



1-1-1998

Ohio v. Robinette: Per Se Unreasonable

Douglas M. Smith

University of the Pacific, McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Douglas M. Smith, *Ohio v. Robinette: Per Se Unreasonable*, 29 MCGEORGE L. REV. 897 (1998).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol29/iss4/6>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Ohio v. Robinette: Per Se Unreasonable

Douglas M. Smith*

TABLE OF CONTENTS

I. INTRODUCTION	899
A. <i>Overview: The Problem</i>	899
B. <i>Principle of Particular Justification</i>	900
II. OHIO V. ROBINETTE	901
A. <i>Factual Background</i>	901
B. <i>Applicable Legal Principles</i>	903
1. <i>Basis of Seizures of Persons</i>	904
2. <i>Consent to Search</i>	907
III. OHIO V. ROBINETTE: THE DECISIONS	908
A. <i>Ohio Court of Appeals: Robinette I</i>	908
B. <i>Ohio Supreme Court: Robinette II</i>	910
1. <i>Seizure Issue</i>	910
2. <i>Consent to Search Issue</i>	911
3. <i>Ohio Supreme Court's Bright Line Rule</i>	912
4. <i>Justice Sweeney's Dissent</i>	913
5. <i>Conclusions About Robinette II</i>	914
C. <i>United States Supreme Court: Robinette III</i>	914
1. <i>Seizure Issue and the Bright Line Rule</i>	914
2. <i>Consent to Search Issue</i>	916
3. <i>Justice Ginsburg's Concurrence</i>	916
4. <i>Justice Stevens' Dissent</i>	917
D. <i>Ohio Supreme Court on Remand: Robinette IV</i>	919
1. <i>Seizure Issue</i>	920
2. <i>Consent to Search Issue</i>	921
IV. ANALYSIS OF THE ROBINETTE III MAJORITY OPINION	922
A. <i>Viewing Robinette III as a Case About Consent to Search</i>	924
1. <i>Criticism of Schneckloth</i>	928

* J.D., University of the Pacific, McGeorge School of Law, to be conferred 1999; B.A. California State University, Chico, 1995. I would like to thank Professor Tim Hurley for his time and effort in editing this Comment, and for his tireless efforts and enthusiasm in aiding the McGeorge Law Review. I would also like to thank Tom Ebersole for his numerous helpful suggestions and his continuing intellectual support.

a. <i>The Court's Reliance on the Coerced Confession Cases Was Unsupported</i>	928
b. <i>Legitimate Need of Consent Searches</i>	929
i. <i>Assuming that the police do have probable cause to search, what is the scope of that search in the traffic stop context?</i>	931
ii. <i>Assuming, however, the search is based solely upon consent, what is the scope of the search in the same context?</i>	931
c. <i>Advising a Person of his Right to Refuse Consent Will Not Adversely Affect the Needs of Law Enforcement</i>	932
d. <i>The Court's Argument that a Zerbst Standard of Waiver is Inappropriate Must Also Fail</i>	935
2. <i>Schneckloth in Light of Robinette Facts</i>	936
a. <i>Just as in Schneckloth, the Voluntariness Standard Fails to Provide Adequate Protection</i>	937
b. <i>The Advising of the Right to Refuse Consent was Plainly Practical Here</i>	939
c. <i>The Ease of Giving a Warning of The Right to Refuse Consent Makes the Zerbst Argument Unpersuasive</i>	940
B. <i>Viewing Robinette as a Case about Seizures of Persons</i>	941
1. <i>Robinette and its Bright Line Rule With Regard to Seizures</i>	941
2. <i>Reasons Why a Bright Line Rule is Preferable Here</i>	943
a. <i>The Giving of the Warning is Practical</i>	943
b. <i>The Giving of the Warning is Particularly Necessary in This Context</i>	944
C. <i>Conclusion of Robinette III Analysis</i>	945
V. <i>ROBINETTE IV: EVIDENCE OF THE CONFUSION CREATED BY CURRENT CONSENT TO SEARCH AND SEIZURE LAW</i>	946
A. <i>Criticism of the Robinette IV Seizure Discussion</i>	946
B. <i>Criticism of the Robinette IV Consent to Search Discussion</i>	949
VI. <i>CONCLUSION: LOOKING FOR A COMPROMISE</i>	950
A. <i>The Road Not Traveled</i>	950
B. <i>Finale</i>	952

I. INTRODUCTION

A. Overview: The Problem

The Fourth Amendment of the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"¹ In the past year, the United States Supreme Court considered a case, the result of which has significantly affected this right. Although the holding of the case severely limited the rights of individuals to be free from unreasonable searches and seizures, it balanced on questionable justifications.

In *Ohio v. Robinette*,² the Court reaffirmed its prior rules regarding consent to search and its test to determine whether a person has been seized under the Fourth Amendment.³ Despite the significant impact that the Court's reaffirmation will have on future consent to search and consensual interrogation situations, the Court failed to justify why the reaffirmation of its case law would be appropriate under the facts before it. The Court's reliance on its holding in *Schneckloth v. Bustamonte*⁴ as a basis for deciding *Robinette* was both erroneous and ill-founded. As this Comment will show, the Supreme Court transformed a garden-variety seizure issue into an issue regarding consent to search. The seizure issue was addressed by both the Ohio Court of Appeals⁵ and the Ohio Supreme Court,⁶ but was summarily side-stepped by the U.S. Supreme Court. Further, this Comment argues that even if *Robinette* could have been treated as a consent to search case, the *Schneckloth* "totality of the circumstances" test for determining voluntariness of consent⁷ is an imprudent rule for consent to search issues arising under facts similar to those in *Robinette*. Thus, *Schneckloth* should have been re-examined before the Court summarily applied it to the facts of *Robinette*.

Ultimately, this Comment utilizes this recent Supreme Court opinion to demonstrate how poorly conceived rules with patently false justifications can significantly,

1. U.S. CONST. amend. IV. The text in full reads:

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 Warrant shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

2. 519 U.S. 33 (1996).

3. *Id.* at 40; see *infra* Part II.B.2 (noting the relevant principles under consent to search law).

4. 412 U.S. 218 (1973).

5. See *State v. Robinette*, No. 14074, 1994 WL 147806, at *1-2 (Ohio Ct. App. Apr. 15, 1994) (stating the issue as whether a person in *Robinette*'s shoes would have felt free to leave, or, in other words, whether *Robinette* was seized).

6. See *State v. Robinette*, 653 N.E.2d 695, 697 (Ohio 1995) (stating that "[w]e find that the search was invalid since it was the product of an unlawful seizure") (emphasis added).

7. *Schneckloth*, 412 U.S. at 248-49.

yet unjustifiably, open the door to police abuses of Fourth Amendment protections. This Comment suggests rules that can be theoretically and pragmatically justified—rules that will balance the justifiable needs of law enforcement against the right of the people to be free from unreasonable governmental intrusions.

B. *Principle of Particular Justification*

As a preliminary matter, this Comment presumes that probable cause⁸ and a sufficiently particular warrant are both required for a search to be valid under the Fourth Amendment.⁹ There are, however, well-recognized exceptions to these fundamental requirements.¹⁰ Each exception is tied in reasoning and scope to the justification that necessitates its existence.¹¹ Thus, when the Court decides to apply an exception to a particular set of facts, the justifications for having the exception must still exist in light of the new facts, otherwise the expansion of the exception is unwarranted. This approach to judicial decision-making is what this Comment refers to as the “principle of particular justification.”¹²

Throughout its discussion, this Comment considers the justifications given for deviations from the probable cause and warrant requirements under the facts of

8. See *Carroll v. United States*, 267 U.S. 132, 162 (1925) (stating that probable cause to search exists when the police know of facts and circumstances, based on reasonably trustworthy information, which would lead a person of reasonable caution to believe that a search of the suspected area will result in the finding of criminal evidence).

9. See *Katz v. United States*, 389 U.S. 347, 357 (1967) (stating that a search conducted without a warrant issued upon probable cause is *per se* unreasonable “subject only to a few specifically established and well-delineated exceptions”).

10. Generally, warrant exceptions such as the “automobile exception,” “search incident to a lawful arrest,” and a general exigency create justifications for the police to search or seize without a warrant. See *Carroll*, 267 U.S. at 153-56 (recognizing that the “automobile exception” allows warrantless searches of automobiles based on probable cause); see also *Chimel v. California*, 395 U.S. 752, 762-63 (1969) (holding that, pursuant to a lawful arrest, police can search the person of the arrestee and the area “within his immediate control without probable cause to search or a warrant). In the case of consent searches, a valid consent defeats both the warrant and probable cause requirements. See generally *Schneckloth*, 412 U.S. at 248-49 (determining that “voluntariness” is the proper test for ascertaining whether consent to search was properly granted); *Davis v. United States*, 328 U.S. 582, 593-94 (1946) (recognizing a consent to search exception to the probable cause and warrant requirements); *Zap v. United States*, 328 U.S. 624, 628-29 (1946) (holding that a person contracted with a government agency, where the contract contained a clause allowing the federal government to audit his books, had validly waived his Fourth Amendment right to privacy, and thus had consented to the search).

11. See *California v. Acevedo*, 500 U.S. 565, 580 (1991) (providing that the police, with probable cause to believe there is contraband in a vehicle, can search anywhere in the vehicle that the contraband could be kept, including any containers which are large enough to hold the suspected contraband); see also *Schmerber v. California*, 384 U.S. 757, 772 (1966) (allowing police to, without a warrant, extract blood from a detainee who is suspected of driving under the influence. This intrusion is justified because of the need of the police to determine quickly the detainee’ blood alcohol level and because of the reasonableness of the means used to extract the blood). See generally JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* §§12.01-17.06 (2d ed. 1997) (describing various warrant exceptions and their justifications and scope).

12. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 29 (1968) (stating that “evidence may not be introduced if it was discovered by means of seizure and search which were not reasonably related in scope to the justification for their initiation”) (citations omitted).

Robinette and its predecessors. If the justifications from *Schneckloth* still exist under the facts of *Robinette*, then assuming that *Schneckloth* was well-conceived, the extension of the *Schneckloth* rule is permissible. This Comment demonstrates, however, that the extension of *Schneckloth*'s holding was unjustified, because *Schneckloth* created a poorly conceived rule, and the justifications that the Court relied upon in *Schneckloth* did not exist under the facts of *Robinette*.¹³ Thus, the principle of particular justification would not recognize the consent to search exception to the warrant (and probable cause) requirement under the facts of *Robinette*.

II. OHIO V. ROBINETTE

A. Factual Background

In *Robinette*, Robert D. Robinette was clocked driving his vehicle sixty-nine miles per hour in a forty-five mile per hour construction zone.¹⁴ Officer Roger Newsome, of the Montgomery County Sheriff's office, stopped Robinette for speeding.¹⁵ Newsome requested Robinette to hand him his driver's license, then he proceeded to run a computer check which indicated Robinette had no previous violations.¹⁶ Officer Newsome then requested Robinette to step out of his vehicle, turned on his mounted video camera, gave a verbal warning to Robinette, and returned Robinette's license.¹⁷ Immediately, Newsome began a "conversation" with Robinette that was of key significance to the outcome of the case.¹⁸

Just as Robinette was about to leave, Newsome said, "One question before you get gone [sic]: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"¹⁹ Robinette said no.²⁰ Subsequently,

13. See *infra* Part IV.A.1 (discussing the weaknesses of the *Schneckloth* justifications and analyzing their application in light of the facts of *Robinette*).

14. Ohio v. Robinette, 519 U.S. 33, 35 (1996).

15. *Id.*

16. *Id.*

17. *Id.*

18. Respondent's Brief at 27, Ohio v. Robinette, 519 U.S. 33 (1996) (No. 95-891).

19. *Robinette*, 519 U.S. at 35-36. The Appendix to Respondent's Brief delineates the substance of the videotaped conversation between Officer Newsome and Robinette.

Dispatch: (Inaudible.)

Officer Newsome: What do you do for a living?

Mr. Robinette: I work for International Paper.

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?

Mr. 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.

Newsome asked, "Would you mind if I search your car?"²¹ Robinette said that he did not mind if the officer searched the vehicle,²² the resulting search of the vehicle revealed marijuana and a methamphetamine pill.²³

Newsome arrested Robinette, and the district attorney charged Robinette with knowing possession of a controlled substance.²⁴ At a pretrial hearing, Robinette unsuccessfully moved to suppress this evidence.²⁵ Robinette pleaded no contest, and the trial court found him guilty on all counts.²⁶ The Ohio Court of Appeals reversed the lower court's decision not to suppress the contraband evidence on the basis that the consent to search was invalid because it was obtained as a result of an unlawful seizure.²⁷ The Supreme Court of Ohio affirmed the appellate court's decision, adopting a bright line rule requiring officers, who have validly stopped a driver, to inform the driver that he or she is free to go prior to requesting consent to search.²⁸ The court's opinion required law enforcement officers to provide this instruction whenever the purpose of the initial detention no longer exists, yet the "conversation" continues, and the consent to search is subsequently requested.²⁹

In an 8-1 decision authored by Justice Rehnquist, the Supreme Court reversed the Ohio Supreme Court's decision finding that the United States Constitution does not require the instruction mandated by the Ohio Supreme Court.³⁰ Reaffirming the "totality of the circumstances" test for determining whether a person has been

One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?

Nothing like that? Okay.

Is all the luggage in there both yours and his? All of it? Okay. Would you mind if I search your car? Make sure there's nothing in there? Wouldn't have any problem with it? Why don't step up here on the passenger side, right up here. Come on over here. Come out, please. Okay.

If you would both of you stand about ten feet in front of your car there and face the other way.

Officer Newsome: Is that all the marijuana you got?

Mr. Robinette: Console.

Officer Newsome: Okay.

Appendix, Respondent's Brief at 27, *Robinette* (No. 95-891).

20. *Robinette*, 519 U.S. at 36.

21. Respondent's Brief at 2a, *Robinette* (No. 95-891).

22. *Robinette*, 519 U.S. at 36.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; *State v. Robinette*, No. 14074, 1994 WL 147806, at *2 (Ohio Ct. App. Apr. 15, 1994).

28. *State v. Robinette*, 653 N.E.2d 695, 699 (Ohio 1995). The court adopted this rule in syllabus two of its opinion. *Id.* at 696. The Ohio Supreme Court speaks as a court through its syllabi only. See *Ohio v. Gallagher*, 425 U.S. 257, 259-60 (1976) (noting that the Ohio Supreme Court utilizes its syllabi to announce its rules of criminal and evidentiary law); *Cassidy v. Glossip*, 231 N.E.2d 64, 68 (Ohio 1967) (reiterating the rule that the syllabi of the Ohio Supreme Court state the law of the case); see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566-67 n.3 (1977) (stating that the United States Supreme Court may look to the opinion of an Ohio Supreme Court decision to interpret the meaning of a particular syllabus, if the syllabus speaks only in general terms of state and federal constitutional law).

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

30. *Robinette*, 519 U.S. at 40.

seized for Fourth Amendment purposes, the Court refused to adopt a bright line rule in an area where it has "consistently eschewed bright-line rules."³¹ The Court remanded the case to the Ohio Supreme Court to either settle the case upon adequate state grounds, or to review the case using the totality of the circumstances test.³²

On remand, the Ohio Supreme Court reconsidered its bright line rule, but for reasons other than those articulated by the United States Supreme Court.³³ The court first articulated its intent to harmonize the Ohio Constitution with the Fourth Amendment.³⁴ It found no substantial reason to deviate from the federal standard for determining validity of consent.³⁵ The court then reexamined the facts of *Robinette* to determine whether Robinette was justifiably seized at various points throughout his encounter with Newsome.³⁶

The court found that Officer Newsome was justified in stopping Robinette for speeding³⁷ and for pulling Robinette out of the vehicle.³⁸ Newsome was even justified in further detaining Robinette to ask him the questions regarding the contraband,³⁹ but the request for consent to search was unjustified.⁴⁰ As such, Newsome obtained the consent as a result of an unlawful seizure.⁴¹ The court continued by considering whether Robinette's consent was valid independent of the unlawful seizure,⁴² but ultimately concluded that the state failed to meet its burden of showing valid consent to search. More specifically, it found that all the state managed to show was that Robinette "merely submitted" to "a claim of lawful authority."⁴³ Thus, the consent was invalid as a product of the unlawful seizure.

B. Applicable Legal Principles

To aid the reader in understanding the various legal issues addressed at each court level, this Comment now briefly discusses the applicable legal principles regarding seizures of persons and consent to search. More extensive treatment of these issues is discussed where relevant.

31. *Id.* at 39-40.

32. *Id.*

33. *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997).

34. *Id.* at 767.

35. *Id.*

36. *Id.* at 767-68.

37. *Id.* at 767.

38. *Id.*

39. *Id.* at 768.

40. *Id.*

41. *Id.*

42. *Id.* at 769-70.

43. *Id.* at 771.

1. *Basis for Seizures of Persons*

To reiterate, the purpose of the Fourth Amendment, in part, is to protect the rights of citizens to be secure in their persons against unreasonable seizures.⁴⁴ To determine if a particular act constitutes an unreasonable seizure, two questions must be answered: (1) Did the officer's conduct in question constitute a seizure?; and (2) If it was a seizure, was that seizure "reasonable" in light of caselaw?⁴⁵

*Terry v. Ohio*⁴⁶ was a seminal case, which among other things, announced a new definition for seizures of persons: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."⁴⁷ Later, in *United States v. Mendenhall*,⁴⁸ the Court refined the *Terry* definition of "seizure of a person" to give it an objective element: "[A] person has been 'seized' . . . 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."⁴⁹ Thus, the "seizure" test requires a court to consider the totality of the circumstances surrounding the event alleged to have resulted in a seizure.⁵⁰

In *Florida v. Bostick*,⁵¹ the Court slightly altered the *Mendenhall* standard to address the situation where a person is voluntarily in a confined space, and not there as a result of police conduct.⁵² In that situation, the test becomes "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."⁵³ Finally, in *California v. Hodari D.*,⁵⁴ the Supreme Court announced a new rule regarding seizures resulting from police pursuits or other "show of authority" seizures. The Court held that a person is seized by a show of authority if the officer applies physical force, like physical touching, or if the subject yields or otherwise submits to the officer.⁵⁵ The Court expressly rejected the

44. See *supra* note 1 (citing the text of the Fourth Amendment).

45. This Comment will only address the first question because the issues of the extent of a seizure and its "reasonableness" were not necessary to the resolution of the *Robinette*.

46. 392 U.S. 1 (1968).

47. *Terry*, 392 U.S. at 16. The Court clarified this definition by stating "[o]nly when [an] 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." *Id.* at 19 n.16.

48. 446 U.S. 544 (1980).

49. *Mendenhall*, 446 U.S. at 554. This rule was announced in a plurality portion of the opinion, but was later adopted by a majority of the Court in *Florida v. Royer*, 460 U.S. 491 (1983).

50. *Mendenhall*, 446 U.S. at 554.

51. 501 U.S. 429 (1991).

52. See *id.* at 435-36 (stating that "when [a] 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").

53. *Id.* at 436. The Court further insisted that this rule follows logically from earlier cases. *Id.* at 436-37.

54. 499 U.S. 621 (1991).

55. *Id.* at 626. This rule was first stated in *Michigan v. Chesternut*, 486 U.S. 567, 577 (1988) (Kennedy, J., concurring), where Justice Kennedy, joined by Justice Scalia, argued that "[i]t is at least plausible to say that whether . . . the officers' conduct communicates to a person a reasonable belief that [the police] intend to apprehend him, such conduct does not implicate the Fourth Amendment protections until it achieves a restraining effect." *Id.*

argument that *Mendenhall* stated the test to sufficiently establish when a person has been seized pursuant to a “show of authority” seizure.⁵⁶ The way the issue was framed, however, may have expanded the scope of *Hodari D.* to cover all show of authority seizures, not simply police pursuit seizures.⁵⁷

Because the standard for determining whether a person has been seized under the Fourth Amendment is an objective one, and given the fact that this issue requires analysis based upon all the circumstances, this Comment will synthesize some of the major cases in this area in order to develop a list of circumstances that may lead a court to find that a person has been seized.⁵⁸

The facts and holding in *Mendenhall* indicate that a person is not seized when the police simply walk up and start a conversation with him or her.⁵⁹ *Mendenhall* also shows that the personal characteristics of the detainee are relevant in determining whether a reasonable person would have felt free to leave.⁶⁰ A key fact in *Mendenhall* that led the Court to find the absence of a seizure was that the police officers returned the defendant’s license and ticket prior to requesting her to accompany them to the police station in the airport.⁶¹ Further, the officers approached her instead of summoning her, they were not wearing uniforms, and they did not display their weapons.⁶² These facts influenced the Court to hold that

(emphasis added).

56. See *Hodari*, 499 U.S. at 628 (stating that “*Mendenhall* establishes that the test for existence of a ‘show of authority’ is an objective one We did not address . . . the question whether, if the *Mendenhall* test was met—if the message that [the subject] was not free to leave *had* been conveyed—a Fourth Amendment seizure would have occurred.”); see also *id.* (stating that the *Mendenhall* test only established a necessary ground, and not a necessarily sufficient ground, for finding a seizure of a person).

57. See *id.* at 626 (“The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.”).

58. In *Robinette*, the Ohio Supreme Court, in its first consideration of the case, cited only the *Mendenhall* test as the proper “seizure of persons” test. *Robinette*, 653 N.E.2d at 698. Because of the treatment of the seizure issue at the state level, this Comment will only focus on that test, although it recognizes that, because of *Hodari D.*, the result of the *Mendenhall* test may not be determinative of the seizure question in the case of a show of authority seizure. See *Hodari D.*, 499 U.S. at 628 (stating that, for show of authority seizures, the *Mendenhall* seizure test is a necessary, but not sufficient, condition to a finding a seizure; in addition, a court must find either physical touching by the police or submission by the suspect).

59. See *Mendenhall*, 446 U.S. at 555 (stating that 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”); see also *INS v. Delgado*, 466 U.S. 210, 216 (1984) (declaring that “[w]hat is apparent from [the cases] is that police questioning, by itself, is unlikely to result in a Fourth Amendment [seizure]”).

60. See *Mendenhall*, 446 U.S. at 558 (noting that, for purposes of determining whether consent to search was voluntary, the fact that the defendant was 22 years old and had not graduated from high school were relevant in the totality of the circumstances inquiry). Given that the test for seizure is also a totality of the circumstances test, by analogy, the characteristics of the subject are equally relevant for seizure purposes.

61. See *Florida v. Royer*, 460 U.S. 491, 501-02 (1983) (noting that the retention of the defendant’s license and plane ticket, without any further indication that he was free to leave, are significant factors which lead to a finding of a seizure). For other significant factors, see 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 5.1(a) (3d ed. 1996).

62. *Mendenhall*, 446 U.S. at 555.

a reasonable person would have felt free to leave; thus, there was no seizure and no implication of the Fourth Amendment.⁶³

In a similar case, *Florida v. Royer*,⁶⁴ two police officers stopped the defendant because he fit a "drug-courier profile."⁶⁵ In contrast with *Mendenhall*, however, the officers in *Royer* retained the defendant's plane ticket and identification.⁶⁶ The Court held that the defendant was seized within the meaning of the *Mendenhall* test because a reasonable person would not have felt free to leave under those circumstances.⁶⁷

There are other factors relevant in determining whether a reasonable person would feel free to leave. "The consideration most frequently cited in the cases finding consent [and no seizure] is that the police specifically advised the suspect that he was not under arrest or that he was free to leave if he wished."⁶⁸ But informing a suspect that he is free to leave is not dispositive if additional police conduct of a coercive nature nullifies the advice.⁶⁹ A showing that the police physically restrained the defendant almost certainly will result in a finding of a seizure, whereas no physical restraint indicates no seizure.⁷⁰ To reiterate, the characteristics of the defendant are relevant in determining whether or not a reasonable person would have felt free to leave.⁷¹ But this standard does assume a reasonable innocent person.⁷²

63. The Court also noted that the suspect voluntarily consented because the police informed her twice of her right of refuse to consent. *Mendenhall*, 446 U.S. at 558.

64. 460 U.S. 491 (1983).

65. *See id.* at 493 n.2 (describing the "drug courier" profile as "an abstract of characteristics found to be typical of persons transporting illegal drugs").

66. *See Mendenhall*, 446 U.S. at 548 (noting that the officer handed Mendenhall her ticket and license back); *see also infra* note 67 (stating that the officers retained Royer's ticket and license when they asked him to go to the police office).

67. The Court reasoned that

[a]sking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment.

Royer, 460 U.S. at 501-02.

68. 3 LAFAVE, *supra* note 61, § 5.1(a) (citations omitted).

69. *Id.*

70. *Id.*

71. *See Mendenhall*, 446 U.S. at 558 (noting the defendant's personal characteristics were not irrelevant in the consent to search inquiry). The Court also stated that "circumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the . . . citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554 (citations omitted).

72. 3 LAFAVE, *supra* note 61, § 5.1(a) (citations omitted).

2. Consent to Search

The general rule for warrantless searches is that such acts are *per se* unreasonable unless some exception exists that excuses the need for a warrant.⁷³ Consent is one such exception.⁷⁴ Consent not only excuses the lack of a search warrant, but it also excuses the requirement of probable cause or reasonable suspicion.⁷⁵ The issues that often arise in consent search cases are whether the person validly consented, and assuming valid consent, what was the scope of the consent.⁷⁶

The leading case concerning the validity of consent to search is *Schneckloth v. Bustamonte*.⁷⁷ In *Schneckloth*, the Court utilized its due process line of confession cases to forge a rule for determining whether consent was voluntarily given.⁷⁸ The test mandates an inquiry into all the circumstances surrounding the giving of the consent to determine whether the person voluntarily gave consent to search.⁷⁹ The Court refused to adopt a waiver test for consent searches, relying instead upon the fact specific, totality of the circumstances voluntariness test.⁸⁰ The Court also declined to adopt a bright line rule which would make the detainee's knowledge of the right to refuse consent a condition precedent to finding effective consent.⁸¹

In *Bumper v. North Carolina*,⁸² a case preceding *Schneckloth*, the Court established that consent will not be found when it was obtained as a result of a police officer's claim of lawful authority.⁸³ In *Bumper*, four policemen went to the home of the defendant's grandmother and falsely announced to the grandmother that they had a warrant to search her home.⁸⁴ The grandmother acquiesced, and the officers searched her home;⁸⁵ this led to the discovery of incriminating evidence against the defendant.⁸⁶

73. *Katz v. United States*, 389 U.S. 347, 357 (1967).

74. *See Davis v. United States*, 328 U.S. 582, 593-94 (1946) (recognizing that consent to search can validate an otherwise invalid warrantless search).

75. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (noting that consent is an exception to both a warrant and probable cause).

76. This latter question regarding the scope of the consent given will be discussed later. *See infra* Part IV.A.1.b.ii (explaining the test for determining the scope of a consent search).

77. 412 U.S. 218 (1973); *see infra* Part IV.A.1 (discussing the facts and reasoning of *Schneckloth*).

78. *See Schneckloth*, 412 U.S. at 223-27 (analyzing the due process confession cases).

79. *Id.* at 248-49.

80. *See generally id.* at 235-46 (discussing the inapplicability of the waiver standard to Fourth Amendment consent to search jurisprudence).

81. *Id.* at 226-27.

82. 391 U.S. 543 (1968).

83. *Id.* at 550 ("When a[n] . . . officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion Where there is coercion there cannot be consent.").

84. *Id.* at 546.

85. *Id.*

86. *Id.*

In deciding the case, the Court stated that prosecutors who seek to rely on consent to validate an otherwise invalid search have “the burden of proving that the consent was, in fact, freely and voluntarily given.”⁸⁷ The Court further stated that this burden cannot be met by a mere showing by the state of a submission to a claim of lawful authority.⁸⁸

A synthesis of *Schneckloth* and *Bumper* establishes that consent, if the product of coercion, is not recognized as valid under the Fourth Amendment. Voluntariness is the test for valid consent to search, and determining whether consent was given voluntarily requires the application of a totality of the circumstances test. Finally, the prosecutor carries the burden of showing that consent was voluntarily given, and that it was not the product of coercion.⁸⁹

III. *OHIO V. ROBINETTE*: THE DECISIONS⁹⁰

Given the factual background behind the case, and the applicable legal principles, this Comment now briefly examines the analysis of the Ohio Court of Appeals and the Ohio Supreme Court, followed by a discussion of the United States Supreme Court’s review of the decision. The Comment will then consider the Ohio Supreme Court’s decision of *Robinette* after it was remanded by the United States Supreme Court.

A. *Ohio Court of Appeals*: *Robinette I*

In *Robinette I*, the Ohio Court of Appeals focused on the issue of whether a reasonable person in Robinette’s position would have believed that the investigatory stop had been concluded and that he was free to go, despite the continued questioning from Officer Newsome.⁹¹ Robinette argued that the purpose of the initial stop no longer existed when Newsome engaged him in the investigatory questioning, and thus the consent to search was obtained unlawfully due to an invalid seizure.⁹² In contrast, the State opined that Robinette was free to go, and thus he was not seized when he consented to the search.⁹³ The court held that a reasonable

87. *Id.* at 548 (citations omitted)

88. *Id.* at 548-49.

89. *Schneckloth*, 412 U.S. at 222.

90. For purposes of clarity, this Comment will hereinafter refer to the Ohio Court of Appeals decision of *Robinette*, State v. Robinette, No. 14074, 1994 WL 147806 (Ohio Ct. App. Apr. 15, 1994) as *Robinette I*. The first Ohio Supreme Court review of *Robinette*, 653 N.E.2d 695 (Ohio 1995), will be referred to as *Robinette II*. The United States Supreme Court decision in *Robinette*, 519 U.S. 33 (1996), will be called *Robinette III*, and the remand decision by the Ohio Supreme Court, 685 N.E.2d 762 (Ohio 1997), will be referred to as *Robinette IV*.

91. *Robinette I*, 1994 WL 147806, at *2.

92. *Id.* at *1.

93. *Id.*

person in Robinette's shoes would not believe that the investigatory stop had ended or that he was free to leave.⁹⁴

In deciding this case, the Ohio Court of Appeals focused on *State v. Retherford*,⁹⁵ a case with "an identical fact pattern," which also involved Officer Newsome. "In that case, [the court] held that once a police officer has issued a traffic violation or warning for a speeding violation, it is unreasonable to detain the motorist further for the purpose of obtaining consent to search. . . ."⁹⁶ Under this type of situation,⁹⁷ the court believed that a reasonable person would not feel free to go, thus making the unjustified seizure unlawful.⁹⁸

The opinion makes it evident that the Court of Appeals dealt only with the issue of the lawfulness of the continued seizure of Robinette. The issue regarding consent to search was not a question of whether the consent to search was voluntary, but rather was a question of whether the consent to search was invalid as a "fruit" of an unlawful seizure.⁹⁹

In a vigorous dissent, Justice Wolff argued that, based on the fact that Robinette had a bachelor of science degree, he was sufficiently educated to know that he was free to go.¹⁰⁰ He further opined that because Robinette testified that he felt free to leave at the time Newsome handed back his license, Robinette could not have been seized.¹⁰¹ The dissent did not focus on the testimony by Robinette that the questions

94. *Id.* at *2.

95. 639 N.E.2d 498 (Ohio Ct. App. 1994).

96. *Robinette I*, 1994 WL 147806, at *2.

97. *Retherford*, 639 N.E.2d 498. As stated before, *Retherford* involved "identical" facts as *Robinette*. *Robinette I*, 1994 WL 147806, at *2. Just as in *Robinette*, Officer Newsome stopped *Retherford* for speeding. *Retherford*, 639 N.E.2d at 501. After giving *Retherford* a warning citation, Newsome used a "technique," which he apparently used often in similar cases. *Id.* at 501. After issuing a citation, he would tell the person she was free to go; then as the driver turned her back, Newsome would engage her in "one more question," which ultimately became a request to search the person's vehicle. *Id.* In *Retherford*, Newsome engaged *Retherford* in one of these "casual conversations," asking about her travel plans and destination. *Id.* He handed her the citation and told her she was free to go. *Id.* Once *Retherford* turned her back, Newsome said, "Excuse me, can I ask you one thing before you go?" *Id.* *Retherford* said "sure," and the resulting questions led to a request to search her vehicle, to which she agreed. *Id.* Newsome later testified, in *Retherford*, that he had requested consent to search about 786 times in 1992 alone. *Id.* at 502. Note that in *Robinette*, Newsome never told Robinette that he was free to go, but otherwise he utilized the same method as that which he used on *Retherford*. *Robinette II*, 653 N.E.2d at 696.

98. *Retherford*, 639 N.E.2d at 507.

We think that no reasonable person subjected to a traffic stop would feel free to walk away at any time when she is questioned about and confronted with the suspicion of drug trafficking

Thus, we conclude that the initial seizure of *Retherford* was not converted into a mere consensual encounter by her purported release because Deputy Newsome immediately focused a new investigation on *Retherford* not reasonably related to the purpose of the initial stop.

Id. (citations omitted).

99. *Robinette I*, 1994 WL 147806, at *2. See *infra* note 218 (discussing the fruit of the poisonous tree doctrine); see also WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 9.3(a) (2d ed. 1992) (discussing this doctrine further).

100. *Robinette I*, 1994 WL 147806, at *3 (Wolff, J., dissenting).

101. *Id.*

following the return of his license “shocked” him, and that he felt that he had to answer the officer’s questions.¹⁰²

Both the majority and the dissent agreed that the issue was whether the continued questioning by Newsome constituted a seizure under the Fourth Amendment, or rather, whether a reasonable person in the shoes of Robinette would have felt free to leave.¹⁰³ Neither discussed the voluntariness of Robinette’s consent outside of the discussion of whether it was invalid as a product of an unlawful seizure. Moreover, the Ohio Court of Appeals impliedly found that an unlawful detention occurred when Robinette was outside of the vehicle and after Newsome returned his license.¹⁰⁴

B. Ohio Supreme Court: Robinette II

1. Seizure Issue

The Ohio Supreme Court stated the issue as “whether the evidence used against Robinette was obtained through a valid search.”¹⁰⁵ To answer this question, the court focused on whether the purpose of the initial seizure had ended, and whether Robinette was unlawfully seized when Newsome requested the consent to search.¹⁰⁶ Of particular import to the court was the fact that the sole purpose for the initial seizure of Robinette was his speeding.¹⁰⁷ “[Newsome] stopped Robinette for the purpose of giving a warning. [He] admitted that he never had any suspicions concerning Robinette beyond giving him a warning for speeding. That was the sole purpose for the stop.”¹⁰⁸

Since Newsome was only going to give a warning, and he had already checked Robinette’s license, “every aspect of the speeding violation had been investigated and resolved.”¹⁰⁹ Without any articulable facts, “Newsome extended his detention of Robinette by ordering him out of the vehicle.”¹¹⁰ Thus, the Ohio Supreme Court found that an unjustifiable seizure occurred once Newsome commanded Robinette

102. *Robinette II*, 653 N.E.2d at 696.

103. *Robinette I*, 1994 WL 147806, at *2; see *id.* at *4 (Wolff, J., dissenting) (arguing that the evidence supported a finding that Robinette was not seized when he consented to the search).

104. *Id.* at *2. This point becomes relevant because the Ohio Supreme Court found that the detention occurred when Robinette was asked to exit his vehicle. *Robinette II*, 653 N.E.2d at 698. Thus, to that court, the seizure was of a greater extent.

105. *Robinette II*, 653 N.E.2d at 697.

106. *Id.*

107. *Id.*

108. *Robinette I*, 1994 WL 147806, at *1; see *Robinette II*, 653 N.E.2d at 697 (noting that Officer Newsome had cause to stop Robinette for speeding, but he had no suspicion when he ordered Robinette to exit the vehicle). *But see* *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (holding that, pursuant to a lawful traffic stop, an officer may order a driver out of her vehicle, as a matter of course, without violating the Fourth Amendment).

109. *Robinette II*, 653 N.E.2d at 697.

110. *Id.*

to exit the vehicle.¹¹¹ Citing its previous decision of *State v. Chatton*,¹¹² the court found that the continued detention was unlawful because it was not based on any articulable facts giving rise to probable cause to extend the scope of the initial detention.¹¹³ "Therefore the detention of Robinette ceased being legal when Newsome asked [Robinette] to leave his vehicle."¹¹⁴

2. Consent to Search Issue

Because of the unlawful seizure, the court next considered whether Robinette's consent was the product of the unlawful seizure.¹¹⁵ To do this, the court examined whether the consent to search was sufficiently removed from the taint caused by the illegal seizure to make the consent independently valid.¹¹⁶ Relying on factors delineated in *United States v. Richardson*,¹¹⁷ the Ohio Supreme Court found that there was no lapse of time between the illegal detention and the request to search, and there were no circumstances that might have either broken or weakened the connection between the request to search and the illegal seizure.¹¹⁸ It further found that the sole purpose of the continued detention was to unlawfully expand the scope

111. See *id.* at 698 ("Therefore the detention of Robinette ceased being legal when Newsome asked him to leave his vehicle."). This fact is important because the seizure, as seen by the Court of Appeals, occurred when Newsome asked the "one more thing" question, *Robinette I*, 1994 WL 147806, at *2, whereas the Ohio Supreme Court saw the seizure as starting once Robinette was pulled from his vehicle. *Robinette II*, 653 N.E.2d at 698. If the seizure began once Robinette left his vehicle, then the extent of the seizure was greater than what the Ohio Court of Appeals found. See *supra* note 104 and accompanying text (discussing how the two courts differed on the extent of the seizure).

112. 463 N.E.2d 1237, 1240-41 (Ohio 1984) (holding that when a police officer's sole purpose for stopping a driver was because the driver's vehicle lacked license plates, and when the officer approaches the vehicle and discovers a valid temporary tag in the window, then, absent additional articulable suspicion to further detain the driver, the officer can no longer lawfully detain the driver).

113. *Robinette II*, 653 N.E.2d at 697-98.

114. *Id.*

115. *Id.*

116. *Id.* The Ohio Supreme Court utilized factors to determine whether Robinette's "consent" was an "independent act of free will," *id.*, but the factors it applied were similar to those for the "attenuation doctrine." See *Brown v. Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring) (discussing the underlying notion behind the attenuation doctrine); *Nardone v. United States*, 308 U.S. 338, 341-42 (1939) (noting the complexities of applying the attenuation doctrine). See generally DRESSLER, *supra* note 11, § 21.08[b][2] (discussing the attenuation doctrine, and its relevant factors of temporal proximity, length of causal chain, act of free will, flagrancy of the violation, and the nature of the derivative evidence). This Comment will use "independent act of free will" and "attenuation" synonymously because the former was the language utilized by the Ohio Supreme Court.

117. 949 F.2d 851 (6th Cir. 1991). In *Richardson*, police officers gained consent to search from the defendant after they placed him in the back of a police car. *Id.* at 854. The police had no articulable suspicion that crime was afoot. *Id.* The court found that the placing of defendant in the police car constituted an arrest, and because it was suspicionless, it was unlawful. *Id.* at 858. In determining that the defendant's consent was invalid as a fruit of the unlawful arrest, the court relied on several factors: 1) The length of time between the unlawful seizure and the subsequent search; 2) whether there were intervening circumstances; and 3) "the purpose and flagrancy of the misconduct." *Id.* at 858.

118. *Robinette II*, 653 N.E.2d at 698.

of the original lawful seizure.¹¹⁹ Consequently, the taint was not sufficiently removed to make Robinette's consent to search valid.¹²⁰

3. *Ohio Supreme Court's Bright Line Rule*

After finding that the consent was not sufficiently removed from the taint of the unlawful seizure, the court decided, in light of the difficulty of determining whether a seizure occurred under these facts, to adopt a bright line rule that would delineate the point "between the conclusion of a valid seizure and the beginning of a consensual exchange."¹²¹ Noting that the "transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred,"¹²² and that 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,"¹²³ the court decided that an officer must tell a legally detained motorist that she is free to go prior to engaging her in a "consensual conversation" once the stop has ended.¹²⁴ Otherwise, any consent to search obtained during the prolonged detention would be deemed invalid as a fruit of the unlawful seizure, unless there were some attenuating facts that would indicate the consent was valid independent of the seizure.¹²⁵

The court emphasized that the leading seizure and consent to search cases involved situations where the defendant was approached by the police for no valid reason, and thus there was no valid initial seizure.¹²⁶ In those situations, the police have not asserted any kind of authority, physical or otherwise, upon the person

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *See id.* at 699 (stating that

we are convinced that the right, guaranteed by the federal and Ohio Constitutions, to 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.).

Id.

125. The court's holding does not mention this extension, but it was implied that such an analysis would be used given appropriate facts because the court employed the analysis once it determined that Robinette was unlawfully seized. *Id.* at 698. It is also doubtful that the Ohio Supreme Court would alter its law regarding the "independent act" or attenuation exception to the fruit of the poisonous tree doctrine without stating so clearly in its syllabi. For the factors which the Ohio Supreme Court uses to determine whether consent to search is valid independent of an unlawful seizure, see *supra* note 117 (listing the *Richardson* factors).

126. *See Florida v. Bostick*, 501 U.S. 429, 431 (1991) (noting that an officer approached the defendant while he sat in a bus, and asked him if they could inspect his ticket and identification); *see also United States v. Mendenhall*, 446 U.S. 544, 547-48 (1980) (noting that the defendant was approached by federal agents, who engaged her in a consensual conversation).

being stopped, and thus the coercive nature of the encounter is less prominent.¹²⁷ Robinette's scenario was distinguishable because he was properly seized pursuant to the traffic stop,¹²⁸ and thus there was some ambiguity as to when the lawful detention ended and the "consensual encounter" began. "That the officer lacks legal license to continue to detain [drivers] is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him."¹²⁹ Thus, in contrast to *United States v. Mendenhall*,¹³⁰ where the defendant had no objective reason to believe she was seized prior to the initial questioning,¹³¹ Robinette was actually seized, and, arguably, continued to be seized when Newsome requested the consent to search.

4. Justice Sweeney's Dissent

Justice Sweeney dissented, relying in part on the fact that Robinette testified that he felt as if he was free to leave once Newsome handed back his license.¹³² Justice Sweeney saw no purpose behind the majority's adoption of the bright line rule, and he supported the "totality of the circumstances" approach previously sanctioned by the United States Supreme Court.¹³³ Further, Justice Sweeney believed that Newsome's technique for obtaining consent was particularly useful because "[t]his technique . . . is employed on a daily basis throughout this nation to interdict the flow of drugs."¹³⁴ So long as the technique is not coercive, Justice Sweeney would treat the consent given as being voluntary.¹³⁵ He further stated that the "bright line test" undercuts police authority and severely curtails an important law enforcement tool that is sanctioned by state and federal constitutional law."¹³⁶

127. *Robinette II*, 653 N.E.2d at 698-99.

128. *See id.* at 696 (noting that Robinette was pulled over for speeding); *see also id.* at 697 (stating that Newsome "certainly had cause to pull over Robinette for speeding"). *See generally* Whren v. United States, 517 U.S. 806, 819 (1996) (holding that it is reasonable, within the meaning of the Fourth Amendment, for the police to stop a car if they have probable cause to believe that the person driving has violated a traffic law).

129. *Robinette II*, 653 N.E.2d at 698.

130. 446 U.S. 544 (1980).

131. *Id.* at 555.

132. *Robinette II*, 653 N.E.2d at 700 (Sweeney, J., dissenting). At the suppression hearing, Robinette testified that, although he at first felt free to leave, the question regarding the consent to search shocked him, and he automatically affirmed Officer Newsome's request for consent to search. *Id.* at 696. Robinette further testified that he did not feel that he could refuse the officer's request. *Id.*

133. *Id.* at 700 (Sweeney, J., dissenting); *see also* Florida v. Bostick, 501 U.S. 429, 439 (1991) (utilizing a totality of the circumstances test for seizures of persons); *Mendenhall*, 446 U.S. at 554 (adopting a totality of the circumstances test for seizures of persons); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (stating that the totality of the circumstances test is the proper test for determining the validity of consent to search).

134. *Robinette II*, 653 N.E.2d at 700 (Sweeney J., dissenting).

135. *Id.*

136. *Id.* at 701.

5. *Conclusions About Robinette II*

Under the particular facts of *Robinette*, the majority reasoned that when a defendant is initially seized, and the officer continues with a "consensual conversation" after the seizure is completed, there needs to be some tool to inform the defendant when the encounter becomes consensual.¹³⁷ However, the majority's rule did not create a one-factor approach to these cases. An analysis of the majority opinion demonstrates three things. First, the Ohio Supreme Court found that Robinette was unlawfully seized because Officer Newsome had completed the valid stop and had no articulable facts to constitute reasonable suspicion¹³⁸ to allow him to continue the seizure further by pulling Robinette out of his vehicle.¹³⁹ Second, after the court decided that Robinette was unlawfully seized, and that his consent to search was invalid as a fruit of the unlawful seizure, the court then announced its bright line rule.¹⁴⁰ Thus, there is little support for the contention that, in Robinette's case, the bright line rule had any effect on deciding the validity of the seizure or the validity of Robinette's consent to search.¹⁴¹

Finally, since the court favorably cited *Mendenhall*¹⁴² and stated that its bright line rule was intended only to clarify the point between the end of a seizure and the beginning of a consensual interrogation,¹⁴³ it would seem that the court did not intend to completely abrogate the totality of the circumstances test for seizures. Rather, the Ohio Supreme Court likely attempted to fashion a bright line rule that would make the warning a condition precedent, or *sine qua non*, to a finding of no seizure under the circumstances. If the warning was given, yet subsequent conduct by the police would make the subject feel as if she was not free to leave, then presumably, there could still be a seizure.

C. *United State Supreme Court: Robinette III*

1. *Seizure Issue and the Bright Line Rule*

In its review of the case, the United States Supreme Court discussed, *inter alia*, whether the Federal Constitution requires an officer to inform a lawfully seized driver that he is free to leave in order for a subsequent consent to search to be

137. See *id.* at 698 (stating that "[t]his case demonstrates the need for this court to draw a bright line rule between the conclusion of a valid seizure and the beginning of a consensual exchange").

138. See *infra* notes 173, 217 and accompanying text (discussing the concept of reasonable suspicion).

139. *Robinette II*, 653 N.E.2d at 698.

140. *Id.*; see *Robinette III*, 519 U.S. at 45 (Stevens, J., dissenting) ("As I read the state court opinion, however, the prophylactic rule announced in the second syllabus was intended as a guide to the decision of future cases rather than an explanation of the decision in this case.").

141. *Robinette III*, 519 U.S. at 46 (Stevens, J., dissenting).

142. *Robinette II*, 653 N.E.2d at 698.

143. *Id.*

valid.¹⁴⁴ In a remarkably short opinion by Justice Rehnquist, the Court relied on its previous cases which had adopted a totality of the circumstances test to resolve the issues of whether a person is seized under the Fourth Amendment and whether consent to search is voluntarily given.¹⁴⁵ The Court explained that it has "long held that the 'touchstone of the Fourth Amendment is reasonableness.'" ¹⁴⁶ "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances."¹⁴⁷ The Court argued that it has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."¹⁴⁸ Further, the Court cited *Schneekloth v. Bustamonte* for the proposition that it has "previously rejected a *per se* rule very similar to that adopted by the Supreme Court of Ohio in determining the validity of a consent to search."¹⁴⁹

Just as it was found to be "impractical to impose on the normal consent search the detailed requirements of an effective warning,"¹⁵⁰ "it [would] be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."¹⁵¹ The Court then concluded that since the totality of the circumstances test was not applied by the Ohio Supreme Court, and because that is the test required by the Federal Constitution, the Ohio Supreme Court's rule must fail.¹⁵² However, the Court did not say that knowledge of a right to refuse consent or of a right to leave is irrelevant. Rather, such knowledge is a factor to consider within the totality of the circumstances test.¹⁵³

144. *Robinette III*, 519 U.S. at 35 ("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. We hold that it does not.").

145. *Id.* at 39 (citing *Florida v. Bostick*, 501 U.S. 429, 439 (1991), and *Schneekloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973)).

146. *Id.* (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)).

147. *Id.*

148. *Id.* The Court utilized *Michigan v. Chesternut*, 486 U.S. 567 (1988), *Florida v. Royer*, 460 U.S. 491 (1983), and *Florida v. Bostick*, 501 U.S. 429 (1991), as examples of cases where it had refused to adopt bright line rules, and it further used the cases to emphasize the argument that there is no "litmus-paper test" for Fourth Amendment problems because of the innumerable factual scenarios which implicate that Amendment. *Royer*, 460 U.S. at 506. *But see* *Maryland v. Wilson*, ___ U.S. ___, 117 S. Ct. 882, 885 n.1 (1997) (stating that although "we typically avoid *per se* rules concerning searches and seizures does not mean that we have always done so"). *Wilson* was decided only two months after *Robinette*.

149. *Robinette III*, 519 U.S. at 39; *see Schneekloth*, 412 U.S. at 227 (rejecting a bright line rule which would require a person to have knowledge of a right to refuse consent for his subsequent grant of consent to be valid). The *Schneekloth* opinion further stated that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." *Id.*

150. *Robinette III*, 519 U.S. at 39 (quoting *Schneekloth*, 412 U.S. at 227).

151. *Id.* at 39-40.

152. *Id.* at 40.

153. *Id.* The opinion does not explicitly say this, but its use of the totality of the circumstances test and its favorable citation to *Schneekloth* implicitly indicate that a detainee's knowledge that he is free to leave is relevant in the "seizure" inquiry. *Id.*

2. Consent to Search Issue

Since the Court found that the Ohio Supreme Court relied on federal grounds to determine the seizure issue,¹⁵⁴ and that the Ohio Supreme Court applied the wrong test under federal law for determining whether Robinette was seized, the Court could have ended its opinion there. Instead, the Court continued by adhering to *Schneekloth v. Bustamonte*¹⁵⁵ and its rule that adopted the totality of the circumstances test as the proper inquiry for determining whether consent to search was given voluntarily.¹⁵⁶ According to the Court, the Ohio Supreme Court erred when it found Robinette's consent to be invalid as a product of the unlawful seizure; it should have applied the totality of the circumstances test to both the seizure and consent to search issues. Because the state court did not, the Court reversed the Ohio Supreme Court's decision.¹⁵⁷

3. Justice Ginsburg's Concurrence

In her concurrence, Justice Ginsburg made clear that the opinion of the majority "does not pass judgment on the wisdom of the first-tell-then-ask rule. [It] simply clarifies that the Ohio Supreme Court's instruction to police officers in Ohio is not . . . the command of the Federal Constitution."¹⁵⁸ Justice Ginsburg chose to concur because she was not clear on whether the intention of the state supreme court was to mandate a new rule under the Federal Constitution.¹⁵⁹ Ginsburg compared the bright line rule adopted by the Ohio Supreme Court to the rule from *Miranda v. Arizona*,¹⁶⁰ in that both rules are essentially prophylactic.¹⁶¹ But, unlike the United States Supreme Court, "the Ohio Supreme Court is not similarly situated. That court can declare prophylactic rules governing the conduct of officials in Ohio, but it cannot command the police forces of sister States."¹⁶² Finally, Justice Ginsburg stressed that the Ohio Supreme Court, on remand, could mold the opinion unam-

154. *Id.* at 37.

155. 412 U.S. 218 (1973).

156. *Robinette III*, 519 U.S. at 40 (citing *Schneekloth*, 412 U.S. at 248-49).

157. *Id.*

158. *Id.* at 42 (Ginsburg, J., concurring).

159. *Id.* at 42-43 (Ginsburg, J., concurring).

160. 384 U.S. 436 (1966). *Miranda* created a bright line rule regarding interrogations which requires police officers, during custodial interrogation, to provide procedural safeguards which will effectively protect the suspect's privilege against compulsory self-incrimination. *Id.* at 478-79; see DRESSLER, *supra* note 11, § 24.04[B] (stating concisely the *Miranda* rule and its requirement of "procedural safeguards").

161. *Robinette III*, 519 U.S. at 43 (Ginsburg, J., concurring); see *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (stating that "[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.") (footnote omitted); *Michigan v. Tucker*, 417 U.S. 433, 444-45 (1974) (finding that an officer's failure to give adequate *Miranda* warnings violated *Miranda* but did not violate the Fifth Amendment privilege against self-incrimination). See generally DRESSLER, *supra* note 11, § 24.06 (discussing the Constitutional basis for *Miranda*).

162. *Robinette III*, 519 U.S. at 43 (Ginsburg, J., concurring).

biguously on state grounds, thus clearly making it the law applicable only in that state.¹⁶³

4. *Justice Stevens' Dissent*

In his dissent, Justice Stevens agreed with what he felt was the narrow holding of the Court: "The Federal Constitution does not require that a lawfully seized person be advised that he is 'free to go' before his consent to search will be recognized as voluntary."¹⁶⁴ His problem was with the Court's finding that the prophylactic rule announced by the Ohio Supreme Court was utilized to solve Robinette's case.¹⁶⁵ "[It] is important to emphasize that nothing in the Federal Constitution . . . prevents a State from requiring its law enforcement officers to give detained motorists the advice mandated by the Ohio court."¹⁶⁶

Justice Stevens found "several circumstances" that supported the Ohio Supreme Court's finding that the detention was unlawful prior to the request to consent to search.¹⁶⁷ He argued that people generally do not feel free to leave when the police continue to interrogate them, and that the police retain the upper hand in such situations, thus making it even less likely that detained motorists will feel free to go.¹⁶⁸ Justice Stevens also found support for concluding that Robinette was seized in the fact that most drivers are in a hurry to get to their destinations, and thus they would not likely extend the stop beyond what they felt was legal.¹⁶⁹ Furthermore, most drivers would not want police looking within their vehicles regardless of whether there is contraband in the car.¹⁷⁰

Finally, the fact that Newsome previously used similar conduct 786 times in one year¹⁷¹ (assuming that people would not willingly surrender their privacy interests if they knew they had no reason to do so) shows that these people likely

163. *Id.* at 44-45 (Ginsburg, J., concurring).

164. *Id.* at 45 (Stevens, J., dissenting).

165. *Id.* In the words of Justice Stevens: "As I read the state [supreme] court opinion, however, the prophylactic rule announced in the second syllabus was intended as a guide to the decision of future cases rather than an explanation of the decision in this case." *Id.*

166. *Id.* at 44-46 (Stevens, J., dissenting).

167. *Id.* at 46-47 (Stevens, J., dissenting). Officer Newsome's initial question was prefaced with the statement "before you get gone[.]" thus implying to Robinette that he was not free to leave; Robinette had been detained; he received no advice that he was free to leave; he was standing in front of a video camera in response to Newsome's order to do so. *Id.* All of these facts tended to show that a reasonable person in Robinette's shoes would not have felt free to leave. *Id.* Therefore, the finding was consistent with the totality of the circumstances test. *Id.* at 46-47.

168. *See id.* at 47 (Stevens, J., dissenting) ("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 47 n.4 (Stevens, J., dissenting) (arguing this point further).

169. *Id.* at 47-48 (Stevens, J., dissenting).

170. *Id.* at 47 (Stevens, J., dissenting).

171. *See State v. Retherford*, 639 N.E.2d 498, 502 (Ohio Ct. App. 1994).

did not feel as if they were free to go.¹⁷² Thus, as Justice Stevens contended, there was adequate factual support for the Ohio Supreme Court to conclude under the totality of the circumstances test that Robinette was seized for purposes of the Fourth Amendment. Because this analysis and conclusion preceded the introduction of the bright line rule in the Ohio Supreme Court opinion, inferentially, the conclusion was not affected by the bright line rule that the court subsequently adopted.

Justice Stevens noted why he believed the majority thought that the state court applied the wrong test. In its first syllabus, the Ohio Supreme Court held that when the officer's "motivation" for the continued detention is no longer related to the purpose of the original stop, if there are no new articulable facts creating reasonable suspicion¹⁷³ to justify a continued detention, then the continued detention is unlawful.¹⁷⁴ The majority read "motivation" to mean "subjective intention." However, the recent decision in *Whren v. United States*¹⁷⁵ made this interpretation irrelevant for purposes of federal constitutional law.¹⁷⁶ Justice Stevens suggested that the word "justification" should be read into the passage in place of "motivation" to evince what the Ohio Supreme Court truly meant to say.¹⁷⁷ The reading would then be consistent with *Whren*.¹⁷⁸ "As an objective matter, it inexorably follows that when the officer had completed his task of either arresting or reprimanding the driver . . . his continued detention of that person constituted an illegal seizure."¹⁷⁹ Thus, for Justice Stevens, this was a "garden-variety" seizure, which the Ohio Supreme Court resolved based upon the totality of the circumstances.¹⁸⁰

Justice Stevens then focused on the bright line rule. Agreeing with Justice Ginsburg, he did not think that the majority was passing upon the prudence of the

172. *Robinette III*, 519 U.S. at 48 (Stevens, J., dissenting) (stating that "[r]epeated 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").

173. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (stating that an officer is justified in briefly detaining a person if she has suspicion, based upon his observing "unusual conduct," which leads her to reasonably believe, in light of her experience and knowledge, that crime may be afoot, or leads her to believe that the person he is dealing with may be armed and dangerous).

174. *Robinette III*, 519 U.S. at 49 (Stevens, J., dissenting) (citing *Robinette II*, 653 N.E.2d at 696).

175. 517 U.S. 806 (1996).

176. See *Robinette III*, 519 U.S. at 38 ("[T]he subjective intentions of the officer did not make the continued detention of respondent illegal under the Fourth Amendment.").

177. *Id.* at 49 (Stevens, J., dissenting); see *Robinette IV*, 685 N.E.2d at 767 (modifying the first syllabus from *Robinette II*, 653 N.E.2d at 696, to read "objective justification" instead of "motivation" as suggested by Justice Stevens in *Robinette III*, 519 U.S. at 49).

178. In his footnote 8, Justice Stevens pointed to two cases which supported this proposition. One case was *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (stating "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"). The other was *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (stating that a "stop and inquiry must be reasonably related in scope to the justification for [its] initiation" (quoting *Terry v. Ohio*, 392 U.S. 1, 29 (1968))). *Robinette III*, 519 U.S. at 50 n.8.

179. *Robinette III*, 519 U.S. at 50-51 (Stevens, J., dissenting).

180. *Id.* at 46.

bright line rule as a matter of state constitutional law.¹⁸¹ He also stated that nothing would prevent the states from adopting greater protections for their citizens.¹⁸² His principal reason for agreeing with the majority as to the bright line rule was that he too thought that the Federal Constitution does not require such a prophylactic rule.¹⁸³

D. Ohio Supreme Court on Remand: Robinette IV

On November 12, 1997, the Ohio Supreme Court reconsidered its *Robinette II* holding,¹⁸⁴ but this time in a way consistent with the United States Supreme Court's admonitions. The Ohio Supreme Court could have followed the suggestion given by both Justices Stevens and Ginsburg by settling the decision on state grounds, while retaining the bright line rule. Instead, the court took a different approach that ultimately made the situation even more precarious for citizens, police, and the courts.

In *Robinette IV*,¹⁸⁵ the Ohio Supreme Court modified its syllabi from *Robinette II* in order to make its decision comport with federal law. For the first syllabus, the court amended the language to read "objective justification" instead of "motivation," the problematic word written in *Robinette II* that was criticized by the United States Supreme Court.¹⁸⁶ In the second syllabus, the court vacated the bright line rule it adopted in *Robinette I*, and instead utilized a totality of the circumstances test for determining whether a person is seized.¹⁸⁷

Finally, in the third syllabus, the court adopted an "independent act test" in order to determine whether consent to search obtained as a result of an unlawful seizure is independently valid.¹⁸⁸ "Once an individual has been unlawfully detained by law enforcement, for his or her consent to be considered an independent act of free will, the totality of the circumstances must clearly demonstrate that a rea-

181. *Id.* at 53 (Stevens, J., dissenting) ("[I] agree that it is not [the Supreme Court's] function to pass judgment on the wisdom of such rules.").

182. *See id.* at 52-53 (Stevens, J., dissenting) (asserting that there is nothing preventing the state court from adopting such a rule because they help police and the courts to determine the validity of a seizure); *see also id.* at 42 (Ginsburg, J., concurring) (noting that a state may, under its own laws, impose greater restrictions on police activity than the federal constitution).

183. *Id.* at 53 (Stevens, J., dissenting).

184. 653 N.E.2d 695 (Ohio 1995).

185. *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997).

186. *Id.* at 764; *Robinette II*, 653 N.E.2d at 696. *See Robinette III*, 519 U.S. at 38-39 (stating that the correct test is not subjective motivation, but rather whether the officer had an objective justification). *But see Robinette III*, 519 U.S. at 49-50 (Stevens, J., dissenting) (arguing that the state supreme court really intended "motivation" to mean "objective justification").

187. *Robinette IV*, 685 N.E.2d at 764.

188. *Id.*

sonable person" would feel free to refuse further questions and *could in fact* leave.¹⁸⁹

1. *Seizure Issue*

In reaching its decision regarding the seizure issue, the Ohio Supreme Court had to initially determine "whether [its] prior holding should be reaffirmed under the adequate and independent ground" of the Ohio State Constitution.¹⁹⁰ Although noting a trend for state courts to adopt broader state constitutional protections for their citizens,¹⁹¹ the court stated that "where the [constitutional] provisions are similar and no persuasive reason for a differing interpretation is presented, this court has determined that protections afforded by Ohio's Constitution are coextensive with those [of the federal constitution]."¹⁹² Because the court found no special reason to expand the Ohio State Constitution's protections, it decided to "harmonize [its] interpretation of Section 14, Article I of the Ohio Constitution with the Fourth Amendment."¹⁹³

The court then went on to apply federal law in a similar fashion as the United States Supreme Court did in *Robinette III*. For this, the court utilized the amended rule from syllabus one, which forced it to look at each stage of the encounter between Robinette and Officer Newsome to determine if the "objective justification" for the continued detention was related to the justification for the original stop.¹⁹⁴ As the court noted, there was no question as to the initial stop and the request for Robinette to exit the vehicle.¹⁹⁵ However, the court's subsequent analysis is quite anomalous.

The court next reviewed Officer Newsome's continued detention of Robinette by focusing on his purpose for interrogating Robinette as to whether he was in possession of any contraband.¹⁹⁶ To answer this, the court likened Robinette's scenario to that of a sobriety checkpoint, in that the drug interdiction purpose has a substantial governmental value, yet the incremental degree of the intrusion is relatively slight. This approach allowed the court to adopt a suspicionless seizure rule.¹⁹⁷ "*Royer* and *Brown* set out a standard whereby police officers . . . may briefly detain an individual without reasonably articulable facts giving rise to suspicion of

189. *Id.*

190. *Id.* at 766.

191. *Id.*

192. *Id.*

193. *Id.* at 767.

194. In framing the issue this way, the Court must have assumed that the extended "detention" constituted a seizure. *Id.*

195. *Id.*

196. *Id.* at 767-68. The Court stated the issue as "[whether] Officer Newsome [was] objectively justified . . . in detaining Robinette after administering the verbal warning." *Id.* at 767.

197. *Id.* at 768 (citing *Brown v. Texas*, 443 U.S. 47 (1979)). The Court also cited *Florida v. Royer*, 460 U.S. 491 (1983), stating that the minimal intrusion caused by questioning a person not in custody is not a "seizure." *Id.*

criminal activity, if the detention promotes a legitimate public concern,"¹⁹⁸ such as reducing the drug trade. Thus, under the *Brown* test, Officer Newsome was justified in asking Robinette whether he had contraband.

Next, the court focused on the consent to search request as a separate issue.¹⁹⁹ It noted that Officer Newsome knew of no facts that could give rise to reasonable suspicion to allow Newsome to further detain Robinette after he had satisfactorily answered the questions regarding contraband.²⁰⁰ Applying the *Brown* test, the court concluded that Officer Newsome was not justified in detaining Robinette to request consent to search, thus making the seizure during this last question unlawful.²⁰¹

2. Consent to Search Issue

Although it found Robinette's seizure to be unlawful, the court continued its analysis by determining whether Robinette's subsequent consent to search validated the otherwise illegal detention and search.²⁰² It quickly disposed of Robinette's contention that the "free to go rule"²⁰³ from *Robinette II* would make determinations of validity of consent to search more predictable. The court stated: "We find that Robinette's conclusion is based on an oversimplified approach to the issue of consent."²⁰⁴ It then adopted the rule and the reasoning from *Schneckloth*.²⁰⁵ Additionally, the court cited *Royer*,²⁰⁶ indicating that "the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, [is] a burden that is not satisfied by showing a mere submission to a claim of lawful authority."²⁰⁷

The court then analyzed the facts of *Robinette*, relying heavily on Robinette's testimony at the suppression hearing.²⁰⁸ It found that "Newsome's words did not give Robinette any indication that he was free to go,"²⁰⁹ but instead indicated to him that he would only be free to go once he answered the additional questions. In

198. *Id.* (italics added). The Court's use of *Brown v. Texas*, 443 U.S. 47 (1979), is troubling, however, because there the issue was whether the police had specific, articulable facts which amounted to reasonable suspicion justifying them to detain the defendant. *Id.* at 51-52. The Ohio Supreme Court was relying solely on the dicta in *Brown*, which argued that "a seizure may be reasonable within the confines of the Fourth Amendment despite the absence of probable cause or reasonable suspicion of criminal activity if the seizure satisfies a balance between 'the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Robinette IV*, 685 N.E.2d at 772 (Cook, J., concurring) (quoting *Brown*, 443 U.S. at 50).

199. *Robinette IV*, 685 N.E.2d at 768.

200. *Id.*

201. *Id.*

202. *Id.* at 769 (citing *Davis v. United States*, 328 U.S. 582, 593-94 (1946)).

203. See *supra* note 124 (containing the text of the rule).

204. *Robinette IV*, 685 N.E.2d at 769.

205. *Id.* See *infra* Part IV.A (discussing the facts, rule, and reasoning in the *Schneckloth* decision).

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

207. *Robinette IV*, 685 N.E.2d at 770 (quoting *Royer*, 460 U.S. at 497) (emphasis omitted).

208. *Id.*

209. *Id.*

addition, Newsome's "superior position of authority,"²¹⁰ when combined with the language of the questioning, would lead a reasonable person to believe that he must answer the questions. "From the totality of the circumstances, it appears that Robinette merely submitted to a 'claim of lawful authority' rather than consenting as a voluntary act of free will."²¹¹ Thus his consent to search was invalid.

IV. ANALYSIS OF THE *ROBINETTE III* MAJORITY OPINION

As intimated in the above discussion, the issue for the Ohio Supreme Court in *Robinette II* and *Robinette IV*, and for the Ohio Court of Appeals in *Robinette I*, was whether Robinette was lawfully seized when Officer Newsome requested consent to search Robinette's vehicle.²¹² Since the facts indicated that the purpose for the original seizure no longer existed when the "conversation" began,²¹³ and since there were no facts indicating that Officer Newsome had particularized suspicion to allow a further detention, the courts narrowed the issue to whether Robinette was seized at all.²¹⁴

In resolving this issue, both the Ohio Court of Appeals and the Ohio Supreme Court looked to federal and state precedent to determine whether a reasonable person in Robinette's shoes would have felt free to leave.²¹⁵ Again, both of the state courts found facts sufficient to support a finding that a reasonable person would not have felt free to leave, thus both courts concluded that Robinette was seized.²¹⁶ Since the seizure was not based on any particularized suspicion, it was unlawful under *Terry v. Ohio*.²¹⁷ After finding that Robinette was unlawfully seized, the

210. *Id.* at 771.

211. *Id.*

212. *Robinette IV*, 685 N.E.2d at 767; *Robinette II*, 653 N.E.2d at 697; *Robinette I*, 1994 WL 147806, at *1.

213. *See Robinette II*, 653 N.E.2d at 697 (stating that the purpose of the traffic stop had ended, and Newsome attempted to engage Robinette in a consensual conversation).

214. *See id.* (discussing the lack of reasonable articulable suspicion when Newsome engaged Robinette in the extended detention). Given that there were no articulable facts constituting at a minimum reasonable suspicion, under *Terry*, 392 U.S. at 21, if Robinette was in fact seized, the seizure likely would have been unlawful.

215. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (concluding that "a person has been 'seized' . . . only if, in view of all the circumstances . . . a reasonable person would have believed that he was not free to leave") (Rehnquist, J., plurality). This rule was adopted by a majority of the Court in *Royer*, 460 U.S. 491 (1983). *See also Florida v. Bostick*, 501 U.S. 429, 439 (1991) (holding that "to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether . . . a reasonable person . . . [would have] felt free to decline the officer's requests or otherwise terminate the encounter"). The Ohio Supreme Court also relied upon *State v. Chatton*, 463 N.E.2d 1237 (Ohio 1984). *Robinette II*, 653 N.E.2d at 697. The Ohio Court of Appeals relied upon *Chatton* and *State v. Retherford*, 639 N.E.2d 498 (Ohio Ct. App. 1994).

216. *Robinette IV*, 685 N.E.2d at 770; *Robinette II*, 653 N.E.2d at 697-98; *Robinette I*, 1994 WL 147806, at *2.

217. *See Terry*, 392 U.S. at 30 (holding "that where a police officer observes unusual conduct which leads him to reasonably conclude . . . that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous," he may briefly stop the persons, make reasonable inquiries designed to

question for the Ohio courts then became whether the application of the "fruit of the poisonous tree doctrine"²¹⁸ would make the consent given by Robinette invalid.²¹⁹ As the Ohio courts held, the consent was invalid under this doctrine.²²⁰

In *Robinette III*, the United States Supreme Court noted that Robinette failed to argue that the valid detention had become an invalid seizure once Newsome, having already determined that he was going to issue a warning, asked Robinette to get out of the car anyway.²²¹ Regardless, the Court saw the issue "[regarding] the continuing legality of the detention [as] a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.'"²²²

In its analysis of the seizure issue, the Court focused on the bright line rule announced by the Ohio Supreme Court opinion.²²³ It found that the Ohio Supreme Court's use of the word "motivation" in syllabus one²²⁴ indicated an improper rule because "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."²²⁵ Further, the Court found that there was no issue regarding Newsome's request for Robinette to get out of the vehicle, because *Pennsylvania v. Mimms*²²⁶ made it clear that, pursuant to a valid traffic stop, an officer may command the driver out of the vehicle as a matter of course.²²⁷ Thus, from the Court's perspective, none of Officer Newsome's acts up to and including the point of commanding Robinette from the car were *per se* unlawful.

Next the Court reiterated its emphasis on reasonableness, and its persistence in eschewing bright line rules.²²⁸ At no point did the Court utilize the totality of the circumstances test to determine whether the Ohio Supreme Court found that a

either support or dispel his beliefs, and conduct a "carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him").

218. For general principles regarding this doctrine, see DRESSLER, *supra* note 11, § 21.08. See also *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (stating that "[i]n order to make effective the fundamental constitutional guarantees [of the Fourth Amendment, the exclusionary rule provides that] evidence seized during an unlawful search [cannot] constitute proof against the victim of the search"). "[This prohibition] extends as well to the indirect as the direct products of such invasions." *Id.* at 484 (citation omitted). See generally 5 LAFAVE, *supra* note 61, § 11.4, at 231 (stating that in many cases, challenged evidence is secondary to the evidence gained by the initial illegality, and in such instances "it is necessary to determine whether the [secondary] evidence is 'tainted' by the prior Fourth Amendment violation").

219. See *Robinette II*, 653 N.E.2d at 698 (determining that the consent given by Robinette was a result of his illegal detention and thus invalid); see also *Robinette I*, 1994 WL 147806, at *2 (holding similarly that "[b]ecause the search . . . resulted from an unlawful detention, it is the fruit of an unlawful seizure").

220. *Robinette II*, 653 N.E.2d at 698; *Robinette I*, 1994 WL 147806, at *2.

221. *Robinette III*, 519 U.S. at 38 (citing SUP. CT. R. 15.2).

222. *Id.* (quoting SUP. CT. R. 14.1(a); *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980)).

223. *Id.* at 39 (discussing the need, or lack thereof, of the bright line rule as a matter of federal constitutional law).

224. *Robinette II*, 653 N.E.2d at 696.

225. *Robinette III*, 519 U.S. at 38 (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)).

226. 434 U.S. 106 (1977).

227. *Robinette III*, 519 U.S. at 38-39 (quoting *Mimms*, 434 U.S. at 111 n.6) ("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.").

228. *Id.* at 39.

reasonable person in Robinette's place would not have felt free to leave. But it is clear from looking at both *Robinette I* and *II* that both Ohio courts resolved the issue of the validity of the consent by finding that Robinette was unlawfully seized,²²⁹ thus making the subsequent consent tainted by this unlawful police conduct.²³⁰ The bright line rule was not meant to address the facts of Robinette's case, and thus the United States Supreme Court's finding that it was invalid, as applied here, was erroneous; the rule simply was not applied in Robinette's case.²³¹

A. Viewing *Robinette III* as a Case About Consent to Search

Finding that there was no continued seizure, the Supreme Court went on to discuss the validity of the bright line rule as a consent to search rule.²³² The leading case concerning the issue of whether consent to search is validly given is *Schneckloth v. Bustamonte*.²³³ In that case, the police stopped six men in an automobile for having a headlight and license plate light burned out.²³⁴ The owner

229. Note that the Ohio Court of Appeals found that, given the totality of the circumstances, Robinette would not have felt free to leave. *Robinette I*, 1994 WL 147806, at *2. The Ohio Supreme Court found that Robinette was unlawfully seized when Officer Newsome, without justification, requested that Robinette exit the vehicle. *Robinette II*, 653 N.E.2d at 698. That court did not discuss whether this act amounted to a seizure under the *Mendenhall* test. Perhaps the court thought that it was beyond question that Robinette would reasonably believe that he was not free to leave when he was commanded from his vehicle.

230. See *Robinette II*, 653 N.E.2d at 698 (stating that, "[g]iven the circumstances, Robinette felt that he had no choice but to comply"); see also *id.* (asserting further that "[t]his case demonstrates the need for this court to draw a bright line"). The Ohio Supreme Court concluded its analysis based upon a totality of the circumstances test, then it went on to state the bright line rule. *Id.* The result is that the bright line rule had no impact on the outcome of the case. See also *Robinette III*, 519 U.S. at 45 (Stevens, J., dissenting) (supporting this conclusion). But see *id.* at 40 (implying that the bright line rule did have an impact on the outcome of the decision).

231. During oral arguments, the State argued that syllabus one was intertwined with syllabus two of the Ohio Supreme Court opinion. Official Transcript at *14-15, *Robinette III*, 519 U.S. 33 (No. 95-891). It argued that the rule in syllabus two was used to determine whether Robinette was unlawfully detained. *Id.* Since the Ohio Supreme Court speaks through its syllabi, *Robinette III*, 519 U.S. at 37 (citations omitted), the actual opinion is only dicta, but it does have interpretive value. See Official Transcript at *15, *Robinette III*, 519 U.S. 33 (No. 95-891). By reading the opinion, the Court could interpret whether syllabus two had been used to determine the issue of Robinette's continued detention. Thus, the State lacked a convincing argument that the bright line rule was necessary to the outcome of the case.

232. See *Robinette III*, 519 U.S. at 40 ("The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and '[v]oluntariness is a question of fact to be determined from all the circumstances.'") (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973)); *id.* ("The Supreme Court of Ohio having held otherwise, its judgment is reversed. . ."). It seems that the Court believed the bright line rule created by the Ohio Supreme Court would negate any consent given subsequent to a lawful detention if the advice that the suspect was free to go had not been given. The Ohio Supreme Court likely did not intend such a rule. Rather, it likely intended a rule which would make any further detention unlawful, thus requiring the magistrate at a suppression hearing to determine whether the subsequent consent to search was sufficiently free from the taint of the unlawful seizure to be valid independent of the seizure. It likely did not intend to create a *per se* rule invalidating all consent under these circumstances. The Ohio Supreme Court's application of the attenuation doctrine supports this. *Robinette II*, 653 N.E.2d at 698.

233. 412 U.S. 218 (1973).

234. *Id.* at 220.

of the car was not one of the occupants, but when the officer requested consent to search the vehicle, a passenger of the vehicle, the brother of the owner, replied, "Sure, go ahead."²³⁵ In the search of the trunk, the officer discovered three checks, which had previously been stolen from a car wash, wadded up under the left rear seat.²³⁶

The trial judge denied Bustamonte's motion to suppress this evidence, the checks were admitted at his trial, and he was subsequently convicted.²³⁷ A California appellate court affirmed the conviction, holding that the totality of the circumstances test is the correct standard to apply when determining whether consent to search was voluntarily given.²³⁸ The California Supreme Court denied review in an unreported opinion.²³⁹

Bustamonte sought a writ of habeas corpus in the United States District Court for the Northern District of California, but was denied review in another unreported opinion. The Ninth Circuit reversed the state court of appeals decision, stating that the California courts had not determined that the subject knew that he could refuse consent.²⁴⁰

In its review of the Ninth Circuit decision, the United States Supreme Court saw the issue as "what must the prosecution prove to demonstrate that a consent was 'voluntarily' given."²⁴¹ The Court relied, in part, upon the due process line of confession cases²⁴² to construct a definition for a "voluntary" consent to search.²⁴³ Noting that "[the] cases yield no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen,"²⁴⁴ the Court stated that the concept of voluntary consent "[could not] be taken literally to mean a 'knowing' choice."²⁴⁵

The Court reviewed numerous factors previously used in determining whether a given confession was coerced, but most importantly argued that "[t]he significant fact about all of these decisions is that none of them turned on the presence or

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 220-21.

239. *Id.* at 221.

240. *Bustamonte v. Schneckloth*, 448 F.2d 699, 700-01 (9th Cir. 1971), *rev'd*, 412 U.S. 218 (1973).

241. *Schneckloth*, 412 U.S. at 223. *But see id.* at 282 (Marshall J., dissenting) (arguing that "[c]onsent, however, is a mechanism by which substantive requirements, otherwise applicable, are avoided"). Thus, he argued, the Fifth Amendment coercion standard is inappropriate for determining whether consent to search was voluntarily given. *See also* Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 793 n.327 (1992) (arguing that the Court in *Schneckloth* stated the issue in a grossly misleading way, thus allowing it to reach the desired conclusion).

242. Among the due process confession cases relied upon in *Schneckloth* are *Culombe v. Connecticut*, 367 U.S. 568 (1961), *Haley v. Ohio*, 332 U.S. 596 (1948), and *Brown v. Mississippi*, 297 U.S. 278 (1936). *See Schneckloth*, 412 U.S. at 223-27 (utilizing these confession cases).

243. *Schneckloth*, 412 U.S. at 223 (citation omitted).

244. *Id.* at 224.

245. *Id.*

absence of a single controlling criterion.”²⁴⁶ Thus, the Court concluded that knowledge of a right to refuse consent is a factor to consider in determining the voluntariness question, but such knowledge is not “the *sine qua non* of an effective consent.”²⁴⁷

To support the proposition that consent searches are advantageous, the Court relied upon various justifications. The Court’s ultimate concern was belied by “the legitimate need for [consent] searches and the equally important requirement of assuring the absence of coercion.”²⁴⁸ Of particular concern was the situation where the police have some evidence of illicit activity, but not sufficient evidence to amount to probable cause.²⁴⁹ In such cases, gaining consent to search may be the only way that police can obtain important and reliable evidence.²⁵⁰ Further, “a search pursuant to consent may result in considerably less inconvenience for the subject of the search.”²⁵¹

The Court refused to adopt the Sixth Amendment standard for “waiver” espoused in *Johnson v. Zerbst*.²⁵² It first found that the *Zerbst* “knowing and intelligent waiver” test, which is applied in a “context of the safeguards of a criminal trial,”²⁵³ is not applied in every context. Because the purpose of the Sixth Amendment is “to preserve the fairness of the trial process,”²⁵⁴ the Court decided to establish a particularly heavy burden for the prosecution.²⁵⁵ By contrast, the Court has not chosen to apply this heavy burden where the ability of the defendant to receive a fair trial is not at issue.²⁵⁶

Additionally, and of special significance, “[t]he protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial.”²⁵⁷ The Fourth Amendment protections do not implicate the problems inherent in the truth finding process at trial because the physical evidence is not suspect, whereas the result of

246. *Id.* at 226 (citing *Miranda v. Arizona*, 384 U.S. 436, 508 (1966) (Harlan, J., dissenting)); *id.* (citing *Miranda*, 384 U.S. at 534-35 (White, J., dissenting)).

247. *Id.* at 227.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 228.

252. *See id.* at 235 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938) (holding that, to prove that a defendant waived his constitutionally guaranteed right to a fair trial, the state must prove that he competently and intelligently waived the right)).

253. *Id.*

254. *Id.* at 236.

255. *Id.* at 236-37.

256. *Id.* at 241-42.

257. *See id.* at 242 (stating that “[t]he guarantees of the Fourth Amendment stand ‘as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone’”) (quoting *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966)).

a trial is suspect if a defendant has not been provided his Sixth Amendment right to counsel.²⁵⁸

Then, the Court argued that it would be nearly impossible to apply the *Zerbst* standard in a consent to search context.²⁵⁹ Relying on the dynamic of informal police-citizen encounters, the Court argued that “[i]t would be unrealistic to expect that in . . . [that] context, . . . a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by [*Zerbst*].”²⁶⁰

Finally, the Court argued that *Miranda* is not analogous to the consent to search issue presented because “[i]n this case, there [was] no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place.”²⁶¹ Thus, the Court narrowly held that “when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, . . . it [must] demonstrate that the consent was in fact voluntarily given. . . . [and] [v]oluntariness is a question of fact to be determined from all the circumstances.”²⁶² “[W]hile the subject’s knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge . . . to [establish] a voluntary consent.”²⁶³

258. See *id.* at 242-43 (stating that:

[N]or can it even be said that a search, as opposed to an eventual trial, is somehow “unfair” if a person consents to a search. While the Fourth and Fourteenth Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person’s voluntarily allowing a search.

see also *Zerbst*, 304 U.S. at 463 (arguing that the Sixth Amendment right to counsel is necessary to protect the fair ascertainment of truth because

[the defendant] is incapable, generally, of determining for himself whether [his] indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.).

259. *Schneekloth*, 412 U.S. at 243.

260. *Id.* at 245.

261. *Id.* at 247. Since the *Miranda* Court developed its holding based upon the premise that custodial interrogations are inherently coercive, *Miranda*, 384 U.S. at 467, the Court’s argument in *Schneekloth* was that the lack of an inherently coercive environment under the facts of the present case made informing the suspect of his right to refuse consent unnecessary. *Schneekloth*, 412 U.S. at 247.

262. *Schneekloth*, 412 U.S. at 248-49.

263. *Id.* at 249. Indeed, the argument has been made that the mere request for permission to search carries with it the implication that the person has the right to withhold consent to search. 68 AM. JUR. 2D *Searches and Seizures* § 85 (1993). This argument affects the assertion made by the *Schneekloth* Court that the police officer advising the subject of the right to refuse consent would somehow have a disastrous impact on the informality of the encounter. *Schneekloth*, 412 U.S. at 231-32. How could explicit advice of rights have some significantly increased impact on the informal police-citizen encounter when the officer has impliedly given the advice in his request for a consensual search?

3. Criticism of *Schneckloth*

In justifying a totality of the circumstances test, the *Schneckloth* Court relied on several justifications. This Comment considers the validity of these justifications at the time of *Schneckloth*, and re-examines them in light of *Robinette*.

a. The Court's Reliance on the Coerced Confession Cases Was Unsupported

One of the primary reasons why the Court decided not to adopt the *Zerbst* standard of “knowing and intelligent waiver” was that it found the due process confession cases to be illustrative in that they utilized a “totality of the circumstances” test to determine whether a confession was voluntarily given.²⁶⁴ “While the state of the accused’s mind, and the failure of the police to advise [him] of his rights, were certainly factors to be evaluated . . . they were not in and of themselves determinative.”²⁶⁵

What the Court failed to do was to state *why* the coerced confession cases are even illustrative in the Fourth Amendment analysis. The problem with using the coerced confession cases is that a person does not waive her right to be free of coercion during a confession. As Justice Marshall noted in his dissent in *Schneckloth*, “[t]he inquiry in a case where a confession is challenged as having been elicited in an unconstitutional manner is . . . whether the behavior of the police amounted to compulsion of the defendant.”²⁶⁶ In confession cases, courts never discuss the question of whether a person knew she had a right to be free of compulsion.²⁶⁷ Thus, the question of whether the suspect “waived” her substantive right to be free of compulsion is never an issue under coerced confession jurisprudence.

As Justice Marshall noted further, this fact is made even more apparent in the *Miranda* context, because a suspect may waive her right to counsel or right to remain silent, but she still is not able to waive her right to be free from compulsion in confessions.²⁶⁸ Marshall also pointed out that “consent” is subtly different from “coercion,” in that freedom from coercion is a substantive right, whereas consent is “a mechanism by which substantive requirements, otherwise applicable, are avoided.”²⁶⁹ Thus, the question under Fourth Amendment consent to search is whether a substantive constitutional right has been foregone, whereas the question

264. *Schneckloth*, 412 U.S. at 224-27.

265. *Id.* at 227.

266. *Id.* at 280-81 (Marshall, J., dissenting).

267. *Id.* at 281.

268. *See id.* at 281-82 (stating that “nothing the defendant did in the [coerced confession cases] was taken to operate as a relinquishment of his rights; certainly the fact that the defendant made a statement was never taken to be a relinquishment of the right to be free of coercion”).

269. *Id.* at 282.

under coerced confession cases is whether the relevant substantive right has been violated.

Moreover, the Court's analysis is disingenuous because both the Fifth Amendment's due process guarantee, as applied in a confession context, and the Sixth Amendment's right to counsel guarantee, to some extent, protect the same constitutional interests: ensuring a fair trial and the fair ascertainment of truth. In *Schneckloth*, the Court acknowledged that the Sixth Amendment protects both interests.²⁷⁰ Fifth Amendment due process also protects these interests, because one concern with admitting a coerced confession in a defendant's trial is that the confession is likely unreliable.²⁷¹ To this extent, the two Amendments protect similar interests, and thus the Court's determination to rely on one amendment's standard for "waiver" rather than the other's, without more, lacked logical support.

b. Legitimate Need of Consent Searches

Another reason why the Court argued for a totality of the circumstances test was that there is a legitimate law enforcement need for such searches.²⁷² In those situations where police do not have sufficient evidence amounting to probable cause, the Court argued "a search authorized by a valid consent may be the only means of obtaining important reliable evidence."²⁷³ It then utilized the *Schneckloth* facts in order to support this view.²⁷⁴ The problem is that the *Schneckloth* facts essentially "load the dice" in favor of the majority opinion.²⁷⁵ Had the police found no evidence or contraband in the vehicle, then their seeking of consent to search in *Schneckloth* may have seemed a waste of police resources.

Probable cause,²⁷⁶ and indeed reasonable suspicion,²⁷⁷ at least give the police an objective basis for believing that some illicit activity is afoot, thus expanding the number of instances in which a search will likely result in the discovery of

270. *Schneckloth*, 412 U.S. at 236 (citing *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938)).

271. DRESSLER, *supra* note 11, § 23.03[B] (citing *Spano v. New York*, 360 U.S. 315, 320 (1959)).

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

273. *Id.*

274. *See id.* at 227-28 (arguing that, although the police had probable cause to stop the car, there was no contention that the search was based on probable cause or that it was justified as incident to an arrest); *see also id.* at 228 (stating further, "Yet, the search yielded tangible evidence that served as a basis for a prosecution.").

275. *See* John B. Wefing & John G. Miles, Jr., *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 249 (1974) (stating that the *Schneckloth* Court's use of the fact that evidence was discovered because of the consent search in that case "touches upon the argument that the Court has eschewed as constitutionally impermissible . . . that a search is justified by what it turns up"). The authors then cite Justice Jackson's view that "a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *Id.* at 249 n.243 (citing *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

276. *See supra* note 8 and accompanying text (discussing what constitutes probable cause to search).

277. *See supra* notes 173, 217 and accompanying text (reviewing reasonable suspicion).

incriminating evidence.²⁷⁸ What the Court essentially supports are fishing expeditions where the police have no reason to believe there is contraband or reliable evidence, but they engage in a search that will likely result in no evidence or contraband anyway.²⁷⁹ Thus, the “legitimate need” argument lacks logical support.

Although it dealt specifically with a seizure issue, *State v. Retherford*²⁸⁰ is illustrative here. In that case, Officer Newsome admitted that, in 1992, he requested consent to search during traffic stops approximately seven hundred and eighty-six times.²⁸¹ Newsome’s candid testimony established that his reason for requesting consent to search so many times was that he needed the practice.²⁸² This fact indicates that, for a reason that could hardly be deemed legitimate, Officer Newsome saw fit to invade the privacy of the defendant based on no suspicion whatsoever. Thus, there is evidentiary support that illustrates the impropriety of the legitimate need argument posited by the *Schneckloth* Court.

To further justify its “legitimate need” argument, the Court argued that in those cases where the police do have probable cause to search but lack a warrant, a consent search “may result in considerably less inconvenience for the subject of the search.”²⁸³ The problem with this argument is that, even assuming it is true, it still ignores the substantial inconvenience to those persons whose vehicles the police search *without probable cause* to believe they will find any incriminating evidence. By framing the argument this way, the Court essentially chose to conceal the true problem with consent searches—the significant invasion that occurs to those individuals about whom the police have no reasonable suspicions, and yet of whom the police seek and obtain consent to search anyway. This phenomenon can be illustrated by considering the relative scopes of searches based upon probable cause and those based upon consent.

278. Justice Marshall in his *Schneckloth* dissent noted that none of the exceptions relating to the overriding needs of law enforcement are applicable when a search is justified solely by consent. On the contrary, the needs of law enforcement are significantly more attenuated, for probable cause to search may be lacking but a search permitted if the subject’s consent has been obtained.

Schneckloth, 412 U.S. at 282-83 (Marshall, J., dissenting).

279. *Id.* at 283 (Marshall, J., dissenting). Justice Marshall further argued that “consent searches are permitted, not because such an exception . . . is essential to proper law enforcement, but because we permit our citizens to choose whether or not they wish to exercise their constitutional rights.” *Id.* (Marshall, J., dissenting).

280. 639 N.E.2d 498 (Ohio Ct. App. 1994).

281. *Id.* at 502.

282. *Id.* Note that this statement supports two conclusions. First, the “legitimate need” of practice searches by police can be anything but reasonable. Second, since the searches were based mainly on his stated need, they were not primarily based on some belief that he might find incriminating evidence.

283. *Schneckloth*, 412 U.S. at 228.

- i. Assuming that the police do have probable cause to search, what is the scope of that search in the traffic stop context?

Under the "automobile exception,"²⁸⁴ if the police have probable cause to believe a vehicle contains contraband, the police may search the vehicle for the contraband without a warrant.²⁸⁵ They may search anywhere in the vehicle, including containers, where the contraband could be contained.²⁸⁶ Thus, the authorized scope of a search based on probable cause is fairly broad in the automobile search context and is only limited by the size and nature of the contraband which the police have probable cause to believe the vehicle contains.

- ii. Assuming, however, the search is based solely upon consent, what is the scope of the search in the same context?

*Florida v. Jimeno*²⁸⁷ is helpful in answering this question. *Jimeno* held that the test for determining the scope of a consent search "is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"²⁸⁸ Under this standard, the scope of the search is based upon what the officer reasonably could have believed the detainee was consenting to. Thus, the scope is not unlimited, rather, "[t]he scope . . . is defined by its expressed object."²⁸⁹ However, an experienced officer who wants to expand the possible scope of the search can do so by requesting to search for small objects, like drugs,²⁹⁰ in order to enlarge the number and types of areas that could contain the objects he is searching for. Consequently, the scope of a consent search can be equally as broad as a warrantless "automobile exception" search.²⁹¹

The key difference, again, is that the "automobile exception" search requires probable cause,²⁹² whereas the consent search can be based on no suspicion

284. See *Carroll v. United States*, 267 U.S. 132, 153-56 (1925) (holding that, based on the ready mobility of a vehicle stopped on the highway, the police can, if they have probable cause to believe the vehicle contains contraband, make a warrantless search of the vehicle for the contraband); see also *California v. Acevedo*, 500 U.S. 565, 580 (1991) (authorizing the search of "containers" in a vehicle which are large enough to hold the contraband the police have probable cause to believe is currently in the vehicle).

285. *Carroll*, 267 U.S. at 153-54.

286. *Acevedo*, 500 U.S. at 580.

287. 500 U.S. 248 (1991).

288. *Id.* at 251; DRESSLER, *supra* note 11, § 17.04.

289. *Jimeno*, 500 U.S. at 251.

290. See, e.g., *Robinette III*, 519 U.S. at 35-36 (discussing how Newsome asked Robinette whether he had drugs). For examples, in *Robinette*, Newsome questioned the defendant as to whether he had any drugs, and then requested consent to search the vehicle. *Id.* Implicitly, Newsome requested for consent to search the vehicle for drugs.

291. See, e.g., *id.* at 48 n.5 (Stevens, J., dissenting) (noting that, under the *Robinette* facts, the consent search was not particularly intrusive, but given the Court's holding in *Jimeno*, 500 U.S. 248, a much more intrusive search, in some cases, may unknowingly be authorized by the person giving consent).

292. See *supra* note 8 and accompanying text (discussing what constitutes probable cause to search).

whatsoever.²⁹³ The number of eligible “searchees” in the consent to search scenario is seemingly unlimited. Thus, when the Court argued in *Schneckloth* that the consent search can actually reduce the intrusiveness of an otherwise lawful “automobile exception” search,²⁹⁴ the Court was being disingenuous; it concealed the fact that consent searches can be based on no suspicion, and yet can be almost equally as invasive. Such a search is hardly “less intrusive.”²⁹⁵

c. Advising a Person of his Right to Refuse Consent Will Not Adversely Affect the Needs of Law Enforcement

To support its claim that a “voluntary” standard sufficiently protects against police abuses, the Court argued that having to advise a person of his right to refuse consent prior to requesting consent to search “would be thoroughly impractical.”²⁹⁶ The Court distinguished the investigatory practice of consent searches from “the structured atmosphere of a trial,”²⁹⁷ but it failed to state why investigatory situations require fewer protections, or to otherwise state the significance of the distinction. The argument said little about the “impracticality” of advising the subject of his right to refuse consent. Consequently, the Court failed to show how the advising of this right would be impractical.

Justice Marshall noted in his *Schneckloth* dissent that informing a suspect of her right to refuse consent would not likely have an impact on the informality of the exchange as argued by the majority.²⁹⁸ He pointed to the fact that for years the Federal Bureau of Investigation “routinely informed subjects of their right to refuse consent.”²⁹⁹ To Marshall, the cases strongly evidenced the fact that “nothing

293. See *supra* note 10 (stating that valid consent defeats both the probable cause and the warrant requirements of the Fourth Amendment).

294. See *supra* notes 10-11 (reviewing the automobile exception).

295. In fact, if the officer had no suspicion warranting a valid search without consent, the consent search of equal scope is actually infinitely more invasive, because any other search, absent consent, would be unjustified.

296. See *Schneckloth*, 412 U.S. at 231-32 (asserting that consent searches “normally occur on the highway, or in a person’s home or office, and under informal and unstructured conditions”). But see *id.* at 288 (Marshall, J., dissenting) (responding to this assertion by arguing:

[W]hen the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens Of course it would be “practical” for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the board.);

cf. Maclin, *supra* note 241, at 795 (noting that the *Schneckloth* “impracticality” argument was made without any proof by the Court).

297. *Schneckloth*, 412 U.S. at 245.

298. *Id.* at 287 (Marshall, J., dissenting) (arguing that “a simple statement by an officer of an individual’s right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he surely is entitled to know”).

299. *Id.* (“The reported cases in which the police have informed subjects of their right to refuse consent show, also, that the information can be given without disrupting the casual flow of events.”) (citation omitted).

disastrous would happen if the police . . . informed the subject that he had a right to refuse consent and that his refusal would be respected."³⁰⁰

Model police procedures similarly support the idea that advising persons of their freedom to refuse consent has no effect on gaining the consent to search. Additionally, such an instruction can be beneficial because it substantially increases the likelihood that the consent will be found voluntary at trial.³⁰¹ Officer Newsome's testimony in *Retherford* supports this view as well. In that case, Newsome testified that "I remember telling her . . . 'you have a nice day, you're free to go,'" prior to requesting the consent to search.³⁰² In describing his typical procedure for gaining consent to search, Newsome stated that after citing the driver and returning her license, "I then continue in a casual manner. Once . . . I'm concluding the conversation, I say you're free to go[.] . . . As soon as [she turns back to her vehicle], I [say], 'Excuse me, can I ask you one more thing before you go[?]'"³⁰³ Then he would proceed to request consent to search.

This procedure, which included advising subjects of their right to leave, was used by Officer Newsome almost eight hundred times in 1992 alone, inferentially evidencing the method's effectiveness in gaining consent.³⁰⁴ Given the effectiveness of Newsome's method, it can hardly be argued that informing a driver of his constitutional rights can have an adverse impact on the ability of the police to gain consent.³⁰⁵ Thus, the *Schneekloth* Court's argument that police are less likely to gain consent to search if they advise persons of their freedom to refuse lacks merit. Both

300. *Id.* at 287-88.

301. See MODEL CODE OF PRE-ARREST PROCEDURE § 240.2(2) (1975) (requiring an officer to warn a suspect of her right to refuse consent, and to warn the suspect that anything found during the search may be seized and used as evidence against her); *id.* commentary and accompanying notes (arguing that the inherently coercive environment, which caused the Court to adopt the *Miranda* rule, exists in vehicle consent searches, and as such commands a similar result); *id.* commentary and accompanying notes (arguing further that "the strongest argument for requiring a warning is that without undue burden, it will . . . avoid confusion"); see also ARNOLD MARKLE, THE LAW OF ARREST AND SEARCH AND SEIZURE 267 (1974) (concluding that "[i]t would be the better practice to have law enforcement officers warn the person giving consent that he does not have to allow the search . . . and that he can refuse consent to such a search").

302. *Retherford*, 639 N.E.2d at 501.

303. *Id.* Although Officer Newsome's technique was designed to allow him to engage in a consensual conversation, the warning which he gave to the suspect, that she was free to go, is analogous to a warning that a person does not have to consent to a search because both warnings indicate to the subject that she has a choice of conduct which she can lawfully pursue, and that her choice will be respected.

304. Justice Stevens argued in his *Robinette* dissent:

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 [can only be explained by the] assumption that they believed that they had a legal duty to do so.

Robinette III, 519 U.S. at 48 (Stevens, J., dissenting).

305. See *Robinette III*, 519 U.S. at 52-53 n.12 (Stevens, J., dissenting) (acknowledging that giving a warning to a detainee that he or she is free to leave is good police practice, and that such a warning is recommended by many police instructors).

police procedures and evidence of police conduct in the field support the conclusion that giving advice is completely practical.

Even if advising a person of her right to refuse consent reduces the number of instances where police could gain “voluntary” consent, this seems to indicate that, had the person known that she had a choice to refuse consent, then she would have exercised that choice. Therefore, informing the person of her right to refuse consent would only make her decision more meaningful because then her choice to “voluntarily” consent would be based on the knowledge of an alternative, that of refusing to consent.

In his *Schneckloth* dissent, Justice Brennan was astounded at the majority’s holding:³⁰⁶

The Court holds today that an individual can effectively waive this right even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of privacy would be constitutionally prohibited. It wholly escapes me how our citizens can meaningfully . . . [waive] something as precious as a constitutional guarantee without ever being aware of its existence.³⁰⁷

Justice Marshall, in his dissent, also found this holding to be “incomprehensible.”³⁰⁸

If anything, the argument that informing a suspect of her right to refuse consent would reduce the number of instances where consent would be obtained supports the conclusion that the persons who would not have consented but for their lack of knowledge of a right to refuse did not make a meaningful choice to voluntarily allow the search. Thus, contrary to the Supreme Court’s holding, informing a subject of her right to refuse consent should be a prerequisite to finding that the subject of the search made a meaningful choice to voluntarily consent.³⁰⁹

306. *Schneckloth*, 412 U.S. at 276-77 (Brennan, J., dissenting).

307. *Id.* at 277.

308. *Id.* at 285 (Marshall, J., dissenting); *see id.* at 284-85 (stating further that “[i]f consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police”).

309. This conclusion follows unless, of course, the Court meant “voluntary choice” to be something other than “meaningful” voluntary choice. That conclusion, however, would seem to be incomprehensible, especially since the issue regards the voluntary waiver of a constitutional right. Note also that the Court analyzed whether a warning was the *sine qua non* of voluntary consent, but it did so mainly by reviewing the need for such a warning in the context of confession cases. *Schneckloth*, 412 U.S. at 227-30. The Court discussed the issue of a warning under a separate “knowing” waiver theory, a lesser standard than the *Zerbst* knowing and intelligent waiver standard, but the analysis centered upon the “impracticability” of such a warning. *Id.* at 231-32. The Court did not discuss the merits of such a warning, or how a warning could provide meaningful Fourth Amendment protection.

d. *The Court's Argument that a Zerbst Standard of Waiver is Inappropriate Must Also Fail*

The *Schneckloth* Court correctly acknowledged that *Zerbst* involved a waiver of the Sixth Amendment right to counsel, and did not stand for the proposition that the waiver of all constitutional rights must be knowing and intelligent.³¹⁰ As the Court noted, "[t]he protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial . . . [T]he Fourth Amendment protects the 'security of one's privacy against arbitrary intrusion by police. . . .'"³¹¹

This line of reasoning supports the view that a *Zerbst* standard of waiver protects the fair ascertainment of truth, whereas evidence found in a consent search is already reliable. Thus, there is no reason to extend the *Zerbst* standard to the Fourth Amendment context. This reasoning, however, fails to acknowledge that there can be other significant reasons for extending the *Zerbst* test to Fourth Amendment jurisprudence.³¹² Simply because the justifications are different does not logically mean that none exist.³¹³ Additionally, even though the Court argued that the protections of the Fourth Amendment are of a "wholly different order,"³¹⁴ it failed to identify why Fourth Amendment rights do not deserve the same level of protection as Sixth Amendment rights, or why a lesser degree of protection is somehow justifiable for Fourth Amendment interests.³¹⁵

The other problem with the *Schneckloth* Court's analysis of the *Zerbst* test is that the Court implied that the only other option, once the *Zerbst* standard had been disposed of, was a standard of "voluntariness" for determining validity of consent. This is supported in the Court's argument that "[i]t would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by [*Zerbst*]." ³¹⁶ The Court, however, never supported its intimation that a voluntariness standard and a *Zerbst* standard were the only two available tests.

310. See *Schneckloth*, 412 U.S. at 237 ("Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.").

311. *Id.* at 242 (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)).

312. See Eugene E. Smary, Note, *The Doctrine of Waiver and Consent Searches*, 49 NOTRE DAME L. REV. 891, 902 (1974) ("If one were to consider the context of past waiver cases, it would appear that the purpose of the [*Zerbst* standard] is to protect *fundamental* rights. Apparently the Court has now decided that this was mere rhetoric.").

313. This Comment only seeks to raise this issue; it would be beyond its scope to discuss at length the justifications for applying a *Zerbst* standard to consent to search analyses.

314. *Schneckloth*, 412 U.S. at 242.

315. 3 LAFAVE, *supra* note 61, at § 8.1(a)(4).

316. *Schneckloth*, 412 U.S. at 245.

For example, Justice Marshall, in his dissent, argued for a “knowing choice” standard for determining voluntariness of consent.³¹⁷ That standard would be intermediate in the spectrum ranging from true “voluntariness” to a *Zerbst* waiver. Under this test, “the burden on the prosecutor would disappear . . . if the police, at the time they requested consent to search, also told the subject that he had a right to refuse consent and that his decision to refuse would be respected.”³¹⁸ It is evident that the Court was focusing on a “knowing and intelligent” standard, whereas a standard of “knowing choice” might have been sufficient to protect the Fourth Amendment interests.³¹⁹ Therefore, the Court’s reliance on the inapplicability of *Zerbst* to Fourth Amendment jurisprudence improperly implied that the only two possible standards were “voluntary” and “knowing and intelligent,” when in fact the Court could have adopted a “knowing choice standard” of waiver, which could adequately protect Fourth Amendment interests.

2. *Schneckloth in Light of Robinette Facts*

There is substantial literature that criticizes the inherent problems underlying *Schneckloth*’s rationale,³²⁰ yet the United States Supreme Court found no difficulty in reaffirming its principle in *Robinette*. Had the Court utilized the principle of particular justification, however, it would have likely reached a contrary result. This Comment will continue by briefly discussing several of *Schneckloth*’s inherent problems, and how these problems were even greater in *Robinette*.

317. *Id.* at 284 (Marshall, J., dissenting).

318. *Id.* at 286.

319. Note, however, that the majority does state that the meaning of voluntariness “cannot be taken literally to mean a ‘knowing’ choice.” *Schneckloth*, 412 U.S. at 224. However, this statement refers to knowledge of a right to refuse consent as being indeterminate in confession cases. *Id.* at 223-27. The Court does not speak of the knowledge requirement as a separate element for finding valid consent. In fact, it skips past that issue by simply stating “[s]imilar considerations lead us to [believe]” that voluntariness is the proper test to apply for consent to search. *Id.* at 227. This statement is the Court’s only attempt to relate the due process confession cases to the consent to search issue.

320. For recent criticisms of *Schneckloth*, see Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory Into the Supreme Court’s Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 215, that analyzes “the Supreme Court’s conception of voluntariness in light of modern psychological findings on authority and obedience.” See generally Rebecca A. Stack, Note, *Airport Drug Searches: Giving Content to the Concept of Free and Voluntary Consent*, 77 VA. L. REV. 183, 202-05 (1991) (arguing that all consent searches should be based upon some level of suspicion prior to the police officer’s requesting consent). The author also argues, contrary to *Schneckloth*, that a suspect should have knowledge of her right to refuse consent for a court to find that the consent was given voluntarily. *Id.* at 205-08. For additional criticisms of the *Schneckloth* analysis, see 3 LAFAYE, *supra* note 61, at § 8.1(a)(1-5) (discussing various commentators’ criticisms of this opinion).

a. *Just as in Schneckloth, the Voluntariness Standard Fails to Provide Adequate Protection*

Voluntariness as a standard for determining whether a subject has waived his Fourth Amendment rights does not adequately protect citizens from invasions by police officers. Since *Schneckloth* was decided, and indeed before it was decided, courts have readily interpreted "voluntary" to mean "not coerced."³²¹ Although the government is supposed to have the burden of proving that consent was given voluntarily,³²² in practice it need only point to the fact that the subject responded affirmatively to the officer's request for consent.³²³ Absent an unlawful claim of authority to search,³²⁴ or some physically coercive conduct by the police,³²⁵ a defendant who answers "yes" to a request to search by the police is almost surely to be found to have voluntarily consented.³²⁶

Under the facts of *Robinette*, it is clear that the "voluntariness" standard did nothing to protect Robinette's Fourth Amendment rights. Officer Newsome said "[o]ne question before you get gone"³²⁷ to Robinette prior to requesting consent to search.³²⁸ A person in Robinette's position could have reasonably concluded that the answering of the questions was a condition which he had to meet prior to Officer

321. See *Schneckloth*, 412 U.S. at 233 (stating that in determining whether consent was voluntary, "it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was . . . coerced"); see also *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) (indicating that "[w]here there is coercion there cannot be [valid] consent"). This last quote says simply that coerced consent is not voluntary; it does not say that coercion is all that is relevant.

322. See *Schneckloth*, 412 U.S. at 248 (holding that the state must prove that consent was in fact voluntarily given, and not the result of coercion). See generally 68 AM. JUR. 2D *Searches and Seizures* § 83 (1993) (stating that the burden of proving voluntariness of consent is on the government).

323. See *Schneckloth*, 412 U.S. at 284 (Marshall, J., dissenting) ("Thus, all the police must do is conduct what will inevitably be a charade of asking for consent. If they display any firmness at all, a verbal expression of assent will undoubtedly be forthcoming.").

324. See, e.g., *Bumper*, 391 U.S. at 550 (involving a situation where police gained consent to enter a person's house using an unlawful claim of authority to search).

325. See 68 AM. JUR. 2D *Searches and Seizures* §§ 83-91 (1993 & Supp. 1997) (noting several police-citizen encounters and the differing ways in which courts handle the issue of coercion for purposes of determining the validity of consent to search); see also *id.* at 711 (indicating that, in one case, consent was not found to be valid where it was sought after three hours of continuous interrogation and after the district attorney told the subject that he could probably get a search warrant anyway) (citing *Commonwealth v. Mamon*, 297 A.2d 471, 475 (Penn. 1972); *United States v. Phillips*, 664 F.2d 971, 1024 (5th Cir. 1981) (stating that it is rare for a court to find consent given at gunpoint to be voluntary). But see, e.g., *United States v. Puglisi*, 790 F.2d 240, 244 (2d Cir. 1986) (finding that consent was validly obtained from an arrestee even though he was arrested with weapons drawn, he was in handcuffs, and he had been frisked).

326. See Barrio, *supra* note 320, at 217 (asserting that "[u]nder *Schneckloth* as modified by subsequent cases, only a showing of affirmative police misconduct can invalidate a suspect's consent") (citations omitted).

327. *Robinette III*, 519 U.S. at 35.

328. *Id.* at 36.

Newsome's letting him go.³²⁹ Further, a reasonable person could have felt that the answer must be one Officer Newsome would expect before Robinette would be free to go.³³⁰ Thus, the conditioning of Robinette's freedom to leave upon his giving an affirmative answer to Officer Newsome's request for consent, alone, likely made the subsequent consent involuntary.

Other factors tended to increase the coercive nature of the encounter. Officer Newsome requested Robinette to exit the vehicle, thus taking away any protective environment that Robinette would have felt from being in the vehicle.³³¹ He turned on his car-mounted camera in order to video tape the entire encounter.³³² This alone would increase the coercive nature of the encounter by putting everything Robinette said and did on video and audio tape. Probably the most significant factor, however, was the fact that Officer Newsome did not ticket Robinette, but rather gave him a warning.³³³ Most people who were just "let off" like Robinette would likely respond in a favorable manner to a police officer's request to search, especially because they would likely believe that the officer could always convert that "warning" into a ticket if they did not act in a helpful manner.

All of these factors tended to increase the coercive nature of the encounter, but under the standard as applied by the United States Supreme Court, this level of coercion was not enough to find that Robinette was unlawfully seized or that he was coerced into giving his consent to search.³³⁴ In the absence of some physical threat of force or other physically aggressive conduct, there are few factual situations under which the Court would find that a reasonable person in the detainee's position

329. *Id.* at 47 (Stevens, J., dissenting) (explaining that "[s]everal circumstances support the Ohio courts' conclusion that a reasonable motorist in [Robinette'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"). Justice Stevens also pointed to the fact that the question itself sought an answer "before you get gone." *Id.*

330. *See Bustamonte v. Schneckloth*, 448 F.2d 669, 701 (9th Cir. 1971) ("Under many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law."); *see also infra* note 333 (noting that Officer Newsome could have changed Robinette's warning to a ticket if he felt Robinette gave him a flippant response); *rev'd* 412 U.S. 218 (1973).

331. In *Robinette III*, 519 U.S. at 38, the Court noted that *Mimms*, 434 U.S. at 111 n.6, justified Newsome in commanding Robinette from the vehicle, yet the Court did not discuss whether such a justified seizure could have still increased the coerciveness of the encounter later in time. Simply because an act of seizing someone may be justified does not nullify the coercive nature of the act.

332. The facts of *Robinette* do not indicate whether Robinette knew that Officer Newsome turned on the video camera. Officer Newsome did request Robinette to exit his vehicle and have him stand in front of the patrol car prior to turning on the video camera. *Robinette II*, 653 N.E.2d at 697. Thus, Robinette might have seen the officer activate the camera. The Ohio Supreme Court considered the fact that the video camera was on as a coercive factor. *Id.*

333. *See, e.g.*, Official Transcript at *7-9, *Robinette III*, 519 U.S. 33 (No. 95-891) (acknowledging that Officer Newsome had the power to void out the written warning and issue a ticket instead, and that he had the discretion as an officer to void the warning and give a ticket if Robinette gave him a flippant response).

334. *Robinette III*, 519 U.S. at 39-40.

might not feel free to leave or might not have consented but for coercion by the police.³³⁵

b. The Advising of the Right to Refuse Consent was Plainly Practical Here

The second argument articulated by the *Schneckloth* Court, that advising the subject that he has a right to refuse consent to search would be “thoroughly impractical,”³³⁶ is clearly inappropriate under the facts in *Robinette* and *Retherford*. Recall that in *Retherford*, Officer Newsome testified that he usually would tell subjects that they were free to go prior to applying his technique for gaining consent to search.³³⁷ Although that particular warning applied to the issue of the subject’s freedom of movement, and thus the seizure issue, it displayed clearly how the police can naturally and effectively interject a warning of the subject’s rights during a lawful seizure.³³⁸

Thus, the claim by the Supreme Court that the warning of rights would have some detrimental effect on the police-citizen encounter is not supported by Officer Newsome’s experience. Note that in *Robinette*, Officer Newsome did not give the warning to the defendant that he was free to go. However, since Officer Newsome was present in both *Retherford* and *Robinette*, and because he was using substantially the same technique to gain consent to search in both cases, *Retherford* impliedly shows that had Newsome given Robinette the warning that he was free to go, it would not have substantially affected his ability to gain Robinette’s consent to search. This is contrary to the argument made in *Schneckloth* that was not based on any facts.³³⁹

Additional evidence demonstrates that the Court’s reliance on *Schneckloth* is incorrect. For years, the Federal Bureau of Investigation has routinely warned a subject of her right to refuse consent prior to requesting consent to search.³⁴⁰ Law enforcement training programs recommend issuing such a warning as well.³⁴¹

335. See Barrio, *supra* note 320, at 218 (arguing that “*Schneckloth* misapprehended the potential for psychological coercion in the context of consent searches”). For examples of extreme situations where courts have found valid consent, see generally 68 AM. JUR. 2D *Searches and Seizures* §§ 83-91 (1993 & Supp. 1997).

336. See *Schneckloth*, 412 U.S. at 231 (“[I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning.”).

337. *State v. Retherford*, 639 N.E.2d 498, 501 (Ohio Ct. App. 1994).

338. See *id.* (discussing Officer Newsome’s technique for gaining consent to search, and the successful results of that technique).

339. See *Schneckloth*, 412 U.S. at 231-33 (discussing why giving a detainee a warning that he has a right to refuse consent would unnecessarily impact the overall encounter).

340. *Id.* at 287 (Marshall, J., dissenting).

341. See, e.g., *Robinette III*, 519 U.S. at 52-53 n.12 (Stevens, J., dissenting) (noting, from the amicus brief filed by Americans For Effective Law Enforcement (AFELE), that many law enforcement agencies have included the *Robinette* seizure warning to their consent to search forms); *id.* (arguing further that such a warning is recommended in many police training programs, and that the AFELE training program speakers give the

Warning the suspect of her constitutional right simply will not substantially affect law enforcement. If given a warning, however, a suspect would be able to make an informed choice because she would know of alternative courses of action.

c. The Ease of Giving a Warning of the Right to Refuse Consent Makes the Zerkst Argument Unpersuasive

The final significant justification this Comment discusses is that the application of the *Zerkst* waiver standard is inappropriate because *Schneckloth* did not involve a Sixth Amendment right to counsel context.³⁴² The *Schneckloth* Court argued that such a standard would create an insurmountable burden on the police in determining whether consent was voluntarily, knowingly, and intelligently given.³⁴³ As discussed earlier, these arguments must both fail, and not because they are necessarily wrong.³⁴⁴ They must fail because a lesser standard of proof could be used, that of informing a suspect of her right to refuse consent, and it could adequately protect the right of the defendant from involuntarily waiving her Fourth Amendment protections.

By analogizing *Robinette* and *Schneckloth*, one can see that giving a warning to subjects that they are free to leave would not significantly affect the ability of police to engage in consensual conversations subsequent to lawful traffic stops. This fact is evident in practice.³⁴⁵ Such a warning would, however, ensure that subjects know that they have two options when an officer attempts to engage them in such a conversation: They can either assert their right to go, as per the officer's warning, or they can voluntarily choose to remain and answer the officer's questions.³⁴⁶ This type of protection would likely satisfy the demands of the most ardent supporters of Fourth Amendment protections and individual liberties.³⁴⁷

recommendation for such a warning).

342. *Schneckloth*, 412 U.S. at 235.

343. *Id.* at 245.

344. See *supra* Part IV.A.1.d (discussing, in part, the portion of the *Schneckloth* analysis regarding whether to adopt a *Zerkst* standard for waiver under consent to search doctrine, and the inherent problems with the reasoning the Court used to reach its result on this issue).

345. The number of consent searches that Officer Newsome engaged in indicates that he did not have much difficulty gaining consent to search after warning suspects that they were free to leave. See *supra* note 97 (delineating Newsome's technique for gaining consent to search and the effectiveness of that technique).

346. This assumes that the officer refrains from conduct which would indicate to a reasonable person that, despite the warning, she was not free to go or free to withhold consent. See *Florida v. Bostick*, 501 U.S. 429, 435 (1991) (stating that when officers have no basis for approaching a person, they may still approach and ask questions of that person so long as they do not indicate to that person that compliance with their requests is required).

347. Cf. *Schneckloth*, 412 U.S. at 277 (Brennan, J., dissenting) (stating that he could not believe that a person could waive a constitutional right that he was not made aware of); *id.* at 284-85 (Marshall, J., dissenting) (arguing for a standard that would require an officer to either inform the subject of the right to refuse consent, or forcing the State to prove that the subject had such knowledge when he consented to a search).

Therefore, by applying the principle of particular justification,³⁴⁸ realizing the inherent problems with the *Schneckloth* reasoning, and noting that none of the *Schneckloth* justifications really apply under the facts of *Robinette*, it follows that the *Schneckloth* totality of the circumstances test was inappropriately applied to the decision in *Robinette*. The Court should have reconsidered the *Schneckloth* test instead of summarily applying it in *Robinette*.

B. Viewing *Robinette* as a Case about Seizures of Persons

Because the bright line rule announced by the Ohio Supreme Court referred to the need to warn a subject of his right to go prior to engaging him in consensual interrogation,³⁴⁹ and did not expressly focus on the issue of whether he had a right to refuse consent, it would seem that *Robinette* really considered the issue of whether or not *Robinette* was unlawfully seized when he gave his consent to search. Thus, this Comment continues by discussing the facts of *Robinette* as it falls within the realm of Fourth Amendment seizure law. It also discusses the prudence of the Supreme Court's finding that the bright line warning is both detrimental to law enforcement, and that it is unnecessary under the totality of the circumstances test.

1. *Robinette* and its Bright Line Rule With Regard to Seizures

Recall that the bright line rule announced by the Ohio Supreme Court in *Robinette II*³⁵⁰ required officers to advise a person that she is free to leave if the person was validly stopped pursuant to a traffic stop, and the purpose of the original seizure had ceased, but the officer wanted to ask further investigative questions, including consent to search.³⁵¹ As this Comment argued earlier, the *Robinette II* rule regards seizures of persons and not consent to search.³⁵² The question of the legality of the search, in the absence of such a warning, would be dependent upon whether the illegal seizure tainted the subsequent consent to search.³⁵³

Assuming, however, that the United States Supreme Court correctly acknowledged this fact, the validity of a bright line rule can be discussed in terms of seizure law. In *Robinette III*, the Court asserted that giving a warning to a detainee that he was free to go was not required by the Fourth Amendment.³⁵⁴ In support of this contention, the Court stated that it has "consistently eschewed

348. See *supra* Part I.B (discussing the principle of particular justification).

349. *Robinette II*, 653 N.E.2d at 699.

350. 653 N.E.2d 695 (Ohio 1995).

351. *Id.* at 699.

352. See *supra* Part IV (concluding that *Robinette* is concerned with seizures of persons, and not consent to search).

353. *Robinette II*, 653 N.E.2d at 698.

354. See *Robinette III*, 519 U.S. at 40 (rejecting the bright line rule adopted by the Ohio Supreme Court in *Robinette II*, 653 N.E.2d at 696).

bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.”³⁵⁵ The problem with this assertion is that it is patently false.

Although the Court has, in certain circumstances, eschewed bright line rules,³⁵⁶ there are many instances where it adopted bright line rules in a Fourth Amendment context. For example, in *New York v. Belton*,³⁵⁷ the Court adopted a bright line rule regarding search incident to a lawful arrest of an occupant of an automobile.³⁵⁸ The Court based its new rule on the justifications that courts have had difficulty applying the *Chimel* doctrine³⁵⁹ in the context of arrests of occupants of vehicles, and the need to guide police in making quick, on the spot, decisions.³⁶⁰ In *United States v. Robinson*,³⁶¹ the Court created a bright line rule allowing officers, incident to a lawful traffic arrest, to search the person of the arrestee, regardless of whether they believe the person has dangerous weapons.³⁶² The Court further declared that the officer in *Robinson* was allowed to open a cigarette container found during the search, even though he did not fear that the arrestee was armed.³⁶³ As with *Belton*, the *Robinson* Court felt it necessary to aid police during the arrest of a person by giving them a bright line rule to guide their conduct.³⁶⁴

In *California v. Hodari D.*,³⁶⁵ the Court adopted what is arguably a bright line rule regarding show-of-authority seizures during police pursuits. The Court declared that a seizure in this context was not to be determined by the *Mendenhall* rule alone, but rather would be determined by considering whether the police officer

355. *Robinette III*, 519 U.S. at 39.

356. In *Robinette III*, 519 U.S. at 39, the Court gives several examples of its refusal to adopt bright line rules. In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court refused to find that questioning of persons on buses for the purpose of drug interdiction was a seizure per se. *Id.* at 439. In *Schneckloth*, 412 U.S. at 227, the Court argued against a bright line rule requiring officers to give a person the advice that she is free to refuse consent prior to requesting consent to search.

357. 453 U.S. 454 (1981).

358. *Id.* at 462-63 (declaring that the passenger compartment of a vehicle and any containers therein are always within the immediate grabbing area of the arrestee and thus subject to search).

359. See *Chimel v. California*, 395 U.S. 752, 762-63 (1969) (holding that the police may search the person of an arrestee and the area within her immediate grabbing area as incident to a lawful arrest).

360. See *Belton*, 453 U.S. at 458 (“[A]s one commentator has pointed out, the protections of the Fourth and Fourteenth Amendments ‘can only be realized if the police are acting under a set of rules which . . . makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified.’”) (quoting LaFare, “Case-By-Case Adjudication” Versus “Standardized Procedures: The Robinson Dilemma,” 1971 SUP. CT. REV. 127, 142); see also *id.* (stating that “[a] single familiar standard is essential to guide police officers”) (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

361. 414 U.S. 218 (1973).

362. *Id.* at 235. Assuming that the arrest was based on probable cause, the subsequent search incident to the arrest requires no further justification. *Id.*

363. *Id.* at 236.

364. See *id.* at 235 (“A police officer’s determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment, which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.”).

365. 499 U.S. 621 (1991).

either physically touched the fleeing person or the person submitted to the officer's authority.³⁶⁶ This is arguably a bright line rule because it requires only a determination of whether the suspect discontinued his fleeing, or whether the officer touched the suspect, to ascertain whether the suspect was seized under the Fourth Amendment.

Finally, in *Pennsylvania v. Mimms*³⁶⁷ and *Maryland v. Wilson*,³⁶⁸ the Court adopted bright line rules regarding the ability of police officers to request the driver and passengers to exit their vehicle during a lawful traffic stop.³⁶⁹ The justification for both rules centered around the need for protecting officers' safety during traffic stops,³⁷⁰ balanced against the *de minimus* further invasion upon the already seized drivers and passengers.³⁷¹ The need to protect officer safety trumped the incrementally increased invasion upon the drivers and passengers, and thus it was reasonable under the Fourth Amendment to give the officer the discretion to order such persons out of the vehicle if the need arose.³⁷²

These cases show that the Supreme Court was being disingenuous when it stated that it has consistently eschewed bright line rules. In fact, the Court has adopted several bright line rules, especially where the adoption of such a rule would either aid police in making on the spot decisions, or where lower courts have had difficulty applying a particular rule. Thus, this justification from *Robinette* was patently false. The Court has readily adopted bright lines when it has reasoned that creating such rules would be prudent in light of the relative balance between governmental concerns and citizens' privacy interests.

2. Reasons Why a Bright Line Rule is Preferable Here

a. The Giving of the Warning is Practical

Just as with the consent to search context, warning detainees that they are free to leave is completely practical and even recommended by some law enforcement authorities. Officer Newsome's conduct and testimony from *Robinette*³⁷³ and *Retherford*³⁷⁴ evidence this. His technique included telling the persons that they

366. *Id.* at 629.

367. 434 U.S. 106 (1977).

368. 117 S. Ct. 882 (1997).

369. *Mimms*, 434 U.S. at 111 n.6; *Wilson*, 117 S. Ct. at 886.

370. *See Wilson*, 117 S. Ct. at 885-86 (noting statistical data showing the safety risks of officers making traffic stops); *Mimms*, 434 U.S. at 110 (relying also on statistical data showing the safety risks of officers during traffic stops).

371. *See Wilson*, 117 S. Ct. at 886 (stating that, "[w]hile there is not the same basis for ordering the passengers out of the car as there is for the driver out, the additional intrusion on the passenger is minimal"); *see also Mimms*, 434 U.S. at 111 (balancing the need for officer safety against the driver's privacy interests).

372. *Wilson*, 117 S. Ct. at 886; *Mimms*, 434 U.S. at 111 n.6.

373. *Robinette III*, 519 U.S. at 48 (Stevens, J., dissenting).

374. *See State v. Retherford*, 639 N.E.2d 498, 501 (Ohio Ct. App. 1994) (describing Officer Newsome's technique for gaining consent to search).

were free to go.³⁷⁵ Again, the Federal Bureau of Investigation, in gaining consent to search, made it a policy to warn persons of their right to refuse consent.³⁷⁶ Law enforcement training schools and seminars promote the use of such a warning.³⁷⁷ Thus, the argument that giving a warning would have a significantly adverse affect on the ability of the police to gain consent to search, or in this context, to further detain a person consensually, has proven to be unwarranted as applied. Police enforcement agencies would not be likely to employ a technique which they knew was not required, if they knew that it would have a substantial impact on their ability to engage in consensual encounters.³⁷⁸

b. The Giving of the Warning is Particularly Necessary in This Context

The requirement of giving a warning to the detainees that they are free to go prior to requesting consent to search is even more necessary under the *Robinette* facts than it would be under a "true" consensual encounter between a police officer and a citizen. Under the "true" consensual encounter, the police officer may approach a person for any number of reasons,³⁷⁹ but in most respects the citizen will probably not, upon first approach, feel restrained from leaving.³⁸⁰ Under the *Robinette* facts, however, the situation is completely different, because the subject was originally seized for some lawful purpose.³⁸¹ The problem arises when the purpose of the initial seizure has ended and the police officer wishes to engage the suspect in "consensual conversation."

As the Ohio Supreme Court noted, the transition from the lawful seizure to the consensual encounter can be seamless.³⁸² Applying a standard where a defendant is seized a second time only if she meets the *Mendenhall* test gives the defendant little protection; she likely feels "seized" until the entire encounter is complete,³⁸³

375. *Id.*

376. Although this is not a warning of a right to leave, it is similar in that it shows the practicality of giving a warning of rights without affecting the outcome of the police-citizen interaction.

377. *Robinette III*, 519 U.S. at 52-53 n.12 (Stevens, J., dissenting).

378. Note that the police might decide that giving the warning is helpful, because it virtually ensures that a court will find that no seizure occurred. This assumes, however, that these agencies will balance the benefit of facilitating consensual encounters against the burden of lost consensual encounters which do not develop due to the warning.

379. See *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (stating that "not all personal intercourse between policemen and citizens involves 'seizures' of persons").

380. See, e.g., *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (noting that "[Mendenhall] was not seized simply by . . . the fact that the agents approached her," asked for her identification and ticket, and asked her a few questions).

381. See *Robinette III*, 519 U.S. at 35 (stating that Robinette was stopped for speeding).

382. *Robinette II*, 653 N.E.2d at 698.

383. See *id.* ("Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them . . . [A] reasonable person would not feel free to walk away as the officer continues to address him."); see also *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984) (acknowledging that "few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told

and she is likely unable to determine whether or not the initial lawful seizure is completed.³⁸⁴ Without some sort of indication to the suspects that they are free to leave, there is little to support the argument that, on their own volition, the subjects will feel confident enough in themselves and their knowledge of the law to assert their right to leave.³⁸⁵

Additionally, one must consider the police officer's conduct during the purported "consensual encounter." In *Robinette*, Officer Newsome preceded the "consensual conversation" with the preface, "one question before you get gone."³⁸⁶ This language alone implies to drivers that they are not free to go until they answer "one more question." The officer only gave Robinette a warning, thus retaining an upper-hand in his further dealings with Robinette; a person would not want to act adversely to the officer's request for fear that the previous "gift" of a warning may be rescinded and replaced with a speeding ticket.³⁸⁷ Cumulating the officer's conduct with the natural restraining effect which exists throughout the duration of a traffic stop, it is unlikely that Robinette felt free to leave when Newsome requested consent. Thus, compared to a true consensual encounter, the characteristics of a *Robinette*-type encounter are drastically different; as such the two situations should not be treated as equivalent.

C. Conclusion of Robinette III Analysis

The principle of particular justification³⁸⁸ necessitates several results from the preceding discussion. First, the Court incorrectly applied cases to the *Robinette* facts, which could be justified neither internally nor in light of *Robinette*. *Schneckloth's* arguments fail to support its result, especially its conclusion regarding the inapplicability of its argued-for, but unadopted bright line rule. The facts of *Robinette* make the condition created by *Schneckloth* even more acute. Thus, the Court in *Robinette* improvidently applied the *Schneckloth* reasoning to the facts at hand.

Second, the Court incorrectly argued that it has consistently eschewed bright line rules, when in fact it has readily adopted such rules for Fourth Amendment

they might do so").

384. *Robinette II*, 653 N.E.2d at 699.

385. See Maclin, *supra* note 241, at 794 (concluding that the *Schneckloth* Court's analysis ignored "the reality of a typical police confrontation. A police confrontation is unlike a 'friendly chat' between two neighbors."). Maclin continues by arguing that most cases of consensual search are the result of acquiescence to an implied claim of lawful authority to search by the police. *Id.* (citation omitted).

386. *Robinette III*, 519 U.S. at 35.

387. See *Robinette IV*, 685 N.E.2d at 771 (noting that the state conceded "that an officer has discretion to issue a ticket rather than a warning to a motorist if the motorist becomes uncooperative"); see also Barrio, *supra* note 320, at 241-42 (arguing that police represent legitimate authority, and because of the "visual trappings" of their authority, the legitimacy of the authority tends to be increased; it also tends to show that noncompliance with that authority may be "swiftly punished").

388. See *supra* Part I.B (discussing this principle).

purposes. The Court also improperly argued that warning persons that they are free to go would be unrealistic. Officer Newsome's conduct, and the practices of various law enforcement agencies and schools, confirm the fact that the giving of such a warning is not only practical, but is also recommended. Additionally, the scenario that Robinette faced was clearly distinguishable from the typical police-citizen consensual encounter. Because of the inherent problems the citizen faces with determining whether she is free to leave after being stopped for a traffic violation, it is virtually impossible to expect her to ever feel free to leave until the officer informs her of that right.

Finally, further review of case law and practical experience show that the adoption of a bright line rule requiring officers to inform citizens of their right to leave would be advantageous to citizens, police, and the courts. Citizens would feel safer knowing that police are not using the citizens' ignorance of the law against them in this context. Police would know to give the appropriate warning under specified circumstances; this is a warning that many officers give already, thus reducing the cumulative change in police procedures. Finally, courts would have a bright line rule to apply to these encounters—one which would create a condition precedent to the finding of voluntariness under the totality of the circumstances.³⁸⁹

V. *ROBINETTE IV*: EVIDENCE OF THE CONFUSION CREATED BY CURRENT CONSENT TO SEARCH AND SEIZURE LAW

As stated earlier, the Ohio Supreme Court recently reconsidered *Robinette*,³⁹⁰ but this time it adopted a different approach—one which may actually decrease the protections for citizens of Ohio in traffic stop situations. This Comment will briefly critique the Ohio Supreme Court's analyses of the seizure and consent to search issues, and then it will discuss the new problems that the Ohio Supreme Court created when it decided to harmonize its state law with the Fourth Amendment jurisprudence of the United States Supreme Court. Then the Comment will conclude by offering a solution to the problems which *Robinette III* and *IV* created.

A. *Criticism of the Robinette IV Seizure Discussion*

The first significant problem with the Ohio Supreme Court's seizure discussion concerns the court's rule from syllabus one.³⁹¹ Focusing on Newsome's questioning

389. See *supra* notes 340-41 and accompanying text (explaining that the habitual use of such a warning is feasible and desirable).

390. *Robinette IV*, 685 N.E.2d 762 (Ohio 1997).

391. Syllabus one states:

When a police officer's objective justification to continue detention of a person stopped for a traffic violation for the purpose of searching the person's vehicle is not related to the purpose of the original stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some illegal activity justifying an extension of the detention, the continued detention to conduct a

for contraband alone, the Court found the extended detention valid utilizing the test espoused in dicta from *Brown v. Texas*³⁹² and *Florida v. Royer*.³⁹³ The problem with this argument is twofold. First, the *Brown* test, as applied in a sobriety checkpoint³⁹⁴ and border patrol contexts,³⁹⁵ allows suspicionless seizures,³⁹⁶ whereas the *Royer* facts deal with the issue of whether a seizure occurred at all.³⁹⁷ Thus, the cases which the court used to adopt its rule for syllabus one were internally inconsistent.

Moreover, even if one assumes that the *Brown* test could apply to these circumstances,³⁹⁸ the court failed to apply its rule correctly. The rule states that if the justification for the continued detention is not related to the purpose for the initial stop, and the justification is not based on some degree of suspicion of illegal activity, then the seizure is unlawful.³⁹⁹ Here the objective justification for the continued detention was drug interdiction, and the purpose of the original stop was

search constitutes an illegal seizure.

Id. at 764 (emphasis added).

392. 443 U.S. 47 (1979); *see id.* at 50-51 (stating that, when considering the constitutionality of a seizure which does not rise to the level of a traditional arrest, the Court should weigh the gravity of the public interests involved, the degree to which the seizure promotes that interest, and the severity of the interference upon the individual's liberty).

393. 460 U.S. 491 (1983); *see id.* at 500 (asserting that the reasonableness of police conduct based on less than probable cause may be supported by a legitimate law enforcement interest, so long as the scope of the police conduct is carefully tailored to its justification); *see also Robinette IV*, 685 N.E.2d at 767-68 (utilizing this language from *Brown* and *Royer*).

394. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (holding that "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of [allowing sobriety checkpoints]").

395. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976) (holding that "stops for brief questioning routinely conducted at permanent [border] checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant"). In *Prouse*, the Court proceeded to limit its holding to the types of stops described in that particular case. *Id.* at 567.

396. *See id.* at 562 (stating that "the stops and questioning [in border patrol cases] may be made in the absence of any individualized suspicion at reasonably located [permanent] checkpoints"). Thus, no suspicion is required to effect the stop. *Id.* The Court also noted that "[i]t is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment." *Id.* at 556; *see also Sitz*, 496 U.S. at 450, 455 (noting that stops at sobriety checkpoints are seizures, yet are reasonable under the Fourth Amendment despite the absence of suspicion of illicit activity).

397. *See Royer*, 460 U.S. at 501-02 (determining if and when *Royer* was seized within the meaning of the Fourth Amendment).

398. Arguably, the United States Supreme Court's decision in *Delaware v. Prouse*, 440 U.S. 648 (1979), makes this assumption false. There, the Court declared unconstitutional Delaware's policy of randomly stopping drivers to determine whether they had valid drivers' licenses and vehicle registrations. *Id.* at 659. The Court further stated that "[t]his 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." *Id.* at 661 (citations omitted). Thus, since Officer Newsome had the complete discretion in *Robinette* to ask or not ask any particular driver the questions regarding contraband, such questioning likely cannot be supported on the basis of a suspicionless seizure because may violate *Prouse*.

399. *Robinette IV*, 685 N.E.2d at 763.

Robinette's speeding.⁴⁰⁰ Thus, the purposes of the initial stop and continued detention were not related. Additionally, there was no suspicion of illegal activity that would justify further detention.⁴⁰¹ Consequently, the continued detention, even to ask the questions regarding whether Robinette was carrying drugs, was unlawful.⁴⁰²

The court could have plausibly argued that the rule in *syllabus* one only applies when the continued detention is for the purpose of conducting a search,⁴⁰³ and that since the continued contraband questioning was merely done to find out if Robinette had drugs, and not for search purposes, the rule does not require both elements. In other words, if the continued detention is not for the purpose of gaining consent to search, then the rule does not apply. This argument, however, is inconsistent with Newsome's own testimony, which showed that his entire questioning process, starting with the interrogation regarding contraband and culminating in the consent to search request, was one designed to obtain consent to search.⁴⁰⁴ Thus, based upon the specific facts of *Robinette*, the court could not have properly applied its rule here.

Even if the rule was applied correctly, expecting police officers, citizens and courts to apply it is unreasonable. These groups have had difficulty in correctly applying a totality of the circumstances test to scenarios where there was a continued detention that turned into a consensual encounter.⁴⁰⁵ The Ohio Supreme Court incorrectly created a third justification for a continued detention, that of a suspicionless seizure, with which citizens, police, and courts must deal with. As the law currently stands, there can be a detention based on probable cause or reasonable suspicion that subsequently becomes a suspicionless seizure, and which can then transform into a consensual encounter.

If the Ohio Supreme Court was truly worried about the seamless way in which valid seizures could become consensual encounters, and the difficulty for the citizens to determine whether they are seized under such circumstances,⁴⁰⁶ it would

400. See *id.* at 768 (stating that the justification for the further detention "promotes the public interest in quelling the drug trade"); *id.* at 767 (noting that Newsome's justification for stopping Robinette was speeding).

401. See *Robinette II*, 653 N.E.2d 695, 697 (Ohio 1995) (noting that Newsome extended Robinette's detention based on "no reason related to the speeding violation, and based on no articulable facts").

402. Cf. *Robinette IV*, 685 N.E.2d at 768 (finding that Newsome was justified in detaining Robinette to ask him the question about drugs, but not justified in detaining him to request consent to search).

403. The rule states in part: "[T]he continued detention to conduct a search. . . ." *Robinette IV*, 685 N.E.2d at 767 (emphasis added).

404. See *Robinette II*, 653 N.E.2d at 698 (stating that Newsome utilized his technique in order to imply to Robinette that he must answer the officer's questions, which would include the request to search); see also *State v. Retherford*, 639 N.E.2d 498, 501 (Ohio Ct. App. 1994) (noting Officer Newsome's technique for gaining consent to search, which involved the same conduct which Newsome utilized in *Robinette*). These two cases indicate that Newsome's goal in both was to extend the detention of both persons in order to ultimately gain consent to search.

405. One need not look far for evidence of this. In *Robinette IV*, the Court noted that even the Ohio Attorney General missed the transition between the lawful seizure, the consensual encounter, and the unlawful seizure. *Robinette IV*, 685 N.E.2d at 771 n.5.

406. *Robinette II*, 653 N.E.2d at 698.

not have adopted this third category of police-citizen encounters. By allowing a suspicionless seizure to occur between the end of a justifiable traffic stop and the beginning of a "consensual encounter," the court actually increased the level of knowledge that subjects must have in order to determine their "seizure" status.

Citizens in Ohio will now need to distinguish between suspicionless seizures and consensual encounters, even if both are preceded by a lawful seizure.⁴⁰⁷ Common sense and experience would indicate that few people will be able to correctly determine their seizure status in the context of a traffic stop given the existence of the coercive nature of the encounter and the three possible classifications of their seizure status during the encounter.⁴⁰⁸

Moreover, the Ohio Supreme Court's new seizure rule, which it attempted to fashion from federal case law, simply cannot be supported. The court itself developed the rule based on two cases which are analytically distinguishable, and which discuss two very different issues.⁴⁰⁹ Further, the court itself misapplied the rule to the facts of *Robinette*. If the court cannot apply its own rule correctly, how can it expect the average citizen stopped for a traffic violation to correctly apply it? Finally, the court created a hair-line distinction between two types of justified seizures and a consensual encounter, a distinction that even the most learned Ohio citizens will have much difficulty applying.

B. Criticism of the Robinette IV Consent to Search Discussion

The first problem with the consent to search analysis was that the court adopted a *Schneckloth* standard for determining validity of consent to search, yet it relied solely on the arguments made by the *Schneckloth* Court.⁴¹⁰ As this Comment has argued previously, *Schneckloth* is analytically unjustified, and to that extent it should not be summarily applied without reconsideration of its justifications.⁴¹¹

In its discussion of whether the consent by Robinette was given independently of the invalid seizure, the court acknowledged the issue that the United States Supreme Court missed—the bright line rule espoused in *Robinette II* was one regarding seizure. It merely made knowledge of a right to leave the *sine qua non* of a valid consensual encounter subsequent to a lawful seizure,⁴¹² and it said nothing about whether the consent to search was invalid. To determine the answer to that question, the Ohio Supreme Court applied an attenuation analysis to see if the

407. This is, of course, assumes that *Delaware v. Prouse*, 440 U.S. 648 (1979), does not invalidate this part of *Robinette IV*.

408. See *supra* note 405 (noting the State's difficulty in making this distinction).

409. See *supra* notes 394-96 and accompanying text (discussing the analytical differences between the two cases).

410. *Robinette IV*, 685 N.E.2d at 769.

411. See generally *supra* Part IV.A.1 (criticizing the *Schneckloth* justifications).

412. See *Robinette II*, 653 N.E.2d at 698-99 (discussing the need for a bright line, and the substance of the warning).

consent to search was tainted by the unlawful seizure.⁴¹³ Thus, this further demonstrates that the United States Supreme Court “missed the boat” when it held that the Ohio Supreme Court’s bright line rule was inconsistent with *Schneckloth*.⁴¹⁴

Finally, the Ohio Supreme Court’s rule in syllabus three is a misstatement of federal law.⁴¹⁵ It says that for the state to prove that consent to search was independent of an unlawful seizure, it must show that, under the circumstances, a reasonable person would have felt free to refuse to answer *and could in fact leave*.⁴¹⁶ The error in this statement is simply that the issue of whether the suspect can in fact leave is only relevant to the extent that the officer conveyed that message to him.⁴¹⁷ Thus, the court erroneously adopted an “in fact” rule regarding consent to search subsequent to an unlawful detention, making its rule disharmonious with federal law.

VI. CONCLUSION: LOOKING FOR A COMPROMISE

A. *The Road Not Traveled*

Perhaps the best statement of the *Robinette* dilemma was made by the Ohio Supreme Court in *Robinette II*:

We are aware that consensual encounters between police and citizens are an important . . . investigative tool. However citizens 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.⁴¹⁸

The Ohio Supreme Court, in *Robinette II*, accurately identified the problem. Not all “consensual encounters” should be treated the same; those which follow a lawful seizure are inherently coercive. Even where a citizen believes a police encounter is over, he will not likely feel free to go until the officer informs him that he may do

413. *Id.* at 698.

414. See *Robinette III*, 519 U.S. at 40 (stating that totality of the circumstances is the proper test for determining voluntariness of consent to search, and that “[t]he Supreme Court of Ohio having held otherwise, . . . is reversed”).

415. For the text of syllabus three, see *supra* note 189 and accompanying text.

416. *Robinette IV*, 685 N.E.2d at 763 (citations omitted).

417. See, e.g., *United States v. Mendenhall*, 446 U.S. 544, 554 n.6 (1980) (acknowledging that the subjective intention of the officer to detain Mendenhall was irrelevant, unless it was conveyed to the defendant). The key question was whether a reasonable person would feel free to leave. *Id.* at 554.

418. *Robinette II*, 653 N.E.2d at 699 (citations omitted).

so.⁴¹⁹ A bright line rule requiring an officer to inform a detainee that he is free to go breaks that tension. This gives the person a clear indication that the encounter is over, thereby giving him confidence in knowing that he will not be doing anything wrong if he leaves. Thus, the bright line rule is necessary, in most instances, to tell detainees when the encounter is over, therefore giving them a reason to feel free to leave in a *Mendenhall* seizure sense.

Further, such a rule would apply only to cases where a person is seized pursuant to some lawful reason and when the officer wants to continue questioning the person after the reason for the initial stop no longer exists. Hence, the number of cases where the bright line rule would apply would be limited.

The rule would also be easy to apply. Officers likely know when they have seized a person, especially in a traffic stop situation. Further, they will know, based on experience, when a person will likely feel free to leave (that is, the seizure no longer exists). The officer could always "hedge his bets" and give the warning if he is unsure if the detainee feels free to leave. The rule may also prevent conduct like that of Officer Newsome—conduct designed to use the detainee's lack of knowledge of the law to unjustifiably increase the scope of a traffic stop.⁴²⁰

The rule would not abrogate the totality of the circumstances test. Such a test would still be necessary because every situation is different. An officer's notification to a suspect that the suspect is free to go, followed by conduct indicating to a reasonable person that he is not actually free to go may still constitute a seizure. This assumes the person either submitted to lawful authority or was physically touched by the officer.⁴²¹ The rule would, however, recognize that few people, if any, feel free to leave after being seized by police unless the officer tells them that they are free to leave. As such, the warning is imperative in these limited circumstances.

Finally, the key significance of the rule would be to ensure that, in the absence of such a warning, the Fourth Amendment's proscription of unreasonable police conduct will be triggered. Could an officer still be able to lawfully detain a person without giving the warning? The answer is yes, assuming that the officer has specific, articulable facts within his knowledge which would reasonably lead him to believe that crime is afoot.⁴²²

The Ohio Supreme Court, in *Robinette II* did not conclude that Officer Newsome could not engage in such conduct. Rather, it stated that if Newsome was going to use his technique for gaining consent to search, he must either give the

419. See *Berkemer v. McCarty*, 466 U.S. 420, 438 (1984) (noting that an individual stopped for a traffic violation likely would not feel free to leave until told to do so); see also *Robinette II*, 653 N.E.2d at 698 (discussing the improbability that people feel free to leave as long as an officer continues to interrogate them).

420. *Robinette II*, 653 N.E.2d at 697-98.

421. *California v. Hodari D.*, 499 U.S. 621, 626-27 (1991).

422. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (requiring an officer to have reasonable, articulable suspicion that crime is afoot prior to seizing a person).

seizure warning—in which case there is a good chance that the “detainee” will be found to have not been seized—or he may choose not to give the warning, so long as he has reasonable suspicion to justify the further seizure.⁴²³

B. *Finale*

In *Robinette III*, the United States Supreme Court had an excellent opportunity to reconsider its law regarding consensual seizures and the validity of consent to search. Instead of seizing this opportunity, the Court propagated its case law unquestioningly. Without justification, it struck down the bright line seizure rule adopted by the Ohio Supreme Court.⁴²⁴ Without a logical basis, it supported the *Schneckloth* rule despite a plethora of literature indicating that *Schneckloth* was poorly decided.

As the Ohio Supreme Court demonstrated in *Robinette II*, the bright line rule would have been preferable. The rule would not have abrogated the totality of the circumstances test, but rather would have made knowledge of the right to leave a condition precedent to finding a valid seizure.⁴²⁵ It would not have affected the *Schneckloth* rule because of the state court’s use of the attenuation doctrine. The bright line rule would simply have clarified the law for citizens, police, and the courts.

Now Ohio’s seizure and consent to search case law is extremely muddled with seamless distinctions which are sanctioned, without justification, by the United States Supreme Court and the Ohio Supreme Court. Fortunately, evidence shows that many law enforcement agencies promote the use of warnings of the rights to leave or to refuse consent prior to further detention or requests for consent to search.⁴²⁶ Yet this approach is questionable.

It is difficult to believe that the Framers intended that the police be the primary protectors of our constitutional freedoms. In the constitutional framework, the Court has the affirmative obligation to protect minority rights. The Court has decided to ignore its duty as protector of our constitutional guarantees and has instead decided to give the police the ability to determine the extent and scope of those protections. The citizens of the United States, at the very least, deserve a principled reason for such a result.

423. *Id.*

424. See *supra* Part IV.A.2 (emphasizing the lack of justification for applying *Schneckloth* to the facts of *Robinette*); see also *Robinette III*, 519 U.S. at 45 (Stevens, J., dissenting) (concluding that the *Robinette II* bright line rule was not even applied in *Robinette*’s case, but rather was intended to guide the decisions of future cases).

425. See *supra* note 389 and accompanying text (discussing this rule).

426. See *supra* notes 299-301, 305 (emphasizing the fact that police agencies promote the use of such warnings).