Just One Question before We Get to Ohio v. Robinette: "Are You Carrying Any Contraband ... Weapons, Drugs, Constitutional Protections ... Anything Like That?"

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COMMENT

JUST ONE QUESTION BEFORE WE GET TO OHIO V. ROBINETTE:¹ "ARE YOU CARRYING ANY CONTRABAND . . . WEAPONS, DRUGS, CONSTITUTIONAL PROTECTIONS . . . ANYTHING LIKE THAT?"

It seems rather incongruous at this point in the world's history that we find totalitarian states becoming more like our 'free society' while we in this nation are taking on their former trappings of suppressed liberties and freedoms. . . . In this 'anything goes' war on drugs, random knocks on the doors of our citizens' homes seeking 'consent' to search for drugs cannot be far away. This is not America.²

Liberty comes not from officials by grace but from the Constitution by right.³

INTRODUCTION

On August 2, 1992, Robert D. Robinette, not unlike many of his fellow Ohioans, was unfortunate enough to get caught speeding. Robinette had been traveling along a stretch of Interstate 70, north of Dayton, Ohio, when Deputy Roger Newsome of the Montgomery County Sheriff's Office clocked him traveling at 69 miles per hour.⁴ After pulling the vehicle over, Deputy Newsome approached

⁴ See Ohio v. Robinette, 117 S. Ct. 417, 419 (1996). The incident occurred in a
Robinette and asked to see his driver’s license. A computer check revealed no previous or outstanding violations, and Newsome asked Robinette to accompany him to the rear of the vehicle so he would be within the view of the cruiser’s mounted video camera. After turning on the camera, the deputy issued Robinette a verbal warning about his speeding and returned his license.

Upon returning the license, Deputy Newsome stated, “One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?” Robinette answered no, at which point Newsome asked if he could search the vehicle. Robinette, shocked and apparently unaware of his right to refuse, gave Newsome his consent. The search turned up a small amount of marijuana and an amphetamine pill, upon which Robinette was arrested and charged with knowing possession of a controlled substance.

Prior to trial, Robinette filed a motion to suppress the evidence found in the search of his vehicle. The trial court denied the motion, finding that Deputy Newsome had made it clear to Robinette that the traffic matter had concluded before asking to search the vehicle. Robinette then pled no contest, was adjudicated guilty, and appealed the trial court’s denial of his motion to suppress. The Court of Appeals for Montgomery County reversed the conviction, ruling that Robinette’s consent had resulted in the stop, as was his routine practice with speeders in that particular construction zone. See State v. Robinette, 653 N.E.2d 695, 696 (Ohio 1995), rev’d, Ohio v. Robinette, 117 S. Ct. 417 (1996).

See State v. Robinette, 653 N.E.2d at 696.

See Ohio v. Robinette, 117 S. Ct. at 419.

Id. At the time, Deputy Newsome was on drug interdiction patrol. See State v. Robinette, 653 N.E.2d at 696.

See Ohio v. Robinette, 117 S. Ct. at 419.

See State v. Robinette, 653 N.E.2d at 696. According to the Ohio Supreme Court, “Robinette testified that he was shocked at the question and ‘automatically’ answered ‘yes’ to the deputy’s request. Robinette testified further that he did not believe that he was at liberty to refuse the deputy’s request.” Id.

See Ohio v. Robinette, 117 S. Ct. at 419. The pill was later determined to be methylenedioxy methamphetamine (MDMA). See id. MDMA is also referred to as Ecstasy. See State v. Robinette, No. 14074, 1994 WL 147806, at *1 (Ohio App. 2 Dist. Apr. 15, 1994).

See Ohio v. Robinette, 117 S. Ct. at 419.

See State v. Robinette, 653 N.E.2d at 696.

See Ohio v. Robinette, 117 S. Ct. at 419.
from an unlawful detention. The Supreme Court of Ohio allowed a discretionary appeal in which it affirmed the appellate court's decision, and in doing so took the additional step of requiring that any attempt at consensual interrogation subsequent to a traffic stop must be preceded by the phrase "At this time you legally are free to go" or words of similar import.

The case reached the United States Supreme Court in its 1996-97 Term, when, by an 8-1 vote, the Court rejected the test announced by the Ohio Supreme Court. The majority opinion, written by Chief Justice Rehnquist, held that the Fourth Amendment to the United States Constitution does not require that a lawfully seized defendant be advised that he or she is "free to go" before a consent search will be recognized as voluntary.

This Comment begins in Part I by discussing prior caselaw associated with voluntary consent searches and the Fourth Amendment. Part II then presents the decision of the Ohio Supreme Court, and the United States Supreme Court majority opinion of Chief Justice Rehnquist reversing the Ohio court. Also included are reviews of the concurring opinion of Justice Ginsberg and the dissenting opinion of Justice Stevens. Part III criticizes the majority opinion for its paucity of analysis and lack of supporting caselaw, and questions the accuracy with which the United States Supreme Court formulated the issue at stake in the Ohio court. Finally, Part IV concludes that the "free-to-go" rule in the context of routine traffic stops is necessary in order to effectively eliminate the potential for police officers to engage in coercive investigative techniques, and to provide adequate protection for Ohio citizens to be free of unreasonable searches and seizures. By basing the rule on Ohio law, the Ohio Supreme Court can ensure that such a rule will withstand the scrutiny of a United States Supreme Court that increasingly appears to view any successful search as a reasonable one.

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16 See Ohio v. Robinette, 117 S. Ct. at 419-20.
17 Justice Ginsberg filed a separate opinion concurring in the judgment, and Justice Stevens filed a dissent. See id.
18 See id.
I. BACKGROUND

The Fourth Amendment protects citizens against unreasonable searches and seizures.\(^9\) Although primarily directed at the conduct of law enforcement officers, not all encounters between police officers and citizens invoke its protections. Currently, there are three recognized categories of police-citizen encounters: arrests, seizures, and consensual encounters.\(^2\) Not all encounters between citizens and police officers are considered seizures, but only those wherein “a reasonable person would have believed that he was not free to leave.”\(^21\) If the encounter is not a seizure, then the Fourth Amendment is inapplicable.\(^22\) In determining whether or not a seizure has occurred, courts are required to examine all of the circumstances surrounding an encounter.\(^23\) Although there is no single dispositive factor for determining a seizure, the United States Supreme Court has nonetheless recognized that whenever a motorist is ordered to pull over by a police officer, a seizure has occurred.\(^24\)

Once an encounter has been categorized as a seizure, the Fourth Amendment is implicated, thereby requiring that the seizure

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\(^9\) The Fourth Amendment provides in part 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, and no Warrants shall issue, but upon probable cause... .” U.S. CONST. amend. IV. The provisions of the Fourth Amendment are made applicable to the states by the Fourteenth Amendment. See Mapp v. Ohio, 367 U.S. 643 (1961).

\(^2\) See Edwin J. Butterfoss, Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins, 79 J. CRIM. L. & CRIMINOLOGY 437, 437 (1988) (“Police encounters with citizens are placed into one of three categories: ‘communication’ between police and citizens involving no coercion or detention and therefore without the compass of the fourth amendment [sic], brief ‘seizures’ that must be supported by reasonable suspicion, and full-scale arrests that must be supported by probable cause.”) (citing United States v. Berry, 670 F.2d 583, 591 (5th Cir. 1982)).

\(^21\) Michigan v. Chesternut, 486 U.S. 567, 573 (1975) (citing United States v. Mendenhall, 446 U.S. 544 (1980)); see also Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (“Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”).

\(^22\) See Florida v. Royer, 460 U.S. 491, 498 (1983) (“If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.”).

\(^23\) Chesternut, 486 U.S. at 572.

\(^24\) See Delaware v. Prouse, 440 U.S. 648, 653 (1979) (“Stopping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth Amendment]”); see also Butterfoss, supra note 20, at 438 n.9 (“Unlike [the] pedestrian cases, the Court views virtually any encounter between a police officer and the operator of an automobile as a seizure.”).
be "reasonable." Prior to Terry v. Ohio,\textsuperscript{25} any seizure was invalid unless justified by probable cause.\textsuperscript{26} In Terry, the United States Supreme Court recognized that certain seizures falling short of an arrest were justified based on a police officer’s reasonable suspicion that the detainee had committed, or was about to commit, a crime.\textsuperscript{27} Hence, reasonable suspicion of criminal activity may warrant a temporary seizure, but only "for the purpose of questioning limited to the purpose of the stop."\textsuperscript{28} Although Terry dealt with the seizure of pedestrians, in the context of traffic stops, "police responsibility for traffic enforcement confers a practically boundless authority to stop."\textsuperscript{29} Nonetheless, investigative detentions must be temporary, must last no longer than is necessary to effectuate the purpose of the stop, and must employ "the least intrusive means reasonably available to verify or dispel the officer’s suspicion."\textsuperscript{30}

Whether or not a detention is constitutionally valid has an important bearing on the admissibility of evidence discovered by police officers during a subsequent search of the detainee’s person or property.\textsuperscript{31} Searches, like seizures, are prescribed by the Fourth Amendment requirements of reasonableness, and it is a long-standing principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions."\textsuperscript{32} One such "specifically established" exception is the voluntary consent search.

Although the United States Supreme Court has consistently recognized the constitutional validity of a warrantless search conducted pursuant to a voluntary consent, a more contentious issue has been whether or not the consent has been given "voluntarily."\textsuperscript{33} In Schneckloth v. Bustamonte,\textsuperscript{34} the Court was called upon

\textsuperscript{25} 392 U.S. 1 (1968).
\textsuperscript{26} See Dunaway v. New York, 442 U.S. 200, 208-09 (1979) ("Terry for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause.").
\textsuperscript{27} See Terry, 392 U.S. at 20-27.
\textsuperscript{28} Florida v. Royer, 460 U.S. 491, 498 (1983).
\textsuperscript{29} See Donald A. Dripps, The Fourth Amendment on the Road, TRIAL, Feb. 1997, at 66.
\textsuperscript{30} See Royer, 460 U.S. at 500.
\textsuperscript{31} Indeed, because of the difficulties involved in challenging police testimony at a suppression hearing that the consent to search was validly made, defendants often have more success challenging the validity of the initial detention. See Dripps, supra note 29, at 66.
\textsuperscript{32} Katz v. United States, 389 U.S. 347, 357 (1967).
\textsuperscript{33} See Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). It is settled that the
to settle a conflict between the California Court of Appeals and the Ninth Circuit Court of Appeals with respect to a state prosecutor's burden in demonstrating that a defendant's consent to search had been voluntarily made. The federal court had required the prosecutor to show that the defendant had actual knowledge of a right to refuse consent. The state court had maintained instead that voluntariness was a factual matter to be determined from the totality of the circumstances, knowledge being only one factor for consideration.

The Court in Schneckloth began by examining voluntariness in the context of criminal confessions, noting that a variety of factors were considered in determining whether a confession had been given by "free and unconstrained choice." The factors included age, educational level, the length of the detention, and the detainee's degree of intelligence, with no single factor regarded as dispositive. Because the query, as applied to confessions, in essence required a balancing of legitimate police needs against the possibility of coercion, this "totality of all the circumstances" test was considered similarly appropriate in the context of consent searches. In as much as this test had effectively filtered out police coercion, the Court opined that there was no need to replace it with a test based on demonstrating actual knowledge on the part of a defendant.

Nor was it appropriate, ruled the Court, to treat a consent to search in the same vein as the waiver of a constitutional right. The concept of waiver, which required the "abandonment of a known right or privilege," was applicable only in the context of trial rights, and the Court noted the "vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment." Similarly, the Court rejected an

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37 See id. at 223.
38 See id.
39 Id. at 225.
40 See id. at 226.
41 Id. at 227.
42 See id. at 229.
43 Id. at 235.
44 Id. at 241.
argument that its decision in *Miranda v. Arizona*,\(^4\) requiring police officers to inform defendants in custody of their rights against self-incrimination, should apply in the consent search context. *Miranda* had been justified on the inherently coercive situations created by custodial surroundings in combination with suspect police questioning techniques.\(^4\) Because the Court found nothing to indicate that traffic stops produced an inherently coercive environment, there was no need to depart from the totality of the circumstances test.\(^4\)

In *Schneckloth*, the Court paused briefly to consider a suggestion that rather than requiring a defendant to have actual knowledge, it would instead suffice for police officers to inform detained motorists of their right to refuse consent. The Court rather swiftly dismissed this requirement as "thoroughly impractical" based on the "informal and unstructured conditions" in which consent searches arose.\(^4\) A *Miranda* style warning was inappropriate in situations far removed from "the structured atmosphere of a trial."\(^4\)

*Schneckloth*, it should be noted, dealt with a consent to search made by a defendant who had been legally seized.\(^4\) However, courts have imposed a different standard for a consent given while a defendant is illegally detained. In *Florida v. Royer*,\(^4\) the United States Supreme Court found that the defendant had been illegally detained at the time of his consent, and that the consent had been "tainted by the illegality," rendering it ineffective to justify the search.\(^5\) In ruling so, the Court applied the *Dunaway v New York* test applicable to statements made during illegal detentions, which requires the state to prove that the consent was not a product of the illegal detention, but rather "the result of an independent act of free will."\(^5\) Hence, the standard used to determine whether or not

\(^{44}\) See *Schneckloth*, 412 U.S. at 247 ("In *Miranda* the Court found that the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation.").
\(^{45}\) See id.
\(^{46}\) Id. at 231-32.
\(^{47}\) Id. at 232.
\(^{48}\) The police officer had a reasonable basis to stop the vehicle based on the fact that one of the headlights and the license plate light were burned out. See id. at 220.
\(^{49}\) 460 U.S. 491 (1983).
\(^{50}\) Id. at 507-08.
\(^{51}\) Id. at 501. See also Joseph G. Casaccio, Note, *Illegally Acquired Information, Consent Searches, and Tainted Fruit*, 87 COLUM. L. REV. 842 (1987) (arguing that a voluntary consent is insufficient to "purge the taint of prior police misconduct").
a consent to search has been voluntarily given depends, in part, on whether the individual offering the consent has been legally or illegally detained.

II. THE ROAD TO REMAND

A. The Ohio Supreme Court Decision

As the United States Supreme Court was later to note, it is the settled rule in Ohio that the Supreme Court "speaks as a court only through the syllabi of its cases." In its 4-3 decision, the syllabus of the Ohio Supreme Court stated as follows:

1. When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.

2. 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.

As if to stress the significance of its syllabus, Justice Pfeifer's majority opinion began by noting that the search of Robinette's car had been invalid because it had resulted from an unlawful seizure. Relying on Terry v. Ohio and State v. Chatton, the

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54. Id. at 696.
55. See id. at 697.
56. 392 U.S. 1 (1968).
57. 463 N.E.2d 1237 (1984). In Chatton, a police officer had stopped a vehicle after
court reiterated the requirement that a police officer have additional articulable facts, arising after the initial stop is made, in order to detain a motorist beyond the scope of the original stop. Although Deputy Newsome had been justified in stopping Robinette for the speeding violation, once he had checked Robinette's license and determined not to issue a speeding ticket to him, the justification for the detention had ceased. When Newsome ordered Robinette out of the car, his detention became illegal.

This did not end the court's inquiry because, as Justice Pfeifer noted, a consent, even though obtained during an illegal detention, may still be valid. The test for determining the validity of such a consent, as outlined in Florida v. Royer, was whether or not the state could demonstrate that the consent was not the product of the illegal detention, but rather the result of an independent act of free will. Factors to be considered in determining this included "the length of time between the illegal seizure and the subsequent search, the presence of intervening circumstances, and the purpose and flagrancy of the circumstances." Proceeding to apply this test to the facts of the case, the court found that the state had failed to meet its burden of showing that Robinette's consent to search the vehicle had been anything other than the result of an illegal detention.

Having ostensibly affirmed the decision of the court of appeals, the majority then turned to the second part of its syllabus, wherein the court had announced that police officers were required to notify detained motorists of the point at which their legal detention had

noticing it displayed neither a front nor a rear license plate. See id. at 1237. Upon approaching the vehicle, the officer noticed a temporary tag in the rear window, which explained the missing license plates. See id. The officer then asked to see the driver's license, which had been erroneously listed by the Bureau of Motor Vehicles as suspended. See id. at 1237-38. The Ohio Supreme Court ruled that once the officer's reasonable suspicion that the vehicle was not properly licensed or registered had been allayed, it was unreasonable to detain the driver in order to determine the validity of his license. See id. at 1240-41.

See State v. Robinette, 653 N.E.2d at 697.
See id. at 697-98.
See id. at 698.
See id.
460 U.S. 491 (1983). For a discussion of this legal test, see supra notes 49-51 and accompanying text.
See State v. Robinette, 653 N.E.2d at 698.
Id.
See id.
The court stated that the facts of the case before it demonstrated the need for a bright-line rule for determining the point at which a legal detention had ended and a consensual encounter had begun. While acknowledging that consensual encounters were a legitimate and important investigative method for police officers to employ, the court nevertheless ruled that:

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

The court also stated its concern that police officers were using subsequent consensual encounters to turn routine traffic stops into “fishing expedition[s] for unrelated criminal activity.” Because most citizens believed they were still in police custody as long as an officer continued to question them, and because a reasonable person would not feel free to walk away under such circumstances, a rule was needed to protect citizens from being coerced into answering questions that they need not answer. Henceforth, the federal and Ohio constitutions would require any consensual encounter subsequent to a traffic stop to be preceded by the phrase “At this time you legally are free to go,” or its equivalent.

Justice Sweeney’s dissent took issue with the majority’s determination that Robinette had been illegally detained. Noting that the traditional test for determining whether or not a person has been seized under the Fourth Amendment was “whether, taking into account all of the circumstances surrounding the encounter, the police conduct ‘would have communicated to a reasonable person

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66. In the first paragraph of the opinion the court stated: “We also use this case to establish a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation.” Id. at 697.

67. See id. at 698.

68. Id. at 699.

69. Id.

70. See id. at 698. The court also noted that Deputy Newsome’s question, “One question before you get gone,” implied that Robinette could not leave until he had answered it. Id.

71. Id. at 699.
that he was not at liberty to ignore the police presence and go
about his business," the dissent believed that application of this
test showed that Robinette had not been seized, and was aware of
his right to leave once his license had been returned. In addi-
tion, the dissent chose not to distinguish the legality of Robinette’s
detention from the validity of his consent to search because, “[t]he
distinction between being informed of the right to refuse a search
and being informed of the right to leave the scene is insignifi-
cant.” Indeed, the dissent apparently construed the issue in the
case as being one of whether “an individual who has been validly
detained pursuant to a traffic stop may, in response to a police
request, give a free and voluntary consent to search, once the traf-
cic stop has been completed and the individual knows he is free to
leave.”

Criticizing the majority’s reliance on State v. Chatton
because it had dealt with an unlawful detention and not an invalid
consent, the dissent disapproved of the majority’s new per se
rule as being “contrary to well-established state and federal consti-
tutional law.” Such a rule, it believed, would vastly undercut the
ability of police officers to “ferret out crime.”

B. The United States Supreme Court Decision

1. Chief Justice Rehnquist’s Majority Opinion

On appeal to the United States Supreme Court, the manner in
which Justice Sweeney’s dissent had eliminated the distinction
between the legality of the detention and the validity of the search
was not lost on Chief Justice Rehnquist. Writing for the majori-
ty, the Chief Justice presented the issue as “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.”

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172 Id. (Sweeney, J., dissenting) (citing Florida v. Bostick, 501 U.S. 429, 437 (1991)).
173 See id. at 700.
174 Id. But see supra notes 49-51 and accompanying text (discussing how validity of
detention effects the test for determining whether consent is voluntary).
175 State v. Robinette, 653 N.E.2d at 700 (Sweeney, J., dissenting) (emphasis added).
176 See id.
177 Id. at 699.
178 Id.
179 Justice Ginsberg filed a separate opinion concurring in judgment, and Justice
Stevens dissented.
180 Ohio v. Robinette, 117 S. Ct. 417, 419 (1996). The actual question presented in
Before reaching the merits of the question, the majority had first to deal with the preliminary issue of whether the Court had jurisdiction to review the decision of the Ohio Supreme Court. Robinette had argued that the decision in the Ohio Supreme Court had rested on Ohio constitutional law as well as on the Federal Constitution, and as such, the decision could be viewed as a state court's exercise of its prerogative to expand upon the liberties guaranteed citizens under the Federal Constitution. However, the Chief Justice quickly disposed of this challenge to jurisdiction by applying the test outlined in *Michigan v. Long*, wherein the Supreme Court had ruled that:

> [When] a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Having invoked the presumption of *Long*, the majority found that the opinion clearly relied on federal law, notwithstanding its passing reference to the Ohio Constitution. All of the cases relied upon were federal cases, with the exception of one state case which applied the Federal Constitution. Because there was noth-
ing to indicate that the Ohio Supreme Court had based its decision on Ohio constitutional law, jurisdiction existed for the United States Supreme Court to review the state court’s interpretation of federal law.87

The majority had also to dismiss Robinette’s argument that because the Ohio Supreme Court had ruled in the first part of its syllabus that Robinette had been illegally seized, the Court could not reach the issue presented for review, viz. whether a consent to search would be recognized as voluntary in the absence of the “free to go” language found in the second part of the syllabus.88 However, because Robinette had not raised this issue in his opposition to certiorari, and because both parties had subsequently briefed the issue, the Chief Justice ruled that the legality of Robinette’s detention was “a ‘predicate to an intelligent resolution’ of the question presented, and therefore ‘fairly included therein.’”89 Hence, the legality of Robinette’s detention became the first substantive issue for the Court to decide.

With reference to the Ohio Supreme Court’s determination that Newsome’s interrogation of Robinette had gone beyond the scope of the initial stop, the Chief Justice simply stated that “in light of the admitted probable cause to stop Robinette for speeding, Deputy Newsome was objectively justified in asking Robinette to get out of the car, subjective thoughts notwithstanding,” and hence, Robinette had not been illegally detained.90 Apparently believing that the Ohio court had relied on Newsome’s subjective intentions91 in order to find his conduct unconstitutional, the majority pointed to its recent decision in Whren v. United States,92 in

87. See id. The Court also rejected a challenge to its jurisdiction based on the fact that in Ohio, “the Supreme Court speaks as a court only through the syllabi of its cases.” Id. The Chief Justice noted that when a syllabus refers only generally to the federal and Ohio constitutions, the Court may review the body of the opinion in order to determine the grounds for its decision, which review confirmed the lack of an adequate and independent state ground. See id.

88. See id.

89. Id.

90. Id. at 421. The court cited Pennsylvania v. Mimms, 434 U.S. 106 (1977), which had itself announced a bright-line rule that it was per se reasonable for a police officer to order the driver of a vehicle which has been lawfully stopped for a traffic violation to get out of the vehicle. This rule has since been extended to passengers traveling in lawfully stopped vehicles. See Maryland v. Wilson, 117 S. Ct. 882 (1997).


which the Court had ruled that a police officer's subjective motivations would not operate to make an otherwise legal detention illegal, as long as there existed objective evidence to support the officer's conduct.93 Having determined that Robinette had not been illegally seized, the Chief Justice turned to the issue presented for review: Whether the Fourth Amendment required a lawfully sized detainee be told he or she is "free to go" before voluntarily consenting to be searched.

The Court began by outlining its general position that reasonableness under the Fourth Amendment "is measured in objective terms by examining the totality of the circumstances."94 Such a test, the Court opined, had proved to be the most effective method of recognizing the endless variety of factual circumstances implicated in Fourth Amendment analysis.95 In addition, the Court claimed to have "consistently eschewed bright-line rules" in determining whether or not police conduct had been reasonable, preferring instead to develop what the Court referred to as its "traditional contextual approach."96 By way of example, the majority pointed to its decisions in Michigan v. Chesternut97 and Florida v. Bostick.98

The Chief Justice then noted the similarity of the rule promulgated by the Ohio Supreme Court to the rule rejected by the United States Supreme Court's prior decision in Schneckloth v. Bustamonte,99 wherein the Ninth Circuit Court of Appeals had required that the state demonstrate a defendant's knowledge of his or her right to refuse to consent before a consent would be recognized as voluntary.100 In rejecting that rule, the Court had found

93. See Ohio v. Robinette, 117 S. Ct. at 420-21 (citing Whren v. United States, 116 S. Ct. 1769, 1774 (1996)) ("The fact that [an officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."). The Court acknowledged that Whren had been decided after the Ohio Supreme Court had made its decision. See id. at 420.
94. Id. at 421.
95. See id.
96. Id.
98. 501 U.S. 429 (1991) (striking down a Florida Supreme Court rule that police questioning aboard a bus was per se a seizure).
100. See Ohio v. Robinette, 117 S. Ct. at 421. For a discussion of Schneckloth, see supra notes 34-48 and accompanying text.
that it "would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning," and so too, in the case at hand, the Chief Justice ruled that 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." Because voluntariness was to be determined by all of the circumstances surrounding the consent, and because the majority believed that the Ohio Supreme Court had said otherwise, its decision was reversed.

2. Justice Ginsberg's Concurring Opinion

Justice Ginsberg, concurring in the judgment, began her separate opinion by reiterating the observations of the Ohio Supreme Court that traffic stops in Ohio were regularly becoming vehicles for contraband searches, despite the fact that police officers had no reason to suspect illegal activity. One Ohio court of appeals had noted that "hundreds, and perhaps thousands of Ohio citizens are being routinely delayed in their travels and asked to relinquish to uniformed police officers their right to privacy in their automobiles and luggage, sometimes for no better reason than to provide an officer the opportunity to 'practice' his drug interdiction technique." Indeed, Deputy Newsome had himself testified on a prior occasion to having made 786 consensual searches in 1992 alone. Justice Ginsberg recognized that the Ohio Supreme Court had announced the "first-tell-then-ask" rule in order to more effectively protect the constitutional rights of Ohio citizens to be secure in their persons and property.

Although agreeing with the majority that the Ohio Supreme Court had not so clearly rested its decision on state law so as to avoid review under the test outlined in *Michigan v. Long,* Justice Ginsberg nonetheless believed that the majority opinion "[did]
not pass judgment on the wisdom of the first-tell-then-ask rule.\textsuperscript{109} States were of course free to place greater restrictions on law enforcement practices than did the Federal Constitution,\textsuperscript{110} but by failing to clearly emphasize that its rule was based on state law, and applicable only to Ohio officials, the Ohio Supreme Court had inadvertently signaled a belief "that the Nation's Constitution would require the rule in all 50 States."\textsuperscript{111} Although Justice Ginsberg expressed serious doubt that the Ohio court had intended this, she nonetheless agreed with the majority that, in so far as federal law imposed no such restriction on law enforcement activity, the Ohio Supreme Court decision should be reversed.

Justice Ginsberg then returned to the rule itself, finding that its intent appeared similar to that of the \textit{per se} rule announced by the Court in \textit{Miranda v. Arizona}.\textsuperscript{112} While neither rule was specifically required by the text of any constitution, federal or state, both rules could be viewed as prophylactic measures to ensure a minimally required standard and "to reduce the number of violations of textually guaranteed rights."\textsuperscript{113} However, the United States Supreme Court was empowered to announce rules like that of \textit{Miranda} upon all fifty states, whereas the Ohio court was not. This point served to confirm for Justice Ginsberg that the Ohio Supreme Court had intended its rule to apply only to Ohio.\textsuperscript{114}

Finally, Justice Ginsberg stressed the need for state courts to clearly indicate their reliance on state law to announce new legal rules invoking elements of federal law.\textsuperscript{115} On remand, noted Jus-

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{109}] Ohio v. Robinette, 117 S. Ct. at 422.
\item[\textsuperscript{110}] See id. at 422-23 (citing Oregon v. Hass, 420 U.S. 714, 719 (1975)) ("A state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.").
\item[\textsuperscript{111}] Ohio v. Robinette, 117 S. Ct. at 423.
\item[\textsuperscript{112}] 384 U.S. 436 (1966).
\item[\textsuperscript{113}] Ohio v. Robinette, 117 S. Ct. at 423.
\item[\textsuperscript{114}] See id.
\item[\textsuperscript{115}] See id. at 423-24. As an example of the clarity required, Justice Gisnberg offered the example of the Montana Supreme Court in \textit{State v. Fuller}, 915 P.2d 809, (Mont.), \textit{cert. denied}, 117 S. Ct. 301 (1996), in which the court had stated:

While we have devoted considerable time to a lengthy discussion of the application of the Fifth Amendment to the United States Constitution, it is to be noted that this holding is also based separately and independently on [the defendant's] right to remain silent pursuant to Article II, Section 25 of the Montana Constitution.

Ohio v. Robinette, 117 S. Ct. at 423-24 (citing Fuller, 915 P.2d at 816) (alteration in original).
\end{enumerate}
\end{footnotesize}
tice Ginsberg, the Ohio Supreme Court was free to clarify "that its instructions to law-enforcement officers in Ohio find adequate and independent support in state law, and that in issuing these instructions, the court [had] endeavored to state dispositively only the law applicable in Ohio."

3. Justice Stevens' Dissenting Opinion

Justice Stevens agreed with the majority in its response to the sole question presented for review, that the Federal Constitution did not require police officers to advise lawfully detained motorists that they were "free to go" before a consent to search would be recognized as voluntary. However, because the "free to go" rule in the second part of the Ohio court's syllabus was clearly intended as a guide for deciding future cases, and because the Ohio Supreme Court had correctly found that Robinette's consent had resulted from an unlawful detention, Justice Stevens would have affirmed the decision of the Ohio court.

Believing the issue to be whether Robinette was still being detained at the point in time when Deputy Newsome asked his "One more question before you get gone," Justice Stevens noted that the Ohio Supreme Court had correctly relied on the United States Supreme Court decision in United States v. Mendenhall, in which the Court had ruled that "a person has been 'seized' within the meaning of the Fourth Amendment... if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Exa- mining the circumstances surrounding Robinette's interrogation, the dissent concluded that both of the Ohio appellate courts had correctly decided that a reasonable person in Robinette's shoes would have believed there was an obligation to answer the deputy's question, and that getting back into the vehicle and driving away was simply not an option.

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116. Ohio v. Robinette, 117 S. Ct. at 424. See Katz, supra note 80, § 15.05 ("It seems the [Ohio Supreme Court] has three choices: (1) pursue the issue of the continued detention, (2) determine whether the bright-line rule requiring a clear statement that the motorist is free to go is required under the Ohio Constitution, or (3) accept the federal rule.").
117. See Ohio v. Robinette, 117 S. Ct. at 424 (Stevens, J., dissenting).
118. See id.
120. Ohio v. Robinette, 117 S. Ct. at 424-25 (citing Mendenhall, 446 U.S. at 554).
121. See id. at 425-26. In reaching this conclusion, Justice Stevens noted that "the ques-
Not only had the Ohio Supreme Court concluded that Robinette had been seized, but it had done so independently of the bright-line rule announced in the second part of its syllabus. As such, Justice Stevens believed the lower court’s factual finding with respect to Robinette’s detention should remain undisturbed. The question then became whether Robinette’s detention had been unlawful. The dissent pointed to the language of the first syllabus wherein the Ohio Supreme Court had declared the seizure illegal because the motivation for Newsome’s continued interrogation had not been “related to the purpose of the original, constitutional stop.” The majority had construed the phrase “motivation behind” to mean the deputy’s subjective motivation, and had responded with its decision in Whren v. United States. In contrast, Justice Stevens would have construed the “motivation behind” language to mean “justification for,” thereby rendering the first part of the syllabus a correct proposition of law. Thus, in order for Robinette’s detention to remain lawful beyond the point at which he had received his warning, Deputy Newsome would have needed “articulable facts giving rise to a reasonable suspicion of some separate illegal activity.” In the absence of any such factual basis, the Ohio Supreme Court’s determination that Robinette was illegally seized was “entirely consistent with federal law.” Because Robinette’s consent had been tainted by the illegality of his detention, and because the United States Supreme Court “reviews judgments, not opinions,” Justice Stevens repeated his desire to affirm the decision of the Ohio court.

Finally, Justice Stevens turned to the “free to go” rule itself.

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122 See Ohio v. Robinette, 117 S. Ct. at 426. Justice Stevens noted that in the first paragraph of its opinion, the Ohio Supreme Court had made it clear that it had based its decision on Robinette’s unlawful seizure, and that “[o]nly then did the court proceed to point out that it would ‘also use this case to establish a bright-line test.’” Id. at 426 n.7.

123 See id. at 426.

124 Id.

125 See supra notes 92-93 and accompanying text.

126 Ohio v. Robinette, 117 S. Ct. at 426.

127 Id. at 426-27.

128 Id. at 427.

129 Id. (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984)).

130 See id.
Agreeing with Justice Ginsberg that the majority had not passed on the wisdom of the Ohio Supreme Court’s rule or its validity as a matter of Ohio law, the dissent stressed that nothing prevented the State of Ohio from promulgating rules proscribing the conduct of its law-enforcement officers, the effect of which was to grant its citizens additional protection beyond that mandated by the Federal Constitution. However, because federal law imposed no such requirement on police officers, Justice Stevens, while dissenting from the majority’s disposition of the case, nonetheless approved of the Court’s treatment of the “free to go” rule.

III. A MOST “UNREALISTIC” RESULT

The remainder of this Comment takes issue with the majority opinion, finding it unpersuasive, unsupported, and in places, simply inaccurate. Besides misconstruing the intended effect of the Ohio Supreme Court’s decision and ignoring prior judicial acceptance of per se rules, the majority opinion, ruling that the Fourth Amendment does not require a lawfully seized defendant to be told he or she is free to go before a consent to search will be deemed voluntary, is a decision full of Fourth Amendment clichés, but short of any substantive factual analysis.

A. Bright-line Confusion

In declaring that reasonableness under the Fourth Amendment requires an examination of the “totality of the circumstances” in order to give account of the “endless variations in the facts and circumstances,” the majority claimed to have “consistently eschewed bright-line rules.” By way of example, the Court made specific reference to two of its prior decisions that had rejected proposed bright-line rules. In Michigan v. Chesternut, the Court had rejected a per se rule for deciding whether an investigatory pursuit was a seizure for Fourth Amendment purposes.

131. See id. at 427-28.
132. See id. at 428.
133. Id. at 421.
134. See supra notes 97-98 and accompanying text.
136. Id. The state had proposed a rule that police investigatory pursuits never implicate the Fourth Amendment unless a defendant is actually apprehended, while the defendant had argued that any and all police chases were per se seizures. See id. at 572. The Court rejected both rules, finding instead that “any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account all of the
Similarly, in *Florida v. Bostick*, the Court struck down a rule announced by the Florida Supreme Court that police interrogation of citizens aboard buses were *per se* seizures under the Fourth Amendment. While these cases do indeed support the Court’s claim to have previously “eschewed” bright-line rules, in claiming to have done so “consistently,” the majority apparently overlooked, or chose simply to ignore, a number of its previous decisions in which *per se* rules had been deemed an appropriate mechanism for protecting Fourth Amendment rights.

On a number of occasions the United States Supreme Court has willingly approved of bright-line rules, notwithstanding the purported necessity of recognizing the “endless variations in the facts and circumstances” implicated by the Fourth Amendment. One such example is the Court’s earlier decision in *Michigan v. Summers*. In *Summers*, Justice Stevens, writing for the majority, ruled that because a judge had determined there was probable cause to search a house, it was *per se* reasonable to detain the occupant while the search warrant was executed. The Court stated: “The connection of an occupant to [the] home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of [the] occupant.” Thus, the authority required to detain an occupant could always be implied from a properly issued search warrant.

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See id. at 433. Writing for the majority, Justice O’Connor reiterated that:

[...] in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.

*Id.* at 439.

In *Summers*, the occupant of a house had been detained while police officers executed a search warrant on the premises. *See id.* at 693. The occupant later claimed his detention had been an illegal seizure because it had not been justified by probable cause. After drugs were found on the premises, the occupant was arrested, and during a search incidental to his arrest, police found additional contraband on his person. The occupant did not challenge the search made pursuant to the arrest, but rather the pre-arrest seizure from which the search resulted. *See id.* at 693-96.

See id. at 703 (“Thus a neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the privacy of a home.”).

*Id.* at 703-04.
In its ruling the Court made a footnote reference to its decision in *Dunaway v. New York.*[^142] *Dunaway* had rejected a totality of the circumstances approach, reaffirming instead a general rule that custodial interrogations were *per se* unreasonable in the absence of probable cause.[^143] Although *Terry* and its progeny had created specific exceptions to this rule, the state of New York had urged the Court to replace the *per se* rule with a “multifactor balancing test of ‘reasonable police conduct under the circumstances’ to cover all seizures that do not amount to technical arrests.”[^144] Rejecting such a test, Justice Brennan, writing for the Court, noted:

> [T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the “often competitive enterprise of ferreting out crime.” A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.^[45]

Because the police officers had not attained that “single, familiar standard” of probable cause, notwithstanding the officers’ reasons for suspecting Dunaway, his detention had been an illegal seizure, and any resulting confession was tainted thereby.^[146]

Justice White similarly underscored the Court’s preference for bright-line rules in his concurring opinion. Noting that the Fourth Amendment generally did indeed require a balancing of competing interests, Justice White remarked that “if courts and law enforcement officials are to have workable rules this balancing must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.”[^147] Hence, in *Dunaway,* a majority of the United States Supreme Court apparently recognized the potential for abuse inherent in allowing the total-


[^143]: See id. at 211 ("Respondent State now urges the Court to apply a balancing test, rather than the general rule, to custodial interrogations, and to hold that 'seizures' such as that in this case may be justified by mere 'reasonable suspicion.'").

[^144]: Id. at 213.

[^145]: Id. at 213-14 (citations omitted).

[^146]: See id. at 216-19.

[^147]: Id. at 219-20 (White, J., concurring) (citations omitted).
ty of the circumstances surrounding an encounter to substitute for a *per se* rule proscribing official conduct.

Other examples illustrate similar concerns. In *Oliver v. United States,* the Court was called upon to reevaluate its prior ruling that the Fourth Amendment did not extend its protections to "open fields." Oliver had argued that in place of this *per se* rule, the Court should instead analyze the circumstances on a case-by-case basis in order to determine whether or not a defendant had a legitimate expectation of privacy. Noting that the accommodation to be made was between the needs of law enforcement and the liberty interests protected by the Fourth Amendment, the Court remarked that such a test would result in police officers having to guess prior to each search "whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy." This type of approach would confuse police officers in their attempts to ascertain the scope of their authority, and would result in arbitrary and inequitable enforcement of constitutionally protected rights. In retaining the *Hester* test, Justice Powell noted that the United States Supreme Court "repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances." Thus, the Court retained the *per se* rule announced in *Hester* that individuals have no legitimate expectation of privacy in their open fields.

In its claim to have "consistently eschewed bright-line rules," the majority in *Robinette* was apparently unaware of how hollow this claim would ring when, only a month later, the Court accepted

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149. In *Hester v. United States*, 265 U.S. 57, 59 (1924), the Court held that "[t]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields."
150. See *Oliver*, 466 U.S. at 181.
151. *Id.*
152. See *Oliver*, 466 U.S. at 181; *see also* *New York v. Belton*, 453 U.S. 454, 459-60 (1981) (stating that "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority").
153. *Oliver*, 466 U.S. at 181.
154. For yet another example of the Court's approval of bright-line rules, see *New York v. Belton*, 453 U.S. 454 (1981) (police officer may search passenger compartment of vehicle, including containers found within, pursuant to a lawful arrest of the occupants).
a per se rule in a Fourth Amendment traffic stop context. In Maryland v. Wilson, Chief Justice Rehnquist ruled that it was per se reasonable to order a passenger from a legally detained vehicle, regardless of any articulable suspicion that the passenger posed a threat to the officer or had committed a criminal offense. Indeed, Wilson extended the application of another bright-line rule previously announced in Pennsylvania v. Mimms, which stated that it was not unreasonable for a police officer to order the driver out of a detained vehicle, a rule purportedly based on the minimal intrusion to the driver who had already been detained, and the substantial interest in ensuring the safety of police officers. In an effort to save face, the Wilson majority tacitly acknowledged that although the Court had “generally eschewed bright-line rules,” it had not always done so. In its reference to Robinette, the Court was prudent enough to avoid any suggestion that its eschewing of bright-line rules had been “consistent.”

As these cases illustrate, the United States Supreme Court has been anything but consistent in its approach to bright-line rules. Indeed, the only consistency would appear to be the manner in which the Court has used the totality of the circumstances approach to extend the scope of police investigatory methods, while using bright-line rules to restrict constitutional protections. As one commentator has noted, “the Court appears to adopt bright-line rules where it would expand a previously limited search and to reject bright-line rules where the rule would act as a brake on police intrusions.” Chesternut and Bostick, rejecting per se rules, both gave the green light for law enforcement officers to use investigative methods that were suspect under the existing constitutional framework. In contrast, Wilson eradicated the Fourth Amendment rights of passengers in the interest of officer safety, while Oliver and Summers seemed primarily concerned with eliminating the inconvenience and confusion experienced by officers in the field. In claiming to have consistently eschewed bright-line rules, the Court

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156. Id. at 886.
158. Wilson, 117 S. Ct. at 885 n.1 (emphasis added).
159. James A. Adams, Search and Seizure as Seen by Supreme Court Justices: Are They Serious or Is This Just Judicial Humor, 12 ST. LOUIS U. PUB. L. REV. 413, 451-52 (1993) (footnotes omitted). Adams argues that the inconsistency in the Court’s Fourth Amendment jurisprudence can only be explained as an effort by the Court to be humorous! Id.
ignored its own jurisprudence of having approved of them in contexts where the Court became convinced that effective law enforcement required a limiting of individuals’ liberty interests. Given the apparent correlation between the purpose behind a proposed per se rule, and the Court’s acceptance or rejection of it, the majority decision in Robinette is hardly surprising.

B. The Potential for Coercion: Schneckloth Revisited

While the Court’s approach to per se rules might explain the Robinette decision, it does not justify it. Nor indeed is Robinette justified by the Court’s reliance on Schneckloth. The Robinette majority stated that it would be “unrealistic” to expect police officers to give warnings to detained motorists that they were free to go. Without offering examples or factual evidence to support this assertion, the Court suggested that such warnings would be unrealistic for the same reasons that had led the Court in Schneckloth to conclude that it would be “thoroughly impractical” to require a criminal prosecutor to demonstrate that a defendant knew of his or her right to refuse to consent to a search. Thus, the Court’s rejection of the “free to go” test would appear to be based entirely on the impracticalities identified in Schneckloth.

Although Schneckloth itself dealt with the issue of whether a voluntary consent search required the defendant to have actual knowledge of a right to withhold consent, the Court also discussed a suggestion that police officers be required instead to simply advise defendants of their right to refuse. It was in the course of this discussion that the Court invoked its “thoroughly impractical” language, Justice Stewart maintaining that such a requirement would be “thoroughly impractical to impose” and that federal and

150. As Professor Adams notes: “Bright-line rulemaking in search and seizure cases is either humor or an art form; it definitely is not a science.” Id.
153. See id. at 231 (“One alternative that would go far toward proving that the subject of a search did know he had a right to refuse consent would be to advise him of that right before eliciting his consent.”). This “alternative” discussion may explain why the Robinette majority believed the rule at issue was “very similar” to the rule rejected in Schneckloth. See Ohio v. Robinette, 117 S. Ct. at 421. However, there would appear to be a substantial difference between a test involving the observable conduct of a police officer, and a test requiring the state to prove a defendant’s mental state. As Justice Stewart remarked with regards the latter of these tests, “the near impossibility of meeting this prosecutorial burden suggests why this Court has never accepted any such litmus-paper test of voluntariness.” Schneckloth, 412 U.S. at 230.
state courts had consistently rejected it. Although not offering any concrete examples of how a police officer might find such a requirement impractical, Justice Stewart noted that consent searches “normally occur on the highway, or in a person’s home or office, and under informal and unstructured conditions,” as opposed to both the structured atmosphere of a trial and the custodial interrogations that had precipitated the rule in *Miranda*. Although noting that the circumstances prompting a consent search request can develop quickly and may arise as a “logical extension of investigative police questioning,” the majority simply did not offer anything by way of specific example to illustrate why it would be “thoroughly impractical” for law enforcement officers to comply with such a rule.

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164 *Schneckloth*, 412 U.S. at 231.
165 Id. at 232. In his dissent, Justice Marshall remarked:

The Court contends that if an officer paused to inform the subject of his rights, the informality of the exchange would be destroyed. I doubt 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.

Id. at 287.
167 *Schneckloth*, 412 U.S. at 232. In his dissent, Justice Marshall responded as follows:

[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 so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. 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. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.

Id. at 288. Professor Adams has offered his own response to the Court’s assertion that such a warning would be impractical:

It simply is not impractical to give a warning in terms of language required, duration of the warning and the exigencies of most such searches. The Fifth Amendment warning about an individual’s right not to incriminate oneself apparently can be “effectively” conveyed in a sentence stating: “You have the right to remain silent; anything you say can and will be used against you.” Two more clauses advise the suspect about the right to assistance of counsel. Surely a statement to a citizen that “You have a right to refuse to consent to any search” would be neither terribly time consuming nor would it appreciably delay the search if consent were given.

Adams, *supra* note 159, at 447. Certainly, the many police departments that currently use the warning as a matter of good police practice would not appear to find the requirement
According to Justice Stevens, the considerations belying the *Miranda* result were inapplicable in the context of consent searches. *Miranda* had required detailed warnings to protect against self-incrimination because “the techniques of police questioning and the nature of custodial surroundings produce[d] an inherently coercive situation.” By contrast, “since consent searches will normally occur on a person’s own familiar territory, the specter of incommunicado police interrogation in some remote station house [was] simply inapposite.” And because there was no reason to presume police coercion, there was no need for detailed warnings in order to determine whether a consent to search had been voluntarily given.

By using the *Schneckloth* decision to support its rejection of the “free to go” rule, the *Robinette* majority clearly signaled its belief that routine traffic stops are devoid of the inherently coercive qualities associated with custodial interrogations. Indeed, this finding is consistent with the Court’s previous decision in *Berkemer v. McCarty*. In *Berkemer*, the Court had been asked to decide whether the roadside questioning of motorists detained pursuant to traffic stops constituted a “custodial interrogation” for purposes of the *Miranda* rule. Justice Marshall, writing for the majority, ruled that “[t]wo features of an ordinary traffic stop mitigate the danger that a person questioned will be induced ‘to speak where he would not otherwise do so freely.” The first of these was the presumptively brief and temporary nature of traffic stops, as opposed to the prolonged nature of station house interrogations. The Court observed that during a traffic stop a motorist expects to receive a citation, but that eventually, “he most likely will be allowed to continue on his way.” In addition, the brevity of the stop ensured that officers had little opportunity to develop and implement the questionable investigative methods that *Miranda* had sought to guard against.

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171. *Id.* at 437 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).
172. *Id.* at 437.
173. *Id.* at 438 n.27:

The brevity and spontaneity of an ordinary traffic stop also reduces the danger that the driver through subterfuge will be made to incriminate himself. One of the investigative techniques that *Miranda* was designed to guard against was the
The second feature of traffic stops that served to lessen the opportunity for coercive police conduct was that motorists did not feel completely at the mercy of the officer. In particular, because traffic stops were conducted in public, the exposure to other passing motorists “both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist’s fear that, if he does not cooperate, he will be subjected to abuse.”

By declining to revisit the assumptions made about traffic stops in Schneckloth and Berkemer, the United States Supreme Court has effectively ruled that despite an escalating “war on drugs,” routine traffic stops remain devoid of the features previously deemed to merit a presumption of coercion. In doing so, the Court has failed to appreciate that traffic stops often implicate a number of the characteristics present in Justice Stevens’ “remote station house” example.

Citizens stopped and ordered from their vehicles are no less disoriented by their physical surroundings than would be the case in a typical interrogation room. Many stops are at night, often at the sides of busy motorways, where other vehicles continue to speed past. Often the stop will occur on a stretch of road with which the motorist is unfamiliar, thereby adding to the confusion. Although Berkemer suggests that motorists should take comfort at the public exposure they are thereby subjected to, the Court has on a prior occasion recognized the substantial anxiety associated with roadside stops. In reality, the motorist standing on the side of a busy highway, possibly in inclement weather conditions, and with the public roaring past, is just as exposed to the “inherently compelling pressures which work to undermine the individual’s will” as a defendant in a remote station house.

use by police of various kinds of trickery—such as “Mutt and Jeff” routines—to elicit confessions from suspects. A police officer who stops a suspect on the highway has little chance to develop or implement a plan of this sort.

(citations omitted).

174. Id. at 438.

175. See Florida v. Bostick, 501 U.S. 429, 440 (1991) (Marshall, J., dissenting) (“Our Nation, we are told, is engaged in a ‘war on drugs.’”).

176. See supra note 174 and accompanying text.


Nor is there continued reason, assuming there was any, to believe that traffic stops are presumptively brief and limited in scope to the reasons prompting their initiation. The American Civil Liberties Union, as amicus, offered the Robinette majority various examples of traffic stops of extended length and of substantial intrusiveness. For example, George Karnes, a businessman stopped for speeding in Pennsylvania, refused to allow police officers to search his vehicle, and was only released after two and a half hours. Even consenting to a search does not necessarily result in the length of a stop being reduced. Craig Kirby, an Alabama textile worker, was stopped for speeding on Interstate 10 in Louisiana:

When the officer asked him whether he could search the car, Kirby said: "Fine." The next thing he knew, Kirby was spread-eagled against the side of his car. The officer searched his luggage and trunk and looked under his hood and dashboard. But the search didn't stop there. The officer... made him drive to a gas station, where he had mechanics take apart his spare tire. The officers also disassembled his seats... They found no drugs and told Kirby he was free to go. The ordeal lasted an hour and a half.

Unfortunately, as the majority opinion makes clear, the Court was not disposed to reconsider its prior rulings that traffic stops are presumed to be brief and temporary, notwithstanding evidence to

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179. Certainly, Justice Kennedy would appear to have conceded this point. See Maryland v. Wilson, 117 U.S. 882, 890 (1997) (Kennedy, J., dissenting) ("Traffic stops, even for minor violations, can take upwards of 30 minutes.").

180. "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (quoting Terry v. Ohio, 392 U.S. 1, 29 (1968)). But see Katz, supra note 80, at § 15.05:

The United States Supreme Court has never shown any inclination to restrict the subject matter of police discussion with a person stopped for a traffic offense. Ohio courts have taken a completely different tack indicating that police may not question or investigate motorists stopped for a traffic violation about other offenses unless reasonable suspicion arises to warrant further investigation into unrelated matters.


182. See id. at 26. The officer did not let Karnes leave but instead called for a K-9 officer with a drug-sniffing dog. When Karnes again refused to consent, the K-9 officer sniffed around the car twice, detecting no drugs. See id.

183. Id. at 28-29.
the contrary. Although the examples offered by the ACLU are
clearly anecdotal, even anecdotal evidence deserves consideration
when it rebuts a presumption otherwise unsupported.

In Schneckloth, the Court stressed that Miranda had concerned
itself with suspects detained in custody, and that its application did
not extend to non-custodial “on-the-scene questioning.” However,
the claim that the potential for coercion is mitigated in non-
custodial situations has little factual basis with which to recom-

mend itself. One commentator, relying on the experiments of noted
social psychologists Stanley Milgram and Leonard Bickman, con-
cludes that “powerful psychological forces are at work even in the
noncustodial police-citizen encounter.” Milgram found that obe-
dience to authority is “a deeply ingrained behavior tendency” in
all people, while Bickman concluded that “the degree to which a
person obeys authority largely depends upon the uniform worn by
the authority figure.” The visible trappings of authority dis-
played by police officers, in particular their badges, weapons, and
uniforms, combine with a citizen’s substantial propensity to obey
authority, to transform the officer’s request to search into a “cour-
teous expression of demand backed by force of law.” Hence,
“obedience theory casts serious doubt on the continued vitality of
what Schneckloth characterized as Miranda’s central holding: that
custody is a necessary prerequisite for a finding of psychological
coercion.”

The potential for coercive police conduct present during routine
traffic stops is only enhanced by the extraordinary discretion police
officers exercise with respect to the penalties that may result. Once
a traffic violation has occurred, the officer may have discretion to
simply warn the driver not to repeat the conduct in the future, or
he or she may issue a citation for the offense, which can result in
a costly fine. The enormous discretion an officer has to decide
the consequences a motorist will face as a result of the traffic

185. Adrian J. Barrio, Note, Rethinking Schneckloth v. Bustamonte: Incorporating Obedi-
ce Theory into the Supreme Court’s Conception of Voluntary Consent, 97 U. ILL. L.
186. Id. at 234.
187. Id. at 238.
188. Id. at 241-42.
189. Id. at 240.
190. In this case, Robinette was issued a warning for his speeding, although clearly
Deputy Newsome could have written a citation.
infraction, albeit a ticket or a warning, is the functional equivalent of the "Mutt and Jeff" interrogation technique that Miranda sought to protect against.\textsuperscript{191} If a motorist refuses to allow the officer to search the vehicle, the officer may express disapproval by issuing a ticket for the infraction, while another motorist stopped for the same traffic violation may sacrifice his or her right to privacy in order to escape with a warning.\textsuperscript{192} As Professor LaFave has noted, "a police procedure is less threatening to Fourth Amendment values when the discretionary authority of the police (and thus the risk of arbitrary action) is kept at an absolute minimum."\textsuperscript{193} The Court's rejection of the "free-to-go" rule will doubtless embolden police officers to make the most of the discretion granted them.\textsuperscript{194}

\textbf{C. Right Case, Wrong Rule}

The paucity of support in the majority opinion, and its lack of factual considerations, can in part be explained by the manner in which the Court formulated the question presented for review. Clearly, the rule promulgated by the Ohio Supreme Court was not as broad or as sweeping as the issue that the United States Su-
preme Court undertook to resolve. Setting aside the peculiarities surrounding the legal significance of the syllabus in Ohio Supreme Court opinions, the Court clearly stated in the second sentence of its opinion, "We find that the search was invalid since it was the product of an unlawful seizure." While the United States Supreme Court discussed the legal standards pertaining to voluntariness in the context of consent searches, the Ohio Supreme Court had focused instead on the seamless transition between a detention and a consensual encounter. Indeed, the Ohio court cited Florida v. Royer for the proposition that a consent given in the course of an illegal detention is only valid if the state proves that "the consent was not the product of the illegal detention but the result of an independent act of free will." The Court then applied this test to the facts of the case, finding that the state had failed to meet its burden. In dealing with the predicate jurisdictional questions, the United States Supreme Court claimed it was "permissible for [the Court] to turn to the body of the opinion to discern the grounds for decision." Had the Court done so, it would have discovered that the Ohio Supreme Court made no reference to the totality of the circumstances test for determining whether a consent has been made voluntarily, and certainly did not suggest that such a test be supplanted by a rule requiring all consents to be preceded by the "free-to-go" language.

What makes this observation more startling is that Chief Justice Rehnquist was apparently aware of it. In response to Robinette's contention that the basis for the Ohio Supreme Court's decision would preclude the United States Supreme Court from reaching the question presented for review, the majority elected to treat the legality of the detention as a predicate question "fairly included" in

195. See supra note 87 and accompanying text.
197. See id. at 698-99.
199. State v. Robinette, 653 N.E.2d at 698.
200. See supra notes 81-87 and accompanying text.
202. But see id. at 421 ("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. The Supreme Court of Ohio having held otherwise, its judgment is reversed.") (citations omitted).
its ultimate decision. The Court then construed the Ohio court as having found the detention to be illegal based on the subjective motivations of Deputy Newsome, notwithstanding the lower court's concern with detentions that went beyond the purpose of the original stop. Having done so, the predicate question became a rather simple one in light of the Court's prior decision in Whren.

Unfortunately, the Chief Justice, in his haste to strike down the "free-to-go" rule, did not pause to consider an alternative possibility. If the Ohio Supreme Court had wrongly concluded that Robinette had been illegally detained, then a more restrained disposition would have been to remand the case for reconsideration, with instructions for the Ohio Supreme Court to determine whether Robinette had voluntarily consented to the search based on his detention being legal. Presumably, only if the majority had agreed with the Ohio Supreme Court that Robinette had been illegally detained would they then have needed to consider the lower court's treatment of the voluntariness of the consent. Alternatively, because the trial court made a factual finding that the traffic matter had concluded prior to Robinette giving his consent, the Court could simply have reversed the Ohio Supreme Court's ruling to the contrary, without passing on the "free to go" rule. Regrettably, because only Justice Stevens in his dissent was prepared to acknowledge the potentially dispositive effect of the majority's ruling on the legality of Robinette's detention, the Court, in essence, crafted a "straw rule," a rule not even considered by the lower courts, and barely touched upon in the briefs submitted by the parties. It is hardly surprising that the Chief Justice dispatched the rule in such rapid fashion. This lack of judicial self-restraint helps in part to explain the unfortunate result.

203. Id. at 420. The Court also mentioned that Robinette had not made this argument in his brief in opposition to certiorari, in violation of Supreme Court Rule 15.2. Id.
204. See State v. Robinette, 653 N.E.2d at 698 ("Newsome asked Robinette to step out of his car for the sole purpose of conducting a line of questioning that was not related to the initial speeding stop and that was not based on any specific or articulable facts that would provide probable cause for the extension of the scope of the seizure.").
205. See supra notes 92-93 and accompanying text.
206. The prospective nature of the rule itself would offer additional support for this disposition.
207. This is true, notwithstanding the fact that Justice Stevens would have affirmed the Ohio court's ruling. See Ohio v. Robinette, 117 S. Ct. at 426 ("[T]hese determinations were independent of the bright-line rule criticized by the majority.").
D. "Free to go" Back to Fourth Amendment Basics

Less than twenty years ago, the United States Supreme Court stated that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."\(^{203}\) A proper application of this test requires consideration of not only the "reasonableness" of post-detention interrogations by police officers, measured against an objective standard,\(^{209}\) but also of the extent to which such practices might be restricted by requiring a prophylactic warning, like the "free-to-go" rule, as a precursor to any such questioning. While few would doubt the compelling need for police officers to apprehend and recover drugs and other contraband, the effectiveness of a particular method does not itself merit the depreciation of Fourth Amendment rights.\(^{20}\) In retaining the totality of the circumstances approach, Chief Justice Rehnquist apparently overlooked this test, preferring instead to declare, without elaboration, that forcing police officers to give warnings to their detainees was "unrealistic."\(^{211}\) This statement is even more astonishing in light of Justice Stevens' observation that a number of law enforcement agencies make regular use of such warnings as a matter of "good police practice."\(^{212}\)

The totality of the circumstances approach has proved ineffective as a method of protecting detained motorists from coercive police conduct, in part because of the judicial assumptions upon which it relies. A number of the assumptions underlying the test simply have no factual basis to support them. For example, courts generally assume that citizens know their substantive rights, including the right to leave a police officer mid-interrogation and to go


\(^{209}\) See id. ("The reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test.") (footnotes omitted).

\(^{211}\) See Florida v. Bostick, 501 U.S. 429, 440 (1991) (Marshall, J., dissenting) ("the effectiveness of a law-enforcement technique is not proof of its constitutionality"); Mincey v. Arizona, 437 U.S. 385, 393 (1978) ("the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment").

\(^{212}\) Ohio v. Robinette, 117 S. Ct. at 421.
their way.\textsuperscript{213} In reality, empirical research reveals otherwise. As one commentator has noted in the context of voluntary consent searches, "the weight of scientific authority suggests that a suspect's ignorance of fundamental Fourth Amendment rights must be viewed as a state of mind that renders a suspect's consent involuntary."\textsuperscript{214} Because the right to refuse consent is commensurate with, and in some cases predicated on, the right to terminate a purportedly consensual encounter, it follows that motorists interrogated about contraband at the conclusion of a routine traffic stop are simply unaware of their right to decline the officer's questions and to go about their business.\textsuperscript{215} Rather, most people believe they are in custody as long as a police officer continues to ask them questions,\textsuperscript{216} and there is nothing inherently unreasonable in such a belief. In fact, during a moment of unprecedented candor, the United States Supreme Court has recognized as much, stating 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 they might do so."\textsuperscript{217}

A more subtle flaw with the totality of the circumstances approach is that the ad-hoc determinations it favors do not adequately permit courts to consider the broader societal impact of police investigative methods in the way that a \textit{per se} rule permits. An adjudication based on the circumstances of a single defendant cannot take cognizance of the impact of post-traffic stop interrogations

\textsuperscript{213} See Florida v. Bostick, 501 U.S. 429, 434 (1991) ("So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual.") (citing California v. Hodari D., 499 U.S. 621, 628, (1991)); Barrio, supra note 185, at 246 n.238 ("When a police officer approaches an individual and asks a few questions, or otherwise engages in conduct that does not rise to the level of a seizure, individuals are presumed to know that they are free to decline the officers' requests or otherwise terminate the encounter.") (citing Bostick, 501 U.S. at 434-36). The assumption that individuals know of their right to terminate an encounter with a police officer is not without its critics. See People v. Spicer, 203 Cal. Rptr. 599, 602 (Cal. Ct. App. 1984) ("The rationale for not treating [consensual] encounters as seizures is that the individual is free to disregard the officer's questions and walk away. While this may be the greatest legal fiction of the late 20th Century, we are bound to give it due regard.") (citations omitted); State v. Sby, 373 So. 2d 145, 149 (La. 1979) ("It would be difficult to find in the annals of the law any instance in which a citizen had successfully exercised this right.").

\textsuperscript{214} Barrio, supra note 185, at 247.

\textsuperscript{215} See Dripps, supra note 29, at 66 ("The consent doctrine now in practice elevates the authority to stop to the level of the authority to search.").

\textsuperscript{216} See Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Ohio at 18, Ohio v. Robinette, 117 S. Ct. 417 (1996) (No. 95-891).

as they occur on a larger scale. As Justice Stevens has recently noted:

Th[e] burden [imposed on citizens] may well be "minimal" in individual cases. But countless citizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands may well consider the burden to be significant. In all events, the aggregation of thousands upon thousands of petty indignities has an impact on freedom that I would characterize as substantial.\(^\text{218}\)

The totality of the circumstances approach would be of limited use, for example, if it were shown that police officers in a certain area were disproportionately requesting consent to search vehicles of motorists belonging to a particular minority group\(^\text{219}\) based on a belief that members of the group were less likely to know of their right to refuse. The "free-to-go" rule announced by the Ohio Supreme Court would effectively remove any incentive for police officers to engage in this type of conduct. The rule would require police officers to ensure that all citizens, irrespective of membership in any minority group, be equally well informed, at least with respect to their right not to have to wait around and undergo further interrogation.\(^\text{220}\) Presumably, the benefits in knowledge disparity accruing to police officers from selectively targeting minority motorists would all but disappear. Although the totality of the circumstances approach may consider factors such as race and level of education, courts cannot deter the police conduct in question without systematically suppressing all evidence perceived to have


\(^{219}\) This may not be as "hypothetical" as it appears. See Luther Wright, Jr., Note, Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications, 48 VAND. L. REV. 513, 555 (1995) ("Judges have noted that there is a nationwide tendency to stop minority drivers . . . primarily because of their race."); see also Florida v. Bostick, 501 U.S. 429, 441 n.1 (1991) (Marshall, J., dissenting) (discussing use of race as factor in deciding who to approach in suspicionless police sweeps of Greyhound buses).

\(^{220}\) The fact that citizens have different degrees of knowledge with respect to their constitutional rights has been noted by Justice Marshall in his characterization of the Schneckloth decision as one "confining[ing] the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and . . . the few"). Schneckloth v. Bustamonte, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting).
resulted from minority targeting. And this would be functionally
equivalent to a bright-line test, with minority status being the dis-
positive factor.

If traffic stops were actually as brief as the United States Su-
preme Court believes them to be, and if police officers adhered to
the dictates of *Terry* and its progeny by detaining motorists only
for as long as necessary to conclude the matter giving rise to the
stop, then the "free-to-go" rule would impose no burden whatsoev-
er on law enforcement techniques. And if police officers are con-
cluding otherwise valid stops by launching into drug interdiction
interrogations without reasonable and articulable suspicion, then the
judiciary need not concern itself with the debilitating effect such a
rule might impose on such methods. Even with the rule in place,
some innocent motorists will still seek to assert their innocence by
forgoing their right to refuse and by permitting an officer to con-
duct a search, albeit on a more knowledgeable basis. Certainly, the
rule does not restrict police officers in gathering articulable facts
during the course of the stop from which to justify a prolonged
detention. And, no doubt, some defendants in possession of illicit
contraband, even after having been told of their right to leave, will
still consent to remain for questioning and a possible search, for
reasons best left to speculation. The "free-to-go" rule is not a
burden on otherwise lawful police activity, but instead a method of
reducing the substantial possibility that police officers will engage
in coercive conduct in situations where they so clearly hold the
psychological upperhand. As the United States Supreme Court
once noted, "[i]f the exercise of constitutional rights will thwart the
effectiveness of a system of law enforcement, then there is some-
thing very wrong with that system."

Professor Katz has noted that Ohio is a "pioneer state" in the

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221. See *Barrio*, supra note 185, at 242 (suggesting that the question that has baffled
courts and commentators since the inception of the consent search is "[w]hy would a
guilty suspect consent to a search that, by virtue of his guilt, is certain to uncover in-
criminating evidence?"); *Dripps*, supra note 29, at 66 ("Why would someone with illegal
drugs consent to a search that could lead to a long term in prison? The obvious answer
is that the person did not feel free to withhold consent."). Not surprisingly, in order to
adequately respond to this question the Court has relied on another assumption: that the
individual being asked to consent is an innocent person. *See Bostick*, 501 U.S. at 438
("The 'reasonable person' test presupposes an innocent person.").

222. See *Schneckloth*, 412 U.S. at 289-90 (Marshall, J., dissenting) ("The Court now
sanctions a game of blindman's buff, in which the police always have the upper hand,
for the sake of nothing more than the convenience of the police.").

effort to provide additional protection for its citizens' constitutional rights to be free of unreasonable searches and seizures. An example of this pioneering effort is \textit{State v. Retherford}, wherein the Court of Appeals for Montgomery County ruled that even though a police officer had informed the detained motorist that she was free to go, the ensuing interrogation would not be construed as a consensual encounter. In effect, the court required that any interrogation beyond that necessary to conclude the initial traffic violation must be based on reasonable and articulable suspicion. Although the Ohio Supreme Court has not expanded constitutional protection to this extent, the case nonetheless illustrates that in Ohio at least, courts are recognizing the potentially coercive nature of traffic stops and the increasingly intrusive methods being used by police officers engaged in the war on drugs. So too, in the spirit of federalism, state courts are free to develop methods of their own to restore the constitutional balance. The responsibility of state courts to do so is only increased by the United States Supreme Court's reluctance to do anything that might disrupt the war effort.

\section*{IV. CONCLUSION}

The United States Supreme Court has shown no inclination to depart from its continued eradication of Fourth Amendment protections. On remand, the Ohio Supreme Court should be encouraged to return to the traditional balancing approach, so long used to evaluate the reasonableness of police methods, and should reaffirm its prior decision that Ohio law requires a \textit{per se} rule for

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\begin{itemize}
\item \textsuperscript{224} \textit{Katz}, supr note 80, § 15.01 ("Controlling police conduct during [traffic] stops is the area of the law where Ohio has been the pioneer state struggling to create new standards to protect rights guaranteed under the Fourth Amendment and the Ohio Constitution while attempting to accommodate legitimate law enforcement needs.").
\item \textsuperscript{225} 639 N.E.2d 498 (Ohio Ct. App. 1994).
\item \textsuperscript{226} None other than Deputy Newsome. \textit{See id.} at 501.
\item \textsuperscript{227} \textit{See id.} at 507-08.
\item \textsuperscript{228} \textit{See id.}
\item \textsuperscript{229} For example, the court in \textit{Retherford} remarked:
\end{itemize}

\begin{quotation}
\[I]t has become clear to us that some police agencies in Ohio are instructing their officers to routinely ask for the consent of individuals stopped for traffic violations to search their vehicles and its contents for drugs, weapons, or large sums of money, even when the officer has little or no suspicion that the occupants of the vehicle are engaged in any criminal activity whatsoever, or that the vehicle itself contains any contraband.
\end{quotation}

\textit{Id.} at 503.
determining when a lawful detention has become a consensual encounter. In doing so, the Court should recognize the opportunities for coercive police conduct presented by routine traffic stops, and acknowledge that the traditional “totality of the circumstances” approach has been ineffective at reducing the incidence of such conduct. Requiring police officers to inform lawfully detained motorists that a traffic stop has concluded as a prerequisite to a subsequent consensual encounter does not pose significant burdens on constitutional law-enforcement techniques, and affords a more certain basis for decision making to motorists and police officers alike. And, as Justice Ginsberg cogently observed, the free-to-go rule does not create additional constitutional rights, but simply provides a mechanism for reducing the number of violations of rights already textually guaranteed.

The majority opinion in *Robinette* characterizes the “free-to-go” rule as “unrealistic.” Nearly twenty-five years ago, Justice Thurgood Marshall concluded his dissent in *Schneckloth* by suggesting that a proper resolution of the consent issue depended in part on a “realistic assessment of the nature of the interchange between citizens and the police,” and that the Court could not avoid “being judged by how well its image of these interchanges accords with reality.” To the extent that the *Robinette* majority makes no attempt to base its ruling on the actualities of real life police-citizen encounters, Justice Marshall’s admonitions take on a prophetic ring. Fortunately, the Ohio Supreme Court has before it the opportunity to demonstrate its own appreciation for the reality of traffic stops, and to show itself more attuned to the dangers of coercion they present.

**ADDENDUM**

On November 12, 1997, after this Comment had been readied for publication, the Ohio Supreme Court issued its decision on

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20. See Escobedo v. Illinois, 378 U.S. 478, 490 (1964) (“No system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights.”).

21. See *supra* notes 112-13 and accompanying text.

22. See Ohio v. Robinette, 117 S. Ct. 417, 423 (1996) (“The first-tell-then-ask rule seems to be a prophylactic measure not so much extracted from the text of any constitutional provision as crafted by the Ohio Supreme Court to reduce the number of violations of textually guaranteed rights.”).

remand. In a majority opinion written by Justice Lundberg Stratton the court declined to reaffirm its previous decision under the adequate and independent ground of the Ohio Constitution. The court did recognize a current trend among state courts to place additional restraints on police activity based on state constitutions "independently of protections afforded by the United States Constitution," a process the court referred to as "New Federalism." However, the majority ruled that because the language in Section 14, Article 1 of the Ohio Constitution was virtually identical to the language found in the Fourth Amendment to the United States Constitution, there was no reason to depart from earlier holdings that the two provisions were "coextensive" and offered the same degree of protection.

Although rejecting the "free-to-go" rule previously announced, the majority nonetheless affirmed its prior decision to suppress the evidence seized during the search of Robinette's vehicle. The majority acknowledged that the initial stop had been justified because Robinette had been speeding. Ordering Robinette to exit the vehicle during the traffic stop was also justified based on the United States Supreme Court's prior ruling in Pennsylvania v. Mimms. However, once Deputy Newsome issued the warning to Robinette, the reason for the stop ended.

The majority also modified its original syllabus in the manner suggested by Justice Stevens' dissenting opinion to take into account the United States Supreme Court decision in Whren v. United States. As modified, the new syllabus read:

When a police officer's objective justification to continue detention of a person stopped for a traffic violation for the

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235. Id. at *4.
236. See id. at *5. In particular the court made reference to its prior decision in State v. Geraldo, 68 Ohio St.2d 120, 125 (1981), wherein the court had stated that it was "disinclined to impose greater restrictions in the absence of explicit state constitutional guarantees protecting against invasions of privacy that clearly transcend the Fourth Amendment."
238. 434 U.S. 106 (1977) (finding it per se reasonable for a police officer to order the driver of a lawfully stopped vehicle to get out).
240. 116 S. Ct. 1769 (1996) (holding that a police officer's subjective motivations do not invalidate a detention as long as there is objective evidence to support the officer's conduct).
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 search constitutes an illegal seizure.\textsuperscript{241}

The court then asked whether Deputy Newsome had been objectively justified in detaining Robinette to ask him about contraband once the speeding warning had been issued.\textsuperscript{242} According to the majority, \textit{Florida v. Royer}\textsuperscript{243} and \textit{Brown v. Texas}\textsuperscript{244} together stood for the proposition that "police officers under certain circumstances, may briefly detain an individual without reasonably articulable facts giving rise to suspicion of criminal activity, if the detention promotes a legitimate public concern, e.g., removing drunk drivers from public roadways or reducing drug trade."\textsuperscript{245}

Because the drug interdiction policy Deputy Newsome was operating pursuant to promoted a public interest in quelling the drug trade, the continued detention of Robinette was justified even though Newsome had no reasonable and articulable suspicion of criminal activity on the part of Robinette.\textsuperscript{246}

However, once the contraband question had been asked, the majority determined that in order to further detain Robinette and to request permission to search his vehicle, Deputy Newsome needed an individualized suspicion of criminal activity.\textsuperscript{247} Because Newsome "did not have any reasonably articulable facts or individualized suspicion to justify Robinette's further detention in order to ask to search his car," Robinette's detention became unlawful.\textsuperscript{248}

Recognizing that the unlawful detention did not end the inquiry, the majority noted that "voluntary consent, determined under the totality of the circumstances, may validate an otherwise illegal detention and search."\textsuperscript{249} More specifically, the court declared that:

\begin{itemize}
  \item \textsuperscript{241} \textit{Robinette}, 1997 WL 675044, at *6.
  \item \textsuperscript{242} \textit{See id.}
  \item \textsuperscript{243} 460 U.S. 491 (1983).
  \item \textsuperscript{244} 443 U.S. 47 (1979).
  \item \textsuperscript{245} \textit{Robinette}, 1997 WL 675044, at *7.
  \item \textsuperscript{246} \textit{See id.}
  \item \textsuperscript{247} \textit{See id.}
  \item \textsuperscript{248} \textit{Id.}
  \item \textsuperscript{249} \textit{Id.} at *8.
\end{itemize}
[O]nce 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 reasonable person would believe that he or she had the freedom to refuse to answer further questions and could in fact leave.  

Applying this test, the majority believed the record failed to show Robinette had voluntarily consented to the search.  

In a well-reasoned and thoughtful concurring opinion Justice Cook took issue with the majority's assertion that once Robinette had received the warning his continued detention had been reasonable. The majority had relied on Royer and Brown to support its position that no individualized suspicion was required to justify asking Robinette if he had any contraband. However, as Justice Cook noted, Royer had discussed consensual encounters—situations where no Fourth Amendment seizure had occurred—and seizures made pursuant to an officer's reasonable suspicion of criminal activity. Royer simply did not discuss or offer legal support for seizures made in the absence of reasonable suspicion. And while Brown had indeed made reference to situations where persons could be temporarily seized in the absence of any individual suspicion, the Court had also stated that such seizures were only reasonable if "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Because the State of Ohio had not argued that Robinette's interrogation had been a consensual encounter, and had offered no evidence that the drug interdiction policy had met the standards of neutrality referred to in Brown, in the opinion of Justice Cook, Robinette had been unlawfully seized at the time Deputy Newsome asked his

250 Id. at *11.
251 See id.
252 See id. at *12 (Cook, J., concurring in the judgment).
253 See id.
254 See id.
255 Id. (citing Brown v. Texas, 443 U.S. 47, 51 (1979)). As support for this proposition, the Court in Brown had made reference to Delaware v. Prouse, 440 U.S. 648 (1979), in which the Court had held that a police officer could not stop an automobile to check the driver's license and registration in the absence of reasonable suspicion, and to United States v. Martinez-Fuerte, 428 U.S. 543 (1976), in which the Court had approved of suspicionless stops at permanent checkpoints away from the national border.
question concerning contraband. Nonetheless, because the State had not met its burden of showing that the consent to search had been made during a period of lawful detention, Justice Cook agreed with the majority that the evidence seized should be suppressed.

Justice Sweeney, who had dissented in the court's prior decision, again dissent, this time agreeing with the test announced by the majority but disagreeing with the majority's determination that the record failed to show voluntariness. Accordingly, Justice Sweeney believed "that there was no coercion and that Robinette voluntarily consented to the search of the vehicle."

Notwithstanding the logical flaws so effectively noted by Justice Cook, the most disappointing feature of the majority opinion is the court's refusal to grant additional protection to Ohio citizens based on Section 14, Article 1 of the Ohio Constitution. Unfortunately, the court focused primarily on the similarity of the language used in the federal and state constitutional provisions and the supposed need for harmony, rather than on the enhanced ability of state courts to recognize and remedy situations where citizens are inadequately protected under federal jurisprudence. This is especially surprising given that the majority purported to recognize the coercive nature of the traffic stops in question. In reviewing the record the majority noted that Newsome's phrasing of his question, the "seamless transition" between the issuance of the warning and the drug interrogation, and the Deputy's superior position of authority all combined to create a situation in which any reasonable person would have felt compelled to answer the question rather than to leave. Indeed, the majority noted that "while Newsome's questioning was not expressly coercive, the circumstances surrounding the request to search made the questioning impliedly coercive."

A point worth salvaging from the decision is that while the "free-to-go" language may not be constitutionally required, the Ohio Supreme Court nonetheless makes a point of encouraging law enforcement agencies to consider using it anyway. In a footnote

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256. See Robinette, 1997 WL 675044, at *12.
257. See id. at *13.
258. See id. at *14 (Sweeney, J., dissenting).
259. Id.
260. See id. at *10.
261. Id.
passage, the majority states that while the "free-to-go" language may not be an absolute requirement for showing a voluntary consent:

[I]f police wish to pursue a policy of searching vehicles without probable cause or reasonably articulable facts, the police should ensure that the detainee knows that he or she is free to refuse consent despite the officer's request to search or risk that any fruits of any such search might be suppressed.\textsuperscript{262}

However, while this may indicate the significant weight courts may attach to an officer's use of the "free-to-go" language as part of the totality of the circumstances consideration, it is of little comfort to those who believe the very purpose of the Fourth Amendment was to preclude law enforcement agencies from "pursu[ing] a policy of searching vehicles without probable cause or reasonably articulable facts."\textsuperscript{263}

\textbf{IAN D. MIDGLEY}

\begin{footnotesize}
\textsuperscript{262} Id. at *11 n.6.
\textsuperscript{263} Id.
\end{footnotesize}