations, other than coercion, for why a person carrying large amounts of unlawful contraband would consent to a search that is certain to result in devastating personal consequences. These include convincing oneself (for the moment) that the contraband is so well hidden that police won't find it, hoping that the grant of permission to search will signal to police that they need not bother doing so, or reasoning that they have already been caught and refusal will only make things worse. For the purpose of the analysis in this essay, I follow the Court's standard and assume that reasonable person means reasonable innocent person.

[28] *Bostick*, 501 US at 438; *Drayton*, 122 S Ct at 2113. I note that the term "voluntary" here appears to mean whether a reasonable person would feel that he or she had a choice. This term therefore raises a question about a psychological state (how a reasonable person would *feel*), rather than a philosophical question about free will.

[29] See, for example, *Drayton*, 122 S Ct at 2112 ("Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances."); id at 2112 ("Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort. The same can be said for wearing sidearms. . . . The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon."); id at 2113 ("[B]us passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them."); id at 2113 ("[W]hen Lang requested to search Brown and Drayton's persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse.").

Drayton is by no means the only case in which members of the Court used their own thoughts and feelings that they imagine they would experience in a particular set of circumstances to determine reasonableness. In oral argument in *Bond v United States*, 529 US 334 (2000), which considered the question of whether an officer's manual squeezing of a bus passenger's luggage amounts to a search, one Justice commented on his own personal, individual expectation of privacy regarding his own luggage: "QUESTION: . . . I fly quite a lot up to Boston and so forth, and I put bags all the time in the upper thing, and people are always moving them around. They push them, they lift them up, they move them to other places, and if they're soft they would feel just what was on the inside. Now, that happens all the time, and I do it myself, frankly. I move somebody else's bag and push

In using this method for determining whether a seizure has occurred, and whether the consent to search was voluntarily given, the Court assumed these questions can be answered from intuition alone. In fact, these are questions that depend crucially on empirical inquiries. Would a reasonable person in Drayton's situation feel free to terminate the encounter with the police? This question concerns facts about the world that we can observe. A question is empirical if any answer to that question could be either confirmed or disconfirmed by observation.[30] The question the Court asks is a question about the actual behavior of real people—about what a reasonable person would do and feel under a specific set of circumstances.

One might respond that even if these questions turn on empirical inquiries, perhaps it is still appropriate to answer them based on intuition alone, especially in light of the fact that there is no direct evidence testing this specific situation. But this is an enterprise fraught with danger. The reason is that relying on casual intuition to infer why someone acted the way they did in a situation where *all* of the details and circumstances are important and must be taken into account (as the Court has emphasized repeatedly) almost always leads to mistaken and erroneous judgments. In the next section I will explain why. While it is true that there is no single study providing direct empirical evidence addressing all the specific circumstances of bus passengers, there is abundant evidence addressing almost all of the individual factors present on the bus (the authority of the officers, the politeness of the request, the physical proximity, the surprise nature of the request, etc.), and all of these factors point to the same conclusion: a reasonable passenger on the bus would have felt compelled to comply even if he or she would have preferred to refuse.

The empirical studies I describe below differ in their method from the method used by the Court to determine whether citizens in particular circumstances feel free to refuse police requests. Each of the empirical studies I describe is governed by rigorous scientific

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mine in, and I imagine the interstate bus here was no different. So if that happens all the time, how can I say that your client has some kind of special expectation, since in my own experience, people are always handling this soft luggage?" Oral argument transcript at 6–7 (Feb 29, 2000).

[30] See Roderick Chisholm, *Theory of Knowledge* 36 (Prentice-Hall, 2d ed 1977); Michael Williams, *Problems of Knowledge: A Critical Introduction to Epistemology* 2 (Oxford, 2001).

methods that are generally accepted in the field to which they belong. Some of the results described below are based upon laboratory experiments in which all relevant variables are tightly controlled to isolate and examine factors of interest. Other results I describe are based upon field experiments in which the behavior of interest is observed in its natural context. Some of the studies are based upon observations of college students; others are based upon observations of other adults who differ widely in age and other demographic characteristics. The studies I will discuss present well-established findings that are not particularly controversial. Many of the findings I describe have been replicated, in various forms, many different times in many different contexts. Strikingly, despite their diverse methods and topics, all of the different studies I describe point to the same conclusion: bus passengers confronting the same situation as Drayton and Brown are extremely unlikely to feel free to refuse the police officers' requests and terminate the encounter.

In this section, I will consider each feature of the situation in which the passengers in *Drayton* found themselves and examine the empirical evidence, if any exists, regarding whether and how that feature affects the extent to which a reasonable person feels free to refuse the requests of the officers. These features include the authority of the police, the politeness and pragmatic implications of their requests, the presence and behavior of other passengers on the bus, the close physical quarters of the officers' approach and the bus itself, and the time constraints of the situation. Before examining these individual factors that characterize the environment on the bus, I review other evidence that suggests that close attention to empirical evidence in the totality of the circumstances analysis is crucial because of the general human inability to discern coercion in a particular set of circumstances from the perspective of outside of the situation in question.

A. THE ACTOR-OBSERVER BIAS

Accurately predicting what a reasonable person would do and feel under a specific set of complex circumstances using one's intuition alone (as the Court has tried to do in *Bostick* and *Drayton*) is nearly impossible. This is because, as a general matter, people tend to grossly overestimate the voluntariness of others' actions. A vast

scientific literature has established that although situational forces systematically pull and push behavior, our ability to recognize these forces depends on whether we are explaining our own behavior or someone else's behavior. As a general matter, people are strongly inclined toward explaining another person's behavior in terms of internal causes (their intentions and dispositions), while ignoring aspects of the situation that could account for the person's actions.[31] For this reason, behavior that looks voluntary from the outside can feel constrained by the situation from the perspective of the actor. "It may be, for example, that a gentle request in a particular setting is just as constraining, as 'motivating,' as a large bribe" even though, from the outside, it is difficult to perceive the constraining features of a particular setting.[32] In a now-classic experiment, subjects observed part of a debate in which the speakers took positions defending or opposing Fidel Castro. Even though the subjects were told that the positions in the debate had been assigned and the speakers had no choice about which position they were presenting, subjects assumed that the speakers had attitudes corresponding to their speech: the speakers who presented the pro-Castro position were perceived to be more pro-Castro than the speakers who took the anti-Castro position.[33] In spite of the fact that subjects understood that the debate position had been assigned, they still could not shake the intuition that the speakers personally believed what they said, because they failed to appreciate the strength of the situational constraints the speaker was under.

There are a number of reasons why people interpret situationally induced behavior as being caused by internal, dispositional factors. Sometimes the situational factors are "invisible"[34]—that is, difficult to pinpoint from the perspective of an observer. For example, in one study, subjects observed people being randomly assigned to the roles of "quizmaster" and "contestant" in a mock game show.[35] Quizmasters created questions from their own men-

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[31] See, for example, Daniel T. Gilbert and Patrick S. Malone, *The Correspondence Bias*, 117 Psychol Bulletin 21 (1995).

[32] Edward E. Jones, *Interpersonal Perception* 122 (Freeman, 1990).

[33] Edward E. Jones amd V. A. Harris, *The Attribution of Attitudes*, 3 J Exp Soc Psychol 1 (1967).

[34] Gilbert and Malone, 117 Psychol Bulletin at 25 (cited in note 31).

[35] Lee D. Ross, Teresa M. Amabile, and Julia L. Steinmetz, *Social Roles, Social Control, and Biases in Social-Perception Processes*, 35 J Personality & Soc Psychol 485 (1977).

tal inventory of favorite trivia, and because the deck was "stacked" in this manner, contestants had trouble answering the questions. Despite the obvious fact that contestants had a much more difficult task than quizmasters, observers rated the quizmasters as genuinely smarter than the contestants. Without the benefit of actually being in the contestants' shoes, observers could not appreciate the strength of the situational constraints on the contestants' ability to answer the questions.

The general finding that observers do not reliably appreciate the strength and consequences of situational constraints on an actor's behavior is robust and has been demonstrated in many different settings, including police-citizen encounters. In police interrogation contexts, observers perceive confessions as more voluntary from the police's perspective compared to the suspects' perspective.[36] To demonstrate this, Daniel Lassiter videotaped a single confession with two cameras. When the camera angle depicted the suspect from the interrogator's perspective (so that the audience saw everything the interrogator saw), the very same confession was perceived as more voluntary than when the camera angle depicted the interrogator from the suspect's perspective (so that the audience saw everything the suspect saw). This robust result has been replicated in no fewer than 15 different studies, using both students and nonstudents, both old and young people, and with whites, blacks, and Hispanics. When the camera is focused on the suspect, observers infer only a small degree of coercion because they attribute the act of confessing largely to the most salient object on the screen: the suspect. On the other hand, when the camera is focused on the interrogator, observers infer a large degree of coercion because they again attribute the act of confessing largely to the most salient object on the screen: this time that is the interrogator. Thus, when the camera is placed so that it shows exactly what the suspect saw, the external forces on the suspect's behavior (notably, the pressure from the interrogator) become more apparent.

It is tempting to conclude that perhaps we can overcome the exaggerated perception of voluntariness by simply imagining the suspect's perspective and then imagining how coercive the situa-

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[36] Daniel G. Lassiter et al, *Videotaped Confessions: Is Guilt in the Eye of the Camera?* in Mark P. Zanna, ed, 33 *Advances in Experimental Social Psychology* 189 (Academic, 2001).

tional constraints would feel. So, for example, we can try to predict what a reasonable person would do in the circumstances present on the bus on which Drayton and Brown were riding by simply imagining ourselves in those circumstances. By imagining oneself in the shoes of the citizen whom the police are targeting, perhaps we can understand the situational pressures that the person feels, and thus more accurately determine whether they are in a position freely to choose whether to consent to the police officers' requests.

But this task is not as easy as it sounds. Because people have difficulty imagining situational influences that constrain choice when such imagining takes place outside of the situation, people tend to grossly overestimate the voluntariness of even their own hypothetical actions. For example, people listening to special beeps tend in a laboratory to overestimate the number of beeps they heard if other people who answer first also overestimate—in this sense, we conform with the decisions of others.[37] But more importantly, observers secretly watching the laboratory session predict that they themselves would be more accurate than the participants.[38] The researchers concluded, "Thus, when the degree of influence shown by others is noted, we see this as relatively large and excessive (even though we might have been influenced an equal amount). We are thus likely to make rather hard moral judgments about those who are 'easily' influenced on the rationale that we wouldn't have given in to such pressure."[39]

Other research confirms the difficulty of accurately imagining the extent to which situational constraints shape our behavior. For example, when participants were asked to write an essay that advocated a position with which they disagreed, compliance rates were high.[40] However, when outsiders are asked hypothetically whether they would engage in the same counterattitudinal essay writing, almost three-quarters said they would not.[41] In another study, ob-

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[37] Robert J. Wolosin, Steven J. Sherman, and Arnie Cann, *Predictions of Own and Other's Conformity*, 43 J Personality 357 (1975).

[38] Id.

[39] Id at 374.

[40] See Gilbert and Malone, 117 Psychol Bulletin at 27 (cited in note 31) (compliance rates with essay-writing request over "decades of research" are "exceptionally high").

[41] Steven J. Sherman, *On the Self-Erasing Nature of Errors of Prediction*, 39 J Personality & Soc Psychol 211 (1980) (three-quarters of those asked to forecast their own compliance predicted they would refuse).

servers who read about a job candidate who is asked inappropriate interview questions predicted that if they were in that situation themselves, they would confront the interviewer directly; however, actual candidates who were placed in the very same situation capitulated and answered the question.[42] There is a gap between what people predict they would do in a situation, and what they actually do. Because of this, it is not enough to try simply to imagine how free a reasonable bus passenger would feel upon being approached by the police with a request to search. Instead, it is important to gain a more systematic and methodical understanding of the influence of each situational factor that might influence how free a citizen feels to refuse police request to search.

B. COMPLIANCE

The Court's analysis of the seizure and consent to search issues has led to highly consistent results. In nearly every case involving police-citizen encounters where the consensual nature of the encounter was at issue, the Court held there was no seizure.[43] Similarly, in cases where the issue of voluntariness of consent to search arose, the Court has held that the search was consensual.[44] We have seen that observers often grossly and systematically overestimate the voluntariness of others' actions, and this is reflected in the Court's consensual police-citizen encounter decisions. By contrast,

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[42] Julie A. Woodzicka and Marianne LaFrance, *Real versus Imagined Gender Harassment*, 57 J Soc Issues 15 (2001).

[43] See *United States v Mendenhall*, 446 US 544, 557–58 (1980) (no seizure where federal drug agents approached a woman walking through an airport concourse and asked to see her ticket and identification); *INS v Delgado*, 466 US 210, 216 (1984) (no seizure where immigration agents questioned factory workers while other agents were positioned at building exits); *Florida v Rodriguez*, 469 US 1 (1984) (no seizure in an airport concourse where police approached and questioned a man who briefly attempted to run away); *Michigan v Chesternut*, 486 US 567 (1988) (no seizure where man fled at sight of police and police drove alongside him for a short distance); *California v Hodari D.*, 499 US 621 (1991) (no seizure where youth fled at sight of police and police gave chase). One exception in this line of no-seizure findings was *Florida v Royer*, 460 US 491, 501 (1983), in which the Court held, in a plurality opinion, that a seizure occurred when police approached and questioned a man in an airport and subsequently held his ticket and identification. In a fractured set of concurring and dissenting opinions, there was no agreement among the Justices on precisely when the seizure began, or whether there was *Terry*-level suspicion to justify it. In another seizure case, *Florida v Bostick*, the Court remanded the seizure question back to the lower courts. However, as I explain in Section IV.B., *Bostick*'s implicit message was that there was no seizure.

[44] See *Schneckloth v Bustamonte*, 412 US 218 (1973); *Ohio v Robinette*, 519 US 33 (1996).

empirical research over the last several decades paints a very different picture—the extent to which we feel free to refuse to comply under situationally induced pressures to do so is extremely limited. Evidence from several different disciplines and research areas all converges on the same general finding regarding limited decision freedom.

The social psychology of compliance is the study of the conditions under which people accede to requests made by others.[45] Thus, empirical evidence on the social psychology of compliance can assist in determining when a citizen's response to a police officer's request to search is voluntary and when it is "no more than acquiescence to a claim of lawful authority."[46] Systematic study of the social psychology of compliance has been advancing for more than 50 years,[47] and social scientists have successfully identified a variety of factors that lead people to consent involuntarily, or, in the language of the majority in *Bostick*, to feel "coerced to comply with a request that they would prefer to refuse."[48] In the discussion that follows, I shall consider two of the most important principles of the social psychology of compliance—authority and social validation[49]—and I will illustrate how the presence of each of these factors makes it more likely that a citizen will "comply with a request they would prefer to refuse."

1. *Compliance with authority.* Whether a request results in acquiescence depends a great deal on whether the requester is a legitimately constituted authority. As a general matter, persons with such authority exert an enormous amount of influence over our decisions.[50] In many ways, it is logical that this is the case: the reason for their inordinate influence is that their position of authority signals that they possess information and power that is greater than our own. Throughout the course of our lives we learn that taking the advice of people like parents, teachers, supervisors,

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[45] See Robert B. Cialdini and Melanie R. Trost, *Social Influence: Social Norms, Conformity and Compliance*, in Daniel T. Gilbert, Susan T. Fiske, and Gardner Lindzey, eds, 2 *The Handbook of Social Psychology* 151, 168 (McGraw-Hill, 4th ed 1998).

[46] *Bumper v North Carolina*, 391 US 543, 548–49 (1968).

[47] See Cialdini and Trost, 2 *The Handbook of Social Psychology* at 168 (cited in note 45).

[48] *Bostick*, 501 US at 438.

[49] See Cialdini and Trost, 2 *The Handbook of Social Psychology* at 170 (cited in note 45).

[50] See, for example, Stanley Milgram, *Obedience to Authority* 104 (Harper & Row, 1983).

oncologists, and plumbers is beneficial for us, both because of their ability to enlighten us and because we depend on their good graces.[51] For example, patients are in the habit of following the advice of their doctors because that advice usually turns out well; employees adopt a general strategy of abiding by the wishes of their supervisor, because in the long run that strategy is good for their career. For most people, most of the time, conforming to the wishes of persons with authority makes a great deal of sense. "It makes so much sense, in fact, that people often do so when it makes no sense at all."[52]

One example of complying with the wishes of an authority even when compliance makes little sense is a phenomenon that airline industry officials have dubbed "captainitis."[53] Like all humans, flight captains in the airplane cockpit sometimes make errors. These errors often go uncorrected, even when they are detected by other crew members, and these uncorrected errors lead to crashes. Despite the obviously serious consequences, crew members go along with the captain's mistake, because they convince themselves that if the captain has decided to do it, it must be right.

Why do we so readily comply with the wishes of authority? One critical piece of this puzzle is the nature of the cognitive mechanisms involved: the processes that lead to compliance with an authority when we are under pressure to make a decision are fast, automatic, and unconscious.[54] Complying with authorities is something that we do quickly, on the spot, without conscious deliberation. We do not always make decisions this way. Sometimes, when

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[51] See Cialdini and Trost, 2 *The Handbook of Social Psychology* at 170 (cited in note 45).

[52] Id.

[53] H. Clayton Foushee, *Dyads and Triads at 35,000 Feet: Factors Affecting Group Process and Aircrew Performance*, 39 Am Psychologist 885 (1984); Robert B. Cialdini, *Influence: Science and Practice* 9–10 (Allyn & Bacon, 4th ed 2001).

[54] See Eric S. Knowles and Christopher A. Condon, *Why People Say "Yes": A Dual-Process Theory of Acquiescence*, 77 J Personality & Soc Psychol 379, 385 (1999) (presenting evidence for a two-stage model of belief process, in which a request is first tacitly and automatically accepted, and then later reconsidered; because the reconsideration stage can require effort, it is easily disrupted, leading to acquiescence); Marco Iacoboni et al, *Watching People Interact: The Neural Bases of Understanding Social Relations*, unpublished manuscript (2002) (observing a person in authority giving an order to another person does not activate brain regions associated with conscious, effortful, cognitive tasks, but does activate brain regions associated with automatic, unconscious processes); Edward E. Jones, *Interpersonal Perception* 124 (Freeman, 1990) (remarking that social roles, such as authority-subordinate roles, are so ingrained that we comply with authorities' requests automatically and mindlessly).

we have the ability and the motivation to engage in careful analysis, we do so. But we do not always have the luxury of careful processing. The world is complicated, and we are often under time pressure, distracted, emotionally aroused, or mentally fatigued.[55] Many times we respond automatically, rather than thoughtfully, because many of our behaviors are situation-specific, so that we respond the same way to certain situation-specific cues. One example of a situation-specific cue that leads to automatic responses is the social role. Certain social roles, such as authority-subordinate roles, give rise to overlearned patterns of responses. We follow the leader, we stop at red lights, and we comply with the police not because we make a deliberate conscious choice to respond in a particular way, but rather because we mindlessly respond in a manner consistent with social roles.[56] As a general matter, we do not always need to make careful, sophisticated, informed decisions; as a result, much of our daily behavior relies on mental shortcuts. Engaging in automatic behavior makes room for elaborate, conscious decisions when we have the opportunity and the need to make them. Usually automatic processing serves us well.[57] But it sometimes leads us astray.

Perhaps the most well-known scientific study of compliance with authority is the set of obedience studies conducted by Stanley Milgram, who investigated the extent to which people would comply with a request to perform an apparently harmful action. Milgram's subjects, who were adults from all walks of life, were informed that they would be participating in an experiment on the effects of punishment on learning. Upon arrival in the laboratory, the subject was assigned (through an apparently random procedure) to assume the role of "teacher," while the other "subject" (actually a confederate of the experimenter) was assigned to be the "learner." The subject was informed that it is his or her job to teach a series of word pairs to the learner. In full view of the subject, the learner was then strapped into a chair, and an electrode

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[55] See Cialdini, *Influence: Science and Practice* at 9 (cited in note 53).

[56] See Jones, 122 *Interpersonal Perception* at 124 (cited in note 32).

[57] See Gerd Gigerenzer and Reinhard Selton, *Rethinking Rationality*, in Gerd Gigerenzer, *Bounded Rationality* 1, 7 (MIT, 2001). For example, when a player runs to catch a ball, she does not calculate the distance between her current position and where she expects the ball to land, then run that distance, and then wait for the ball. Instead, she catches the ball by running just fast enough to maintain a constant angle between her eye and the ball.

was taped to his wrist. As teacher, the subject's job was to administer shocks to the learner, by pressing switches on a shock generator, each time the learner made an error in recalling a word. Before beginning the learning task, the experimenter asked the subject to press the electrode to his or her own arm to experience a mild (but real) shock such as the one the learner would receive.

The subject was then led to an adjacent room where he or she could hear, but not see, the learner. The subject was seated in front of the shock generator, which was a box with 30 lever switches, labeled in 15-volt increments from 15 to 450 volts. The levers were also labeled with accompanying descriptions of the shock intensities, ranging from "slight shock" to "danger: severe shock." The last two switches were labeled "XXX." The experimenter informed the subject that he or she was to increase the shock level by 15 volts with each incorrect answer given by the learner.

After administering the first few shocks, the subject hears the learner protest about the painfulness of the shocks. When the shock level reaches 300 volts, the learner pounds on the wall in protest and stops participating in the word-recall task. The learner protests that his heart is bothering him, and his verbal protests become agonizing screams. Eventually, there is complete silence after each shock. Throughout the experiment, if the subject questions the procedure because of the learner's reaction, the experimenter responds by saying, "Please continue." If the subject expresses reluctance to continue, the experimenter says, "The experiment requires that you continue." If the subject becomes very insistent, the experimenter says, "You have no choice; you must go on."

Unbeknownst to the subjects, the shocks delivered to the learner are not real. Even though they believed they were delivering real shocks, most people participating in this experiment (over 65%) continued on until the very end, beyond the "danger: severe shock" level and all the way to "XXX." One hundred percent of all participants continued shocking the learner even after he protested that he was in pain.

There are obvious differences between the situation in which Milgram's subjects found themselves and the situation of the passengers on Drayton and Brown's bus. Most prominently, unlike in the Milgram experiments, no one was telling the bus passengers

"you must continue." But there are similarities also. Instead of an experimenter in a white lab coat expecting cooperation, the bus passengers faced a police officer with a badge (and a gun) expecting cooperation. Like the role of the white lab coat in the Milgram experiments, the role of the police officer's displayed badge in *Drayton* should not be underestimated. In *Drayton*, Officer Lang leaned in at close range and held up his badge. Despite Milgram's empirical demonstration of the power of authorities to command compliance, the Court flatly rejected the notion that a police badge exerts pressure on passengers, holding that factors such as the presence of badges, uniforms, or guns "should have little weight in the analysis."[58] At the same time that one officer leaned in close to passengers and displayed his badge, another officer had taken the driver's seat. With one officer in the back, one in the driver's seat, and another displaying his badge, the officers had essentially commandeered the bus. From the passengers' perspective, the message was clear that the bus was going nowhere until the officers were satisfied that they had received cooperation.[59] Aside from the obvious message that the continuation of the trip was dependent on the officers achieving their goal of receiving passenger cooperation, the more subtle message was conveyed through symbols of authority such as the officers' positioning on the bus and the display of the badge 12–18 inches from each passenger's face. Even though the police were not in uniform, the symbols of authority were quite strong. The main point here is that in both situations, people are coerced to comply when they would prefer to refuse.[60]

There is a parallel here to the phenomenon of "false confession," in which an innocent person confesses to a crime that he or she did not, in fact, commit.[61] Because of the situational pressures

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[58] *Drayton*, 122 S Ct at 2112.

[59] "[T]he customary course of events was stopped flat. The bus was going nowhere, and with one officer in the driver's seat, it was reasonable to suppose no passenger would tend to his own business until the officers were ready to let him." *Drayton*, 122 S Ct at 2117 (Souter dissenting). There was also evidence in *Drayton* that, just prior to the officers boarding the bus, the driver had collected all passengers' tickets and brought them inside the terminal.

[60] "[T]here was no reason for any passenger to believe that the driver would return and the trip resume until the police were satisfied. The scene was set and an atmosphere of obligatory participation was established . . . ." *Drayton*, 122 S Ct at 2116 (Souter dissenting).

[61] See Saul M. Kassin and Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 Psychol Sci 125 (1996). For discussions of actual false confession cases, see Hugo Bedau and M. Radelet, *Miscarriages of Justice in*

brought to bear by police, the false confessor is coerced to comply with the request to confess, when he or she would prefer to refuse.[62] Similarly, because of situational pressures brought to bear upon bus passengers, they also can be coerced to comply with the request to consent to a search of their luggage when they would prefer to refuse. Admittedly, the tactics that police typically use in false confession situations (lengthy interrogation, isolation, presentation of false evidence) are much more coercive than tactics used by members of drug interdiction police squads in bus sweeps. On the other hand, innocent bus passengers have much less to lose by complying with the police request to consent to search than do innocent suspects by complying with the police request to confess. Less pressure is used in the former situation, but less is also needed to gain compliance.

Additionally, in some situations very little pressure is needed to induce innocent people to confess to a transgression they did not commit. In a dramatic demonstration of false confession under minimal pressure, researchers brought individual subjects into the laboratory and asked them to perform a computer task. Subjects were warned not to press the "Alt" key or the computer would crash. At a preprogrammed moment, the computer did in fact crash, and the experimenter accused the subject of having hit the forbidden key. The experimenter then asked the subject to sign a written confession stating, "I hit the 'Alt' key and caused the program to crash. Data were lost." The consequence of this confession would be a phone call to the subject from the principal investigator of the experiment. A total of 69% of subjects signed the confession, admitting to a transgression that they did not in fact commit.[63] Sometimes the subject was confronted with false evidence in the form of a witness who said she saw the subject hit the forbidden key. When faced with false evidence, between 89% and 100% of all subjects confessed even though they were inno-

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Potentially Capital Cases, 40 Stan L Rev 21 (1987); Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J Crim L & Criminol 429 (1998).

[62] Not all false confessions involve coercion. A "voluntary" false confession is defined as one in which a person confesses in the absence of external pressure to do so. Kassin and Kiechel, 7 Psychol Sci at 125 (cited in note 61).

[63] See Kassin and Kiechel, 7 Psychol Sci at 127 (cited in note 61).

cent.[64] But even in the absence of false evidence, when the only pressure brought to bear was the experimenter asking the subject to sign the written confession, between 35% and 65% of subjects confessed even though they were innocent.[65]

In the experiment, in all instances when subjects signed the confession, they had been coerced to comply with a request that they (presumably) would have preferred to refuse. In the bus sweep situation, it is difficult to estimate how many passengers who in fact cooperated would have preferred to refuse. The *Drayton* majority implied that the number of bus passengers who would have preferred to refuse to consent to the police request to search was zero: "[B]us passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them."[66] The *Drayton* Court also decided, seemingly as a matter of law, that when a police officer asks a citizen for consent to search, and the citizen responds positively, such consent is voluntary. "When this exchange takes place, it dispels inferences of coercion."[67] Although it is difficult to estimate how many bus passengers who find themselves targets of a bus sweep would prefer to refuse the police officers' requests, evidence from the social psychology of compliance with authority discussed earlier strongly suggests that the Court is mistaken in inferring, as a matter of law, that no coercion exists so long as law enforcement asks passengers for consent. As for the question of whether citizens ever prefer to refuse a police request for consent to search, there is indeed evidence that some citizens do hold such preferences. I return to this topic in Section IV.A.

2. *Social validation.* In new or ambiguous situations, people often decide upon the correct course of action for themselves by following other people's actions.[68] The rule of thumb of "consensus

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[64] The confession rate in the false-evidence (witness) condition was 89% when the task had required that subjects type slowly, and 100% when the task had required that subjects type quickly. Id at 127.

[65] The confession rate in the no-false-evidence (no witness) condition was 35% when the task had required that subjects type slowly, and 65% when the task had required that subjects type quickly. Id at 127.

[66] *Drayton*, 122 S Ct at 2113.

[67] Id at 2114.

[68] Cialdini and Trost, 2 *The Handbook of Social Psychology* at 155 (cited in note 45).

equals correctness" has been shown to influence behavior across a wide array of contexts. For example, amusement park visitors use this rule of thumb when deciding whether to litter;[69] pedestrians use it when deciding whether to stop and look up at an empty spot in the sky;[70] college students use it when deciding whether to donate blood;[71] and, sadly, troubled individuals use it when deciding whether to end their own lives.[72] In many situations, this rule of thumb makes a great deal of sense. For example, sometimes, to determine what to do, we need to first make sense of and attach meaning to the situation in which we find ourselves. For example, is that woman across the street in trouble, or is she engaging in horseplay with two male friends? To assess what is happening, we look around at others' reactions. If no one else seems concerned, then others have probably concluded it is horseplay. Therefore, when we decide that no action is necessary, this decision is based in part on the actions of others.

Obviously, the "consensus equals correctness" rule of thumb does not determine all of our behavior at all times. The extent to which we follow the decisions of other people depends, among other things, on the ambiguity of the situation, the number of other people present, and whether those other people are similar to oneself. People are especially likely to comply with a request when it appears that other people like themselves have already done so.[73] It is for this reason that bartenders often "salt" their tip jars at the beginning of their shift, and that political activists often display a long list of other people who have already signed onto the cause.

The socially validating effects of the decisions of similar others also explain why an onlooker in an emergency is unlikely to give

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[69] See Robert Cialdini, Carl Kallgren, and Raymond Reno, *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, 24 Advances in Exp Soc Psychol 201, 203 (1991).

[70] Stanley Milgram, Leonard Bickman, and Lawrence Berkowitz, *Note on the Drawing Power of Crowds of Different Size*, 31 J Personality & Soc Psych 79 (1969).

[71] Peter H. Reingen, *Test of a List Procedure for Inducing Compliance with a Request to Donate Money*, 9 J Appl Psychol 110 (1982).

[72] There is evidence that news stories about suicide trigger additional suicides. See David P. Phillips and Laura L. Carstensen, *Clustering of Teenage Suicides After Television Stories About Suicide*, 315 New Engl J Med 685 (1986); David P. Phillips, *The Influence of Suggestion on Suicide: Substantive and Theoretical Implications of the Werther Effect*, 39 Am Soc Rev 340 (1979).

[73] Cialdini and Trost, 2 *The Handbook of Social Psychology* at 172 (cited in note 45).

aid when other bystanders are present. We try to infer from the way other people are acting whether what we are witnessing is a genuine emergency, or something else. Is that kid who is screaming "no!" being kidnapped or is he just having a tantrum outside his parents' car? Does the man lying across the sidewalk need help or is he just sleeping? Genuine emergencies are often not recognized as such when there are several bystanders; each person present decides that because nobody else looks worried, there must be nothing wrong. Ironically, often nobody else looks worried because everyone is looking surreptitiously at the reactions of others to decide the seriousness of the situation.

Research on the automatic nature of social perception suggests that sometimes behavior can follow social perception quite automatically, without any conscious thought at all.[74] We often do what we see others doing not because we have consciously decided to do it, but rather as a natural consequence of the automatic activation of behavioral representations that follow perceptions.[75] The simplest examples include yawning when we see someone else yawn, or scratching our head when we see someone else scratching their head.[76] We are not motivated to yawn or head scratch; we just do it because seeing someone else doing it activated the behavioral representation of the act, which in turn led, unthinkingly, to the behavior.[77] We also unconsciously imitate other people's posture[78] and tone of voice,[79] not because we are motivated to do so, but

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[74] See Ap Dijksterhuis and John A. Bargh, *The Perception-Behavior Expressway: Automatic Effects of Social Perception on Social Behavior*, in Mark P. Zanna, ed, *Advances in Experimental Social Psychology* 1 (Academic, 2001).

[75] Id. This direct relation between perception and behavior is supported by neurophysiological evidence, which shows that thinking about a word, gesture, or complex action such as running or weightlifting leads to activation of the same neural pathways in the brain as actually uttering the word, making the gesture, or performing the action. See T. Paus, M. Petrides, A. C. Evans, and E. Meyer, *Role of Human Anterior Cingaluate Cortex in the Control of Oculomotor, Manual and Speech Responses*, 70 J Neurophysiol 453 (1993); M. Jeannerod, *The Representing Brain: Neural Correlates of Motor Intention and Imagery*, 17 Behavioral & Brain Sci 187 (1994).

[76] See, for example, Robert R. Provine, *Yawning as a Stereotypical Action Pattern and Releasing Stimulus*, 71 Ethology 109 (1986).

[77] Facial expression imitation can be observed in babies as young as one month old. See, for example, Andrew N. Meltzoff and Keith M. Moore, *Imitation of Facial and Manual Gestures by Human Neonates*, 198 Science 75 (1977).

[78] See Frank Bernieri, *Coordinated Movement and Rapport in Teacher-Student Interactions*, 12 J Nonverbal Behav 120 (1988).

[79] Roland Neumann and Fritz Strack, *"Mood Contagion": The Automatic Transfer of Mood Between Persons*, 79 J Personality & Soc Psychol 211 (2000).

rather because these processes are automatic and unintentional.[80] Interestingly, it is not always necessary actually to observe other people engaging in behavior for the automatic perception-behavior link to emerge. Sometimes it is enough for a stereotype of behavior to become activated in order to produce actual behavior associated with that stereotype. For example, people asked to write down all the typical attributes of college professors that they could think of performed better in a subsequent "Trivial Pursuit" game than those who were not asked to think about college professors; conversely, people (Europeans) asked to write down the typical attributes of soccer hooligans performed worse on a "Trivial Pursuit" task than those who were not.[81] Further, people asked to unscramble sentences containing some words (among other words) relating to the elderly (gray, Florida, bingo) subsequently walked more slowly when leaving the experiment (without realizing it) than people who unscrambled sentences without words relating to the elderly.[82] Finally, people asked to think about fast animals (cheetah, antelope) walked faster (without realizing it) to pick up a questionnaire in an adjacent room than did people asked to think about slow animals (snail, turtle).[83] In sum, observing others or even thinking about others doing an act can automatically lead to doing that act ourselves, even if we do not intend to, are not aware of doing so, or would prefer to do otherwise.

The influence of the behavior of others can be so great that people end up responding in a way that every bone in their body is telling them is wrong, but they do it anyway. The classic demonstration of the immense pressure exerted by social validation is Solomon Asch's 1950s studies on conformity.[84] The task in the experiment was simple. A board at the front of the room depicted several straight lines. On the left side of the board was a single

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[80] Dijksterhuis and Bargh, 33 *Advances in Experimental Social Psychology* at 1 (cited in note 74).

[81] Ap Dijksterhuis and Ad van Knippenberg, *The Relation Between Perception and Behavior, or How to Win a Game of Trivial Pursuit*, 74 J Personality & Soc Psychol 865 (1998).

[82] John A. Bargh, Mark Chen, and L. Burrows, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action* 71 J Personality & Soc Psychol 230 (1996).

[83] Henk Aarts and Ap Dijksterhuis, *Category Activation Effects in Judgment and Behaviour: The Moderating Role of Perceived Comparability*, 41 Brit J Soc Psychol 123 (2002).

[84] Solomon E. Asch, *Opinions and Social Pressure*, 193 Scientific Am 31 (1955).

"target" line. On the right side were three "comparison" lines. The subject was asked to choose the one comparison line that was the same length as the target line. The task was quite easy—participants working on their own chose the correct comparison line 98% of the time. This high accuracy rate decreased dramatically, however, when the subject publicly stated his or her judgment in the presence of several other "subjects,"[85] each of whom stated that the matching line was line B (rather than the correct answer, line A). In this situation, accuracy dropped precipitously, with over 75% of subjects giving wrong answers. In interviews after the experiment, subjects mentioned that they went along with the majority because they believed that the majority must have been right: either their own eyesight was failing them, or they misunderstood the instructions (maybe they were to judge line width, not length).[86] In this way, "the judgments of others are taken to be a more or less trustworthy source of information about the objective reality."[87] The appropriate response is powerfully dictated by the responses of others who went before.

At the same time, people doubt that they would succumb to social influence if they themselves were placed in the Asch experiment. When people are asked to predict what they themselves would do in a version of the Asch experiment, people predict that they would give a response contrary to everyone else in the group a much higher percentage of the time than is actually observed.[88] People are, of course, mistaken about this, but this mistake is the same mistake made by the Court when it asserted that a reasonable person would feel free to terminate the encounter with police once the cascade of acquiescence is under way.

Extreme examples of the powerful influence of the decisions and actions of other people who are similar to ourselves are not confined exclusively to artificially constructed laboratory situations. The immense power of social influence is illustrated in what has been called "perhaps the most spectacular act of compliance of our

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[85] These other "subjects" were actually confederates who had been instructed in advance to answer incorrectly.

[86] Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority*, 70 Psychol Monogr 1 (1956).

[87] Morton Deutsch and Harold B. Gerard, *A Study of Normative and Informational Social Influences upon Individual Judgment*, 51 J Abnormal & Soc Psychol 629, 634 (1955).

[88] Wolosin, Sherman, and Cann, 43 J Personality at 372–76 (cited in note 37).

time"[89]—the mass suicide of over 900 people in Jonestown, Guyana, in 1978. The leader of the People's Temple, Jim Jones, had moved the group from San Francisco to a jungle settlement in South America about a year before the tragedy.[90] When Congressman Leo R. Ryan went to Guyana on a fact-finding mission, he was murdered, along with several others. Within hours of the murders, Jones assembled the entire group for a final gathering and called on everyone in the community to commit suicide en masse. Amazingly, nearly everyone—over 900 people—did so.[91] The first volunteer was a young woman who administered the now-famous cyanide-laced drink to her baby and to herself. According to the few people who escaped and survived, the vast majority of the people who followed did so calmly, willfully, and with no evidence of panic.[92]

Undoubtedly, many factors led to this act of mass suicide, including the charisma of the leader and the religious nature of the group, among other things. The scale of the mass suicide was so enormous that it is tempting to posit overly simple explanations such as "they did it because they were brainwashed cult members." But this "explanation" begs the question of what led to such an unthinkable event. It is improbable that all 900 otherwise mentally healthy, normal people had been transformed into automatons, so each act in their daily lives was dictated by the groups' leaders. Perhaps this is plausible for a handful of intensely loyal followers. But it is hard to imagine that it was true for 900 people.

An explanation based on social validation suggests that at the crucial moment of decision about whether to end their lives, the isolated, unfamiliar, jungle environment that group members found themselves in left them ready to follow the lead of others.[93]

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[89] Cialdini, *Influence: Science and Practice* at 130 (cited in note 53).

[90] Id.

[91] Over 200 children died. The children were made to swallow the poison by adults. See Marc Galanter, *Cults: Faith, Healing, and Coercion* at 114 (Oxford, 2d ed 1999).

[92] Cialdini, *Influence: Science and Practice* at 132 (cited in note 53); see also Galanter, *Cults* at 114 (cited in note 91) ("The amount of force exerted to complete the mass suicide varied among the members. For most, no coercion was necessary; only a small minority acted under overt threats from Jones's henchmen, who were brandishing firearms.").

[93] Id at 132–33.

The only other similar people for miles around were other group members. Upon receiving Jones's fatal command, they looked around at their fellow community members. The few who were fanatically obedient willingly took the poison—a strong signal to the rest of the group that this was the right thing to do. The reaction of the rest of the group—that of assessing the situation—was interpreted as patient turn-taking. The genius of Jim Jones, then, was not necessarily his charisma and dynamic personal style, but his arranging of environmental conditions so that the isolation and unfamiliarity of the surroundings would prompt the vast majority of the group to be entirely dependent on observing similar others to decide how they themselves should act.[94]

At the point when the officers had approached Drayton and Brown, they had already addressed three other passengers, none of whom attempted to terminate the encounter. In addition, the officers had already requested consent to search from one of the other passengers, which was granted. Using the rule of thumb that consensus equals correctness, a reasonable innocent person in Drayton's and Brown's shoes would have concluded that consenting was the correct thing to do. There were 25–30 passengers on the bus. No one asked the officers why they were doing what they were doing or questioned them. All passengers they addressed did what was asked unquestioningly. No one tried to get up and leave. No one tried to interfere or even politely intervene. All signals pointed to polite cooperation as the rule of the day. In a totality of the circumstances analysis of whether a reasonable person would have felt free to refuse the officer's requests or terminate the encounter, the influence of the "consensus equals correctness" heuristic on decisions to comply is a factor that must be considered, and one that law enforcement conducting bus sweeps use to their advantage.[95]

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[94] Id.

[95] As Drayton's and Brown's attorneys point out, "the Tallahassee Police Department's bus interdictions are routinized, scripted events." See *Drayton*, Respondent's Brief at 26. The police appeared to have made a conscious decision to question passengers on the bus, where they could expect (based on hundreds of prior bus sweeps) each passenger to observe other passengers' compliance with requests for information and for consent to search. Drayton, Brown, and all other passengers on the bus were required to exit the bus during the stopover in Tallahassee. The police began watching Drayton and Brown inside the bus terminal at noon, but waited until they had reboarded the bus some 40 minutes later to

C. SOCIAL CONTEXT, POLITENESS, AND THE LOGIC OF CONVERSATION

In its analysis of the totality of the circumstances, the *Drayton* opinion focused heavily on the tone of the conversation between the police officer and the citizens. The Court pointed to the officer's quiet and polite tone of voice, the fact that he did not state or suggest that citizens he spoke with were required to answer, that he talked to passengers one by one, and that he did not say or suggest that passengers could not leave the bus or could not terminate the encounter. The Court noted that the encounter contained "no threat, no command, not even an authoritative tone of voice." Focusing on the officer who kneeled backward in the driver's seat to observe the passengers, the Court noted that he "did nothing to intimidate passengers, and he said nothing to suggest that people could not exit and indeed he left the aisle clear."

Similarly, in analyzing the consent to search issue, the Court pointed out that "[n]othing Officer Lang said indicated a command to consent to the search. . . . Rather he asked for . . . permission . . ." and that when the officer first requested to search their persons "he asked first if they objected thus indicating to a reasonable person that they were free to refuse." Even after arresting Brown, the officer "provided no indication [to Drayton] that he was required to consent to a search." To the contrary, Lang asked for Drayton's permission to search him ("Mind if I check you?"). After dismissing the notion that the officer must warn the citizen that he has a right to refuse the request to search, the Court concluded: "[a]lthough Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable."

Focusing narrowly on the tone and language used by the police makes plausible the notion that voluntary cooperation and consent were the only thoughts on the minds of passengers on the bus that day. But the Court's intense focus on precisely what Officer Lang did and did not say is problematic, because in doing so it neglected

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question them. See *Drayton*, Joint Appendix at 108, 139. Instead of questioning Drayton and Brown privately in the relatively open confines of the terminal, the police questioned them in the close confines of a cramped bus seat, in an atmosphere where each passenger sees and hears that others are cooperating with police.

what the passengers actually experienced when they listened to the officers' polite tone and requests for permission. As Herbert Clark, widely recognized as a prominent scientific psychologist in the area of pragmatics,[96] has stated:

> [It is a] common misperception that language use has primarily to do with words and what they mean. It doesn't. It has primarily to do with people and what they mean. It is essentially about speakers' intentions.[97]

Therefore, any analysis of the conversations that took place between the officers and the passengers on the bus that Drayton and Brown rode on should not focus on the precise words that were spoken or not spoken in light of what those words generally mean and how we (as people outside the context of the bus) understand them. Instead, the analysis should focus on what the officers meant and intended and, more importantly, on the bus passengers' understanding of the officers' meaning and intention.

From the passengers' perspective, the officers appeared to board the bus with a specific goal in mind. The fact that a police officer was occupying the driver's seat in the absence of the driver gives rise to the natural inference that the officers intend to achieve their goal before the bus would continue on its regular route. Officer Lang testified that he approached each individual passenger, introduced himself while holding his badge, and told the passenger that he was looking for illegal drugs and weapons. Officer Lang announced his goal at the outset, and the meaning of the speaker's intentions was therefore clear to the passenger: he is a police officer (an authority) and intends to look for illegal contraband.

Having understood the speaker's meaning and intentions, the next thing that the passengers heard was an indirect request: "Would you mind if I searched your bag?"[98] Phrased directly, the

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[96] Pragmatics is the study of how context influences how we interpret the meaning of language. See Victoria Fromkin and Robert Rodman, *An Introduction to Language* 189 (Holt, Rinehart & Winston, 3d ed 1983); Steven Pinker, *The Language Instinct* 480 (Harper Perennial, 1994).

[97] Herbert H. Clark and Michael F. Schober, *Asking Questions and Influencing Answers*, in J. M. Tanur, ed, *Questions About Questions* 15, 15 (Russell Sage Foundation, 1992).

[98] An indirect request ("Could you tell me what time it is?") is a polite way of uttering a command ("Tell me the time."). See Herbert H. Clark and Eve V. Clark, *Psychology and Language* 244–45, 563 (Harcourt Brace Jovanovich, 1977). The way in which an utterance is interpreted can vary drastically depending on the context. For example, if I say to a friend, "Would you like to go to the movies?" this generally will be interpreted as a question. But

request would be something like: "Let me search your bag." The question "Would you mind if . . ." is interpreted as the same thing as the direct request, but phrased more politely. The indirect request is more polite because it threatens the listener's status less than the direct request. So in all likelihood, this statement was interpreted by passengers as the officers informing the passenger what he would do, albeit in a polite fashion.[99]

The context of discourse is crucial in the understanding of it;[100] this is especially true when the speaker is making a request.[101] Perceived coercion is determined by the speaker's authority and the speaker's language working together. Because authorities such as police officers direct the actions of others, the listener is likely to conclude that an utterance is in fact a directive, or an order to be followed.[102] For example, citizens generally do not interpret "Can I please see your license and registration?" as spoken by a police officer as a genuine request; it is a command, and everyone understands this. Furthermore, certain contextual features are taken as cues as to the overall understanding of an event. Importantly, authority figures do not need to employ highly face-threatening language to achieve their goal.[103] In fact, a polite request is usually perceived by the listener as being face-maintaining because the listener understands that coercion may be used. Thus, a police officer who says, "Do you mind if I search your bags?" is perceived as being more face-sensitive than one who says, "I am going to search your bags"; at the same time, the listener in both situations

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if I say to my son, "Would you like to wash the dishes?" this is actually a command, even though phrased in the form of a question. See Peter Meijes Tiersma, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 Cal L Rev 189, 194 (1986).

[99] See Tiersma, 74 Cal L Rev at 194 (cited in note 98) ("[a] familiar convention allows one to make a command more polite by superficially offering a choice, as in 'How would you like to do me a favor and open the door?'").

[100] See, for example, Johnny I. Murdock, James J. Bradac, and John W. Bowers, *Effects of Power on the Perception of Explicit and Implicit Threats, Promises, and Thromises: A Rule-Governed Perspective*, 48 Western J Speech Comm 344, 356 (1984).

[101] Judith A. Becker, Herbert Kimmel, and Michael J. Bevill, *The Interactive Effects of Request Form and Speaker Status on Judgments of Requests*, 18 J Psycholinguistic Res 521, 529 (1989).

[102] Thomas Holtgraves, *Communication in Context: Effects of Speaker Status on the Comprehension of Indirect Requests*, 20 J Exp Psychol: Learning, Memory, & Cognition 1205 (1994).

[103] In communication, maintaining face means preserving a person's positive personal and social identity (positive face) as well as maintaining freedom from constraint and avoiding violations of autonomy (negative face). See Penelope Brown and Stephen C. Levinson, *Politeness: Some Universals in Language Usage* 62 (Cambridge, 1987). In conversation, people try to maintain the face of the person to whom they are speaking (as well as their own). Id.

realizes he or she must comply with the message. Thus, because a police officer is perceived as an authority, he need not rely on coercive statements to achieve a goal—his role is adequate, and a polite request can increase face-sensitivity without reducing coercive power.[104] Because a coercive threat underlies any kind of confrontation regarding a potential rule violation,[105] the possibility of the officer's exercising the authority of the government influences the listener's understanding of the episode. Because people perceive discourse originating from an authority to be coercive regardless of assertive linguistic cues, authority figures need not use highly face-threatening language—part of that burden is carried by the badge and gun.[106] When discourse is framed as a suggestion (rather than imperative), and when the listener believes that he or she must comply anyway (due to the authority of the speaker), the suggestion is taken as a sign that the authority is being sensitive to face.[107]

The influence of the speaker's authority on perceived meaning has been demonstrated empirically. In one study, participants assumed the role of an employee who was late for work.[108] The employee was advised, either by her boss or by her co-worker, not to be late anymore. The results revealed that when a peer is speaking, the listener perceives imperatives ("don't be late again") as more coercive than suggestions ("try not to be late again"). But when an authority (such as the boss) is speaking, there is no such difference in perceived coercion—forcefulness of language does not matter. The authors conclude, "those who have authority apparently need not activate coercive potential through their discourse. Their roles are sufficient to do so."[109] So, when authorities

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[104] Jennifer L. Vollbrecht, Michael E. Roloff, and Gaylen D. Paulson, *Coercive Potential and Face Threatening Sensitivity: The Effects of Authority and Directives in Social Confrontations*, 8 Intl J Conflict Mgmt 235, 236 (1997).

[105] Here, the rule violation is the carrying of illegal contraband. The authorities are police officers. So the rule violation is also a formal violation of the law.

[106] This point was understood by Justice Souter, who, in his dissent in *Drayton*, wrote that "a police officer who is certain to get his way has no need to shout." *Drayton*, 122 S Ct at 2116–17.

[107] See Peter Tiersma, *The Judge as Linguist*, 27 Loyola LA L Rev 269, 282 (1993) (arguing that the power relationship between police and citizen suggests that when police make a request that they could apparently compel, the request will be viewed as a command).

[108] Vollbrecht, Roloff, and Gaylen, 8 Intl J Conflict Mgmt at 244 (cited in note 104).

[109] Id.

use softened discourse—suggestions rather than imperatives—they can exert control without being face-threatening.

In *Drayton*, the Court apparently ignored the empirical evidence demonstrating the powerful influence of contextual factors (such as the authority of the speaker) in how listeners interpret the coerciveness of language.[110] Instead, the *Drayton* majority appears to have simply substituted the intuitive judgment of its members regarding how they would interpret a police officer's request to search had they been passengers on the bus. For example, during oral argument in *Drayton*, Justice Scalia made clear that his own personal intuition is that the literal meaning of the words of the police officer would "counteract" contextual cues suggesting compulsion, such as the placement of one of the officers in the driver's seat of the bus.[111] The majority's opinion also reflects this intuition in its emphasis on the literal meaning of the words spoken by the officer: "[n]othing Officer Lang said indicated a command to consent to the search. . . . Rather he asked for . . . permission. . . ." Again, the intuition expressed by the Court is that literal meaning overpowers contextual meaning. Unfortunately, these intuitions are not supported by the data. Rather, the available data strongly suggest that quite the opposite is the case: the meaning of the police officer's words was strongly influenced by context, so that the police officer's statement to bus passengers, "Do you mind if I search?" was interpreted in these circumstances as a command, not a request for permission. In sum, the politeness of the officer's words, so heavily emphasized by the Court, does not give rise to the inference that passengers thereby felt free to refuse the officers' requests or terminate the encounter.

D. PERSONAL SPACE, STATUS, AND COMPLIANCE

Studies of interpersonal distance and compliance have demonstrated that people feel more pressure to comply with a request when the requester speaks to them from a close physical distance

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[110] The Court was informed of this empirical evidence in the Brief for the Respondents. Brief of Respondents at 42 n 4.

[111] Official Transcript of Oral Argument, *Drayton* at 46. Specifically, Justice Scalia asked, "Why . . . is it that the most immediate expression of the police officers does not counteract whatever other indications of compulsion might exist under the circumstances? . . . [T]here's a policeman in the front of the bus. Who cares? He . . . has made it very clear that he's asking for your permission."

(1–2 feet).[112] For example, in one study, students sitting alone in a cafeteria were approached and asked whether they would be willing to participate in a study for no compensation.[113] Students who were approached at a close distance (12–18 inches) were more likely to comply with the request than students approached from a further distance (36–48 inches). Interestingly, the experimenters chose a distance of 12–18 inches—the same distance chosen by Officer Lang in *Drayton*—specifically to ensure that participants' sense of personal space was violated. (It was.)[114] In other studies, invasion of personal space led to higher rates of compliance when adults were approached on the street with a request to make change,[115] and when college students were approached by other students on campus with a request to sign a petition.[116]

Personal space can be defined as "the area individuals maintain around themselves into which others cannot intrude without arousing discomfort."[117] This zone of discomfort varies to some extent across individuals and situations. But, generally speaking, the degree of discomfort experienced is proportional to the degree of intrusion into one's personal space.[118] Thus, in one study, subjects approached by another person reported feeling "slightly uncomfortable" at about 27 inches, "moderately uncomfortable" at about 20 inches, and "very uncomfortable" at about 12 inches.[119] People who feel that their personal space is being invaded display reactions of stress and physiological arousal,[120] which are experi-

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[112] Chris Segrin, *The Influence of Nonverbal Behaviors in Compliance-Gaining Processes*, in Laura K. Guerrero, Joseph A. DeVito, and Michael L. Hecht, eds, *The Nonverbal Communication Reader: Classic and Contemporary Readings* (Waveland, 1990).

[113] Robert A. Baron and Paul A. Bell, *Physical Distance and Helping: Some Unexpected Benefits of "Crowding In" on Others*, 6 J Appl Soc Psychol 95 (1976).

[114] A questionnaire administered after the experiment revealed that students approached at a distance of 12–18 inches felt more tense and uncomfortable than students approached at a distance of 36–48 inches. Id.

[115] Robert C. Ernest and Ralph E. Cooper, *"Hey Mister, Do You Have Any Change?" Two Real World Studies of Proxemic Effects on Compliance with a Mundane Request*, 1 Personality & Soc Psychol Bulletin 158 (1974).

[116] David B. Buller, *Communication Apprehension and Reactions to Proxemic Violations*, 11 J Nonverbal Behav 13 (1987).

[117] Leslie A. Hayduk, *Personal Space: Where We Now Stand*, 94 Psychol Bulletin 293, 293 (1983).

[118] Id at 298.

[119] Id.

[120] Id at 319.

enced subjectively as bewilderment and embarrassment.[121] They may assume a defensive posture, or try to move away.[122] If these initial acts are ignored they may try to flee from the "space invader."[123] Most of these "coping tactics," of course, were not possible on the bus.

When deciding how close is too close, authority roles matter. People naturally provide high-status individuals with more personal space than low-status individuals.[124] Even though we are not usually aware of it, we show special deference to high-status people by keeping a distance from them. The prerogative to invade others' space resides with people who have higher status and power.[125] Law enforcement officials are well aware of this phenomenon and exercise their prerogative to their advantage. For example, one widely used police textbook recommends that the interrogator should begin the interrogation by sitting a few feet from the suspect, with no table or desk in between because an obstruction of any sort "affords a guilty suspect a certain degree of relief and confidence not otherwise attainable."[126] The authors recommend that the interrogator gradually move his chair closer so that the suspect's knees are almost between the interrogator's knees.[127] This technique was also used successfully by the officers on the bus in *Drayton*, where Officer Lang placed his face 12–18 inches away from each passenger he addressed.

Also relevant here is the finding that in particular physical environments people prefer more space, including when they are in a corner (as was defendant Brown in *Drayton;* he was sitting in the window seat), under a low ceiling (as were all bus passengers—the overhead rack was only 19 inches above them), in a stressful

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[121] Nancy J. Felipe and Robert Sommer, *Invasions of Personal Space*, 14 Soc Problems 206 (1966).

[122] Robert Sommer, *Personal Space: The Behavioral Basis of Design* at 35 (Prentice-Hall, 1969).

[123] Id.

[124] Peter A. Anderson and Linda L. Bowman, *Positions on Power: Nonverbal Influence in Organizational Communication*, in Laura K. Guerrero, Joseph A. DeVito, and Michael L. Hecht, eds, *The Nonverbal Communication Reader: Classic and Contemporary Readings* (Waveland, 1990).

[125] Id.

[126] Frederick E. Inbau and John E. Reid, *Criminal Interrogation and Confessions* 80 (Aspen, 4th ed 2001).

[127] Id at 339–40.

situation (as were, presumably, all passengers approached and addressed by the police), or expecting a hostile encounter (as some might have been when approached by a police officer whose announced intention was to investigate his suspicion that passengers are carrying drugs or weapons).[128]

In sum, people approached at a close distance by an authority in a tightly enclosed space with no opportunity to move further away or leave feel discomfort and tension; at the same time, people who find their space invaded in this manner are more willing to comply with the request of the person making them feel uncomfortable. Compliance in the face of discomfort, anxiety, and tension strongly suggests that in bus sweep situations, passengers are coerced to comply with a request that they would prefer to refuse—the *Bostick* Court's very definition of involuntary consent.

E. TIME PRESSURE, SCRIPTED CONFORMITY, AND MINDLESSNESS

Bus passengers like Drayton and Brown who are approached by police and asked to submit to a search are necessarily under time pressure to provide an immediate answer. Requesting a few days or even a few minutes to think it over is not a viable option because the bus is in a temporary stopover city and police typically begin their "sweep" minutes before the bus is scheduled to depart. Also, the pragmatics of conversation demand that pauses or silence not last more than a few seconds, lest they be interpreted as evasive or otherwise uncooperative.

Given this time pressure, there is a question whether passengers say yes when they would prefer to say no, and would have said no had they been given more time to decide. This might be the case. As an illustrative example, consider one town's effort to curb unsupervised underage drinking in private homes. The local police in Ridgewood, New Jersey, mailed out 2,700 consent forms to households with teenage children, requesting permission from the homeowners to allow police to enter and search their home if the

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[128] Hayduk, 94 Psychol Bulletin at 318 (cited in note 117). Note that, depending on one's race, socioeconomic status, or prior personal contact with the police, some citizens might be more likely than others to expect a hostile encounter. Demographic differences in police-citizen interactions become relevant in the context of intercity bus travel because passengers are disproportionately poor, nonwhite, and less educated. See note 194.

police receive a report of teenage drinking in their home.[129] Only 20 forms were signed and returned. This minuscule positive response rate stands in stark contrast to the very large percentage of bus passengers that consent to the police request to search.[130] As pointed out earlier, the large percentage of passengers who agree to a search is not, in itself, evidence of coercion. But the large difference in consent rates between citizens under severe time pressure and citizens under no time pressure to make a decision suggests that time pressure might be a factor causing passengers to say yes when they would prefer to say no.

Empirical research does suggest that time pressure affects decisions. Decisions made under time pressure use different processes from decisions made without time stress. Many studies have documented that time pressure reduces the effectiveness of decision making.[131] People making decisions under time pressure engage in what has been termed "premature closure": they end their decision process prior to considering all the relevant information and alternatives.[132] For example, people solving problems under time pressure fail to consider relevant information that people not under time pressure successfully do consider.[133] They also engage in defensive reactions, such as denying the importance of pieces of information.[134] People making decisions under time pressure tend to rely on "accessible constructs"[135] like stereotypes. For example, people who are asked to make a judgment about what another person does for a living are more likely to rely on stereotypical infor-

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[129] Robert Hanley, *An Anti-Drinking Campaign and How It Flopped*, NY Times B1 (Sept 28, 1994). Cited in Strauss, 92 J Crim L & Criminol at 266 n 195 (cited in note 18).

[130] Of course, any given face-to-face request may be more effective than a corresponding mailed request simply because mailed requests are more easily discarded or ignored. But the low compliance rate in this example is nonetheless illustrative.

[131] See, for example, Dan Ariely and Dan Zakay, *A Timely Account of the Role of Duration in Decision Making*, 108 Acta Psychologica 187, 197 (2001); Irving L. Janis, *Stress, Attitude, and Decisions* (Praeger, 1982).

[132] See Irving L. Janis, *Decision Making Under Stress*, in L. Goldberger and S. Breznitz, eds, *Handbook of Stress* (Free Press, 1982); Jay J. J. Christiansen-Szalanski, *A Further Examination of the Selection of Problem-Solving Strategies: The Effects of Deadlines and Analytic Aptitudes*, 25 Organizational Behav & Human Decision Processes 107 (1980).

[133] See Edward M. Bowden, *Accessing Relevant Information During Problem Solving: Time Constraints on Search in the Problem Space*, 13 Memory & Cognition 280, 284 (1985).

[134] See Ariely and Zakay, 108 Acta Psychologica at 197 (cited in note 131).

[135] See Chi-yue Chiu, Michael W. Morris, Ying-yi Hong, and Tanya Menon, *Motivated Cultural Cognition: The Impact of Implicit Cultural Theories on Dispositional Attribution Varies as a Function of Need for Closure*, 78 J Personality & Soc Psychol 247, 255–56 (2000).

mation if their judgment is made under time pressure, and to fail to consider alternatives compared to decisions not made under time pressure.[136] People under time pressure immediately seize onto the first information that grabs their attention and will ignore other more diagnostic information.[137] So, people deciding whether a target person is a painter focus on information stereotypical of painters and ignore information that would rule out other related professions such as architects.

In most of the research on decision making under time pressure, the decision tasks used are ones where there is an objectively correct answer; these studies show that time pressure can cause people to be less accurate or to choose the wrong answer.[138] This is because cognitive functioning, as a general matter, declines under stresses like time pressure.[139] But even when decisions involve choosing the best alternative for oneself, as opposed to choosing an objectively correct answer, the effects of time pressure operate in the same way. This suggests that because the passengers on the bus on which Drayton and Brown were riding were faced with a police officer demanding an immediate response, the passengers may have engaged in "premature closure" when they consented to converse with the officers and to allow them to search their baggage. Even seemingly small stresses, such as the presence of other people in the same room when we are responding to an unfamiliar problem, can lead to physiological responses that make us feel threatened and compromise our ability to reason and think.[140] The decision processes used by passengers who were confronted in a public place, and who were feeling pressure to respond imme-

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[136] See Arie W. Kruglanski and Ofra Mayseless, *Contextual Effects in Hypothesis Testing: The Rule of Competing Alternatives and Epistemic Motivations*, 6 Soc Cognition 1, 12–17 (1988).

[137] Id.

[138] See, for example, John W. Payne, James R. Bettman, and Mary Frances Luce, *When Time Is Money: Decision Behavior Under Opportunity-Cost Time Pressure*, 66 Organizational Behav & Human Decision Processes 131 (1996); Jose H. Kerstholt, *The Effect of Time Pressure on Decision-Making Behaviour in a Dynamic Task Environment*, 86 Acta Psychologica 89 (1994); Edward M. Bowden, *Accessing Relevant Information During Problem Solving: Time Constraints on Search in the Problem Space*, 13 Memory & Cognition 280 (1985); Dan Zakay and Stuart Wooler, *Time Pressure, Training and Decision Effectiveness*, 27 Ergonomics 273 (1984).

[139] See Ariely and Zakay, 108 Acta Psychologica at 197 (cited in note 131).

[140] See Jim Blascovich and Joe Tomaka, *The Biopsychosocial Model of Arousal Regulation*, 28 Advances in Exp Soc Psychol 1, 23–24 (1996) (reporting that people asked to solve math problems in the presence of a friend experience increased physiological responses (heart rate and blood pressure) and worse math performance compared to those solving math problems in the absence of a friend).

diately to police requests, were likely to be characterized by reliance on implicit cultural theories and norms[141] (such as "police officers must be obeyed") and by a failure to consider information that might have counseled against agreeing to be searched.

Such failure to consider all relevant information is predictable in light of the fact that human understanding of the social world is largely dependent on scripts.[142] A script is a "mental representation of a social situation as it unfolds over time."[143] Once a script is activated, it allows us more easily to interpret our perceptions and observations in a given situation. Events that always follow the same order become chronically associated, so that when we experience the first event we expect the next one to follow.[144] In fact, when we are mentally ready to perceive an event in a standard situation, we often carry out what would be the next event in the script even when the prior event did not occur, simply because the superficial features of the situation had followed the same form as the script.[145]

Ordinary people have numerous event scripts at their disposal—for restaurants, funerals, weddings, the classroom, and so on. For instance, the student script for a classroom involves finding one's seat, facing the front of the classroom, and speaking only when it is appropriate to do so. Deviations from the script (standing up, speaking out of turn, clipping one's toenails, etc.) are bound to elicit looks of surprise from others. In fact, flouting of event scripts is often the premise for humor.[146] Scripts are used so often that we rely on them without ever thinking about it—scripts are both automatic and pervasive.[147] Early use of scripts (such as the first

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[141] See Chiu et al, 78 J Personality & Soc Psychol at 256 (cited in note 135).

[142] Roger C. Schank and Robert P. Abelson, *Scripts, Plans, Goals, and Understanding* 36–68 (Erlbaum, 1977).

[143] John A. Bargh, *Automaticity in Social Psychology*, in Tory Higgins and Arie W. Kruglanski, eds, *Social Psychology: Handbook of Basic Principles* 169, 179 (Erlbaum, 1996).

[144] Id.

[145] Ellen J. Langer, Arthur Blank, and Benzion Chanowitz, *The Mindlessness of Ostensibly Thoughtful Action: The Role of "Placebic" Information in Interpersonal Interaction*, 36 J Personality & Soc Psychol 635, 641 (1978).

[146] Consider a recent television show (called "Spy TV"), the humorous premise of which is based on the incongruence of social scripts (such as a man shaving at his lunch table) and the reactions of others that ensue. The final product is considered humorous because we so rarely see people flout implicitly agreed-upon scripts.

[147] Ellen J. Langer and Allison I. Piper, *The Prevention of Mindlessness*, 53 J Personality & Soc Psychol 280, 280 (1987).

time in a restaurant) requires thoughtful and conscious attention.[148] But once we become accustomed to relying on a particular script, it no longer requires the same level of conscious deliberation. This automatic activation and use of scripts is fortunate because without them we would suffer from cognitive overload.

Even though interacting with police is not something most people do on a daily basis, we are exposed to depictions of such interactions frequently in the popular press and other forms of popular culture—television, movies, and novels. As a result of these depictions, our script for interacting with police officers undoubtedly involves ready cooperation and compliance with requests.[149] Automatic processing of scripts is intensified when the script involves interacting with an authority. In making an on-the-spot decision about whether to comply with the request of an authority, people's actions are best characterized by "reacting, not thinking"—in other words, people often react and respond to legitimate authority in a mindless, automatic, thoughtless, fast, and shallow manner with little processing.[150] Similarly, complying with an officer's request to search may fit into a well-learned script of cooperating with legitimate authorities. Such compliance occurs automatically once a script is engaged, so that bus passengers, for example, regularly and uniformly relinquish control of their personal belongings to police officers, even if, had they been asked the question, "Would you voluntarily agree to allow a police officer looking for drugs to search your luggage?" they may, given a different context that allows opportunity for reflection, answer "no."

III. Applying the Evidence: Perspective Is Everything

A. Perceiving Coercion

From the earlier discussion, we know that some of the factors that have been reliably shown to lead to coercion (authority, social validation, pragmatics of politeness, time pressure, personal space,

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[148] John A. Bargh, *The Automaticity of Everyday Life*, in R. Wyer, ed, 10 *The Automaticity of Everyday Life: Advances in Social Cognition* 1, 29 (Erlbaum, 1997).

[149] See Jones, 122 *Interpersonal Perception* at 50 (cited in note 32).

[150] Cialdini, *Influence: Science and Practice* at 186 (cited in note 53); see, for example, Roger Schank and Robert P. Abelson, *Scripts, Plans, Goals, and Understanding: An Inquiry into Human Knowledge Structures* (Erlbaum, 1977); Bargh, *Automaticity in Social Psychology* at 170 (cited in note 143).

and scripted conformity) were present in the situation in which Drayton and Brown (and the other bus passengers) found themselves. But how do we know that the passengers acquiesced to the search because they were coerced, rather than for other reasons? In this sense, the bus situation is unlike the situation in some of the studies discussed above, where coercion can be safely inferred solely from the person's behavior. For example, in the Milgram studies, (most) people clearly had a preference to refrain from hurting another human being. If only a small proportion of subjects had complied, we would have to consider the possibility that those subjects were actually acting consistently with their preferences—these are the few sadists who actually prefer to harm another human. But, in fact, 100% of subjects in Milgram's experiments administered shocks at the point when the subject was apparently being harmed. Assuming that most people prefer not to harm others without justification, we can infer that most (if not all) subjects were coerced into complying with the experimenter and did an act that they preferred not to do.

In *Drayton*, the preference not to engage with the officers or consent to the search cannot be inferred so readily. It is plausible that a sizable proportion of citizens approached actually preferred to engage with the officer and consent to the search, out of a sense of good citizenship, civic virtue, or some similar sentiment. If, however, a certain proportion of people that the police approached preferred not to consent, but did so because they felt coerced, how would we know this? The fact that no one says "no" is certainly consistent with coercion, but it does not prove coercion, because it could be the case that the low refusal rate is most accurately explained by people's strong sense of good citizenship and civic virtue. One way to find out is to ask people. The study described next did just that. We have no direct evidence to address whether a reasonable person present on Drayton and Brown's bus that day would have felt free to terminate the encounter or refuse consent. No one did a poll of that bus or (apparently) any other bus: there appear to be no studies examining coercion in the bus sweep situation. But there is a study examining another voluntary consent situation: the highway stop.

From the perspective of the police officers, their interactions with citizens on the bus during the sweeps are completely noncoercive. They simply board the bus and engage in friendly conversa-

tion. As Officer Lang put it, "I [was] being friendly and courteous. . . . I [was] just talking to them in a nice tone of voice."[151] The majority in *Drayton* apparently was deeply impressed with the lack of coercion that was plain from the police perspective. In its analysis of whether a seizure took place, the majority focused exclusively on the behavior of the police—what they did and, even more, what they did not do. The majority asserted that the police gave the passengers no reason to believe that they were required to answer the officers' questions.[152] Specifically, the Court noted that the officers did not brandish their weapons or make any intimidating movements.[153] They did not block the aisle. They spoke to each passenger individually in a polite, quiet voice. They said nothing to suggest passengers were prohibited from leaving or otherwise ending the conversation. The police did not use force, nor did they make "an overwhelming show of force." They did not make threats. They did not use commands. They did not even use an authoritative tone of voice. Thus, from the perspective of the police, the encounter with each passenger was far from coercive, but was instead polite, friendly, and informal.

Perspective, however, is everything. It is extremely unlikely that the targets of the police inquiry and search—the bus passengers—experienced the encounter in the same way as the police. An atmosphere interpreted as noncoercive and voluntary from the perspective of the police can at the same time be experienced as coercive and nonvoluntary from the perspective of a reasonable (innocent) person who is the target of police suspicion.[154] This crucial difference in perceived voluntariness arising from differences in perspec-

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[151] *Drayton*, Joint Appendix at 58.

[152] *Drayton*, 122 S Ct at 2112

[153] Officer Lang's display of his badge and simultaneous placement of his face 12–18 inches from the face of each passenger was likely to have been experienced by the passengers as intimidating. But because Officer Lang was "trying to be friendly" and because the Court adopted the perspective of the police, an action experienced by passengers as intimidating was interpreted as not intimidating.

[154] In fact, citizen ratings of the intrusiveness of many different police search and seizure scenarios reveal that a scenario involving the police "boarding a bus and asking to search luggage" is perceived as among the most intrusive of all police actions, on a par with the searching of residences. See Christopher Slobogin and Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 Duke L J 727, 735–42 (1993). Out of 50 different scenarios, citizens ranked the bus sweep scenario as the seventh most instrusive invasion of privacy or autonomy; average ratings of the bus sweep scenario placed it as even more intrusive than police "questioning on a public sidewalk for ten minutes." Id.

tive has been firmly demonstrated as an empirical matter, as I discussed earlier. In the next section, I review survey evidence that suggests that citizens confronted by police requesting consent to search accede to those requests because of the situational constraints examined in the various empirical studies reviewed earlier.

At this point, however, a discrepancy between the Court's stated rationale and its actual analysis begins to emerge. In both *Bostick* and *Drayton*, despite announcing a rule that requires the decision maker to adopt the perspective of the citizen (whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter), the Court nonetheless has taken the perspective of the police and ignored the perspective of the citizen. As a result, encounters that the Court characterizes as noncoercive and consensual were likely experienced by the citizen (and the reasonable person) as coercive and nonconsensual. In *Bostick* and in *Drayton*, the Court claimed to analyze whether a seizure took place (i.e., whether a reasonable person felt free to terminate the encounter) and whether consent to search was freely given (i.e., whether the defendant was coerced to comply when he would prefer to refuse). In fact, because the Court adopted the narrow perspective of the police, the true basis of its holding in *Bostick* and in *Drayton* was that the conduct of the police was reasonable under the circumstances in the sense that it was not abusive.[155] Although it may be true that the conduct of the police in these cases was not abusive, the Court announced a holding in both of these cases that was based on a very different footing—that there was no seizure and there was no unconsented search. If the police did, in fact, effect a suspicionless seizure of the bus passengers, such a seizure violated the Fourth Amendment, even though one could argue that the officers' conduct was not abusive. Similarly, if the police failed to secure voluntary consent from the passengers they searched, such searches violated the Fourth Amendment.[156] In Section II, I discussed general evidence that pressures to comply were especially strong in the situation in which Drayton and Brown

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[155] See William J. Stuntz, *Local Policing After the Terror*, 111 Yale L J 2137, 2170 n 102 (2002).

[156] In both *Bostick* and in *Drayton*, consent was the sole justification proffered by the prosecution for the warrantless police search. Similarly, the only seizure issue was whether the passengers had been seized at all; there was no Fourth Amendment justification for a seizure. See *Bostick*, 501 US at 433–34 ("The State concedes . . . that the officers lacked the reasonable suspicion required to justify a seizure . . .).

found themselves. Next, I discuss evidence specific to police-citizen encounters that tends to undermine the plausibility of the Court's holding that reasonable citizens feel free to refuse police requests. At the same time, this same evidence undermines the notion that requiring the police to caution citizens that they have a right to refuse to consent will enable citizens to avoid situations in which they are pressured to consent.

B. CITIZENS' FEELINGS OF INVOLUNTARINESS IN POLICE ENCOUNTERS—SURVEY EVIDENCE

The robust findings from the compliance, pragmatics, personal space, time pressure, and scripted conformity studies reviewed earlier make a strong case for doubting that reasonable passengers involved in bus sweeps actually feel free to terminate their conversations with the police or deny the request to search. The powerful findings from the confession studies show that a confession that looks voluntary to the police might feel coerced by the suspect. Analogously, what looks like a friendly conversation to the police officers boarding the bus, at the same time feels like a coerced encounter and search to the passengers. And how it feels to the passengers is the crux of the Court's test: there is no seizure if a reasonable person would feel free to terminate the encounter, and consent is voluntary if a reasonable person would feel free to refuse. How free one feels determines whether one has been seized and whether permission to search is given voluntarily.

But there is another piece of empirical evidence that also strongly suggests that reasonable bus passengers generally do not feel free to decline the officer's request to search or otherwise terminate the encounter. The simplest way to determine whether a reasonable person voluntarily consented to a police search is simply to ask them, "To what extent did you feel free to decline the officer's request?" While there is no direct evidence available about the subjective experience of the reasonable bus passenger during a bus sweep (it appears that no one has asked this question of bus passengers), there is an existing survey of motorists who had been asked to consent to a search of their car after being stopped by police for a traffic violation.[157] Some police depart-

[157] Illya D. Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police-Citizen Encounter*, unpublished doctoral dissertation, on file with author.

ments, including the Ohio Highway Patrol, keep records of requests for consent searches.[158] Illya Lichtenberg randomly sampled a group of citizens who had been asked for their consent to search their car after they were stopped for traffic violations on Ohio interstates between 1995 and 1997 and interviewed them about their experiences.[159] An overwhelming majority (49 out of the 54 respondents) agreed to let the police the search; five refused.[160] There are a number possible explanations for why such a large proportion of motorists agreed to have the police search their cars. As with bus passengers, it is possible that the large number of motorists consenting to the search did so because they felt that the police were doing important work and that good citizens ought to cooperate when the police request cooperation. On the other hand, it is also possible that many of the motorists felt that they did not have a choice, and agreed involuntarily. Lichtenberg's interview data suggest that the latter interpretation is more plausible. Of the 49 motorists who agreed to let police search their cars, all but two said that they were afraid of what would happen to them if they did not consent.[161] Their fears included having their trip unduly delayed, being searched anyway, incurring property damage to their car if they refused and police searched anyway, being arrested, being beaten, or being killed.[162] Some representative responses include:

> I knew legally I didn't have to, but I kind of felt that I had to.[163]

See also Illya D. Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the "Voluntary" Waiver of Fourth Amendment Rights*, 44 Howard L J 349 (2001).

[158] Pursuant to standard departmental procedure, the Ohio State Police maintained a record for every traffic stop in which police requested consent to search during the period reported. Lichtenberg, *Voluntary Consent* at 163–64 (cited in note 157).

[159] Id at 241, 246.

[160] Id at 251. The rate of refusal to consent in the sample was therefore about 9%. The sample was drawn from a population consisting of all traffic stops conducted between January 1995 and May 1997 by the Ohio Highway Patrol where consent was requested (N = 699). The rate of refusal in the sample (about 9%) was similar to the rate of refusal in the population (about 8%). Note that the sample size of the survey described here is small (N = 54). Nevertheless, the sample well represented the population in terms of refusal rate, gender, and age. The race/ethnicity of the sample subjects resembled that of the population fairly well, except that Hispanic subjects were underrepresented in the sample.

[161] Id at 268.

[162] Id at 261–63.

[163] Id at 264, subject #15373.

> I felt a little pressured that I didn't have much choice, due to the circumstances surrounding the incident it would have been very, very inconvenient to be locked up for the night. I didn't know if that was an option, and I didn't want to find out.[164]
>
> . . . at first I didn't think there was any reason to [consent] and then I realized that if I didn't they would do it anyway.[165]
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> . . . to this day I do not know what would have happened if I had said, "No, absolutely not." . . . I really didn't know how else to respond. . . .[166]

Many emphasized that they felt pressure to consent because they were far from home and had no one to call if they angered police and ended up in jail for refusing. When asked if they felt the police would have honored their request if they had refused, only one citizen answered "yes," and one did not know.[167] All of the remaining respondents (96%) felt that police would not have honored their refusal and would have searched them anyway.[168] Their concerns were apparently well founded: of the five motorists who declined to consent to the search, two reported being searched despite their explicit refusal to consent.[169] Another motorist who refused to consent was not searched but was threatened with future retaliation.[170]

C. THE FUTILITY OF MIRANDA-LIKE WARNINGS IN CONSENT SEARCH SITUATIONS

The *Drayton* Court took as its main mission to "determine whether officers must advise bus passengers . . . of their right not to cooperate."[171] This is not the first time the "warning" issue has arisen in consent search cases. In *Schneckloth*, the Court rejected the possibility of requiring police seeking consent to search to issue

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[164] Id at 261, subject #3371.

[165] Id at 261, subject #4337.

[166] Id at 263, subject #16633.

[167] Id at 271–72.

[168] Id.

[169] Id at 280–81.

[170] Id at 279–80. This motorist was apparently so shaken that he reported that he avoids driving on the interstate near his home (where the stop occurred) even though he now drives a different car than the one he drove on the day he was stopped.

[171] *Drayton*, 122 S Ct at 2108.

a warning regarding the right to refuse, akin to *Miranda*'s requirement that police interrogators warn a suspect in custody of the right to remain silent. The *Schneckloth* majority did, however, acknowledge that whether the suspect was aware of the right to refuse is a relevant factor in the analysis of whether the consent was voluntary. The issue of mandatory police warnings in consent search situations arose again in *Ohio v Robinette*,[172] a case involving a police request for consent to search during the course of a traffic stop.[173] In *Robinette*, the Court rejected the notion that police must inform motorists that they are "legally free to go" before requesting consent to search.

Several commentators have supported a requirement that the police warn citizens of their right to refuse a request to search.[174] They argue that the coercion citizens feel arises, at least in part, from the lack of knowledge of their right to refuse the request. One cannot refuse if one is not aware that refusal is an option. By requiring police to advise suspects that they can refuse to cooperate with the request to search, the argument goes, we remove the coercive aspect of the request and allow citizens to make a free and informed choice. The assumption is that if police are required to issue *Miranda*-type warnings in consent search cases, the compliance rate will necessarily decrease because, armed with the knowledge that refusal is an option, some people will choose to refuse. In fact, the majority in *Schneckloth* appears to have assumed that if warnings were required, virtually all citizens would refuse to consent to a search.[175]

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[172] *Robinette*, 519 US 33 (1996).

[173] In *Robinette*, a police officer stopped a motorist for speeding and ordered him out of the car. After checking for outstanding warrants, the officer issued an oral warning and returned the driver's license. The officer then asked the motorist for consent to search the car. The Court rejected the motorist's claim that because the traffic stop had concluded, he was unlawfully seized during the request for consent. Instead, the Court held that the Constitution does not require that the officer inform the motorist that he is free to go before a consent search may be deemed voluntary. Id at 40.

[174] See Devon W. Carbado, *Erasing the Fourth Amendment*, 100 Mich L Rev 946, 1030 (2002); Carol S. Steiker, *How Much Justice Can You Afford? A Response to Stuntz*, 67 Geo Wash L Rev 1290, 1294 (1999); Rebecca A. Stack, *Airport Drug Searches: Giving Content to the Concept of Free and Voluntary Consent*, 77 Va L Rev 183, 205–08 (1991). Other commentators question whether police issuance of *Miranda*-type warnings in the consent search context is likely to dissipate coercion. See Strauss, 92 J Crim L & Criminol at 254 (cited in note 18).

[175] *Schneckloth*, 412 US at 229. The Court worried that adding a warning requirement would "in practice, create serious doubt whether consent searches could continue to be conducted." Id.

That assumption turns out to be mistaken, at least in instances where it has been explicitly examined. A study of all Ohio highway stops conducted between 1995 and 1997 found no decrease in consent rates after police were required to advise motorists of their right to refuse to cooperate with a request for consent to search.[176] In fact, the same number of citizens consent with the warnings as without the warnings. Apparently, people are unaffected by the warnings because they do not believe them—they feel that they will be searched regardless of whether or not they consent.[177] Why would people who are told by police that they have a right to refuse to consent to search persist in believing that they have no choice and will be searched anyway? Many of the factors discussed earlier in Section II come into play here: we comply with the police not because we make a deliberate conscious choice to respond in a particular way, but rather because we mindlessly respond in a manner consistent with social roles; just as we do not hear "May I see your license and registration please?" as a genuine question, we do not hear "You have the right to refuse to consent" as a genuine option; under time pressure we respond to requests of authorities in the same way we usually do, by automatically complying. In this way, the experimental research suggests generally what the survey of motorists finds explicitly: people who are targeted for a search by police and informed that they have a right to refuse nonetheless feel intense pressure to comply and feel that refusal is not a genuine option.

Given the magnitude of situational pressures brought to bear on citizens in bus sweeps and similar situations, there is no reason to think that police advising citizens that they have a right not to cooperate with their request for consent to search will significantly reduce coercion experienced by citizens in this situation. In this

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[176] Lichtenberg, 44 Howard L J at 349 (cited in note 157). Lichtenberg examined Ohio State Police consent search data both before and after the Ohio Supreme Court ruled in *Robinette* that motorists who are stopped for traffic violations must be warned that they are free to leave prior to being asked by police for consent to search their vehicle. *Ohio v Robinette*, 653 NE2d 695 (Ohio 1995) (the U.S. Supreme Court subsequently reversed and held that no such warning was necessary. *Robinette*, 519 US 33 (1996)). This comparison revealed that the rate at which motorists consented to searches actually increased nominally after the institution of warnings. Id at 367. An examination of data from a control group (Maryland, in which warnings were never instituted) reveals that a similar nominal increase occurred there during the same time period, suggesting that the Ohio warnings had no effect whatever on rates of consent to searches. Id at 372–73.

[177] See text accompanying notes 161–70.

sense the issue of police warnings in consensual search situations—considered by the Court twice in the last 10 years—is something of a red herring and should be put aside. This issue simply diverts attention away from the real question—whether citizens who are approached and searched in these situations have consented freely or perceived themselves as having no choice.

D. THE SECURITY FICTION

In concluding that a reasonable bus passenger would have felt free to decline the police officers' requests and terminate the encounter, the *Drayton* Court asserted that passengers did not experience the situation as coercive because they were concerned about security and felt that the officers' search of bags and persons on the bus "enhance[d] their own safety and the safety of those around them."[178] But the notion that the police were rifling through passengers' bags and patting down passengers' groin areas for the passengers' own protection has an "air of unreality"[179] when considered from the perspective of the passenger.

It is undoubtedly true that after the terrorist attacks of September 11, 2001, citizens feel a greater need to rely on police for safety and security. As a result, citizens and their elected representatives now may be more willing to give police wider latitude to intrude upon individual privacy interests to further the purposes of rooting out terrorism and enhancing our safety.[180] The majority in *Drayton* was keenly aware of this: a large part of the opinion in *Drayton* was devoted to showing that the police officers' actions were designed to make the bus more safe and secure, and that the innocent citizens on the bus very much appreciated what the police were doing to enhance their security. For example, the Court noted that

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[178] *Drayton*, 122 S Ct at 2113.

[179] Id at 2114 (Souter dissenting).

[180] See Robin Toner and Janet Elder, *A Nation Challenged: Attitudes; Public Is Wary but Supportive on Rights Curbs*, NY Times A1 (Dec 12, 2001) (a NY Times/CBS News poll revealed that 64% feel that it is a good idea for the president to have the authority to make changes in rights usually guaranteed by the constitution; 90% approve of the way the president is handling the campaign against terrorism); Brad Smith, *Critics Alarmed Over Post-9/11 Crackdown*, Tampa Tribune 12 (Sept 2, 2002) (a National Public Radio/Harvard Kennedy School poll revealed that 51% said it was necessary to surrender some civil liberties to curb terrorism; a *Los Angeles Times* poll reported that 59% were in support of wider government powers to tap telephone lines and monitor wireless communications). See also Stuntz, 111 Yale L J at 2138 (cited in note 155).

in the experience of police officers who conduct daily bus sweeps, the vast majority of all bus passengers cooperate. "Bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety."[181] The Court also noted that the fact that officers are armed and in uniform is a source of "assurance, not discomfort."[182] Again, the assumption is that bus passengers view the police as there to help them feel safe and secure.

This is implausible for a number of reasons. First, the purpose of "bus sweeps" as they are conducted on intercity buses is to intercept illegal narcotics. The bus sweeps are conducted by officers assigned to "narcotics interdiction" teams.[183] They choose to board only certain buses, coming from certain cities, precisely to increase the probability of finding illegal drugs.[184] Florida is a major corridor in the illicit drug trade, and this is why so many sweeps are conducted there.[185] *Drayton* is not about weapons,[186] bombs, or terrorism. Because of the risk of terrorism, there may come a time when all intercity bus passengers are subject to search as a condition of boarding the bus. Such routine searches as a condition for certain travel are now familiar and are widely accepted as being justified in light of current terrorism risks.[187]

But such was not the state of affairs in *Drayton*. The police officers' business was intercepting illegal drugs, and everyone on the bus knew why the police were there and what they were looking for (indeed, they announced this as their purpose). As a general matter, it is far from obvious that even innocent passengers generally felt relieved or assured to see police, knowing that they were

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[181] *Drayton*, 122 S Ct at 2113.

[182] Id at 2112.

[183] *Drayton*, Joint Appendix at 69.

[184] Id.

[185] The federal government recently designated eight Florida counties as a "High Intensity Drug Trafficking Area." See Dana Treen, *Medicine Cabinets, Mailrooms Figure in Drug Trade Trafficking Hides Behind a New Face, Experts Say*, Fla Times Union (Jacksonville) B3 (Sept 26, 2001).

[186] There was testimony at the suppression hearing in *Drayton* that Officer Lang asked Brown's permission to check him for weapons. *Drayton*, Joint Appendix at 92. Brown's attorney argued that this was a ploy to convince Brown to agree to a search that Brown assumed would be limited for those purposes. Respondent's Brief at 38 n 32. The *Drayton* opinion does not address this argument.

[187] The dissent's argument in *Drayton* begins with this point. *Drayton*, 122 S Ct at 2114.

looking for drugs secreted in baggage or on persons.[188] Second, passengers who were targeted for questioning and searches likely did not feel assured or safe once they became targets. From the perspective of the bus passenger to whom the police turn their attention, the police uniform and gun were indeed sources of discomfort, not assurance—just the opposite of the majority's assertion. At the moment the police officer approaches, holds up his badge, and begins introducing himself, it is quite clear that the police are motivated by suspicion, not benevolence. The police have boarded the bus to catch criminals, and they are now trying to determine whether you are one of them.

There is an additional reason to suspect that the *Drayton* majority is mistaken in its assertion that bus passengers welcome police requests to search their belongings and their persons. As discussed earlier, ordinary citizens who are asked to rate various police search and seizure scenarios report that they perceive police boarding a bus and asking to search luggage as among the most intrusive of all 50 scenarios evaluated, representing a greater "invasion of privacy or autonomy" than police questioning on the sidewalk for 10 minutes.[189] Considering that the goal of the police in *Drayton* was to identify people who were transporting illegal drugs, and that police requests to search bus passengers are perceived by ordinary citizens to be quite intrusive and invasive, it is unlikely that the specific manner in which police carried out their searches dispelled any inference of coercion, as the *Drayton* majority held.

IV. The Social Significance of Fourth Amendment Consent Jurisprudence

A. The Cost to Innocent People Subjected to "Consent" Searches

The sheer number of innocent people affected by the police practice of consent searches suggests that this is an issue that deserves attention. Consent searches are now a routine method of

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[188] There are a multitude of reasons why an innocent person would not want police rifling through his or her belongings or searching his or her person. A law-abiding citizen might possess items that he or she simply would prefer to keep private, such as personal grooming items, medications, sexual aids, or controversial printed matter, to name just a few.

[189] See Slobogin and Schumacher, 42 Duke L J at 735–42 (cited in note 154).

crime control in many jurisdictions,[190] and there has been a recent proliferation of routinized, suspicionless searches.[191] The Fourth Amendment requires no justification for consent searches: they may be done pursuant to slight suspicion, a hunch, or nothing at all. In some localities, law enforcement officers have adopted a practice of requesting consent to search during every traffic stop.[192] Because many (if not most) police departments do not keep track of every instance in which they request consent to search in the absence of probable cause, it is very difficult to estimate the actual number of consent searches that are conducted across the United States or the percentage of searches conducted pursuant to consent in the absence of probable cause. But the small amount of scattered evidence that exists suggests that the absolute number of consent searches is quite high, as is the proportion of consent searches of all searches conducted.[193] And their number seems to be increasing. For example, in just one city in Florida (Tallahassee), the local police have routinized bus sweeps to such an extent that a special squad of officers is assigned to conduct daily consent searches on intercity buses.[194] Over the course of just one typical year, it is

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[190] See Wayne R. LaFave, 3 *Search & Seizure* § 8.1 (West, 3d ed 1996).

[191] See *Minnesota v George*, 557 NW2d 575, 581–82 (Tomljanovich concurring) (noting the increasing use by police of subtle tactics to obtain citizens' consent to search, and remarking that officers have recently begun to receive training on obtaining consent, making use of tactics similar to "the training sales people receive in getting people to agree to buy things they do not want").

[192] *Robinette*, 519 US at 40.

[193] There is no single reliable estimate for the number of consent searches conducted in any given year nationwide (or even statewide). In some cases, police officers have testified that they ask for consent to search every motorist they stop. See *Harris v State*, 994 SW2d 927, 932 n 1 (Tex Crim App 1999). In one city, it was estimated anecdotally that 98% of the searches were consent searches. Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 Crim L Bull 405, 415 (1986).

[194] *Drayton*, Joint Appendix at 69. As others have observed, the targeting of intercity buses for consent searches gives law enforcement access to a segment of the population that is arguably especially vulnerable to coercive practices. Intercity bus passengers are disproportionately poor, nonwhite, and less educated. See William R. O'Shields, Note, *The Exodus of Minorities' Fourth Amendment Rights into Oblivion*, 77 Iowa L Rev 1875, 1899, n 211 (1992). Others have argued that the demographic characteristics of intercity bus passengers make it more likely that they will acquiesce to authority because they do not know how to object, or because they have more reason to be intimidated. See Dennis J. Callahan, *The Long Distance Remand: Florida v. Bostick and the Re-Awakened Bus Search Battlefront in the War on Drugs*, 43 Wm & Mary L Rev 365, 401 n 171 (2001); see also *United States v Lewis*, 728 F Supp 784, 789 (DC Cir 1990) (intercity buses "are utilized largely by the underclass of this nation who, because of greater concerns (such as being able to survive), do not often complain about [bus sweeps]").

estimated that these particular officers board and search buses carrying over 26,000 passengers, all of whom become potential search targets when police interrupt their trip to scrutinize passengers and baggage.[195] In another Florida city (Fort Lauderdale), one police officer testified that in the previous nine months he had personally conducted consent searches of over 3,000 bags.[196] One officer in Ohio testified that during the course of the past year he made 786 requests for consent to search of motorists whom he had stopped for routine traffic violations.[197]

The vast majority of people subjected to consent searches are innocent.[198] This is a fact that is easily forgotten because consent searches often come to our attention via published exclusionary rule cases, in which the defendant was (presumably) factually guilty. How do consent searches affect the lives of innocent people—that is, people who possess no illegal drugs or guns, are not engaged in illegal activity, yet find themselves in a situation where a police officer has approached them and wants them to submit to a search? In the Court's view, the citizen in this situation makes a rather simple decision, and the citizen ordinarily (absent a gun pointed at them, for example) would feel free to decline the officer's request to search, or even decline to engage in conversation at all with the officer, and to simply "terminate the encounter." In fact, the view of the *Drayton* majority appears to be that consent searches ought to be encouraged (or at least not discouraged) because they reinforce the rule of law.[199] Specifically, the Court said

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[195] *Drayton*, Joint Appendix at 80. Officer Lang testified that over a three-year period he conducted bus sweeps of four to six buses per day, four to five days per week, with each bus containing an average of 25–30 passengers.

[196] *Florida v Kerwick*, 512 So2d 347, 349 (1987).

[197] *State v Retherford*, 93 Ohio App 3d 586, 591–92 (1994). This same officer who requested consent 786 times in one year also claimed that the main reason he requested consent to search in the instant case was that "I need the practice, to be quite honest." Id.

[198] Because of the absence of systematic record keeping, it is difficult to calculate the proportion of consent searches in which the target is innocent of any crime. There are, however, scattered statistics for individual localities. For example, the Sheriff in one Florida county arrested only 55 of the 507 motorists subjected to consent searches over a three-year period. Jeff Brazil and Steve Berry, *Color of Driver Is Key to Stops in I-95 Video*, Orlando Sentinel Tribune A1 (Aug 23, 1992). An analysis of over 1,900 consent searches of motorists concluded that illegal drugs are discovered in about one of every eight searches. Lichtenberg, *Voluntary Consent* at 171 (cited in note 157).

[199] *Drayton*, 122 S Ct at 2114.

that a citizen-police interaction in which the police request consent to search and the citizen "advise[s] the police of his or her wishes" reinforces the rule of law, and ought to be "given a weight and dignity of its own."[200]

As I have already discussed, a more plausible interpretation of these encounters—one that is based on established empirical findings—is that in many consent search situations, citizens do not feel free to decline the search request, much less to terminate the encounter at the outset. Instead, the citizen develops a clear understanding from the context of the encounter that any attempt to decline the request or terminate the encounter would be construed by the officer as refusal to cooperate, and such refusal will be met with negative consequences for the citizen (even though it is typically unclear at the time precisely what those negative consequences would be).[201] In addition, citizens anticipate that part of the set of negative consequences would be a decidedly negative affective reaction on the part of the officer.[202] The officer's request for consent to search therefore places the citizen on the horns of a dilemma: either accede to a request that you would prefer to refuse, or refuse the request and incur the (unknown) consequences of being "uncooperative."[203]

The lasting impact that consent searches have on citizens is potentially important in the aggregate because of the sheer numbers of citizens who find themselves in the position of being asked by a police officer to submit to a search. The Lichtenberg survey provides strong evidence that a substantial portion of citizens whose consent was requested from the Ohio Highway Patrol felt nega-

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[200] Id.

[201] Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 San Diego L Rev 507 (2001). The sentiment of one motorist in Lichtenberg's survey is perhaps typical: "I don't think they would have searched the car then and there if I refused to sign the [consent] form, but I didn't know what would have happened beyond that." Lichtenberg, *Voluntary Consent* at 272 (cited in note 157), subject #3614.

[202] Steinbock, 38 San Diego L Rev at 272 (cited in note 201). According to one motorist in Lichtenberg's survey: "Yeah, if I refused, he would get pissed-off and detain me longer." Lichtenberg, *Voluntary Consent* at 269 (cited in note 157), subject #01185.

[203] As is well known to many citizens who live in communities where police presence is pervasive, the consequences of being perceived by police as "uncooperative" are sometimes much more severe than a simple negative affective reaction on the part of the law enforcement officer. See, for example, Tracey Maclin, *Black and Blue Encounters*, 26 Valp U L Rev 243 (1991).

tively affected by the police encounter. Rather than feeling that their response to the police had a "dignity and weight of its own," they instead felt afraid and reported that their respect for the police had diminished.[204]

After the search happened to them, most respondents (60%) reported that they thought about it often—about once a day.[205] When asked about how they felt about the experience, a small proportion of respondents (26%) made positive or neutral comments, such as the following:

> I wish they would do it more.[206]
>
> I'm just glad I had nothing to hide.[207]
>
> I guess they were just doing their job.[208]

A large majority (74%), however, had decidedly negative feelings about the experience:

> I don't know if you ever had your house broken into or ripped off . . . [it's] an empty feeling, like you're nothing.[209]
>
> People probably know me because I own my own business. It was embarrassing. It pissed me off . . . they just treat you like a criminal and you ain't done nothing. . . . I think about it every time I see a cop.[210]
>
> I feel really violated. I felt like my rights had been infringed upon. I feel really bitter about the whole thing.[211]
>
> I don't trust [the police] anymore. I've lost all trust in them.[212]

Thus, consent search encounters with police often have a substantial impact on people—they do not forget about the experience

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[204] For example: "I knew I wouldn't be going to jail for not replying, but I knew I might be detained. . . . There's a foggy area between knowing your rights . . . and something like a policeman disliking the way you answered a question. . . . [I] had to reply to avoid trouble." Lichtenberg, *Voluntary Consent* at 265 (cited in note 157), subject #16633.

[205] Id at 282 n 38.

[206] Id at 283, subject #05168.

[207] Id at 284, subject #13688.

[208] Id at 284, subject #07267.

[209] Id at 285, subject #11091.

[210] Id at 283, subject #14735.

[211] Id at 285, subject #15494.

[212] Id at 288, subject #12731.

quickly, and most people, in this sample at least, had lasting negative attitudes toward the incident (and sometimes toward the police) as a result.[213] Finally, unlike people who are discovered carrying unlawful contraband, innocent citizens who are subjected to coercive consent searches have no practical recourse—it is difficult to prove a constitutional violation even when their privacy interests protected by the Fourth Amendment were violated, and in any event the amount of money damages recovered is likely to be quite small.[214]

B. THE HARM OF THE CONSENT FICTION: CONFLICT IN THE LOWER COURTS

That the Court's Fourth Amendment consensual encounter doctrine is founded upon a legal fiction is not a secret. For example, in his widely used treatise, Professor Wayne LaFave begins the first sentence of his discussion on the doctrine by referring to "[t]he so-called consent search."[215] Professor William Stuntz asserts that because "hardly anyone feels free to walk away from a police officer without the officer's permission," the Court's free-to-terminate test is merely the nominal standard for seizure; the

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[213] The Court in the past has recognized that there is a cost associated with police inspection of the person (pat-downs) or personal effects of citizens. For example, Chief Justice Warren stated in *Terry v Ohio* that when a police officer accosts an individual and restrains his or her freedom to walk away, and conducts a pat-down of that person's body, such a procedure is "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Terry v Ohio*, 392 US 1, 17–18 (1968). And, more recently, the Court acknowledged the intrusiveness of a police officer's tactile examination of a bus passenger's carry-on luggage, and compared this with the intrusiveness of a police officer's physical inspection of a person's clothing described in *Terry*. *Bond v United States*, 529 US 334, 337–38 (2000).

[214] A civil lawsuit alleging violations of the Fourth Amendment may be brought against federal officers, see *Bivens v Six Unknown Named Agents*, 403 US 388 (1971), or under 42 USC § 1983 against state officers. Success rates are low. See Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L Rev 482, 550–51 (1982). Injuries are often difficult to prove. See Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum L Rev 247, 284 (1988).

[215] Wayne R. LaFave, 4 *Search and Seizure: A Treatise on the Fourth Amendment* § 8.1 596 (West, 3d ed 1996). Other authors have explicitly argued that the Court's doctrine regarding consensual encounters and consent searches is characterized in practice by pervasive lack of consent. See Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 Cornell L Rev 723, 792–95 (1992); William R. O'Shields, Note, *The Exodus of Minorities' Fourth Amendment Rights into Oblivion*, 77 Iowa L Rev 1875 (1992).

real standard is whether the level of police coercion is reasonable.[216]

This would account for how the Court persists in reaching conclusions that fly in the face of scientific findings about the psychology of compliance and consent and that many ordinary people find implausible. The "real" standard—whether the police conduct was within the bounds of "acceptable" coercion under the circumstances (no guns drawn, no explicit threats uttered)—functions as the decision rule that permits individual Justices to make an initial private, internal judgment about whether to uphold the admission into evidence of the contraband police discovered. The basis of that judgment is that the police behaved responsibly and did not cross the line that defines acceptable police behavior. The "nominal" standard is then trotted out in the Court's written opinion to justify the police officers' invasion of the citizen's privacy. The reasoning employed to effectuate the nominal standard, by now familiar, goes something like this: The police officer asked permission. The citizen granted it. A reasonable person in the situation would have felt free to not grant permission. Therefore encounter and subsequent search were consensual.

Perhaps the "real" standard can be made workable, as Professor Stuntz suggests.[217] It may be no more vague than the nominal standard, given that both standards must take into account all of the surrounding circumstances that came into play in the particular context. The important point, however, is that in the current state of the law, the Court's stated definitions of seizure and voluntary search are a sham. This is, indeed, a worrisome state of affairs for several reasons.

First, the Court's stated definitions of seizure and voluntary search have already (even prior to the reaffirmation of those definitions under *Drayton*) produced disagreement in the lower courts. Indeed, the most likely reason that the Court granted certiorari in *Drayton* was the lower courts' clashing interpretations of seizure and voluntary search in bus sweep cases after *Bostick*. This is understandable, given that the courts below in *Bostick* had already applied virtually the same test subsequently articulated by the Court and had concluded that the defendant had been unlawfully seized or

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[216] Stuntz, 111 Yale L J at 2170 n 102 (cited in note 155).

[217] Id at 2174 n 115.

that the search had been coerced. In *Bostick*, the Court remanded the case back to the Florida courts with instructions that essentially said, "Wrong conclusion. Try again."[218] Shortly after *Bostick* was decided, Professor Wayne LaFave remarked that "*Bostick* lends itself to a rather chilling interpretation: that lower courts are expected not to interfere with bus sweep procedures."[219] Thereafter, the Florida state courts upheld the consent search in every published bus sweep consent search case in the 11 years between *Bostick* and *Drayton*, regardless of the facts, consistently reasoning in each case that the defendant felt free to refuse.[220] The Eleventh Circuit, on the other hand, interpreted *Bostick* more literally and evaluated each bus sweep case before it under the totality of the circumstances. As a result, the post-*Bostick* Eleventh Circuit sometimes found that the seizure was unlawful or that the search was not voluntary.[221] The practical result was that prosecutors in Florida who wanted to be sure that the search in their bus sweep case would be upheld arranged to bring charges in state court rather than in federal court.

This lack of consistency also played itself out in other jurisdictions. Some courts adopted an approach like that of the Eleventh Circuit and ordered suppression of evidence on the grounds that a reasonable passenger in the situation would not have felt free to

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[218] In *Bostick*, the Court's remand instructions were actually "We remand so that the Florida courts may evaluate the seizure question under the correct legal standard." *Bostick*, 501 US at 437. The "correct" legal standard as articulated by the Court was in reality scarcely different from the standard originally applied by the Florida Supreme Court. As one commentator has remarked, "the Court seems so certain that there was no seizure in the instant case that it virtually reads the question it supposedly remanded right out of the case." Wayne R. LaFave, *Two Hundred Years of Individual Liberties: Essays on the Bill of Rights*, 1991 U Ill L Rev 729, 752 (1991).

[219] Id.

[220] See, for example, *Hemingway v State*, 762 S2d 957 (Fla App 2000); *Ramos v State*, 758 S2d 741 (Fla App 2000); *Mondestin v State*, 760 S2d 1062 (Fla App 2000); *Stubbs v State*, 661 S2d 1268 (Fla App 1995); *State v Hunter*, 596 S2d 158 (Fla App 1992); *State v Kuntzwiler*, 585 S2d 1096 (Fla App 1991).

[221] *United States v Washington*, 151 F3d 1354 (11th Cir 1998); *United States v Guapi*, 144 F3d 1393 (11th Cir 1998). Interestingly, in *Guapi*, the bus driver stated under oath that he thought passengers were not free to leave the bus without being searched. 144 F3d at 1396–97. Courts in most other federal circuits as well as many state courts generally interpreted *Bostick* in such a way that resulted in virtually all bus sweep consent searches being deemed voluntary. See, for example, *United States v Broomfield*, 201 F3d 1270 (10th Cir 2000); *United States v Boone*, 67 F3d 76 (5th Cir 1995); *United States v Garcia*, 103 F3d 121 (4th Cir 1996); *United States v Graham*, 982 F2d 273 (8th Cir 1992); *State v Hernandez*, 64 SW3d 548 (Tex Ct App 2001); *Stevenson v State*, 961 P2d 137 (Nev 1998). But there were some exceptions. See cases cited in notes 222–28.

terminate the encounter in light of the fact that the police did not advise passengers that they could choose not to cooperate.[222] (The Ninth Circuit even suppressed evidence from a consent search in a case where the police did in fact advise passengers of their right not to cooperate but where the majority held that the warning was misleading.[223]) Other courts gave no special weight to the absence of police advice to passengers that they could choose not to cooperate and upheld consent searches under those circumstances.[224] Some courts considering bus passenger cases post-*Bostick* ordered evidence suppressed in cases where the police threatened the use of a drug dog;[225] other courts denied motions to suppress where the police threatened the use of a drug dog.[226] Some courts ordered evidence suppressed when the passenger questioned the officers' authority to search ("Don't you need a warrant?" "Do I have a right to privacy?").[227] Another court upheld a search even where the passenger appeared to hesitate after granting consent.[228]

The Court's response to the disorder in the lower courts was to grant certiorari in *Drayton* and simply repeat the same standard for consensual encounters and voluntary searches already articulated in *Bostick*.[229] *Drayton* did clarify that the absence of police

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[222] See *People v Bloxson*, 517 NW2d 563 (Mich App 1994); *State v Talbert*, 873 SW2d 321 (Mo App SD 1994); *United States v Lopez*, 1999 WL 494007 (D Or 1999).

[223] *United States v Stephens*, 206 F3d 914 (9th Cir 2000) (holding that the police announcement that passengers were free to leave amounted to a "Hobson's choice" of submitting to a search or missing the bus).

[224] See, for example, *United States v Portillo-Aguirre*, 131 F Supp 2d 874 (WD Tex 2001); *United States v Outlaw*, 134 F Supp 2d 807 (WD Tex 2001); *United States v Gant*, 112 F3d 239 (6th Cir 1997); *United States v Broomfield*, 201 F3d 1270 (10th Cir 2000); *Stubbs v State*, 661 So2d 1268 (Fla App 5th Dist 1995); *State v Hernandez*, 64 SW3d 548 (Tex Ct App 2001); *Hemingway v State*, 762 So2d 957 (Fla App 4th Dist 2000).

[225] *United States v Brumfield*, 910 F Supp 1528 (D Colo 1996); *United States v Barrett*, 976 F Supp 1105 (ND Ohio 1997); *State v Vikesdal*, 688 So2d 685 (La App 2d Cir 1997); *Mitchell v State*, 831 SW2d 829 (Tex Ct App 1992); *United States v Garzon*, 119 F3d 1446 (10th Cir 1997).

[226] *United States v Jones*, 914 F Supp 421 (D Colo 1996); *United States v Bobo*, 2 Fed Appx 401 (6th Cir 2001); *Stevenson v State*, 961 P2d 137 (Nev 1998).

[227] *United States v Randolph*, 789 F Supp 407 (DDC 1992); *Mitchell v State*, 831 SW2d 829 (Tex Ct App 1992).

[228] *Burton v United States*, 657 A2d 741 (DC 1994).

[229] In the bus sweep cases in which the search was found to be invalid, the Eleventh Circuit considered the fact that the police did not advise passengers that they had a right not to cooperate. In reversing the Eleventh Circuit's decision in *Drayton*, the Court admonished the Eleventh Circuit for having adopted a per se rule that invalidated bus sweep searches whenever the police don't advise passengers of their right to refuse. While the

advice to passengers that they need not cooperate was a factor like any other and did not receive any special weight in the totality of the circumstances analysis.[230] But in the end, *Drayton* did little to resolve the lack of consistency in the lower courts. Instead, it essentially affirmed Professor LaFave's "chilling interpretation" of *Bostick:* lower courts are expected to refrain from interfering with bus sweeps. Thus, after *Drayton*, the safest course for lower courts deciding the validity of consent searches in bus sweep cases would be to craft their totality of the circumstances analyses in a way that results in a finding that the search was voluntary and the encounter consensual (regardless of the actual circumstances). But what is a lower court to do when it encounters a bus sweep case involving a new fact (not present in *Drayton*) that suggests that perhaps this particular situation involved coercion, such as a threat to use a drug-sniffing dog? Having adopted a nominal standard for consensual police-citizen encounters and voluntary consent to search that is actually fictitious, the Court has left the lower courts in the unenviable position of deciding cases without the benefit of knowing how to apply the Court's "actual" (though unarticulated) standard. This is a recipe for continued confusion.[231]

Eleventh Circuit does not appear to have explicitly adopted such a bright line rule, it may be the case that in its analysis of the totality of the circumstances, the absence of police warnings effectively tipped the scale in the direction of finding coercion.

[230] *Bostick* had left some ambiguity about this. The majority stated, "Two facts are particularly worth noting. First, the police specifically advised Bostick that he had the right to refuse consent." 401 US at 432. A few lower courts subsequently interpreted *Bostick* to stand for the proposition that because the presence of police warnings is a fact "particularly worth noting," the absence of police warnings weighs especially heavily in the totality of the circumstances analysis. See *United States v Guapi*, 144 F3d 1393, 1395 (11th Cir 1998) ("the absence of such notice is an important factor in this case").

[231] The lower courts' difficulty in applying the current standard for voluntary consent to search is exacerbated by the fact that, because the question of voluntariness is determined on a case-by-case basis, by considering the totality of the circumstances, this encourages the police—who have no concrete guidelines as to which methods are acceptable—to apply as much pressure as is necessary in each case to obtain consent. The lower courts, already faced with the difficult task of assessing all of the circumstances contributing to pressures on the suspect to consent, must factor into their assessment the incentives of the police to minimize the appearance of any pressure at a suppression hearing. For example, at the hearing on the motion to suppress the illegal narcotics found on Drayton's and Brown's person, the arresting officer emphasized repeatedly his own polite manner toward the bus passengers that day. *Drayton*, Respondent's Brief, Joint Appendix at 51, 99, and 101. This incentive structure is similar to that existing under the pre-*Miranda* voluntariness regime, in which case-by-case review left police without adequate guidance and subtle incentives to allow interrogation pressures to spiral out of control. See Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U Chi L Rev 435, 451–52 (1987).

C. THE HARM OF THE CONSENT FICTION: DIMINISHED RESPECT FOR THE LAW

The Court's continued articulation of a fictional standard for the definitions of seizure and voluntary consent threatens a different kind of harm as well. As many other scholars have argued, the law works not only because of the sanctions it threatens but also because of the messages it expresses.[232] One possible manifestation of law as an expressive instrument is that when people notice that the legal system regulates behavior in a way that makes sense, they are more likely to comply with the law.[233] Indeed, empirical evidence suggests that citizens who feel that the law is worthy of respect tend to comply more with particular laws.[234] On the other hand, perceived injustices in the legal system have subtle but pervasive influences on people's deference to and respect for the law in their everyday lives.[235] Americans are culturally attentive to law and are concerned when they perceive injustice in the legal system. This attentiveness to legal rules and results is especially likely for the law of consent searches, in part because so many people are personally affected by them (as discussed above), but also because the issue of racial profiling has resulted in a great deal of public attention to consent searches in the popular press.[236] When people perceive the legal system to be unjust, the diminished respect for

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[232] See Robert Cooter, *Expressive Law and Economics*, 27 J Legal Stud 585 (1998); Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U Chi L Rev 591 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U Chi L Rev 943 (1995); Richard McAdams, *A Focal Point Theory of Expressive Law*, 86 Va L Rev 1649 (2000).

[233] See Paul H. Robinson and John M. Darley, *The Utility of Desert*, 91 Nw U L Rev 453 (1997).

[234] Tom R. Tyler, *Why People Obey the Law* (Yale, 1990).

[235] Janice Nadler, *Flouting the Law: Does Perceived Injustice Provoke General Non-Compliance?* Unpublished manuscript (2002).

[236] See, for example, *Most Recent Traffic Stop Data Show Little Change; Black Drivers Still Stopped at Higher Rate*, Washington Post T03 (June 6, 2002) ("Black and Hispanic drivers are having their vehicles searched at a rate greater than that in which both groups are stopped"); Mike Connell, *Search After Traffic Stop Raises Question of Equal Treatment*, Times Herald (Port Huron, MI) 7B (May 19, 2002) ("once they were pulled over, black males were 70% more likely than white males to be searched without evidence of a crime—so-called consent searches"); *Group to Inform Drivers of Rights in Searches*, New York Times B5 (May 9, 2002) ("consent searches . . . have been the focus of the fight over racial profiling"); John M. Glionna, *Oakland Police: Success Story or Scandal?* Los Angeles Times pt 2, p 1 (Dec 3, 2001) (outlining accusations by the ACLU against the Oakland Police of using racial profiling in consent searches, and noting that the California Highway Patrol had declared a moratorium on consent searches).

the legal system that follows can potentially destabilize the law-abiding behavior of ordinary people. Because people have reasons for obeying the law that are apart from the threat of sanctions, obedience to law is vulnerable to diminished respect produced by perceptions of injustice. According to the Flouting Thesis, when people perceive the law as unjust, they are less likely to comply with legal rules governing everyday behavior.[237]

I have demonstrated the Flouting Thesis empirically in a different context in which I show that the perceived injustice of a particular law can lead to lower levels of expressed willingness to comply with other laws, even those distinct from and unrelated to the source of the perceived injustice.[238] For example, a person who reads a newspaper story about a (perceived) unfair change in the tax code is more likely, on average, to express a future intent to flout other laws, such as parking regulations and copyright restriction, compared to a person who read about a similar but fair law. This research suggests that the fiction that pervades the Court's Fourth Amendment consent search jurisprudence, if known to citizens, can trigger the very kind of lack of moral authority that leads to noncompliance with other unrelated laws. If the *Drayton* Court's conclusion that a reasonable passenger on the bus would feel free to refuse the officers' requests to search and terminate the encounter is perceived by citizens as unjust, this perception can trigger general flouting of the law in everyday life.[239]

It is tempting to dismiss this concern on the grounds that most citizens do not read and are unaware of Supreme Court decisions like *Drayton*, so there is little danger that decisions like *Drayton* or *Bostick* will result in diminished respect for law and increased flouting.[240] While it is undoubtedly true that the vast majority of

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[237] Nadler, *Flouting the Law* (cited in note 235).

[238] Id. In an experimental demonstration of the Flouting Thesis, some participants were given newspaper stories to read that were about laws widely perceived to be unjust. Others read newspaper stories about perceived just laws. Later, in a seemingly unrelated study, all participants indicated their personal willingness to engage in various examples of unlawful behavior, such as drunk driving, shoplifting, speeding, etc., all unrelated to the laws in the newspaper stories. People who were exposed to unjust laws via newspaper stories were more willing to flout (unrelated) laws in their everyday lives than people exposed to just laws in the newspaper.

[239] These very sentiments were expressed by motorists interviewed in Lichtenberg's survey. See Lichtenberg, *Voluntary Consent* (cited in note 157).

[240] Most citizens undoubtedly did not hear about the *Drayton* opinion, but some did. Shortly after the Court issued its decision in *Drayton*, syndicated columnist James J. Kil-

citizens will never become aware of particular decisions announced by the Court, the effects of those decisions often seep into popular awareness. This is especially true for decisions such as *Drayton* that directly bear on topics that are considered hot-button issues of the moment. With respect to *Drayton*, the associated hot-button issue is racial profiling of citizens by police. For several years prior to *Drayton*, media attention had been focused intensely on the government's use of consent as a justification for searching African-American and Hispanic motorists, who had been stopped by police in disproportionate numbers.[241] For example, the press has reported that blacks and Hispanics are more likely to be targeted for consent searches once they have been stopped.[242] Consent searches of motorists have played such a large role in the racial profiling debate that the most populous state in the nation, California, recently declared a moratorium on consent searches by highway patrol officers.[243] *Drayton* concerned consent searches on buses rather than on highways, but the issue of disproportionate police targeting of members of racial and ethnic minorities for consent searches is raised indirectly by *Drayton* because of the demographic realities of intercity bus travel.[244] Because of this, there is a possibility that *Drayton* will further fan the flames of the racial profiling debate, even if citizens never hear about the case directly.

Once perceptions of injustice in the law take hold, the negative effects of these perceptions can become manifest very broadly. In

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patrick wrote an editorial published by many local newspapers across the country. In it, he openly mocked the Court's reasoning in *Drayton*. Kilpatrick quoted from a portion of the majority opinion which stated, "'Nothing would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter,'" to which Kilpatrick retorted, "Ho, ho, ho, and call the Tooth Fairy to the stand!" The *Augusta Chronicle* ran Kilpatrick's column under a headline entitled, *Justice Kennedy Disconnected from Reality* (July 21, 2002), p A04. It is therefore somewhat plausible that such publicity has direct effects on citizens' respect for law, although these direct effects may be small. There are also more widespread, indirect effects, as I argue in the remainder of this section.

[241] See note 236.

[242] See, for example, *Most Recent Traffic Stop Data Show Little Change; Black Drivers Still Stopped at Higher Rate*, Washington Post T03 (June 6, 2002) (cited in note 236); Connell, *Search After Traffic Stop Raises Question of Equal Treatment*, Times Herald (Port Huron, MI) 7B (May 19, 2002) (cited in note 236).

[243] See *Group to Inform Drivers of Rights in Searches*, New York Times B5 (May 9, 2002) (cited in note 236); Glionna, *Oakland Police: Success Story or Scandal?* Los Angeles Times pt 2, p 1 (Dec 3, 2001) (cited in note 236).

[244] Intercity bus passengers are disproportionately poor, nonwhite, and less educated. See O'Shields, 77 Iowa L Rev at 1899 n 211 (cited in note 194).

the study cited earlier,[245] people who read newspaper stories about the unjustness of civil forfeiture and tax laws later expressed a greater willingness to flout laws that were completely unrelated to the newspaper stories that were the source of the perceive injustice. There is reason to think that the Court's consent fiction has already generated perceptions of injustice. After *Bostick* and *Robinette*, the popular press had a difficult time reconciling the Court's standard with common sense justice. One commentator remarked that "by the [C]ourt's weird reasoning, you can 'voluntarily' consent to a search even if you think your cooperation is compulsory."[246] The *Drayton* decision comes at a time of intense public debate about the propriety of consent searches and amidst accusations that the police use consent searches as a tool to target racial and ethnic minorities improperly.[247] Even citizens who never hear directly about the Court's decision in *Drayton* are likely to be exposed in some fashion to this widely publicized debate, to which *Drayton* now has indirectly contributed. To the extent that *Drayton* provides fodder for those who would believe that the law gives free rein to police who target racial and ethnic minorities for consent searches, it also contributes to perceptions among some citizens who are attentive to this debate that the law is unjust. Such perceptions generally can lead to decreased respect for and compliance with the law as a whole.

V. Conclusion

It may be the case that, on balance, it is desirable to permit police to board intercity buses and pose questions to passengers and, in some circumstances, conduct searches of baggage and persons, especially with the current need to be vigilant about potential risks of terrorism. In this way, it is understandable that the *Drayton* Court scrupulously avoided announcing rules in drug cases that would restrict the ability of police to investigate terrorism and other serious threats to public security.

On the other hand, in its effort to be sensitive to the order-

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[245] See Nadler, *Flouting the Law* (cited in note 235).

[246] Stephen Chapman, *"Voluntary" Consent and Other Judicial Fantasies*, Chicago Tribune C23 (Nov 24, 1996).

[247] See note 236.

maintenance needs of the government,[248] the Court has promulgated a standard for determining the bounds of consensual police-citizen encounters and voluntary searches that struggles against a wealth of social science evidence, that subjects many innocent people to suspicionless searches and seizures against their will, and that produces disagreement and confusion in the lower courts. It may be that large-scale, suspicionless searches of passengers on common carriers is a price that we ought to be willing to pay to stem the flow of illegal narcotics transported on intercity buses and trains.[249] If this is the determination that underlies the decision in *Drayton*, then the Court should have explicitly stated it and justified it—rather than relying on the implausible assertion that bus passengers, when they are individually confronted by armed police officers who want to search them, feel free to ignore the police or outright refuse their requests.

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[248] See David Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Supreme Court Review 271; Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich L Rev 2466, 2468 (contending that since the 1960s the Court has become "more accommodating to assertions of the need for public order.").

[249] Of course, it is somewhat self-serving for scholars, policymakers, and judges, many of whom do not travel frequently on intercity buses and trains, to determine that this sacrifice is one worth making when it is others (especially those who are politically vulnerable) who bear the burden of the sacrifice. This kind of self-serving "sacrifice" is reminiscent of an ironic moment in the movie *Shrek*, when Lord Farquaad announces to his constituency, "Some of you may die, but it's a sacrifice I am willing to make."