

**“WHEN WILL THIS TRAFFIC STOP END?”: THE
UNITED STATES SUPREME COURT’S DODGE OF
EVERY DETAINED MOTORIST’S CENTRAL
CONCERN—OHIO V. ROBINETTE**

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I. INTRODUCTION

While driving down the interstate, you see the flashing lights of a police cruiser in your rearview mirror. As you obediently pull over to the side of the road, several questions race through your mind: “Was I speeding?,” “Will I get a ticket or a warning?,” “How long will the officer keep me?” Typically, most of these uncertainties will be resolved soon after the officer approaches your vehicle. However, one question remains unanswered until you are told you may leave: “When will this traffic stop end?”

Suppose further that the officer asks for your license, has you exit your car and stand between it and the cruiser, and turns on a video camera pointed at you. When the officer hands your license back to

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you, he tells you that, although you were indeed speeding, he is going to “cut you some slack” and let you off with a warning. Then, with no break in the conversation, the officer ventures, “One question before you get gone. [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?”¹ At this moment, what are your options? Is it reasonable to infer from these circumstances that you can simply ignore the officer’s query, get in your car and leave the officer, who just showed you “some slack,” in the dust? Apparently, the United States Supreme Court believes that you may.²

In *Ohio v. Robinette*,³ the United States Supreme Court found that facts similar to those above created an issue not of seizure, but of consent. The Court then promptly rejected a *per se* requirement that every detainee be warned that she is free to go before her consent to search may be deemed voluntary.⁴ Chief Justice Rehnquist, writing the opinion for a seven member majority, adhered closely to both the letter and the spirit of well-established precedent concerning consent to Fourth Amendment searches.⁵ Indeed, this holding was so unremarkable that it generated a dissenting opinion from only one justice.⁶ Thus, the answer provided by the Court in *Robinette* would be perfectly proper if it addressed the question raised by the facts in the case. Unfortunately, it did not.

In framing *Robinette*’s issue as one of consent, Chief Justice Rehnquist glossed over a much more difficult question: whether the predicate stop remained lawful at the time consent was sought. The first sentence of the majority opinion set the analysis for the entire case: “We are here presented with the question whether the Fourth Amendment requires that a lawfully seized defendant must be advised that he is ‘free to go’ before his consent to search will be recognized as voluntary.”⁷ By inserting the assumption of a lawful seizure in the issue presented, Chief Justice Rehnquist distorted the Court’s analysis from the outset. On its surface, the majority opinion sounds

1. *Ohio v. Robinette*, 117 S. Ct. 417, 419 (1996).

2. See *id.* at 420-21.

3. 117 S. Ct. 417 (1996).

4. See *id.* at 421.

5. See *id.* The Fourth Amendment provides:

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

U.S. CONST. amend. IV. See *Robinette*, 117 S. Ct. at 421 (citing the Court’s prior refusal in *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), to mandate as a precondition to voluntary consent that persons be warned of their right to refuse consent to search).

6. See *Robinette*, 117 S. Ct. at 424 (Stevens, J., dissenting).

7. *Id.* at 419.

like nothing more than a simple reaffirmation of a principle deemed fundamental for nearly a quarter of a century: warning requirements have no place in the informal context of an officer's request for consent to search.⁸ However, the true question presented in *Robinette* is the one asked by every motorist stopped on our nation's roads: "When will this traffic stop end?"

Part II of this Article examines the history behind the Court's current view of Fourth Amendment seizures of the person. Part III critically examines the Supreme Court's analysis in *Robinette*. Finally, Part IV offers proposed definitions to clarify the boundaries of seizure of the person under the Fourth Amendment.

II. THE HISTORICAL BACKGROUND OF THE FOURTH AMENDMENT ISSUES RAISED IN OHIO V. ROBINETTE

A. The Creation and Evolution of the Fourth Amendment Definition of Seizure of a Person

Today's core concepts about seizures of the person stem from *Terry v. Ohio*,⁹ the first United States Supreme Court case to confront directly the issues of Fourth Amendment application to detentions short of arrest.¹⁰ In *Terry*, Detective Martin McFadden, a thirty-nine-year veteran of the Cleveland Police Department, observed John W. Terry and Richard Chilton repeatedly walk past and peer into the windows of a store on the detective's beat, and then confer with a third man.¹¹ Detective McFadden suspected the three of "casing a job, a stick-up" of the store, and therefore approached and identified himself as an officer.¹² When the suspects mumbled their responses, Detective McFadden grabbed Terry, swung him around, and patted down his outer clothing for weapons.¹³ Detective McFadden's patdown resulted in the recovery of a .38 caliber revolver which led to John Terry's charge of and conviction for carrying a concealed weapon.¹⁴

Detective McFadden's stop and frisk of Terry presented the Court with a choice of two extremes. One argument advanced the notion

8. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 231 (1973).

9. 392 U.S. 1 (1968).

10. See *id.* at 4. Chief Justice Warren, writing for the majority, noted: "We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court." *Id.* at 9-10. For a thorough discussion of *Terry*'s impact on individual freedom from seizures on the street, see Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets* 75 *CORNELL L. REV.* 1258 (1990).

11. See *Terry*, 392 U.S. at 5-6.

12. *Id.* at 6-7.

13. See *id.* at 7.

14. See *id.*

that a stop and frisk was “outside the purview of the Fourth Amendment because neither action [rose] to the level of a ‘search’ or ‘seizure’ within the meaning of the Constitution.”¹⁵ This view considered a stop or frisk to “amount to mere ‘minor inconvenience and petty indignity.’”¹⁶ Indeed, one lower court roughly equated the frisk’s “sense of exterior touch” to those of “sight or hearing—senses upon which police customarily act.”¹⁷ At the opposite end of the spectrum was the view recognizing no legitimate police restraint absent full probable cause: “There is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest.”¹⁸

The Court in *Terry* aimed to steer between these two polar extremes. Chief Justice Warren, writing for the majority, determined that the Court’s “first task is to establish at what point in this encounter the Fourth Amendment becomes relevant.”¹⁹ The *Terry* Court then ventured to identify this point with the following definition of a seizure: “It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”²⁰ Chief Justice Warren also noted, “Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”²¹

Due to a dearth of facts in the record, the Court refrained from deciding whether Detective McFadden conducted a “seizure” prior to physically touching John Terry.²² However, *Terry* involved the Constitution at a stage earlier than full-blown arrest, amounting to a rejection of the government’s contention that stops and frisks occurred in an area of law outside of the Fourth Amendment.²³ A

15. *Id.* at 16.

16. *Id.* at 10.

17. *Id.* at 11 n.5 (citing *People v. Rivera*, 14 N.Y.2d 441, 445, 447 (1964)).

18. *Id.* at 11. The Court elaborated on this contention by noting that “[t]he heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution.” *Id.*

19. *Id.* at 16.

20. *Id.*

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

22. Chief Justice Warren noted: “We cannot tell with any certainty upon this record whether any such ‘seizure’ took place here prior to Officer McFadden’s initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.” *Id.*

23. Chief Justice Warren flatly stated: “We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if

driving force behind the Court's broad definition of Fourth Amendment seizure was a fear of unchecked police conduct. Chief Justice Warren found the logic which distinguished between a stop and an arrest of a person dangerous: "It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen."²⁴ Thus, in the very first case where the scope of constitutional protection over stops was squarely addressed, the Court emphasized the hazards inherent in unchecked governmental authority.

Terry's protection of detainees consisted of a twofold assessment of reasonableness. Not only must governmental intrusion be "justified at its inception," but it must also be "reasonably related in scope to the circumstances which justified the interference in the first place."²⁵ Therefore, from the very first case directly handling the sensitive issues presented in street detentions and frisks, the Court stressed the importance of limiting the government power it had just created to stop individuals on information falling short of probable cause. Terry aimed to restrain law enforcement authority during detentions by ensuring all police activity during the stop or frisk be anchored to the original reason for intrusion.²⁶

the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" *Id.* at 19.

24. *Id.* at 17.

25. *Id.* at 20. Much of the Court's discussion regarding the subsequent scope of government intrusion related to searches rather than seizures. For instance, Chief Justice Warren noted: "This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Id.* at 17-18. Further, "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* at 19. However, the Court indicated the force of this logic applied to both searches and seizures, when, in rejecting the notion that stops and frisks are not subject to constitutional scrutiny, it offered: "In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all exigencies of the case, a central element in the analysis of reasonableness." *Id.* at 17-18 n.15.

26. See *id.* at 19 (reaffirming its requirement that the scope of a search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible). Interestingly, Terry unwittingly locked in the structure of detention analysis for the next three decades. The Court ever since has approached every investigatory detention, despite Terry's recognition of the "protean variety" of street encounters, with one query: at what point during an encounter does the Fourth Amendment become relevant? *Id.* at 15. This narrow focus has left an equally important inquiry unresolved: at what point during an encounter does the Fourth Amendment cease being relevant? When does Fourth Amendment protection stop? In short, when does a seizure of the person end? Terry, of course, did not consider the end point of seizures because that question was not before the Court. Yet, nothing in the majority opinion suggested that future courts should limit their consideration of Fourth Amendment protection to a dogmatic recital of the initiation of constitutional protection. This Article thus considers the definition of the end point of detentions of the person.

In *Davis v. Mississippi*,²⁷ the next detention case after *Terry*, the Court adhered to the essentials of its original analysis.²⁸ *Davis* reaffirmed that the Fourth Amendment applies to all seizures of the person, including those which involve only a brief detention short of traditional arrest.²⁹ The *Davis* Court echoed its original fear of exposing citizens to police authority without constitutional protection: "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'"³⁰

The next seizure cases visited by the Court are of particular significance, for, like *Robinette*, they involved detentions of motorists. In *Adams v. Williams*,³¹ the Court was faced with a recovery of a handgun during a *Terry* stop.³² A lone officer patrolling a high-crime area at 2:15 in the morning was told by an informant that a person in a nearby car, later identified as Robert Williams, was in possession of a gun and narcotics.³³ The officer, Sergeant Connolly, approached William's car, tapped on the driver's window, and asked the driver to open the door.³⁴ When Williams merely rolled down the window, the officer reached inside the car and recovered a gun from Williams' waistband.³⁵

The *Adams* Court found Sergeant Connolly's conduct reasonable. Justice Rehnquist concisely summarized the two extremes that had previously faced the Court in *Terry* in formulating the "intermediate response" of a *Terry* stop: "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."³⁶ Instead, "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."³⁷ Interestingly, Justice Rehnquist, the very justice who would later author *Robinette*'s majority opinion, recognized in *Adams* that a seizure would continue to exist while an officer

27. 394 U.S. 721 (1969).

28. See *id.*

29. See *id.*

30. *Id.* at 726-27.

31. 407 U.S. 143 (1971).

32. See *id.* at 144.

33. See *id.* at 144-45.

34. See *id.* at 145.

35. See *id.*

36. *Id.*

37. *Id.* at 146.

“maintained the status quo” during an investigatory detention.³⁸ Thus, the Court recognized that once the officer initiated a seizure of an individual, the “status quo” of the seizure remained in effect until the officer indicated otherwise.³⁹

The Court next considered *United States v. Brignoni-Ponce*.⁴⁰ Here, the Court found that the Fourth Amendment applied to random vehicle stops made by roving border patrols.⁴¹ Of particular interest was an assumption made by the *Brignoni-Ponce* Court as it calculated these stops’ “interference with [the motorist’s] individual liberty.”⁴² In determining the intrusion to be “modest,” the Court accepted the government’s characterization of the vehicle stops as requiring only that “the vehicle’s occupants [respond] to a brief question or two and possibly the production of a document evidencing a right to be in the United States.”⁴³ Here, *Brignoni-Ponce* assumed a point apparently so obvious as to require no justification: once an officer initiated a seizure by pulling over a moving vehicle, the seizure continued throughout the questioning process. As will be seen, an entirely contrary assumption was made in *Robinette*.

In *Delaware v. Prouse*,⁴⁴ a patrolman, lacking any kind of individualized suspicion of illegal activity, stopped a car merely to check the driver’s license and registration.⁴⁵ Even though *Prouse* recognized that the detention resulting from such a stop was typically “quite brief,” Justice White, writing for the majority, expressed alarm at the implications of such governmental intrusions.⁴⁶ In essence, the Court feared a gap in Fourth Amendment protection against the exercise of government power, no matter how minimal.⁴⁷ Lack of constitutional oversight of even a simple license-check stop created an unacceptable danger: “This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.”⁴⁸ Moreover, of par-

38. *Id.*

39. *See id.*

40. 422 U.S. 873 (1975).

41. *Brignoni-Ponce* reaffirmed the broad admonition in *Terry* that “[w]henver a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” *Id.* at 878.

42. *Id.* at 879.

43. *Id.* at 880.

44. 440 U.S. 648 (1979).

45. *See id.* at 650-51.

46. *See id.* at 653.

47. Justice White opined: “The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials.” *Id.* at 661.

48. *Id.*

ticular relevance to Robinette, the harm to the individual is no less simply because he is stopped while driving a car:

Many people spend more hours each day traveling in an automobile than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.⁴⁹

In the next phase of precedent, the Court began a process of developing a specific test to define what government actions constituted a "seizure" for Fourth Amendment purposes. Here, the Court focused on the dividing line between police behavior amounting to a seizure, which is governed by the Fourth Amendment, and conduct which falls short of a seizure and is beyond the constraints of the reasonableness requirement. This analytical structure is important because it focused judicial inquiry on the narrow stage of police-citizen interaction to determine what police behavior transformed a consensual encounter into a constitutional event. This, in turn, drew the Court's attention to what made a seizure begin rather than end. The result is lopsided because the Court has identified facts that trigger a seizure in a wealth of cases, yet at the same time, has responded with silence as to when the Fourth Amendment, once triggered by a seizure, ultimately concludes.

In *United States v. Mendenhall*,⁵⁰ Drug Enforcement Administration (DEA) agents approached Sylvia Mendenhall as she walked through an airport concourse.⁵¹ The two officials identified themselves as federal agents and asked to see Mendenhall's identification and airline ticket, which she provided.⁵² The agents asked why Mendenhall's airline ticket was in a name different from her own, inquired as to her length of stay out of state, and then specifically identified themselves as narcotics agents.⁵³ Even though the agents returned her ticket and driver's license, they asked her to accompany them to the airport DEA office some fifty feet away for further questioning.⁵⁴ At the DEA office, an agent, after advising Mendenhall of

49. *Id.* at 662-63. Justice White continued: "People are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles." *Id.* The Court reiterated its concern regarding the potential abuse of attendant "unfettered discretion" in *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

50. 446 U.S. 544 (1980).

51. See *id.* at 547.

52. See *id.* at 547-48.

53. See *id.* at 548.

54. See *id.*

her right to refuse, asked for and obtained consent for a search of Mendenhall's person and bag.⁵⁵

Justice Stewart, announcing the judgment of the Court in an opinion joined only by Justice Rehnquist, found Terry to be of limited help in determining whether the DEA agents had seized Mendenhall before requesting consent. After all, in Terry, Detective McFadden had "obviously" seized John Terry when "he took hold of him, spun him around, and patted down the outer surfaces of his clothing."⁵⁶ In contrast, Sylvia Mendenhall experienced no such physical contact with the federal agents before consenting to be searched. Therefore the DEA's actions toward Mendenhall fell in a gap that existed in the definition of a Fourth Amendment seizure. Justice Stewart noted: "What was not determined in [Terry], however, was that a seizure had taken place before the officer physically restrained Terry for purposes of searching his person for weapons."⁵⁷ Justice Stewart thus found a need to fill this constitutional void by drawing a dividing line between a "seizure" on the one hand and a mere "encounter," which "intrude[d] upon no constitutionally protected interest," on the other.⁵⁸

Thus, Justice Stewart established a bright line between persons seized and those who were not. Individuals who were detained, even briefly, enjoyed constitutional protection mandating "objective justification."⁵⁹ Meanwhile, people involved in police activity failing to meet the seizure definition were not similarly protected. This was because the police officer, like any other "citizen," has the "liberty . . . to address questions to other persons."⁶⁰ Likewise, the person the officer addresses "has an equal right to ignore his interrogator and walk away."⁶¹ Hence, "nothing in the Constitution" prevented such encounters.⁶²

It therefore became crucial to develop a clear test to determine when police behavior crossed the line from consensual encounter into Fourth Amendment seizure. Justice Stewart offered:

55. See *id.*

56. *Id.* at 552.

57. *Id.* at 552-53.

58. *Id.* at 552.

59. *Id.* at 551.

60. *Id.* at 553.

61. *Id.*

62. *Id.* Justice Stewart premised his recognition of "consensual encounters" (the class of police activity falling short of a "seizure") on the assumption that individuals who remain and answer police questions despite their right to ignore such interrogations must do so of their own volition. In this vein, Justice Stewart described the nonseizure encounter as when a person responds to the officer in some fashion not out of submission, but "voluntarily in a spirit of apparent cooperation." *Id.*

We adhere to the view that a person is “seized” only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. . . . As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy as would under the Constitution require some particularized and objective justification.⁶³

Weighing whether one felt restrained or able to walk away was to be assessed by an objective standard: “We conclude that a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”⁶⁴ This standard does not require that an individual make and fail at an attempt to leave in order to establish a seizure. Obvious official signals that may trigger a seizure included physical touching or the display of weapons.⁶⁵ Yet, more subtle actions could also trigger a seizure, because the mere number of officers could establish a “threatening presence,” and even the officer’s “use of language or tone of voice” could indicate a seizure to a reasonable person in the detainee’s circumstances.⁶⁶

Justice Stewart’s standard had a dramatic result: the circumstances surrounding Mendenhall did not add up to a Fourth Amendment seizure. The Court found it relevant that the agents displayed neither uniforms nor weapons, approached Mendenhall rather than summoned her to their presence, and requested rather than demanded to see her identification and ticket.⁶⁷ Justice Stewart thus asserted that “[i]n short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way,

63. *Id.* at 553-54.

64. *Id.* at 554.

65. *See id.*

66. *Id.*

67. *See id.* at 555. Justice Stewart continued: “The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions.” *Id.*

Of particular interest to the Court’s later analysis in *Robinette*, Justice Stewart in *Mendenhall* contrasted an encounter with a pedestrian from that of a motorist:

[S]topping or diverting an automobile in transit, with the attendant opportunity for a visual inspection of areas of the passenger compartment not otherwise observable, is materially more intrusive than a question put to a passing pedestrian, and the fact that the former amounts to a seizure tells very little about the constitutional status of the latter.

Id. at 556-57.

and for that reason we conclude that the agents' initial approach to her was not a seizure."⁶⁸

Justice Stewart's emphasis on seizure-versus-nonseizure labeling has created a laser-like focus by the Court on one boundary of a Fourth Amendment seizure, its initiation.⁶⁹ *Florida v. Royer*,⁷⁰ another case in which law enforcement approached a drug courier in an airport, adopted Justice Stewart's seizure-versus-consensual encounter analysis.⁷¹ The *Royer* Court echoed Mendenhall's bright-line conclusion that consensual encounters, unlike even the briefest of seizures, trigger no Fourth Amendment issue:

The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.⁷²

Two years later, the Court again referred to the "consensual encounter" in another drug courier case, *Florida v. Rodriguez*.⁷³ By the time *Rodriguez* was decided, the Court took it for granted that such contacts with the citizenry implicate "no Fourth Amendment interest."⁷⁴

The Court's emphasis on drawing a constitutional boundary line between a "consensual encounter" and a Fourth Amendment "seizure" continued as a consistent theme in its case law, even in unique circumstances. In *INS v. Delgado*,⁷⁵ the Court was confronted with the Immigration and Naturalization Service's (INS) practice of

68. *Id.*

69. Although initially accepted by only one other member of the Court (Justice Rehnquist), Justice Stewart's formulation of a Fourth Amendment seizure in *Mendenhall* was ultimately recognized by a majority of the Court. See *INS v. Delgado*, 466 U.S. 210, 228 (1984). Justice Brennan noted: "A majority of the Court has since adopted [Justice Stewart's] formula as the appropriate standard for determining when inquiries made by the police cross the boundary separating merely consensual encounters from forcible stops to investigate a suspected crime." *Id.* (Brennan, J., concurring and dissenting); see also Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729, 736 (1991) (observing that "[a]lthough this bifurcation in *Mendenhall* seemed to deprive the case of any significance, the Stewart standard later came to command a majority of the Court"). Indeed, Justice Stewart's "test" ultimately was "embraced" by a unanimous Court. See *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

70. 460 U.S. 491 (1983).

71. See *id.*

72. *Id.* at 497-98.

73. 469 U.S. 1 (1984).

74. *Id.* at 6.

75. 466 U.S. 210 (1984).

“factory surveys.”⁷⁶ Instead of officials stopping people as they were in motion, whether by driving down a street or walking through an airport concourse, the INS agents in Delgado came upon individuals who were at work, and thus already at their destinations. Justice Rehnquist, writing for the Court, described the INS’s factory surveys as follows:

At the beginning of the surveys several agents positioned themselves near the buildings’ exits, while other agents dispersed throughout the factory to question most, but not all, employees at their work stations. The agents displayed badges, carried walkie-talkies, and were armed, although at no point during any of the surveys was a weapon ever drawn. Moving systematically through the factory, the agents approached employees and, after identifying themselves, asked them from one to three questions relating to their citizenship. If the employee gave a credible reply that he was a United States citizen, the questioning ended, and the agent moved on to another employee. If the employee gave an unsatisfactory response or admitted that he was an alien, the employee was asked to produce his immigration papers. During the survey, employees continued with their work and were free to walk around within the factory.⁷⁷

In determining whether such conduct amounted to a seizure, Delgado again referred to the Court’s delineation between a “consensual encounter” and a “seizure.”⁷⁸ Indeed, the Court even recognized that an initially consensual exchange could be transformed into a Fourth Amendment detention if the surrounding circumstances so indicated to a reasonable person.⁷⁹ Yet, the Court viewed the agents’ actions in performing the factory survey as nothing more than setting up a situation where officers could perform “mere questioning of an individual.”⁸⁰ Justice Rehnquist then deemed that “police questioning, by itself, is unlikely to result in a Fourth Amendment violation.”⁸¹ As to the typical reaction a person may have to mere questioning, Justice Rehnquist noted, “While most citizens will respond to a police request, the fact that people do so, and do so without being told they

76. *Id.* at 212.

77. *Id.* at 212. Justice Brennan, in a separate opinion, labeled the Court’s description as “an unrealistic view of the facts.” See *id.* at 229 (Brennan, J., concurring and dissenting).

78. *Id.* at 215.

79. See *id.* Thus, the Delgado majority considered whether the circumstances before it would initiate a Fourth Amendment seizure, but, as the issue was not before it, the Court did not have the occasion to consider which facts could end the seizure, thus returning it to a consensual encounter. See *id.*

80. *Id.* at 216.

81. *Id.*

are free not to respond, hardly eliminates the consensual nature of the response.”⁸²

Delgado therefore established a particular mode of analysis for seizure issues. Although the Court had directed judges to view “all the circumstances surrounding the incident” to decide whether a “reasonable person would have believed that he was not free to leave,”⁸³ it did not envision actually considering all the facts as taken together. The facts were not to be viewed in their totality, as impacting on and building upon each other. Rather, each fact was a discrete bit of information, viewed in a vacuum.⁸⁴

This piecemeal approach was highlighted by the Delgado Court’s response to concerns raised by the court of appeals, which was bothered by the INS’s use of the “element of surprise” and “systematic questioning of individual workers by several INS agents.”⁸⁵ Rather than being considered on the merits, these facts were dismissed as not being “pivotal” to the lower court’s decision.⁸⁶ This analysis enabled Justice Rehnquist to isolate as the “pivotal factor” in the lower court’s decision the “stationing of INS agents near the exits of the factory buildings.”⁸⁷ Having thus discounted the court of appeals’ several concerns into one factor regarding the posting of agents at the doors, Delgado was free to diminish the impact of this one variable:

Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers’ voluntary obligations to their employers. The record indicates that when these surveys were initiated, the employees were about their ordinary business, operating machinery and performing other job assignments. . . . [T]he record also indicates that workers were not prevented by the agents from moving about the factories.⁸⁸

82. *Id.*

83. *Id.* at 215 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

84. In a separate opinion, Justice Brennan stated:

The Court goes astray, in my view, chiefly because it insists upon considering each interrogation in isolation as if respondents had been questioned by the INS in a setting similar to an encounter between a single police officer and a lone passerby that might occur on a street corner. Obviously, once the Court begins with such an unrealistic view of the facts, it is only a short step to the equally fanciful conclusion that respondents acted voluntarily when they stopped and answered the agents’ questions. . . . The surrounding circumstances in this case are far different from an isolated encounter between the police and a passerby on the street.

Id. at 229 (Brennan, J., concurring and dissenting).

85. *Id.* at 217.

86. *Id.*

87. *Id.*

88. *Id.* at 218.

When considering respondent's contention that the very stationing of agents near the exits showed the INS's intent to prevent people from leaving, the Court treated such stationing of officials as an event separate from the questioning of individuals inside the factory: "If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits."⁸⁹ Such a one-bite-at-a-time approach allowed Delgado to ingest all the facts into its analysis without considering the effect of the entire meal. Through such semantic "sleight of hand," Justice Rehnquist deemed the "widespread disturbance" caused by "15 to 20" agents moving "systematically through the rows of workers," resulting in some employees being handcuffed and led away to awaiting vans, as "nothing more" than reasonable questioning of employees.⁹⁰

The Court performed similar surgery on the facts of *Michigan v. Chesternut*.⁹¹ One afternoon, four officers patrolling the streets of Detroit saw Michael Mose Chesternut look at their marked police cruiser and run.⁹² In order to "see where [Chesternut] was going," the cruiser quickly caught up with and drove alongside him as he ran.⁹³ Police saw him discard several packets he had retrieved from his pocket.⁹⁴ One of the cruiser's passengers, Officer Peltier, got out of the car and recovered the packets, determining them to be codeine pills.⁹⁵ Chesternut was then arrested.⁹⁶ He moved to dismiss the charges on the ground that he had been "seized" in violation of the Fourth Amendment at the time he discarded the pills.⁹⁷

Writing for a unanimous Court, Justice Blackmun characterized the ruling in *Chesternut* as a middle course between two extremes.⁹⁸ The government had argued that "the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority."⁹⁹ Meanwhile, Chesternut contended that "any and all

89. *Id.*

90. *Id.*; see also *id.* at 226, 229-30 (Brennan, J., concurring and dissenting).

91. 486 U.S. 567 (1987).

92. See *id.* at 569.

93. *Id.*

94. See *id.*

95. See *id.*

96. See *id.*

97. See *id.* at 570.

98. In this sense, the *Chesternut* Court adopted an approach favoring an "intermediate response," much as it did in *Terry*. See *Terry v. Ohio*, 392 U.S. 1, 17-19 (1968); *Adams v. Williams*, 407 U.S. 143, 145 (1972).

99. *Chesternut*, 486 U.S. at 572. Justice Blackmun continued: "Thus, petitioner would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." *Id.*

This logical extreme became the standard rule only four years later in *California v. Hodari D.*, 499 U.S. 621 (1991), wherein Justice Scalia defined a Fourth Amendment seizure,

police ‘chases’ are Fourth Amendment seizures.”¹⁰⁰ Justice Blackmun bluntly rejected both as attempts to create “bright-line” rules for “all investigatory pursuits” and thus as failures to heed the Court’s “clear direction” favoring a “contextual approach” where “all the circumstances surrounding the incident” were weighed in each case.¹⁰¹

Justice Blackmun announced that the Court had “embraced” Justice Stewart’s *Mendenhall* test for defining a Fourth Amendment seizure: “The test provides that the police can be said to have seized an individual ‘only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’”¹⁰² Justice Blackmun essentially found Justice Stewart’s test to be the best of both worlds, for it was “flexible enough to be applied to the whole range of police conduct in an equally broad range of settings” while at the same time it called for “consistent application from one police encounter to the next, regardless of the particular individual’s response to the actions of the police.”¹⁰³ Because the *Mendenhall* objective “reasonable person” standard did not vary with the particular individual approached, it therefore freed police to decide in advance which actions would trigger Fourth Amendment application.¹⁰⁴

Interestingly, Justice Blackmun celebrated the *Mendenhall* test’s “necessary” imprecision, for it was “designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation.”¹⁰⁵ Such language belies the Court’s selective memory, as its piecemeal analysis of the facts in *Delgado* occurred only four years earlier. Further, Justice Blackmun’s admonition to view the situation “as a whole,” including not only a perusal of “police conduct” but also “the setting in which the conduct occurs,” was not heeded even in *Chesternut*.¹⁰⁶ Rather than considering all the circumstances surrounding the incident, the *Chesternut* Court ultimately labeled the entire episode as merely “a brief acceleration to catch up with respondent, followed by a short drive alongside him.”¹⁰⁷ The Court spent little time considering the setting of the event, the number of officers, or the effect of the mark-

based on the common law of arrest, as requiring “either physical force . . . or, where that is absent, submission to the assertion of authority.” *Id.* at 626 (emphasis added).

100. *Chesternut*, 486 U.S. at 572.

101. *Id.* at 572-73.

102. *Id.* at 573 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

103. *Id.* at 574.

104. See *id.*

105. *Id.* at 573 (emphasis added).

106. *Id.*

107. *Id.* at 576.

ings on the car and uniforms on the officers.¹⁰⁸ Such facts form a portion of “all of the circumstances surrounding the incident”¹⁰⁹ and should therefore have been weighed. Indeed, such particulars were not seen as insignificant by the Mendenhall Court, the opinion from which Justice Blackmun adopted the Court’s “test.”¹¹⁰ Instead, Chesternut emphasized absent circumstances, such as the fact that police failed to activate their siren or display their weapons.¹¹¹ Therefore, despite the fact that a marked cruiser filled to capacity with uniformed officers sped up to follow Chesternut around a corner and then drove alongside him, the Court concluded that a reasonable person in Chesternut’s position would not have believed “that he was not free to disregard the police presence and go about his business.”¹¹²

The Court changed track in its next case, *California v. Hodari D.*¹¹³ In *Hodari*, police officers Brian McColgin and Jerry Pertoso, while patrolling the streets of Oakland, observed several youths scatter, apparently in panic, upon seeing the officers’ vehicle.¹¹⁴ The officers gave chase, McColgin by car and Pertoso on foot.¹¹⁵ *Hodari* was one of the youths who took flight.¹¹⁶ “Looking behind as he ran, he did not turn and see Pertoso until the officer was almost upon him, whereupon he tossed away what appeared to be a small rock. A moment later, Pertoso tackled *Hodari*, handcuffed him, and radioed for assistance.”¹¹⁷ *Hodari* ultimately moved to suppress the small rock, later determined to be crack cocaine, arguing that it was recovered as a result of an unlawful seizure of his person.¹¹⁸

To arrive at an answer to the question of whether *Hodari* was seized at the time he threw the crack cocaine, Justice Scalia took a road different from that taken by the Court in all its cases since

108. See *id.* at 569 (stating that the four policemen “followed the respondent around the corner” and thus did not merely drive up alongside him while patrolling).

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

110. As to the number of officers, Justice Stewart found as a relevant factor “the threatening presence of several officers.” *Id.* Moreover, Justice Stewart deemed important the fact that the agents who approached *Mendenhall* “wore no uniforms.” *Id.* at 555.

111. “The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt, or displayed any weapons; or that they operated the[ir] car in an aggressive manner to block respondent’s course or otherwise control the direction or speed of his movement.” *Chesternut*, 486 U.S. at 575. A demonstration of the continued parsing of facts is provided in the next sentence: “While the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does not, standing alone, constitute a seizure.” *Id.* (emphasis added).

112. *Id.* at 576.

113. 499 U.S. 621 (1991).

114. See *id.* at 623.

115. See *id.*

116. See *id.*

117. *Id.*

118. See *id.*

Terry.¹¹⁹ Instead of relying on the precedent as it had evolved since 1967, the year the Warren Court handed down *Terry*, Justice Scalia peeled the onion all the way back to the common law. He commenced with the most basic of premises, considering the meaning of seizure in relation to any object, whether “animate or inanimate.”¹²⁰ He noted that the common law generally understood seizures to include not merely grasping the object, but “actually bringing it within physical control.”¹²¹ Thus, confining himself to the law in force at essentially the time of the framers,¹²² Justice Scalia relied on the definition of the only seizure then recognized for the person, arrest: “To constitute an arrest, however—the quintessential “seizure of the person” under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient.”¹²³

Justice Scalia then signaled that it was the arrest, the most severe form of seizure of the person, that would become the yardstick for the Fourth Amendment seizure: “We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest.”¹²⁴

Of course, an arrest is the most intrusive form of seizure of the person, and therefore it is the most narrowly defined kind of detention. Justice Scalia thus chose the most restrictive form of seizure to determine the boundaries of seizures of the person in general. Perhaps Justice Scalia’s reliance on the law of arrest was forced upon him by his mode of analysis, for he anchored his reasoning to concepts formed during the common law near the time of ratification, and therefore could not consult *Terry*, a decision handed down over a century later. Yet the confines of Justice Scalia’s analysis are manifest; by defining Fourth Amendment seizure in terms of arrest, he failed to consider the potentially broader dimensions of *Terry* stops, and so artificially curtails Fourth Amendment protection.¹²⁵

119. Justice Scalia framed the question thusly: “As this case comes to us, the only issue presented is whether, at the time he dropped the drugs, Hodari had been ‘seized’ within the meaning of the Fourth Amendment.” *Id.* at 623.

120. *Id.* at 624.

121. *Id.*

122. See *id.* (citing *The Josefa Segunda*, 10 Wheat. 312, 325-26 (1825)).

123. *Id.*

124. *Id.* at 627.

125. Justice Scalia’s failure to consider *Terry* might have been no accident. He had previously criticized *Terry* for failing to consider the state of the law at the time of ratification:

I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification. Thus, when the Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and ef-

As to when the Fourth Amendment is triggered, Justice Scalia offered a new, bright-line definition, based on the law of arrest: "An arrest (and therefore Fourth Amendment application) requires either physical force . . . or, where that is absent, submission to the assertion of authority."¹²⁶ This test emphasizes the behavior of the individual pursued by police. A seizure "does not remotely apply" to an officer yelling "'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure."¹²⁷

Hodari, therefore, prescribed as a necessary ingredient of a Fourth Amendment seizure of a person by show of authority the person's own conduct. In a sense, the individual can, by his or her own actions, initiate the Fourth Amendment in certain circumstances. Should an individual be confronted with a government official's assertion of authority, the citizen can summon constitutional protection by submitting to that authority. A submission to an officer's authority thus simultaneously forces the officer to submit to the Fourth Amendment.

Justice Scalia's analysis represented a dramatic shift away from the Court's modern precedent. Perhaps in recognition of the incon-

facts, against unreasonable searches and seizures, shall not be violated" (emphasis added), it "is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted," . . . The decision of ours that gave approval to such searches, *Terry v. Ohio* . . . made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was "reasonable" by current estimations.

Minnesota v. Dickerson, 508 U.S. 366, 379-80 (1993) (Scalia, J., concurring) (citations omitted). Stepping outside of the analysis followed by the *Terry* line of precedent, the *Hodari* Court reconsidered the boundaries of a seizure somewhat independent of that case law. Included within this discussion was not only an analysis of the starting point of a seizure, but also mention of its end point. Justice Scalia noted:

To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a continuing arrest during the period of fugitivity. If, for example, *Pertoso* had laid his hands upon *Hodari* to arrest him, but *Hodari* had broken away and had then cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest. "A seizure is a single act, and not a continuous fact."

Hodari, 499 U.S. at 625 (emphasis added) (citation omitted). Beyond this dictum, no rule is established to identify the end point of all seizures.

126. *Id.* at 626 (parenthetical and emphasis added). Although Justice Scalia's analysis of the common law at the time of ratification represented a departure in method from *Terry* and its progeny, the words ultimately used in the *Hodari* test would not have sounded entirely alien to the justices on the bench at the time of *Terry* or *Mendenhall*. In a footnote Chief Justice Warren mentioned in reference to seizures of the person: "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968). Justice Stewart cited this language in his opinion in *Mendenhall*. See *United States v. Mendenhall*, 446 U.S. at 544, 552 (1980). However, neither reference included the citizen's own actions as part of the seizure definition.

127. *Hodari*, 499 U.S. at 626.

gruity of *Hodari* among the case law, Justice Scalia responded by attempting to diminish and even marginalize the Court's previous rulings. Justice Scalia referred to Justice Stewart's standard for seizure of a person as "the so-called *Mendenhall* test,"¹²⁸ even though he conceded that this definition was "adopted by the Court in later cases."¹²⁹ Further, he seemed to indicate that the "whether a reasonable person feels free to leave" analysis was not alone determinative of the existence of a seizure in any case:

In seeking to rely upon [the *Mendenhall*] test here, respondent fails to read it carefully. It says that a person has been seized "only if," not that he has been seized "whenever"; it states a necessary, but not a sufficient, condition for seizure—or, more precisely, for seizure effected through a "show of authority."¹³⁰

Thus, *Hodari*, in one sentence and despite the Court's reliance upon it for two decades, reduced *Mendenhall* from a test to a mere factor, albeit a "necessary" one. When faced with the Court's heavy reliance upon the *Mendenhall* standard in *Chesternut*, Justice Scalia explained all that spilled ink by asserting that the officers' actions in driving along *Chesternut* never rose to the level of conveying "the message that he was not free to disregard the police and go about his business."¹³¹ Thus, the Court never reached the issue of whether, had that message indeed been sent, a Fourth Amendment seizure would have occurred.¹³²

After the detour taken in *Hodari*, the Court, still in its 1991 term, returned to its well-worn line of precedent that originated with *Terry*, in *Florida v. Bostick*.¹³³ In *Bostick*, the Broward County Sheriff's Department had developed a drug interdiction program wherein officers routinely boarded buses at scheduled stops and requested passengers' permission to search their luggage.¹³⁴ Implementing this policy, two officers, "complete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol," approached Terrance Bostick as he sat on a bus bound from Miami to Atlanta in a stopover in Fort Lauderdale.¹³⁵ The officers asked Bostick for his bus ticket and identification, and returned these items when they found them "unremarkable."¹³⁶ However, the police re-

128. *Id.* at 627 (emphasis added).

129. *Id.* Justice Scalia's implied criticism of the "so-called" *Mendenhall* test is curious, for he joined *Chesternut*, the unanimous decision that he himself acknowledged adopted this as the standard of a Fourth Amendment seizure of a person.

130. *Id.* at 628.

131. *Id.*

132. See *id.*

133. 501 U.S. 429 (1991).

134. See *id.* at 431.

135. *Id.* (quoting *Bostick v. State*, 554 So. 2d 1153, 1154 (Fla. 1989)).

136. *Id.*

mained with Bostick, advising him they were narcotics agents looking for drugs.¹³⁷ The officers then requested permission to search Bostick's luggage, advising him that he had the right to refuse consent.¹³⁸ The trial court found that Bostick consented, and the subsequent search recovered cocaine, resulting in Bostick's arrest.¹³⁹ Justice O'Connor, writing for the Court, found two facts to be "particularly worth noting":

First, the police specifically advised Bostick that he had the right to refuse consent. Second, at no time did the officers threaten Bostick with a gun. The Florida Supreme Court indicated that one officer carried a zipper pouch containing a pistol—the equivalent of carrying a gun in a holster—but the court did not suggest that the gun was ever removed from its pouch, pointed at Bostick, or otherwise used in a threatening manner.¹⁴⁰

In *Bostick*, unlike *Hodari*, Justice O'Connor clearly returned the Court to the totality of the circumstances analysis it had developed since *Terry* in 1968. In fact, the *Bostick* Court cited *Terry* in building on its basic premise that not all intercourse between officer and citizen amounts to a seizure.¹⁴¹ However, perhaps in deference to *Hodari*, which the Court handed down months before *Bostick*, reliance on *Mendenhall* was muted and even somewhat camouflaged. Justice O'Connor did indeed cite *Mendenhall* for the proposition that officers may request identification even when they lack a basis for suspecting the individual accosted.¹⁴² However, *Bostick* avoided outright mention of *Mendenhall* when referring to previous discussion of "encounters in airports" by citing *Rodriguez*, which itself relied on *Mendenhall*.¹⁴³

By being the last case in which the Court explicitly ruled on the boundaries of a Fourth Amendment seizure of the person, *Bostick* appropriately represented the culmination of several rationales the Court had developed since *Terry*. In fact, certain concepts, which were mere nebulous notions in *Terry*, had, with *Bostick*, solidified into established precedent. The most dramatic example of this phe-

137. See *id.* at 431-32.

138. See *id.* at 432.

139. See *id.*

140. *Id.* Justice O'Connor considered these two facts so crucial that she repeated them later in the opinion: "Here, the facts recited by the Florida Supreme Court indicate that the officers did not point guns at Bostick or otherwise threaten him and that they specifically advised Bostick that he could refuse consent." *Id.* at 437.

141. See *id.* at 434.

142. See *id.* at 435.

143. *Id.* at 434 ("The Court has dealt with similar encounters in airports and has found them to be 'the sort of consensual encounter[s] that implicat[e] no Fourth Amendment interest.'") (quoting *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984)). This statement was in turn taken by the *Rodriguez* Court from *Mendenhall*. See *Rodriguez*, 469 U.S. at 5-6 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

nomenon was the Court's articulation of the "mere questioning" rule. In *Terry*, the Court determined that it lacked sufficient information from the record to entertain the issue of whether Officer McFadden's behavior before his physical touching of Terry amounted to a Fourth Amendment seizure.¹⁴⁴ In contrast to such hesitation, *Bostick* accepted as a given that "[s]ince *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure."¹⁴⁵ Thus, in thirty years, the Court firmly established that officers have an affirmative right to approach citizens and engage them in conversation. Such action may include not only questioning, but also requesting identification.¹⁴⁶ Further, officers may commit these intrusions even when they have absolutely "no basis for suspecting a particular individual," for the Fourth Amendment simply does not apply.¹⁴⁷

This "mere question" rule stems from yet another maxim originating with *Terry* and polished by *Bostick*: An officer, like any other human, may interact with other people. As long as a reasonable person feels free "to ignore the police presence and go about his business," the encounter is consensual, and no Fourth Amendment interests are implicated.¹⁴⁸ Therefore, the key inquiry is whether officers have transformed a consensual encounter into a seizure by conveying a "message that compliance with their requests is required."¹⁴⁹ The focus traditionally had been on whether official conduct had restrained an individual from "walk[ing] away."¹⁵⁰ Justice O'Connor refined this rule due to the analytical problems presented by the bus traveler:

[W]hen the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.

Here, for example, the mere fact that *Bostick* did not feel free to leave the bus does not mean that the police seized him. *Bostick* was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. *Bostick's* movements were "confined" in a sense, but this was the natural result of his decision to take the bus; it says

144. See *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

145. *Bostick*, 501 U.S. at 434. Justice O'Connor felt so comfortable with this truism of constitutional law that she repeated its substance twice within two paragraphs. The Court's other statement of this rule is as follows: "Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Id.*

146. See *id.*

147. *Id.* at 435.

148. *Id.* at 437.

149. *Id.*

150. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

nothing about whether or not the police conduct at issue was coercive.¹⁵¹

Therefore, the inquiry in such situations should instead focus on “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”¹⁵² This question is still answered by “taking into account all of the circumstances surrounding the encounter.”¹⁵³

However, in actually applying this “all of the circumstances” analysis, Bostick continued the Court’s bad habit of fracturing the totality of the circumstances into a series of separate parts. Justice O’Connor failed to follow her own advice in looking at the situation as a whole from the vantagepoint of a person seated on a bus. Instead, she first took Terrance Bostick out of his bus seat:

There is no doubt that if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure. The Court has dealt with similar encounters in airports and has found them to be “the sort of consensual encounter[s] that implicat[e] no Fourth Amendment interest.”¹⁵⁴

After establishing that the conduct of Bostick’s two officers, had it taken place in the kind of ideal vacuum found in an airport terminal or lobby, would not have even implicated the Fourth Amendment, the Court then separately considered the fact that this case actually occurred “in the cramped confines of a bus.”¹⁵⁵ Thus, the total impact of having official attention directed toward the individual while trapped in a seat was diffused by taking all the facts and parceling them out in pieces.

As noted by Bostick’s bus traveler refinement of the reasonable person test, officials need not account for restrictions on individual freedom caused by circumstances beyond government conduct. The fact that a person seated on a bus does not feel free to leave has no place in the measure of the coercive effect of government conduct.¹⁵⁶

151. Bostick, 501 U.S. at 435-36.

152. *Id.* at 436.

153. *Id.* at 437.

154. *Id.* at 434 (quoting *Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984)). Justice O’Connor mirrored this approach in her initial statement of the issue of the case:

We have held that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate. This case requires us to determine whether the same rule applies to police encounters that take place on a bus.

Id. at 431.

155. *Id.* at 435.

156. See *id.* at 436.

Just like the workers in *Delgado*, the bus traveler voluntarily limits his own freedom regardless of the actions of law enforcement.¹⁵⁷ This limit on personal freedom is in a sense the fault of the individual, and therefore will not be charged to the police. The Court will look at all of the circumstances that could cause a reasonable person to feel compelled to respond to the police, except for those which are of the individual's own making. If the Court truly carried out this logic, *Bostick*, who placed himself on the bus, would, for purposes of applying the totality of the circumstances test, be removed from the bus and again taken out to the terminal.

The final theme fully formed in *Bostick* involved the threshold of intimidation needed to trigger a seizure. The Court previously indicated, in *Chesternut*, that police could exude some intimidation and still not trigger Fourth Amendment application. The Court conceded that the "very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating."¹⁵⁸ It was not, however, intimidating enough "standing alone," to constitute a seizure.¹⁵⁹ Likewise, in *Bostick*, one officer was indeed armed with a gun. However, Justice O'Connor found it "particularly worth noting" that no evidence suggested that "the gun was ever removed from its pouch, pointed at *Bostick*, or otherwise used in a threatening manner."¹⁶⁰ The force of this reasoning set up a particularly high threshold for the intimidation necessary to trigger a seizure. The Court found the absence of severe police behavior, such as the drawing of guns or the making of threats, to be relevant. The implication must be that lesser actions might not constitute a Fourth Amendment seizure. Further, the viewing of all the facts to the situation now includes facts that did not occur at the scene. The lack of certain official behavior now acts to mitigate official conduct to such a degree that it may prevent the application of the Constitution.

One issue missing from *Bostick* was a question essentially missed by all of the cases since *Terry*: How is a continuing seizure of a person assessed? All of the Court's precedent involved measuring the onset of constitutional application in the vacuum of an initial encounter. None considered the question of determining a seizure, under the totality of the circumstances test, when one of the circumstances was a previous seizure. Of course, the Court properly refrained from promulgating a rule on this issue because the facts necessary to determine such a case were never before it. Yet, this changed with *Robinette*, for here the Court was indeed confronted

157. See *id.*

158. *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988).

159. *Id.*

160. *Bostick*, 501 U.S. at 432. This fact was so "worth noting" that the Court noted it twice. See *id.* at 437.

with the situation where a citizen's consent was requested during the limbo existing after a seizure affected by a traffic stop. The Ohio State Supreme Court recognized that Robinette had been seized and considered it crucial to decide whether he remained seized during the request for permission to search.¹⁶¹ The Court was thus presented with not only an opportunity but a call to duty to clarify this portion of the seizure definition.

B. The Court's Allusion to an End Point for Seizures in Its Definition of the Brevity Requirement for Investigatory Detentions

A Fourth Amendment seizure of a person is, of course, finite, for it must, at some time, end. Although the Court has never squarely addressed the question of defining the end point of a seizure of the person, the Court has provided some clues. In *United States v. Sharpe*,¹⁶² the Court made various assumptions about a seizure's conclusion when it considered the "brevity" requirement of investigative stops.¹⁶³ In *Sharpe*, DEA Agent Cooke became suspicious when he observed an apparently heavily loaded pickup truck with a camper shell and a Pontiac driving in tandem across state lines.¹⁶⁴ Agent Cooke radioed the State Highway Patrol to make an investigative stop of both vehicles.¹⁶⁵ Responding to Agent Cooke's call, Officer Thrasher activated his flashing light and motioned the Pontiac driver to stop.¹⁶⁶ As *Sharpe*, the driver of the Pontiac, began to comply, Savage, the pickup's driver, cut between the Pontiac and the patrol car, almost causing a collision.¹⁶⁷ Officer Thrasher pursued the pickup, pulling it over about one-half of a mile down the road from where Agent Cooke stopped with the Pontiac.¹⁶⁸ Agent Cooke waited for the Myrtle Beach Police to arrive and detain *Sharpe* before he joined Officer Thrasher with the pickup.¹⁶⁹ This caused Savage to be detained, against his express desire to leave, for fifteen minutes before Agent Cooke could arrive to investigate the pickup.¹⁷⁰ Agent Cooke made some further observations of the pickup's exterior, opened the rear of the camper, found marijuana, and arrested Savage and ultimately *Sharpe* as well.¹⁷¹

161. See *State v. Robinette*, 653 N.E.2d 695, 698 (Ohio 1995).

162. 470 U.S. 675 (1984).

163. See *id.* at 683.

164. See *id.* at 677.

165. See *id.*

166. See *id.* at 678.

167. See *id.*

168. See *id.*

169. See *id.*

170. See *id.* at 678-79.

171. See *id.* at 679.

The Sharpe Court was thus presented with the issue of whether, under the circumstances, it was reasonable for the officer and the agent to detain Savage for twenty minutes in light of the Fourth Amendment's standards of reasonableness.¹⁷² Of course, the whole concept of brevity is based on an assumption that the time period measured has not only a beginning, but also an identifiable ending. Sharpe indicated that a seizure's end point is linked to the reason for the intrusion in the first place: "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."¹⁷³ Brevity was more than counting the ticks of a clock; it included a consideration of the "law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes."¹⁷⁴ As to Agent Cooke's actions, the Court emphasized that the lower court did not conclude that he "unnecessarily prolonged Savage's detention."¹⁷⁵ The implication here is patent; if Agent Cooke had detained Savage for any time beyond that necessary to serve the law enforcement purposes of the stop, he would have unnecessarily prolonged the motorist's detention, and thus violated the Fourth Amendment's brevity requirement. Later in the opinion, the Sharpe Court again restricted the scope of a legal detention to the "time . . . necessary to detain" the person.¹⁷⁶ Therefore, Sharpe unquestioningly applied a "completion of purpose" definition to determine the end point of a reasonable seizure of the person.¹⁷⁷ Law enforcement may hold a person only so long as necessary to complete the lawful purpose of a stop.¹⁷⁸

The Court brought home the importance of the completion-of-purpose definition of seizure in its application of Sharpe's facts. The Court found: "During most of Savage's 20-minute detention, Cooke was attempting to contact Thrasher and enlisting the help of the local police who remained with Sharpe while Cooke left to pursue Officer Thrasher and the pickup."¹⁷⁹ Since Agent Cooke did everything he reasonably could to carry out the investigation diligently, his stop did "not involve any delay unnecessary to the legitimate investigation."¹⁸⁰

Interestingly, Sharpe followed the "completion of purpose" test for the end of a seizure while at the same time rejecting the call to formulate a "bright-line" rule for measuring brevity of investigatory de-

172. See *id.* at 683.

173. *Id.* at 684.

174. *Id.* at 685.

175. *Id.* (emphasis added).

176. *Id.* at 686.

177. See *id.*

178. See *id.*

179. *Id.* at 687.

180. *Id.*

tentions.¹⁸¹ The Court felt that a “hard-and-fast time limit” on detentions would hamper police in diligently pursuing the purpose of the stop.¹⁸² Thus, the Court apparently envisioned the completion-of-purpose definition as a standard sufficiently flexible for daily police use, in contrast to the bright-line time limit it rejected.

C. The Court’s Creation of “Bright-Line” Fourth Amendment Rules

In assessing the reasonableness of Deputy Newsome’s actions toward Robinette, the Robinette Court asserted that it “consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.”¹⁸³ Chief Justice Rehnquist then bolstered this point by citing the Court’s avoidance of bright-line rules for the determination of seizures during law enforcement approaches at airport terminals, police investigatory pursuits, and drug agent bus sweeps.¹⁸⁴ The Court even noted its rejection of a *per se* rule when weighing the voluntariness of consent to search.¹⁸⁵ Robinette’s reliance on precedent, however, was selective. Chief Justice Rehnquist, in his uninterrupted list of cases adhering to the totality of the circumstances approach, failed to acknowledge prior Supreme Court holdings that clearly established bright-line rules. Such omissions are all the more curious, for they required that the Court turn a blind eye to factual settings much more similar to the one Robinette faced than airports or bus sweeps. Indeed, the bright-line rules missed by the Court were designed in the context of traffic stops of motorists.

The first bright-line case, *Pennsylvania v. Mimms*,¹⁸⁶ was indeed mentioned by the Robinette Court.¹⁸⁷ In fact, Chief Justice Rehnquist cited it as authority to justify Deputy Newsome’s request that Robinette exit his car.¹⁸⁸ In *Mimms*, Philadelphia officers lawfully stopped Harry Mimms for driving with expired license tags in violation of the state Motor Vehicle Code.¹⁸⁹ One of the officers then asked Mimms to step out of his car and produce his license and owner’s card.¹⁹⁰ When Mimms did so, officers observed a bulge under his sports jacket.¹⁹¹ A resulting frisk revealed a revolver.¹⁹² Rather than

181. *Id.* at 685.

182. *Id.* at 686.

183. *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996).

184. *See id.*

185. *See id.*

186. 434 U.S. 106 (1977).

187. *See Robinette*, 117 S. Ct. at 421.

188. *See id.*

189. *See Mimms*, 434 U.S. at 107, 109.

190. *See id.* at 107.

191. *See id.*

192. *See id.*

consider only the facts of this particular case, the *Mimms* Court weighed the interests of the state versus those of the individual in such cases in general.¹⁹³ The result was the creation of a bright-line rule for all lawfully initiated traffic stops: “We hold . . . that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable searches and seizures.”¹⁹⁴ This was the holding Chief Justice Rehnquist cited in *Robinette* to support Deputy Newsome’s actions.¹⁹⁵ However, in the very next paragraph of the *Robinette* opinion, Chief Justice Rehnquist failed to recognize this bright-line standard in his rendition of the Court’s rejection of *per se* rules.¹⁹⁶

Another case that belies the Court’s consistent shunning of bright lines is *Hodari*. As previously noted in Part II.A. of this Article, the *Hodari* Court broke away from what it described as the “so-called *Mendenhall* test,” which considered the totality of the circumstances surrounding the police and the citizen.¹⁹⁷ Instead, Justice Scalia crafted a specific definition for seizure of the person that pinpointed only certain factors to weigh in determining the exact genesis of any seizure: “An arrest (and therefore Fourth Amendment application) requires either physical force . . . or, where that is absent, submission to the assertion of authority.”¹⁹⁸ This, quite simply, is nothing less than a bright-line test for seizure of the person. The Court itself has flatly stated as much. In *Chesternut*, the government advanced the argument that “the Fourth Amendment is never implicated until an individual stops in response to the police’s show of authority.”¹⁹⁹ Writing for a unanimous Court, Justice Blackmun criticized this approach as a “bright-line rule” which failed to “heed this Court’s clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account ‘all of the circumstances surrounding the incident.’”²⁰⁰ Thus, in

193. Rather than considering *Mimms*’ danger to the officers at this traffic stop, the Court took a wider view. See *id.* at 109. For instance, the Court consulted the literature regarding dangers to police in traffic stops in general: “According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.” *Id.* at 110 (quoting *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972)). Noting that not all these approaches involved traffic violations, the Court still concluded “that a significant percentage of murders of police officers occurs when the officers are making traffic stops.” *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973)).

194. *Id.* at 111 n.6.

195. See *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996).

196. See *id.*

197. *California v. Hodari D.*, 499 U.S. 621, 626-28 (1991).

198. *Id.* at 626 (parenthetical and emphasis added).

199. *Michigan v. Chesternut*, 486 U.S. 567, 572 (1987).

200. *Id.*

the space of four years, the Court went from unanimously condemning a *per se* rule to adopting it.²⁰¹ This inconsistency was then compounded by the Court's reassertion of the totality of the circumstances approach in *Bostick*, a case handed down only months after *Hodari*.²⁰² Such a history hardly supports Chief Justice Rehnquist's portrayal of a Court "consistently eschew[ing] bright-line rules."²⁰³

Indeed, rather than resembling a train steadily chugging down a straight track, the Court appears to be a rather erratic pendulum, shifting with each case. In the same term it handed down *Robinette*, the Court also decided *Maryland v. Wilson*.²⁰⁴ Here, months after stating in *Robinette* that the Court "consistently eschewed" bright-line rules, it not only reasserted but expanded *Mimms'* *per se* holding allowing officers to ask lawfully stopped drivers to exit their vehicles.²⁰⁵ As to the apparent inconsistency of its rulings, Chief Justice Rehnquist offered:

Respondent argues that, because we have generally eschewed bright-line rules in the Fourth Amendment context, see, e.g., *Ohio v. Robinette* . . . we should not here conclude that passengers may constitutionally be ordered out of lawfully stopped vehicles. But, that we typically avoid *per se* rules concerning searches and seizures does not mean that we have always done so; *Mimms* itself drew a bright line, and we believe the principles that underlay that decision apply to passengers as well.²⁰⁶

Thus, in one term, the same Court, in two opinions authored by the same Justice, took diametrically opposed approaches toward the appropriateness of the use of bright lines in Fourth Amendment litigation.²⁰⁷ Perhaps Chief Justice Rehnquist failed to see the enormity of the Court's latest shift in *Wilson*, for rather than remembering the Court's "consistent eschew[ing]" of bright-line rules, he downgraded the Court's avoidance of this approach with the terms "generally" and "typically."²⁰⁸

The tug-of-war in which the Court has placed itself results from the competing concerns it faces in seizure-of-the-person cases. The Court has, at times, avoided an absolute rule so that it might craft guidelines to handle all of the various police-versus-citizen encounters, which it has found "incredibly rich in diversity."²⁰⁹ However, the

201. See *supra* text accompanying notes 196-200.

202. See *Florida v. Bostick*, 501 U.S. 429, 435-37 (1991).

203. *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996).

204. 117 S. Ct. 882 (1997).

205. The *Wilson* Court concluded: "We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop." *Id.* at 886.

206. *Id.* at 885 n.1 (citation omitted).

207. See *supra* text accompanying notes 193-206.

208. *Wilson*, 117 S. Ct. at 885.

209. *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

Court has also recognized powerful rationales that support bright-line guides for law enforcement.²¹⁰ In *New York v. Belton*,²¹¹ a case wherein the Court sought a clear rule establishing the scope of searches incident to arrest in automobiles, Justice Stewart noted that the Fourth Amendment:

“can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.” . . . This is because “Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged”²¹²

Thus, in language strikingly contrary to the thrust of totality of the circumstances reasoning, *Belton* continued, “[A] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”²¹³ Therefore, bright lines can advance personal privacy and security by ensuring that police easily know the limits of their day-to-day activities.²¹⁴ This strong language, along with a sampling of Fourth Amendment cases, calls into serious question Robinette’s wholesale rejection of *per se* rules.

III. ROBINETTE’S CONFUSION OF THE SCOPE OF SEIZURE OF THE PERSON

A. Robinette’s Factual Background

On August 3, 1992, Deputy Roger Newsome of the Montgomery County Sheriff’s Department was conducting a drug interdiction patrol on Interstate 70 north of Dayton, Ohio.²¹⁵ Deputy Newsome clocked Robert D. Robinette driving his red Pontiac Firebird at sixty-nine miles per hour in a forty-five-mile-per-hour construction zone.²¹⁶ He therefore decided to follow his “routine practice regarding speeders in that particular construction zone” of merely issuing a verbal

210. See *supra* text accompanying notes 193-223.

211. 453 U.S. 454 (1981).

212. *Id.* at 458 (citations omitted).

213. *Id.* (citing *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

214. See *id.*

215. See *Ohio v. Robinette*, 117 S. Ct. 417, 419 (1996); Brief for Amicus Curiae of the American Civil Liberties Union and the ACLU of Ohio in Support of Respondent at 1, *Ohio v. Robinette*, 117 S. Ct. 417 (1996) (No. 14074) [hereinafter ACLU Brief].

216. See *Robinette*, 117 S. Ct. at 419; Brief for Respondent at 1, *Ohio v. Robinette*, 117 S. Ct. 417 (1996) [hereinafter Respondent’s Brief].

warning.²¹⁷ He stopped Robinette and requested and received his driver's license.²¹⁸ A computer check revealed no prior violations.²¹⁹ However, instead of simply giving the speeding warning to the motorist as he sat in his car, Deputy Newsome asked Robinette to exit his vehicle and stand between his Firebird and the patrol cruiser.²²⁰ Retaining Robinette's license, Deputy Newsome returned to his cruiser and activated the car's video camera to videotape the encounter with Robinette.²²¹ Deputy Newsome then handed back Robinette's license and issued his warning.²²² However, he continued the conversation as follows:

Officer Newsome: Okay. Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?

Robinette: I didn't see the sign was dropped down.

Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets though. One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?²²³

Deputy Newsome later testified that his "only purpose" for activating the video camera was that "he was a member of a drug interdiction patrol, and he wanted to record his questioning of Robinette regarding drugs, weapons and contraband."²²⁴ Indeed, Deputy Newsome had performed a similar routine in requesting consent to search in "786 traffic stops in 1992, the year of Robinette's arrest."²²⁵ Deputy Newsome's reason for his habitual requests to search cars was "more so for any other reason the fact that I need the practice, to be quite honest."²²⁶

When, "with no pause or break in the conversation,"²²⁷ Deputy Newsome abruptly shifted subjects from speeding to contraband, he caught Robinette off guard.²²⁸ Robinette denied having drugs or weapons in his car.²²⁹ When Newsome then followed up by asking

217. *State v. Robinette*, 653 N.E.2d 695, 696 (Ohio 1995).

218. See *Robinette*, 117 S. Ct. at 419.

219. See *id.*

220. See ACLU Brief, *supra* note 215, at 1.

221. See *id.*; Respondent's Brief, *supra* note 216, at 2.

222. See *Robinette*, 117 S. Ct. at 419.

223. Respondent's Brief, *supra* note 216, at 2-3.

224. *Id.* at 2.

225. *Robinette*, 117 S. Ct. at 422 (Ginsburg, J., concurring).

226. Respondent's Brief, *supra* note 216, at 18.

227. *State v. Robinette*, No. 14074, 1994 WL 147806, at *1 (Ohio App. 2d. Apr. 15, 1994).

228. See *State v. Robinette*, 653 N.E.2d 695, 696 (Ohio 1995).

229. See *id.*

permission to search the vehicle, Robinette was “shocked” and “automatically” answered “yes.”²³⁰ The resulting search revealed a small amount of marijuana and a pill later determined to be methylenedioxy methamphetamine (MDMA).²³¹

B. Every Lower Court in Robinette Considered the Scope of the Seizure to Be the Determinative Issue in the Case

The discovery of illegal drugs in Robinette’s car led to his indictment, his unsuccessful motion to suppress the evidence, and ultimately to his “no contest” plea.²³² In overruling the motion to suppress, the trial court focused on the scope of Deputy Newsome’s detention of Robinette.²³³ The judge found that “the deputy made clear to Robinette that the traffic matter was concluded before asking to search the vehicle” and therefore the consent to search “did not result from any overbearing behavior on behalf of Newsome.”²³⁴ Thus, at the very first hearing, the trial judge identified as the constitutional battleground the boundaries of seizure of the person, and whether or not that person was within those boundaries when consent was solicited.²³⁵

When Robinette appealed his conviction, the Court of Appeals of Ohio, Montgomery County, continued to focus on the proper scope of the initial detention.²³⁶ The court noted, “He contends that once the purpose for the investigative stop—in this case the issuance of a warning for speeding—had been satisfied, the officer could not lawfully detain him further for the purpose of securing his consent to search for narcotics. We agree.”²³⁷

Relying on this argument as the “sole Assignment of Error,” the court of appeals concluded:

[A] reasonable person in Robinette’s position would not believe that the investigative stop had been concluded, and that he or she was free to go, so long as the police officer was continuing to ask investigative questions. . . . Because the search in the case before us resulted from an unlawful detention, it is the fruit of an unlawful seizure.²³⁸

230. ACLU Brief, *supra* note 215, at 2.

231. See Robinette, 653 N.E.2d at 696.

232. See *id.*

233. See *id.* at 697.

234. *Id.* at 696.

235. See *id.*

236. See *id.*

237. State v. Robinette, No. 14074, 1994 WL 147806, at *1 (Ohio App. 2d Apr. 15, 1994).

238. *Id.* at *2.

Likewise, the Supreme Court of Ohio viewed the continued legality of the detention as the crux of this case: "We find that the search was invalid since it was the product of an unlawful seizure."²³⁹ In fact, recognizing that Robinette's detention began legally, the state supreme court pinpointed the relevant inquiry: "The question is when the validity of that stop ceased."²⁴⁰ Justice Pfeifer, writing for the majority, regarded the marijuana and MDMA as illegally recovered not because of some flaw within the consent itself, but due to the context within which the consent was obtained.²⁴¹ Deputy Newsome had, with neither reason nor articulable facts, "extended his detention of Robinette by ordering him out of the vehicle. . . . Therefore the detention of Robinette ceased being legal when Newsome asked him to leave his vehicle."²⁴² The Ohio Supreme Court thus concluded: "Because Robinette's consent was obtained during an illegal detention, his consent is invalid unless the state proves that the consent was not the product of the illegal detention but the result of an independent act of free will."²⁴³ Justice Pfeifer noted that several facts, such as the lack of a "time lapse" between the illegal detention and the request to search, the deputy's prefacing his request to search with the phrase "before you get gone," and most people's belief that an officer's continued interrogation signals continued custody, caused this case to be "an example of the blurring between a legal detention and an attempt at consensual interaction."²⁴⁴ The state supreme court cogently identified the danger involved:

The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.²⁴⁵

Thus, the court felt a "need for this court to draw a bright line between the conclusion of a valid seizure and the beginning of a con-

239. Robinette, 653 N.E.2d at 697.

240. *Id.* (emphasis added).

241. See *id.* at 698.

242. *Id.* at 697-98. Although the Ohio Supreme Court correctly identified the issue in this case as one involving the scope of a legal detention, its statements regarding violation upon requesting an individual to get out of the vehicle during a traffic stop are contrary to *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977). Thus, the improper extension of the detention actually occurred after Robinette was out of the car, when Deputy Newsome had completed his task of warning Robinette about speeding. In the majority opinion in this case, Chief Justice Rehnquist noted the Ohio Supreme Court's failure to heed *Mimms*. See *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996).

243. Robinette, 653 N.E.2d at 698.

244. *Id.*

245. *Id.*

sensual exchange.”²⁴⁶ Justice Pfeifer therefore crafted a rule to address the concerns of police overreaching due to the citizenry’s ignorance of the absence of detention:

[T]o be secure in one’s person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase “At this time you legally are free to go” or by words of similar import.²⁴⁷

Justice Pfeifer’s warning requirement was not created in a vacuum. The state supreme court had just witnessed the government’s claim that a reasonable person who is caught speeding by a patrolling sheriff, ordered out of the car, and videotaped while asked “One question before you get gone: are you carrying any illegal contraband in your car?” would feel free to just drive away.²⁴⁸ The state court, therefore, established their warning rule in the hope of preventing officers from transforming initially legal traffic stops into “fishing expedition[s] for unrelated criminal activity.”²⁴⁹

C. The Robinette Court’s Ruling and Rationale

As previously noted, in the very first court in which this case was heard, the parties and courts uniformly drew the battle lines at the issue of the continuing validity of Deputy Newsome’s seizure of Robinette. Indeed, before this case reached the United States Supreme Court, each court that passed on the matter felt compelled to directly address the legality of the search in this case in terms of the proper scope of the accompanying Fourth Amendment seizure.²⁵⁰ Even the United States Supreme Court itself recognized the significance of the seizure question, stating, “We believe the issue as to the continuing legality of the detention is a ‘predicate to an intelligent resolution’ of the question presented, and therefore ‘fairly included therein.’ The parties have briefed this issue, and we proceed to decide it.”²⁵¹ Yet, the Court then went on to dodge this issue.

In the very first paragraph after the Court’s rendition of the case’s facts and procedural history, Chief Justice Rehnquist focused on the state supreme court’s warning requirement that “[a]ny attempt at consensual interrogation must be preceded by the phrase

246. *Id.*

247. *Id.* at 699.

248. See *infra* text accompanying notes 265-85.

249. *Robinette*, 653 N.E.2d at 699.

250. See *infra* Part III.B.

251. *Ohio v. Robinette*, 117 S. Ct. 417, 420 (1996) (citations omitted).

‘At this time you legally are free to go’ or by words of similar import.”²⁵² He then isolated this portion of the state court opinion by announcing the Court’s grant of certiorari “to review this per se rule, and we now reverse.”²⁵³ By such selective citation, Chief Justice Rehnquist placed the lower court’s ruling in a false light. He distorted Justice Pfeifer’s reasoning into nothing more than a call for a warning requirement for consent to search.

Robinette’s articulation of the issue thus glossed over the true area of dispute: the continuing lawfulness of Deputy Newsome’s seizure of Robinette. As previously indicated, a closer look at the Ohio Supreme Court opinion reveals that the majority’s primary concern was the illegality of the continued detention.²⁵⁴ In fact, its first ruling was focused not on the warning mandate but on the “continued detention of a person stopped for a traffic violation.”²⁵⁵ Further, the first conclusion mentioned in Justice Pfeifer’s opinion concerned the unlawfulness of the seizure: “We find that the search was invalid since it was the product of an unlawful seizure.”²⁵⁶ Although in the next sentence Justice Pfeifer did indeed establish the “bright-line” warning requirement for “any consensual interrogation,” he devoted virtually all of his remaining opinion to the difficulties in determining the end-point of a seizure during a traffic stop.²⁵⁷ The warning requirement had no purpose in and of itself. The Ohio Supreme Court established it as a response to the coercive effects of an illegally extended seizure.²⁵⁸ Yet, Chief Justice Rehnquist failed to recognize the broader context of the Ohio Supreme Court’s warning rule.²⁵⁹ By narrowing the scope of the state supreme court’s reasoning, Robinette set up a “warning-is-required-for-consent” straw man that it could easily knock down without addressing the troubling concerns underlying the state court ruling. This, in turn, obscured Justice Rehnquist’s dodge of the case’s true issue.

Chief Justice Rehnquist’s sidestep is illustrated by a yawning gap in the Robinette opinion. In considering the legality of the “continued detention,” the Court began by addressing the propriety of stopping

252. *Id.* at 419-20 (citing *Robinette*, 653 N.E.2d at 699).

253. *Id.* at 420 (emphasis added).

254. See *Robinette*, 653 N.E.2d at 697.

255. *Id.* at 696. In this ruling, as indicated in both the majority and dissenting opinions of the United States Supreme Court, the Ohio Supreme Court applied an improper standard to the legality of the detention, incorrectly focusing on the subjective motivations of Deputy Newsome himself. See *Robinette*, 117 S. Ct. at 420-21. The state supreme court, therefore, while improperly measuring the legality of the detention, at least recognized that the detention was the proper issue in the case. See *Robinette*, 653 N.E.2d at 697.

256. *Robinette*, 653 N.E.2d at 697.

257. *Id.* at 697-99.

258. See *id.* at 698.

259. See *Robinette*, 117 S. Ct. at 420-21.

Robinette in the first place.²⁶⁰ There was “admitted probable cause to stop Robinette for speeding.”²⁶¹ Further, in light of this probable cause for the stop, “Deputy Newsome was objectively justified in asking Robinette to get out of the car.”²⁶² Of course, the conclusions that probable cause supports a traffic stop and that officers may order the driver out of a lawfully stopped vehicle cover no new ground. Nonetheless, the Court took pains to decide these non-issues.

At this point in the analysis, the Court had Robinette out of his car, standing between his Firebird and the police cruiser, and presumably listening to Deputy Newsome’s concerns for accidents on that stretch of highway.²⁶³ The Court had arrived at the core of the Fourth Amendment problem posed by the facts: Was the continued detention of Robinette reasonable, either as a pure consensual encounter or as a justified extension of the original detention? Seemingly sensing this, the Court stated, “We now turn to the merits of the question presented.”²⁶⁴ Then, it offered nothing.

The Court’s failure to confront the seizure issue was apparent from the very start of its discussion of the “merits of the question presented.”²⁶⁵ The “merits” of Robinette began, “We have long held that the ‘touchstone of the Fourth Amendment is reasonableness.’”²⁶⁶ Chief Justice Rehnquist lifted this language from *Florida v. Jimeno*,²⁶⁷ a case concerning not the seizure of a person, but the separate issue of the scope of consent to search.²⁶⁸ Thus, in the first words of his analysis of the merits, Chief Justice Rehnquist telegraphed his view that Robinette was nothing more than a consent case.²⁶⁹ Any meaningful “seizure of the person” reasoning was therefore short-circuited before it even began.

Chief Justice Rehnquist then dutifully cited the series of cases in which the Court defined a seizure of the person.²⁷⁰ Yet, the Court then employed none of these authorities to answer whether Robinette was indeed seized at the very moment Deputy Newsome said,

260. *Id.* at 421.

261. *Id.*

262. *Id.*

263. See *id.*

264. *Id.* at 421.

265. *Id.*

266. *Id.* (citing *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)).

267. 500 U.S. 248 (1991).

268. See *id.* at 250; see also *Robinette*, 117 S. Ct. at 421.

269. See *Robinette*, 117 S. Ct. at 421.

270. Justice Rehnquist cited language from *Florida v. Royer*, 460 U.S. 491 (1983), in which the Court traced the increasing level of intrusion upon a traveler in an airport terminal and required that government justification match each advancement in invasion of liberty interests; *Michigan v. Chesternut*, 486 U.S. 567 (1988), wherein the Court considered whether a cruiser driving along a person running on the sidewalk constituted a seizure; and *Florida v. Bostick*, 501 U.S. 429 (1991), in which the Court considered whether an encounter during a bus sweep constituted a seizure.

“before you get gone.”²⁷¹ Instead, Robinette spent two paragraphs blandly stating that the “endless variations” of facts involved in these encounters necessitated that the Court eschew “bright-line rules” in favor of a “totality of the circumstances” approach to reasonableness.²⁷²

Of course, the totality of the circumstances rule was crafted to allow the Court to determine the existence of a seizure itself. However, Chief Justice Rehnquist did not then actually apply all the facts to see if Deputy Newsome did in fact continue to seize Robinette when he was asking him about contraband in his car. Instead, he entirely skipped over the seizure, the primary issue, to rule on the voluntariness question of the resulting consent.²⁷³ Thus, Chief Justice Rehnquist’s language about favoring the “traditional contextual approach” instead of a rigid “per se rule” allowed the Court to go off on a tangent about the Court’s previous rejection of per se rules in the consent context.²⁷⁴ Indeed, *Schneckloth v. Bustamonte*,²⁷⁵ a case cited by Robinette for its rejection of per se rules, was a consent case.²⁷⁶ Once the Court launched on the secondary discussion of consent, any opportunity to provide guidance on seizure was lost.

The shifting of battlegrounds to a discussion of warning requirements for consent to search spelled doom for any thoughtful weighing of the facts surrounding Deputy Newsome’s inquiries about guns and drugs in Robinette’s car. Robinette simply equated the Ohio Supreme Court’s “you legally are free to go” warning with the “you have a right to refuse to consent” warning it rejected in *Schneckloth*.²⁷⁷ This enabled Chief Justice Rehnquist to couch the rest of the majority opinion in voluntariness of consent terms.²⁷⁸ The result was an opinion, having come to the very brink of addressing the crucial point in the case, detouring into an irrelevant discussion regarding the undesirability of warnings for consent to search.²⁷⁹

The opportunity to provide lower courts with guidance on “the continuing legality of the detention,” which was the issue the Court had itself deemed “predicate to an intelligent resolution of the question presented,” was thus never actually handled. Or, perhaps it was. By going directly to the consent issue, especially after mentioning the importance of the continued validity of the detention, Robinette signaled in deeds, more powerfully than in words, that the de-

271. Robinette, 117 S. Ct. at 421.

272. *Id.*

273. See *id.*

274. *Id.*

275. 412 U.S. 218 (1973).

276. See Robinette, 117 S. Ct. at 421.

277. *Id.*

278. See *id.*

279. See *infra* text accompanying notes 289-319.

tention here lacked any constitutional significance.²⁸⁰ Therefore, the Court created an unprecedented extension of government power to control physically persons of the citizenry.²⁸¹ There now appears to be an undefined window of time, after an officer has completed the duties demanded of the stop, when law enforcement may maintain contact with a citizen without constitutional justification.

Such a gap in Fourth Amendment coverage was precisely the evil the Court aimed to prevent decades ago in *Terry*.²⁸² When offered the option of defining a stop or frisk as activity falling “outside the purview of the Fourth Amendment,”²⁸³ the *Terry* Court “emphatically” rejected the notion, prophetically fearing that such logic “seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen.”²⁸⁴ Curiously, what the Court once so loudly guarded from “the unbridled discretion of law enforcement officials,”²⁸⁵ it now casually handed over without the uttering of even one relevant word. Every motorist’s constitutional protection from unconstrained official discretion upon an officer’s completion of the task of a traffic stop has ended not just without a bang but without even a whimper.

D. Finishing the Court’s Incompleted Task: Assessing Whether Robinette Was Seized at the Time He Consented to the Search Under Either the “Totality of the Circumstances” or the “Bright-Line” Approaches

1. Applying the Totality of the Circumstances Test to Deputy Newsome’s Actions

Robinette was indeed seized when Deputy Newsome pulled his Firebird over to issue a traffic warning.²⁸⁶ The question is whether Robinette remained seized at the moment he was asked to allow a search of his car. Since there exists no Supreme Court holding directly addressing the termination point of a seizure of the person, the closest pertinent rules regard the definition of a seizure itself. As previously indicated, the Court, in precedent stretching from *Mendenhall* through *Bostick*, has determined the existence of sei-

280. See *Robinette*, 117 S. Ct. at 421.

281. See *id.*

282. See *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

283. *Id.* at 16.

284. *Id.* at 17.

285. *Delaware v. Prouse*, 440 U.S. 648, 651 (1979).

286. Indeed, the Court so readily recognized the traffic stop to be a detention that it immediately launched into the justifications for the seizure without first establishing Fourth Amendment application: “We believe the issue as to the continuing legality of the detention is a ‘predicate to an intelligent resolution’ of the question presented” *Ohio v. Robinette*, 117 S. Ct. 417, 420 (1996).

zures by assessing how a “reasonable person” in the individual’s shoes would view all of the circumstances.²⁸⁷

A full application of this totality of the circumstances test in this case indicates that Robinette remained seized when he consented to a search of his vehicle. The first relevant fact is the prior existence of a seizure of Robinette’s person. The very fact of a pre-existing seizure enhanced the police dominance of the situation, and, therefore, increased the potency of all the other factors pointing toward the restriction of Robinette’s liberty.²⁸⁸ Not only was Robinette stopped, he had been advised by an officer in a marked patrol cruiser that the officer observed him violate the law. Since the Court has seen the lack of uniforms as a factor demonstrating the consensualness of an encounter,²⁸⁹ it is fair to assume that the display of authority in the form of a police cruiser would point toward a restriction of liberty. Moreover, the Court has viewed officers’ advising a person of their identity as narcotics agents, and of their suspicion that the person was violating narcotics laws, as relevant facts weighing toward detention.²⁹⁰ In *Robinette*, although Deputy Newsome never flatly said that he suspected Robinette of drug possession, he directly told this motorist that he had seen him exceed the speed limit.²⁹¹ He thus established his power to punish Robinette, however minimally, with a ticket.

Further, Deputy Newsome did not simply speak to Robinette as the driver sat in his car. Instead, Deputy Newsome had Robinette exit his vehicle.²⁹² While this order is fully consistent with *Mimms*, it also shifts control away from the driver to the officer.²⁹³ No longer could Robinette simply turn the ignition key and drive away. Instead, in order to leave, he had to affirmatively reverse an action previously requested by the officer—he had to get back into his car. However, Deputy Newsome did more than merely have Robinette step out of his Firebird. He directed Robinette to stand in between

287. See discussion *supra* Part II.A.

288. The Supreme Court of Ohio recognized this dynamic:

[C]itizens who have not been detained immediately prior to being encountered and questioned by police are more apt to realize that they need not respond to a police officer’s questions. A “consensual encounter” immediately following a detention is likely to be imbued with the authoritative aura of the detention. Without a clear break from the detention, the succeeding encounter is not consensual at all.

State v. Robinette, 653 N.E.2d 695, 699 (Ohio 1995).

289. See *United States v. Mendenhall*, 446 U.S. 544, 555 (1980).

290. See *Florida v. Royer*, 460 U.S. 491, 501 (1983).

291. See *Robinette*, 117 S. Ct. at 419.

292. See *id.*

293. Indeed, *Mimms* involved a detention under the Fourth Amendment. The only issue was the reasonableness of its scope in asking a motorist to exit the vehicle with no further justification beyond the reason for the initial stop. See *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977).

his car and the cruiser.²⁹⁴ When an officer tells a motorist to stand in a particular spot, a reasonable person not only complies, but does so until told otherwise.²⁹⁵

Add to these circumstances the fact that the officer turned on a video camera.²⁹⁶ Reasonable people are fully aware that cameras preserve every movement and word that takes place in front of their lenses. Such recording devices create a certain formal atmosphere because they convey the idea that the scene is important enough to preserve. Persons who are not experts in all the nuances of the Fourth Amendment may hesitate to act in their own interests while being filmed, for they would not wish any error to be permanently recorded. Cameras therefore create a potential to chill the exercise of constitutional rights.

Deputy Newsome did return Robinette's license, a factor that has weighed in favor of the consensual nature of an encounter.²⁹⁷ However, the timing of the return is itself significant. Deputy Newsome handed back the license after he had formalized the encounter by activating the video camera.²⁹⁸ Now, if Robinette wished to leave, he would have to do so on camera without any signal that he was free to go. A reasonable person might be concerned that walking away on camera might signal for an official record a consciousness of guilt.

Further, Deputy Newsome's words speak volumes:

Officer Newsome: Okay. Since you live in Montgomery County, and you're almost at the end of your trip, I'm going to cut you some slack. Okay?

Robinette: I didn't see the sign was dropped down.

Officer Newsome: If you have been watching the news you know we've been having a lot of problems with accidents up here, one right after another. We just want to get everyone to slow down. We have been writing a lot of tickets though. One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?²⁹⁹

In this brief exchange, Deputy Newsome seemingly carefully chose his words and actions in order to establish an atmosphere conducive to his drug investigation. After all, contrary to what he told

294. See Robinette, 117 S. Ct. at 419.

295. As indicated in Adams, an example of this dynamic was once recognized by Chief Justice Rehnquist himself: "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams*, 407 U.S. 143, 146 (1971). Here, Justice Rehnquist recognized the power of an officer to maintain the status quo during a field detention.

296. See Robinette, 117 S. Ct. at 419.

297. See *United States v. Mendenhall*, 446 U.S. 544, 548 (1980).

298. See Robinette, 117 S. Ct. at 419.

299. Respondent's Brief, *supra* note 216, at 2-3.

Robinette, Deputy Newsome did not stop Robinette in order to give him a traffic citation, for he had decided even before he approached Robinette's vehicle to issue only a verbal warning.³⁰⁰ In fact, his job description at the time he spotted Robinette's car was as "drug interdiction patrol."³⁰¹ Deputy Newsome himself gave as his "only purpose" for activating the video camera that "he was a member of a drug interdiction patrol, and he wanted to record his questioning of Robinette regarding drugs, weapons and contraband."³⁰²

Of course, the Court has emphatically held that an officer's subjective motivations for his actions are simply irrelevant for Fourth Amendment purposes, as the true measure of constitutionality in this area of law is objective reasonableness. However, the facts in this case show that Deputy Newsome's aims hit their target. He had indeed created an atmosphere where a reasonable person would not feel comfortable refusing his requests. In fact, he had established such a setting 786 times in one year.³⁰³ According to Deputy Newsome's own testimony, he had requested consent to search in "786 traffic stops in 1992, the year of Robinette's arrest."³⁰⁴ It strains logic to assume that 786 motorists, many of whom were probably stopped for speeding, would allow for the delay entailed in a search of their cars when they reasonably believed they were simply free to leave.³⁰⁵

Deputy Newsome offered as the reason for his routine requests to search motorists' cars: "more so for any other reason the fact that I need the practice, to be quite honest."³⁰⁶ Given the simplicity and informality of a request for consent to search, one might wonder what exactly was needed to be practiced in seeking consent to search? Certainly, even the dimmest officer would get a handle on this procedure

300. See *State v. Robinette*, 653 N.E.2d 695, 696 (Ohio 1995).

301. *Id.*

302. Respondent's Brief, *supra* note 216, at 2.

303. See *Robinette*, 117 S. Ct. at 422 (Ginsburg, J., concurring).

304. *Id.*

305. In his dissenting opinion, Justice Stevens noted:

Moreover, as an objective matter it is fair to presume that most drivers who have been stopped for speeding are in a hurry to get to their destinations; such drivers have no interest in prolonging the delay occasioned by the stop just to engage in idle conversation with an officer, much less to allow a potentially lengthy search. I also assume that motorists—even those who are not carrying contraband—have an interest in preserving the privacy of their vehicles and possessions from the prying eyes of a curious stranger. The fact that this particular officer successfully used a similar method of obtaining consent to search roughly 786 times in one year . . . indicates that motorists generally respond in a manner that is contrary to their self-interest. Repeated decisions by ordinary citizens to surrender that interest cannot satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so.

Id. at 425 (Stevens, J., dissenting) (citations omitted).

306. Respondent's Brief, *supra* note 216, at 18.

after performing it an average of more than twice a day in the course of a year.

Perhaps the true need for practice is in the set up of the driver. Deputy Newsome never mentioned to Robinette that his primary reason for questioning him was his need to sharpen his drug interdiction skills. Instead, he led this motorist to believe that the reason for the stop was highway safety. The deputy went so far as to refer to accident reports on the news and the fact that police have been "writing a lot of tickets."³⁰⁷ One could assume that a reasonable person, taking the deputy's words at face value, would consider the purpose of the encounter to be traffic safety. Having lulled the motorist into a false sense of security by leaving the impression that the focus of law enforcement interest is only safe driving, Deputy Newsome also reminded Robinette of his discretion over him by stating that he was cutting him "some slack."³⁰⁸ This false favor was supported by an equally artificial rationale: that Deputy Newsome was refraining from writing a ticket because the motorist was "almost at the end of [his] trip."³⁰⁹ Since Deputy Newsome had already decided to issue only a warning before he approached Robinette's car, he therefore had chosen to forgo writing a ticket even before he learned of Robinette's home address from his license. The result of this ruse is the creation of a false sense of security on the part of the reasonable motorist in order to lay the groundwork for the request for consent.

The Supreme Court, however, has indicated that the reasonable person envisioned by the Fourth Amendment is "an innocent person."³¹⁰ Arguably, an innocent person would not have violated the traffic laws, and therefore would not be vulnerable to the officer's discretion in writing a ticket. This would remove any coercive impact caused by Deputy Newsome's off-handed mention of writing "a lot of tickets" and his practiced request for consent. The problem of such reasoning is that it quickly loses relevance when applied to the vast majority of stopped motorists. In order to stop a driver, police must have an objectively reasonable basis for the seizure.³¹¹ Most roadside stops are based upon a traffic violation. Therefore, most motorists finding themselves in Robinette's situation will not be wholly innocent; they will have committed some kind of traffic infraction and thus keenly fall under the discretionary power of the official who has

307. *Id.* at 3 (emphasis added).

308. *Id.* at 2.

309. *Id.*

310. *Florida v. Bostick*, 501 U.S. 429, 438 (1991).

311. "[T]he fact that [an] officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

pulled them over. A strict application of the reasonable person standard as a wholly innocent person would cause the Court's test to entirely detach from the reality faced by every motorist properly stopped for a traffic violation. Therefore, it would seem that in order to preserve the purpose of the reasonable person test in placing the reasonable person in the individual motorist's actual situation, complete innocence, even of traffic violations, could not be a workable standard. However, by failing to address the scope of Deputy Newsome's seizure of Robinette, the Court has created yet another gap in guidance.

Such a void is especially problematic in light of the Bostick Court's pronouncement that "an individual may decline an officer's request without fearing prosecution" for "[w]e have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."³¹² Of course, failure to cooperate with a seemingly simple request to search may be seen as ungrateful in the face of an officer's mercy in foregoing writing a ticket. Again, the Court's earlier pronouncements upon the relative positions of power between officer and citizen are found lacking in the context of the typical traffic stop.

Still more facts must be considered in the totality of Robinette's circumstances. Deputy Newsome conveyed both his power and his mercy in not following the usual practice of writing yet another of the whole "lot of tickets." Then, "with no pause or break in the conversation,"³¹³ he abruptly shifted gears to an inquiry about drugs and weapons, in order to catch the motorist off guard. It worked. When Newsome asked whether any contraband was in the car, Robinette answered "No."³¹⁴ When Newsome then followed up by asking permission to search the vehicle, Robinette was "shocked" and "automatically" answered "Yes."³¹⁵ The resulting search revealed a small amount of marijuana and a pill later determined to be MDMA.³¹⁶ Again, the subjective impressions of the individual are not directly relevant factors in measuring the impact of the totality of the circumstances upon the reasonable person.³¹⁷ However, the specifics of Deputy Newsome's practiced request for consent, along with a track record of 786 successful requests to consent, tellingly prove that Robinette's feelings were not unreasonable.

312. Bostick, 501 U.S. at 437.

313. State v. Robinette, No. 94-14074, 1994 WL 147806, at *1 (Ohio App. 2d Apr. 15, 1994).

314. State v. Robinette, 653 N.E.2d 695, 696 (Ohio 1995).

315. ACLU Brief, *supra* note 215, at 2.

316. See Robinette, 653 N.E.2d at 696.

317. See Bostick, 501 U.S. at 435-36.

Furthermore, the Deputy's own words would indicate to a reasonable listener that Robinette was not yet free to go. Deputy Newsome phrased his question in such a manner as to compel a response from anyone who wished to leave. The Supreme Court of Ohio recognized as much:

Newsome then said, "One question before you get gone: are you carrying any illegal contraband in your car?" (Emphasis added.) Newsome tells Robinette that before he leaves Newsome wants to know whether Robinette is carrying any contraband. Newsome does not ask if he may ask a question, he simply asks it, implying that Robinette must respond before he may leave.³¹⁸

In his dissenting opinion, Justice Stevens recognized the accumulated power of each of the circumstances surrounding Robinette's consent.³¹⁹ He agreed with the Ohio Supreme Court that reasonable persons would assume they were validly in an officer's custody for the duration of the officer's interview.³²⁰ However, as previously noted in Part II.A., applying the totality of the circumstances test literally, by assessing all the facts taken together, does not follow Supreme Court precedent. Delgado isolated as "pivotal" the factor that INS agents were stationed at the factory exits;³²¹ Chesternut distilled the facts before it to merely a "brief acceleration to catch up with respondent, followed by a short drive alongside him;"³²² and Bostick removed the rider from the bus and placed him in the terminal.³²³ In Robinette, it is not known how the Court would have grouped the

318. Robinette, 653 N.E.2d at 698 (parenthetical in original). Justice Stevens, in his dissenting opinion, agreed:

Several circumstances support the Ohio courts' conclusion that a reasonable motorist in respondent's shoes would have believed that he had an obligation to answer the "one question" and that he could not simply walk away from the officer, get back in his car, and drive away. The question itself sought an answer "before you get gone."

Ohio v. Robinette, 117 S. Ct. 417, 425 (1996) (Stevens, J., dissenting).

319. Justice Stevens noted:

[T]he facts that respondent had been detained, had received no advice that he was free to leave, and was then standing in front of a television camera in response to an official command, are all inconsistent with an assumption that he could reasonably believe that he had no duty to respond.

Robinette, 117 S. Ct. at 425 (Stevens, J., dissenting).

320. Justice Stevens agreed with the Ohio Supreme Court and noted:

Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

Id. at 425 (quoting Robinette, 653 N.E.2d at 698).

321. INS v. Delgado, 466 U.S. 210, 217 (1984).

322. Michigan v. Chesternut, 486 U.S. 567, 576 (1987).

323. See Florida v. Bostick, 501 U.S. 429, 435-36 (1991).

facts, for it simply failed to perform a totality of the circumstances analysis.

Further, the Court has repeatedly indicated that the totality of the circumstances rule requires a weighing not only of the facts that surrounded the individual, but also those that did not.³²⁴ Indeed, the Court has found the absence of various factors to be relevant to the issue regarding the existence of a seizure. In *Mendenhall*, Justice Stewart found it significant that the agents in that case did not wear uniforms, did not display weapons, and did not summon the defendant to them but instead approached her.³²⁵ Likewise, the Court in *Chesternut* found the lack of sirens and flashers, a command to halt, the display of weapons, and the operation of the police car in an “aggressive manner” as relevant to the seizure issue.³²⁶ Finally, the *Bostick* Court considered the fact that officers did not point guns at the defendant nor “otherwise threaten him” as important in determining the nonexistence of a seizure in that case.³²⁷

In *Robinette*, the Court’s absence-of-factors analysis tends to result in a wash. While it is true that Deputy Newsome did not point a gun at *Robinette*, drive his cruiser in an “aggressive manner,” or “otherwise threaten” *Robinette*, he did in essence command *Robinette* to stop by pulling him over in his cruiser. Thus, the absence-of-factors analysis does nothing to alter the conclusion that *Robinette* was still seized under the totality of the circumstances when he was asked to consent to a search of his *Firebird*.

The totality of the circumstances analysis would not be complete without a consideration of the level of intimidation necessary to constitute a seizure. The Court in *Chesternut* allowed police to commit acts that were “somewhat intimidating” and still not trigger constitutional scrutiny.³²⁸ Additional facts, such as the activation of sirens or flashing lights, or the display of weapons, would have to be added to driving alongside a running pedestrian in order to reach the intimidation threshold.³²⁹ The *Bostick* Court found the lack of threats with a gun to be relevant for seizure purposes.³³⁰ Again, without guidance from the Court, we are left with a mixed message from Deputy Newsome. Certainly, he did not draw his weapon or act in a threatening or even rude manner. However, his behavior included facts demonstrating seizure in *Chesternut*: lights and, with his

324. See *supra* Part III.D.1.

325. See *United States v. Mendenhall*, 446 U.S. 544, 555 (1980).

326. *Chesternut*, 486 U.S. at 567.

327. *Bostick*, 501 U.S. at 437.

328. *Chesternut*, 486 U.S. at 575.

329. See *id.*

330. See *Bostick*, 501 U.S. at 432.

“before you get gone” words, an “attempt to . . . intrude upon [a person’s] freedom of movement.”³³¹

Thus, without the benefit of an explicit ruling by the Court, a balance of all the facts surrounding Robinette’s consent tilt toward the existence of a seizure of his person. Therefore, Robinette’s failure to address this issue is at best unhelpful, and at worst misleading. After all, the Court’s rush to the consent issue creates a negative implication that no seizure of Robinette’s person occurred at the time Deputy Newsome sought his consent.

2. Applying Hodari’s Bright-Line Test to Deputy Newsome’s and Robinette’s Actions

As noted in Part II.B., in *Hodari*, Justice Scalia offered an alternative definition for seizure of the person. In bright-line fashion, Justice Scalia crafted two ways to seize a person: officers could affect a seizure either by “physical force” or by show of authority along with “submission to the assertion of authority.”³³² No facts in *Robinette* indicate that Deputy Newsome physically restrained Robinette at the time he requested consent to search his car. However, the record in *Robinette* does indicate not only that Robinette submitted to Deputy Newsome’s authority, but that he repeatedly did so over the course of the traffic stop.³³³ Further, Robinette was still submitting to Deputy Newsome’s authority at the moment the officer asked for permission to search the vehicle. Deputy Newsome demonstrated his authority, and Robinette his submission, with the traffic stop itself. Deputy Newsome again showed his authority when he asked Robinette to step out of his Firebird. Robinette submitted to this additional official command. The Deputy asserted still more official authority in having Robinette stand between his Firebird and the police cruiser. Robinette offered still more submission in acceding to this instruction. Indeed, each of Robinette’s additional actions—handing over his license, allowing himself to be videotaped, offering an explanation for his speeding—all indicate continued submission to Deputy Newsome’s authority. Thus, with “no time lapse”³³⁴ between this pattern of submission and Deputy Newsome’s request to search, it would appear that not only did this officer initially seize Robinette, he continued to do so during his request for consent.

Thus, under either the *Mendenhall/Bostick* totality of the circumstances approach to determining a seizure, or under *Hodari*’s bright-line test of seizure, Robinette was seized when he gave consent to

331. *Chesternut*, 486 U.S. at 575.

332. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

333. See *Ohio v. Robinette*, 117 S. Ct. 417, 419 (1996).

334. *State v. Robinette*, 653 N.E.2d 695, 698 (Ohio 1995).

search his car. This crucial link is simply missing from the Court's chain of analysis in *Robinette*. It is in this gap that police abuse may occur. Thus, the Court should have formulated and applied a rule to determine the constitutional significance of Deputy Newsome's conduct.

IV. ADDRESSING THE MOTORIST'S CENTRAL CONCERN: A PROPOSED DEFINITION OF THE END-POINT OF SEIZURE OF THE PERSON

A. A Proposed Rule for the Determination of the End of a Seizure

A review of the circumstances *Robinette* found himself in prompted the following from the Ohio Supreme Court:

This case demonstrates the need for this court to draw a bright line between the conclusion of a valid seizure and the beginning of a consensual exchange The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into . . . allow[ing] a search of a vehicle that they are not legally obligated to allow.³³⁵

Contrary to Chief Justice Rehnquist's protestations in *Robinette*, such a rule would be consistent with much of the Supreme Court's Fourth Amendment doctrine.³³⁶ The Fourth Amendment rules designed to regulate police in their daily activities "ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged."³³⁷ A bright-line rule determining the end point of a seizure would benefit not only police in the field, but judges on the bench, and ultimately individuals throughout the nation.

After all, the Court has invested decades in crafting rules identifying the starting point of a seizure of the person, and in fact, in the case of *Hodari*, has even established a bright-line rule as a definition. Consistency would seem to mandate at least some attention be given to determining the other boundary of a seizure, its termination.

Since *Hodari* established with simple clarity that a seizure occurs with either the application of official force or with the showing of authority along with the individual's submission to that show of authority, this same rule could operate in the reverse to undo a seizure. Under such an analysis, if the government could demonstrate that at the relevant time period (here, the requesting of consent), the

335. *Id.*

336. See discussion *supra* Part II.C.

337. *New York v. Belton*, 453 U.S. 454, 458 (1981).

officer no longer restrained the citizen by either the “physical force” or “submission to show of authority” prongs of the rule, then the individual would be deemed to no longer be seized. As for proving a termination of the show of authority, the same kind of factual analysis exercised to determine the start of a seizure could be used to identify its end. Officers show authority by communicating in some fashion that the individual must “Stop, in the name of the law!”³³⁸ Likewise, the end of a seizure would require a similar kind of communication. If the Court can envision police communicating with individuals to start a seizure, the same kind of conduct could not be seen as too onerous to end a seizure. Indeed, this communication occurs between police and citizens every day, when officers advise individuals that they are “free to go” or to “proceed on the highway.”

Rather than being an unfair burden upon officers, such a test actually strengthens law enforcement’s ability to control their encounters with individuals. Without a clear test, citizens may receive a signal from the *Robinette* decision that once an officer takes a breath, they can walk away. Officers might fear allowing themselves even a moment of pause, for any hesitation could be a pretext for a motorist to head for the car. Instead, compliance with lawful police orders should be encouraged.³³⁹ This proposed test of the end point of a seizure, based as it is on overt communication, clarifies the encounter for the individual, thus allowing officers to maintain better control.

This test might incorrectly be construed as a version of the very “warning” requirement for valid consent rejected by Chief Justice Rehnquist in *Robinette*.³⁴⁰ However, rather than being a requirement for obtaining lawful consent, as presented in *Robinette*, this rule would simply determine the end point of a seizure. Contrary to what was envisioned in *Robinette* with its proposed per se requirement, police could still obtain voluntary consent without providing any warning. This is because police are able to obtain valid consent from individuals every day, whether or not the persons are currently being seized. After all, the key is not whether individuals who provide consent are seized, but whether they are lawfully seized. Thus, police could obtain valid consent from seized individuals, so long as these citizens voluntarily consented to the search. Additionally, police could obtain consent from people who are simply not seized.

Thus, the Court’s entire concern about unnecessarily creating a “warning requirement”³⁴¹ for consent was a red herring. The crucial issue missed in *Robinette* dealt not with the resulting consent, but

338. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

339. “Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged.” *Id.* at 627.

340. See *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996).

341. See *supra* text accompanying notes 251-58.

with the continuing seizure. By failing to target the correct question, the Court missed the opportunity to clarify an area of the law suffering from uncertainty. The clear rule proposed here, based as it is on empowering officers to define the boundaries of their seizures by simply communicating with the citizens, could end much of this confusion.

B. A Proposed Rule for Determining the Legality of a Continuing Detention

A clear and understandable rule for identifying a seizure's conclusion, however, does not provide a complete solution. Also needed is a simple standard to determine the legality of any continuing detention. Fortunately, such a test is easily available. In fact, Justice Stevens made reference to a common sense standard in his dissent: "As an objective matter, it inexorably follows that when the officer had completed his task of either arresting or reprimanding the driver of the speeding car, his continued detention of that person constituted an illegal seizure."³⁴² Thus, the end of a lawful seizure occurs upon the officer's "completion" of his or her "task." A citizen must be released from official authority once the original purpose of the seizure has been accomplished,³⁴³ or when the legitimate duties triggered by reasonable suspicion or probable cause that developed during the duration of the seizure have been served.³⁴⁴

The advantages of this simple rule are manifest. First, the "completion of task" test is easy for law enforcement to apply. Certainly, any reasonable officer should know, at the outset of any stop, her purpose behind the seizure she is effectuating. In carrying out her duties, the one guide already in any officer's mind is the successful completion of the task at hand. Merely limiting officers' activities to their legitimate tasks borders on stating the obvious. In fact, the ease of application is demonstrated in *Robinette* itself. In its petition for writ of certiorari, the government noted that the issue in this

342. *Robinette*, 117 S. Ct. at 427 (Stevens, J., dissenting) (emphasis added).

343. For example, the officer should allow the motorist to resume his or her travels once the initial purpose of the traffic stop (the writing of a ticket or the administration of a speeding warning) is finished.

344. For instance, an officer may initially pull a vehicle over for running a red light only to discover upon approach that the motorist's speech is slurred. Of course, the officer may then graduate her actions to meet these new facts. She can, among other things, order the motorist to perform a series of field sobriety tests. Yet, suppose the motorist passes the tests and cogently explains that the slurred speech is the result of a recent visit to the dentist. Then, the officer's duties triggered by her slurred speech observations are fulfilled, and she must let the driver proceed on his way.

case involved activity “after the completion of the business of the stop.”³⁴⁵

In contrast to the officer, the motorist lacks certainty as to the “business” of the stop. Of course, a driver may know that he or she was speeding or performed an illegal turn. Yet, recognizing that the officer is an individual whose behavior can vary from other police or with each traffic stop, the citizen does not know what will be the ultimate outcome of the seizure. Further, the traveling public is aware that the officer on the beat has considerable discretion in deciding whether to issue a citation or to grant mercy. The motorist’s fate may be a mere warning or a ticket, or it may be a mistaken arrest or even a roust. Moreover, typically being lay persons, drivers do not know the exact boundaries of lawful police protocol. Thus, many individuals assume a somewhat passive role, dutifully reacting to official demands for identification and registration, and quietly awaiting the officer’s final decision. The “completion of task” rule therefore places the burden of action on the party with the most knowledge, the officer. The police officer knows best the moment when her own task is complete, and thus should be prohibited from intruding on the individual for any amount of time after that goal is accomplished. This rule also has the merit of avoiding the dangers of rigidity inherent in a “bright-line” test. By this standard’s very definition, officers are free to perform their duties as long as they have duties to perform. The limit on authority will be tailored in every case because it is tied to the determination of the task itself.

Finally, and most importantly, this “completion of task” rule brings home the underlying theme of the Fourth Amendment itself to law enforcement: governmental intrusion on the individual must be limited to the original justification. Indeed, the “completion of task” limit is hardly revolutionary. The Terry Court presented a version of it in its discussion of the proper scope of both seizures and searches: “[I]n determining whether the seizure and search were ‘unreasonable’ our inquiry is a dual one—whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”³⁴⁶ Moreover, a plurality of the Court articulated a form of it specifically in reference to seizures of the person in 1982: “This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.”³⁴⁷ Chief Justice Rehnquist himself joined a majority opin-

345. Petition for Writ of Certiorari at 2, *Ohio v. Robinette*, 117 S. Ct. 417 (1996) (No. 14074).

346. *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968) (emphasis added).

347. *Florida v. Royer*, 460 U.S. 491, 500 (1983) (emphasis added).

ion adopting this language.³⁴⁸ Therefore, this rule sounds a value basic to Fourth Amendment law: that government should intrude upon our privacy and security only so much as is necessary for it to do its job.

V. CONCLUSION

When considering the nation as a whole, perhaps most people will never suffer an arrest, or have their house searched pursuant to a warrant. Although more common, most individuals will not experience a car search, or even be confronted with a request to search their vehicle. Yet, by the end of their driving careers, many motorists will probably at some time see that flashing light in their rearview mirror. Every stopped driver, the innocent as well as the guilty, will ponder some form of the following question: "When will the officer let me go?" Even though the Court has addressed the rarer events of arrest and search, it chose to dodge the one practical question uppermost in any detained person's mind: "When will this traffic stop end?"

This is no minor omission. The Supreme Court itself has characterized the unique value protected by the Fourth Amendment as "the concern of our society for the right of each individual to be let alone."³⁴⁹ Therefore, the central concern of the stopped driver of "When will this traffic stop end?" is really a specific articulation of a more general question: "When will society's concern for each of us to be left alone reattach?" After all, if "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law,"³⁵⁰ should not the boundaries of such a sacred guarantee be jealously guarded?

Yet the Court left its post. Robinette failed to answer the question put squarely to it by Deputy Newsome's practiced delivery of his consent request. In turning a blind eye to the crucial issue of the seizure of Robinette's person, the Court caused a breach to form in the defense of the Fourth Amendment's basic right of personal security.

348. See *United States v. Sharpe*, 470 U.S. 675, 684 (1984).

349. *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973).

350. *Terry*, 392 U.S. at 9 (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891)).