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FREE TO LEAVE? AN EMPIRICAL LOOK AT THE FOURTH AMENDMENT'S SEIZURE STANDARD

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So what do we do if we don't know? I can follow my instinct. My instinct is he would feel he wasn't free because the red light's flashing. That's just one person's instinct. Or I could say, let's look for some studies. They could have asked people about this, and there are none What should I do? . . . Look for more studies?

—Justice Stephen Breyer¹

Maybe we can just pass until the studies are done?

—Justice Antonin Scalia²

Whether a person has been “seized” often determines if he or she receives Fourth Amendment protection. The U.S. Supreme Court has established a standard for identifying seizures: a person is seized when a reasonable person in his situation would not have felt “free to leave” or otherwise to terminate the encounter with law enforcement. In applying that standard, today’s courts conduct crucial seizure inquiries relying only upon their own beliefs about when a reasonable person would feel free to leave. But both the Court and scholars have noted that although empirical evidence about whether people actually feel free to leave would help guide the seizure inquiry, no such evidence presently exists. This Article presents the first empirical study of whether people would actually feel free to leave

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¹ Transcript of Oral Argument at 43, *Brendlin v. California*, 127 S. Ct. 2400 (2007) (No. 06-8120) (Breyer, J.).

² *Id.* at 44 (Scalia, J.).

in two situations in which the Court has held that people would: on public sidewalks and on buses. Drawing on a survey of 406 randomly selected Boston residents, this Article concludes that people would not feel free to end their encounters with the police. Under the Court's current standard, respondents would be seized within the meaning of the Fourth Amendment in both scenarios. The data also show that knowledge of one's legal right to end the encounter with the police would not make people feel free to leave, and that women and people under twenty-five would feel less free to leave than would men and people over twenty-five. This initial empirical evidence suggests the need to rethink the current seizure standard.

I. INTRODUCTION

During recent oral arguments in *Brendlin v. California*,³ Justices Breyer and Scalia both noted the lack of empirical evidence informing the application of the Supreme Court's standard for identifying a seizure. That standard mandates that a person interacting with a law enforcement officer is seized only when, "in view of all of the circumstances surrounding the incident," a reasonable person would have felt free "to leave,"⁴ "to decline the officers' requests,"⁵ or "otherwise [to] terminate the encounter."⁶ In applying its standard, the Court has determined, without empirical evidence, whether reasonable people would in fact feel free to leave or to terminate specific encounters with law enforcement. For instance, the Court has found that people would feel free to leave when approached and questioned by an officer while on a public street or on a Greyhound bus.⁷ But would actual people feel free to leave in the situations where the Justices believe that a reasonable person would do so? Although the reasonable person described by the Court and the average person described

³ 127 S. Ct. 2400 (2007).

⁴ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion). The actual language in *Mendenhall* is whether a reasonable person "would have believed he was not free to leave," *id.*, but later references to the standard have used the wording "felt free to leave." See, e.g., *Florida v. Bostick*, 501 U.S. 429, 435-36 (1991); *California v. Hodari D.*, 499 U.S. 621, 639-40 (1991) (Stevens, J., dissenting); Transcript of Oral Argument at 43, *Brendlin*, 127 S. Ct. 2400 (No. 06-8120) (Breyer, J.). In addition, the Court seems never to have drawn a distinction between "believed he was not free" and "did not feel free."

⁵ *United States v. Drayton*, 536 U.S. 194, 202 (2002).

⁶ *Id.* This Article collectively refers to these tests as asking whether a person felt "free to leave."

⁷ See, e.g., *Muehler v. Mena*, 544 U.S. 93, 101 (2005) ("We have held repeatedly that mere police questioning does not constitute a seizure." (internal quotation marks omitted)).

by empirical data will not be identical, they should be similar.⁸ Data about how the actual person feels, therefore, would either support or call into question the Court's application of its seizure standard.

This Article presents the first set of empirical evidence that addresses whether or not actual people would feel free to terminate simple encounters with law enforcement officers.⁹ There are three principal findings. Based on data from a survey administered to 406 randomly selected people in Boston, I conclude that, in two situations in which a person is approached by a police officer, people *would not* feel free to terminate their encounters with the police. These two situations are similar to situations in which the Court has held that people *would* feel free to leave.¹⁰ Furthermore, women and people under twenty-five would feel even less free than average. The data showed no statistically significant differences between races or levels of income. Finally, even people who know they have the right not to talk to a police officer would not feel free to terminate such encounters. Others have predicted that people would not feel free to leave¹¹ and that knowledge

⁸ As discussed below, the reasonable person described by the Court should act and feel roughly the way the average person described by the results of the survey should. *See infra* text accompanying notes 161-68.

⁹ Janice Nadler has noted that “[t]he simplest way to determine whether a reasonable person voluntarily consented to a police search is simply to ask them, ‘To what extent did you feel free to decline the officer’s request?’” Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 201. But she concluded “that no one has asked this question.” *Id.*; see Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 552 (2001) (“The author knows of no scientific study on this issue directly, but there is no reason one could not be undertaken.”). Burkoff does cite an unpublished undergraduate thesis that surveyed Florida State University students and law enforcement officers about whether they believed a person would feel free to leave once he had refused an officer’s request to search his car. John M. Burkoff, *Search Me?*, 39 TEX. TECH L. REV. 1109, 1119-20 (2007). But that survey focused on the voluntariness of consent searches, a question related to, but not identical to, the subject of this Article.

¹⁰ *See supra* note 7.

¹¹ *See, e.g.*, Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN’S L. REV. 535, 555 (2002) (“[M]ost people who have been stopped understand that they are not free to leave until the police officer tells them so.”); Tracey Maclin, “*Black and Blue Encounters*” – *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 249 (1991) [hereinafter Maclin, “*Black and Blue Encounters*”] (“The average, reasonable individual—whether he or she be found on the street, in an airport lobby, inside a factory, or seated on a bus or train—will not feel free to walk away from a typical police confrontation.”); Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 28 (2008) [hereinafter Maclin, *The Good and Bad News*] (“[E]veryone else knows [that] a police ‘request’ to search a bag or automobile is understood by most persons as a ‘command.’”); Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 137 (2003) (“Would any reasonable worker feel free to leave under

of rights would still not make people feel free to leave,¹² but no one has shown that reality with data.

These findings raise troubling questions about the way the Court has protected the rights guaranteed by the Fourth Amendment.¹³ A person who is seized by law enforcement officers may challenge his seizure if it is not supported by probable cause,¹⁴ and evidence obtained as a result of an illegal seizure may be suppressed;¹⁵ in contrast, a person who is not considered seized (or searched) receives no Fourth Amendment protection at all. Since the Court is finding that people would feel free to leave in situations in which people actually would not feel free, the Court is considering too few people to be seized. Those people who should have been considered seized, but are not so considered under the current standard, are thus deprived the protections of the Fourth Amendment.

To address these questions, the Court should consider changes to its seizure standard. Two possible changes present themselves for consideration. If one believes that the people whom the court is currently identifying as seized *should* be identified as seized, then a solution would be to change the wording of the test to bring it and its results into harmony. If one believes instead that the courts are finding too few people to be seized, then a solution would be to keep the current test, but to apply it more realistically to the facts of each case. Either of these solutions would improve the current situation in which some people who should be considered seized are not. The data do not, however, support requiring police officers to give a warning before interacting with potential suspects or witnesses.

This Article proceeds in five Parts. Part II provides background, discussing the development of the Court's seizure doctrine and the existing evidence about the accuracy of that doctrine. Part III provides the methodology for the survey and discusses attempts to mitigate bias. Part IV

these circumstances? In the world in which most people live, the answer is no."); *see also* RONALD JAY ALLEN ET AL., *CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL* 404 (2005) ("[D]oes the average person when approached by a police officer feel free to terminate the encounter . . . ? Isn't the seizure test in fact a legal fiction . . . ?").

¹² *See infra* text accompanying notes 88-110.

¹³ Steinbock, *supra* note 9, at 535-36 (discussing other troubling consequences of the Court's jurisprudence).

¹⁴ A seizure is unconstitutional if it occurs without a warrant or probable cause, or, in some cases, without reasonable suspicion. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE* §§ 7-9 (2006) (reviewing the kinds of justifications that make a seizure "reasonable," that is, constitutionally permissible).

¹⁵ Evidence gathered during such a seizure would be inadmissible in court. *E.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the exclusionary rule to state trials); *Weeks v. United States*, 232 U.S. 383 (1914) (establishing the federal exclusionary rule).

lays out the results of the survey, and Part V considers some implications of those results, considering changes to the seizure standard.

II. BACKGROUND

This Part examines the current views of the Supreme Court and commentators about when people feel free to leave their encounters with the police. It first discusses the Court's application, over the last thirty years, of its free-to-leave standard for determining whether an individual has been seized. In applying that standard, the Court has required a showing of considerable coercion on the part of police officers before it seems willing to find that a person has been seized. Next, this Part discusses the limited evidence concerning when people actually do feel free to leave during such encounters. Evidence from analyses of data on consent searches resulting from traffic stops and a wide variety of psychological research suggests that, in contrast to the Court's holdings, people rarely, if ever, act freely and voluntarily when interacting with the police. Finally, this Part explores the debate in existing literature about whether knowledge of one's freedom to decline police requests makes one more likely to feel free to decline those requests. There is no clear answer in the existing literature.

A. THE COURT REQUIRES A STRONG SHOWING OF COERCION BEFORE IT WILL FIND A PERSON DID NOT FEEL FREE TO LEAVE

Under the Supreme Court's seizure doctrine, not all encounters with the police constitute seizures.¹⁶ A seizure occurs only when an officer restrains "the liberty of a citizen" either through the use of physical force or by a show of authority.¹⁷ While seizures resulting from use of physical force are relatively easy to identify,¹⁸ the Court created a standard to help it determine when a person was sufficiently coerced by a show of authority to be considered seized. In applying that standard, the Court has set a high bar for the kinds of encounters that qualify as "seizures."

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

¹⁷ *Id.* ("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."); see *Brendlin v. California*, 127 S. Ct. 2400, 2405 (2007) ("A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned.").

¹⁸ These seizures involved handcuffs or other ways of physically restraining a suspect. See, e.g., *California v. Hodari D.*, 499 U.S. 621, 629 (1991) (holding that defendant was seized when "he was tackled" by a police officer).

In *Mendenhall* in 1980, Justice Stewart introduced the test used today to identify a seizure accomplished by a show of authority (rather than physical force). Stewart declared that such a seizure occurs if “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”¹⁹ The standard is an objective one, asking “not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer’s words and actions would have conveyed that to a reasonable person.”²⁰ Justice Stewart explained that since the Fourth Amendment’s prohibition on seizures exists “to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals,” so long as “the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy.”²¹ The standard is meant to avoid imposing “wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices” by turning every investigation into an unconstitutional seizure.²²

Applying the free-to-leave standard to the facts of *Mendenhall*, the Court determined that a woman approached and questioned by Drug Enforcement Agency agents in the public concourse of an airport was not seized.²³ The Court noted that the agents wore no uniforms, displayed no weapons, “requested” rather than demanded to see the woman’s identification, and asked her a few questions.²⁴ The Court determined that “nothing in the record suggests that the [woman] had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way.”²⁵

The Court repeatedly used the free-to-leave standard after *Mendenhall*.²⁶ For example, the Court in *Royer* found that a person

¹⁹ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion).

²⁰ *Hodari D.*, 499 U.S. at 628. Because the test is objective, “neither the subjective intentions of the particular officer nor the subjective expectations of the particular suspect are determinative.” Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment “Seizures”?*, 1991 U. ILL. L. REV. 729, 738.

²¹ *Mendenhall*, 446 U.S. at 554.

²² *Id.* at 555.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Brendlin v. California*, 127 S. Ct. 2400, 2405 (2007); *Ohio v. Robinette*, 519 U.S. 33, 46 (1996); *California v. Hodari D.*, 499 U.S. 621, 627 (1991); *Brower v. County of Inyo*, 489 U.S. 593, 600-01 (1989) (Stevens, J., concurring in the judgment); *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (“The Court has . . . embraced this test”); *INS v. Delgado*, 466 U.S. 210, 214 (1984); *Florida v. Royer*, 460 U.S. 491, 516 n.1 (1983). The test has been widely used in the federal circuit courts as well. *See, e.g., Belcher v. Norton*, 497 F.3d 742, 747-48 (7th Cir. 2007) (“In order to establish that Deputy Marshal Norton’s actions

approached by narcotics agents in an airport had been seized.²⁷ The seizure did not occur when the officers first approached and questioned Royer, as similar officers had done in *Mendenhall*, but rather “when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver’s license and without indicating in any way that he was free to depart.”²⁸ The Court believed this greater show of authority would have made a reasonable person believe he was not free to leave.²⁹

In contrast, the Court did not find a seizure in *Delgado*, a case in which Immigration and Naturalization Service (INS) agents searching for illegal workers questioned the entire work forces of two factories.³⁰ Though INS agents were positioned at the exits to the factories and caused “some disruption,” the record indicated that the agents did not prevent workers from moving about the factory.³¹ The Court reasoned that “[i]f mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits.”³² Finally, in *Michigan v. Chesternut*, the Court concluded Chesternut was not seized even though a police car followed him for a short distance and then drove parallel to him as he ran.³³ The Court believed the “brief acceleration to catch up” and the “short drive alongside him” were not “so intimidating” that respondent could reasonably believe “he was not free to disregard the police presence and go about his business” as he continued walking.³⁴

The Court in *Chesternut* added a further justification for its free-to-leave test. Because the test focuses on what a reasonable man would believe, it allows for “consistent application from one police encounter to the next, regardless of the particular individual’s response to the actions of

constituted a ‘seizure,’ the plaintiffs must demonstrate, from all the circumstances surrounding the incident, that a reasonable person in such a situation would have believed that he was not free to leave.”); *United States v. Washington*, 490 F.3d 765, 770 (9th Cir. 2007) (“In sum . . . the mere asking of questions, including asking for permission to search Washington’s person, raised no Fourth Amendment issue so long as a reasonable person in Washington’s situation would have felt free to leave.”).

²⁷ *Royer*, 460 U.S. at 502.

²⁸ *Id.* at 501.

²⁹ *Id.* at 502 (“These circumstances surely amount to a show of official authority such that ‘a reasonable person would have believed he was not free to leave.’” (quoting *Mendenhall*, 446 U.S. at 554)).

³⁰ *Delgado*, 466 U.S. at 218.

³¹ *Id.*

³² *Id.*

³³ *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988).

³⁴ *Id.* at 576.

the police.”³⁵ This consistency allows the police to determine, in advance, whether the contemplated conduct would violate the Fourth Amendment.³⁶ As such, the Court believed the test had predictive power that was useful to law enforcement.

In 1991, the Court expanded the free-to-leave standard to address situations in which an individual had “no desire to leave” for reasons unrelated to the police officer’s action.³⁷ In *Bostick*, the Court considered the case of a man who was approached by a police officer while the man was sitting on a Greyhound bus that had stopped in the middle of its journey.³⁸ Explaining that a passenger in the middle of a trip would not feel free to get up and leave the bus, the Court determined that the passenger was not seized only if “a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”³⁹ The Court declined to apply its expanded standard to the facts, however, remanding to the trial court to apply the new standard to all the facts of the case. But the Court noted its prior reasoning that merely approaching or questioning a suspect did not constitute a seizure and emphasized that the officers did not point guns at Bostick or otherwise threaten him.⁴⁰

The Court reaffirmed its expanded free-to-leave standard in *Drayton*,⁴¹ addressing a stop on a bus similar to that in *Bostick*, and in *Brendlin*,⁴² addressing the police stop of a car and its passengers. Unlike in *Bostick*, the *Drayton* Court actually applied the facts to its standard and determined that a seizure had not occurred: the officer did not brandish his weapon, left the aisle free, and spoke in a “polite, quiet” voice,⁴³ and the Court concluded that “[n]othing [the officer] said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the

³⁵ *Id.* at 574.

³⁶ *Id.*

³⁷ *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

³⁸ *Id.* at 431-32.

³⁹ *Id.* at 436. The Court also made clear that the reasonable person it had in mind was an “innocent person,” not a reasonable criminal. *Id.* at 438.

⁴⁰ *Id.* at 434, 437.

⁴¹ *United States v. Drayton*, 536 U.S. 194, 202 (2002) (“The proper inquiry is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” (internal quotation marks omitted)).

⁴² *Brendlin v. California*, 127 S. Ct. 2400, 2405-06 (2007) (“[W]hen a person has no desire to leave for reasons unrelated to the police presence, the coercive effect of the encounter can be measured better by asking whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter . . .” (internal quotation marks omitted)).

⁴³ *Drayton*, 536 U.S. at 203-04.

encounter.”⁴⁴ The *Brendlin* Court, on the other hand, did find a seizure. It held that not only the driver but also the passengers of a car stopped by the police were seized.⁴⁵ The Court explained that everyone in the car would have recognized that “no one in the car was *free to depart* without police permission.”⁴⁶

In using this standard for seizure, the Court has provided numerous examples of situations in which a person is not seized. Although “for the most part *per se* rules are inappropriate in the Fourth Amendment context,”⁴⁷ there are certain classes of encounters with the police that the Court seems to believe never to constitute a seizure. A citizen on the street “or in another public place”⁴⁸ who is approached by a police officer and asked questions by that officer is not seized.⁴⁹ There is also no seizure when officers identify themselves as police officers,⁵⁰ ask for a person’s identification, or ask to search his baggage. Even when that questioning takes place in a more contained environment, such as on a bus where an officer stands in the doorway,⁵¹ in a factory where officers wait at the exits,⁵² or on the street as a police car drives next to a person as he walks,⁵³ the Court has held that a seizure does not occur without more police action than mere questioning.

To find a seizure based on a “show of authority,” the Court requires more evidence of coercion than the mere presence and speech of law enforcement officers.⁵⁴ That evidence can include “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone

⁴⁴ *Id.* at 204.

⁴⁵ *Brendlin*, 127 S. Ct. at 2410 (“*Brendlin*[, the passenger,] was seized from the moment *Simeroth*’s[, the driver,] car came to a halt on the side of the road . . .”).

⁴⁶ *Id.* at 2407.

⁴⁷ *Drayton*, 536 U.S. at 201.

⁴⁸ *Florida v. Royer*, 460 U.S. 491, 497 (1983); *see, e.g., Florida v. Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam) (holding that such interactions in airports are “the sort of consensual encounter[s] that implicat[e] no Fourth Amendment interest”).

⁴⁹ *See, e.g., Muehler v. Mena*, 544 U.S. 93, 101 (2005) (“We have held repeatedly that mere police questioning does not constitute a seizure.” (internal quotation marks omitted)); *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring) (“[T]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.”).

⁵⁰ *Royer*, 460 U.S. at 498.

⁵¹ *Drayton*, 536 U.S. at 210.

⁵² *INS v. Delgado*, 466 U.S. 210, 218 (1984).

⁵³ *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988).

⁵⁴ *Cf. Marcy Strauss, Reconstructing Consent*, 92 J. CRIM L. & CRIMINOLOGY 211, 212 (2002) (“Only if the police behave with some extreme degree of coercion beyond that inherent in the police-citizen confrontation will a court vitiate the consent [to search].”).

of voice indicating that compliance with the officer's request might be compelled."⁵⁵ Both the *Bostick* and *Drayton* Courts specifically noted that the officers did not brandish their weapons or make threats—the type of coercion that might constitute a seizure. The coercion in *Royer* came from the police identifying Royer as a suspect and retaining his identification and ticket. Coercion is most clear in *Brendlin*, as the Court explained, since no person would feel that he could simply drive away from a police stop without being pursued by the officer.⁵⁶

As these cases demonstrate, the Court has consistently applied its seizure standard since first introducing that standard in 1980. The Court has declined to find seizures based on mere interaction with law enforcement without a showing of some degree of outward coercion, such as verbal threats or the presence of weapons. The Court has firmly held that, absent that kind of coercion, a reasonable person would feel free to leave or otherwise terminate his encounters with law enforcement officers.

B. LIMITED EXISTING EVIDENCE SUGGESTS THAT PEOPLE DO NOT FEEL FREE TO LEAVE IN MANY MORE SITUATIONS THAN THE COURT BELIEVES

In developing its standard for determining when a person is seized, the Supreme Court has relied on its own beliefs about how the reasonable person would feel.⁵⁷ While determining the knowledge and feelings of the reasonable person is a mainstay of many of the Court's doctrines,⁵⁸ both commentators⁵⁹ and the Court⁶⁰ itself have noted that empirical evidence

⁵⁵ *United States v. Mendenhall*, 446 U.S. 544, 544 (1980).

⁵⁶ *See Brendlin v. California*, 127 S. Ct. 2400, 2407 (2007).

⁵⁷ Nadler, *supra* note 9, at 166-67 (2002) (“[T]he Court assumed these questions can be answered from intuition alone.”); *see also* Ric Simmons, *Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 *IND. L.J.* 773, 800-01 (2005) (“The most frequent criticism of the consent search cases is that the Supreme Court is unaware of the realities on the street . . .”).

⁵⁸ *See, e.g., Missouri v. Seibert*, 542 U.S. 600, 615-16 (2004) (“[S]ince a reasonable person in the suspect’s shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.”).

⁵⁹ *See, e.g., Nadler, supra* note 9, at 167 (“[T]hese are questions that depend crucially on empirical inquiries . . . [R]elying on casual intuition to infer why someone acted the way they did in a situation where *all* of the details and circumstances are important and must be taken into account (as the Court has emphasized repeatedly) almost always leads to mistaken and erroneous judgments.”); *see also* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 *HARV. L. REV.* 4, 56 (1998) (“To begin, the Court could rely to a greater extent on empirical and policy analysis in its written opinions.”).

would be helpful in resolving seizure questions. Almost no empirical evidence exists, however, showing when a person would feel free to leave an encounter with the police.⁶¹ There is limited empirical evidence, both directly from analysis of data and indirectly from psychological studies, on a related question: when do people voluntarily consent to searches by the police? If an average person would not feel free to decline a police officer's search request, it is also likely that an average person would not feel free to leave an encounter with those same police officers.

One study directly addresses whether people voluntarily, or freely, consent to police requests to conduct searches of those people's automobiles, and it concludes that people do not feel free to say no to the police.⁶² That study examined the rate at which people in Ohio consented to a search request from the Ohio Highway Patrol during a traffic stop.⁶³ The study revealed that motorists consented to a search of their cars 88.5% of the time.⁶⁴ The police found drugs in approximately 12.9% of the searches conducted with the driver's consent,⁶⁵ a result reminiscent of *Bostick* and *Drayton*, in which passengers consented to searches even though they were carrying drugs. This finding suggests that the consent to search was not freely given, either because people did not know they could refuse or because they knew, but still did not feel free to do so.⁶⁶

⁶⁰ See, e.g., Transcript of Oral Argument at 43-44, *Brendlin*, 127 S. Ct. 2400 (No. 06-8120) (noting the lack of "studies" concerning whether people feel free to leave during encounters with police).

⁶¹ See Burkoff, *supra* note 9, at 1119-20 (discussing an undergraduate thesis that asked whether people would feel free to leave once they had declined a police request to search a car); Nadler, *supra* note 9, at 201 (noting the absence of studies on this question); cf. Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U. L.Q. 175, 188 (1991) ("Empirical studies [on consent searches] are either nonexistent or inconclusive.").

⁶² Burkoff also refers to "anecdotal" evidence from an unpublished undergraduate thesis. Burkoff, *supra* note 9, at 1119-20.

⁶³ Illya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the "Voluntary" Waiver of Fourth Amendment Rights*, 44 HOW. L.J. 349, 366 (2001).

⁶⁴ *Id.* at 367. The study found that the rate of consent actually went up slightly once the police began using the warning. *Id.* But there is no discussion in Lichtenberg's article about whether this difference is statistically significant, and the difference may have been caused by an overly sensitive dependent variable.

⁶⁵ Steven L. Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 TENN. L. REV. 399, 452 (2004) (discussing data from Lichtenberg's study available in Lichtenberg's doctoral dissertation, but not published in the final article).

⁶⁶ Simmons, *supra* note 57, at 774 ("[N]o outsider viewing the interaction would conclude that the defendants voluntarily consented to a search when surrounded by police at close quarters, especially if the defendants knew (as they must have) that giving the consent would ultimately result in serious criminal charges being filed against them.").

Along with this limited direct data, there is a wealth of evidence from psychological studies suggesting that people rarely comply freely with requests from police officers.⁶⁷ As one commentator explained, “the extent to which we feel free to refuse to comply under situationally induced pressures to do so is extremely limited.”⁶⁸ Those situationally induced pressure are particularly strong in the seizure context.

The first finding in this psychological literature is that people feel compelled to comply with authority figures.⁶⁹ This finding is primarily supported by studies conducted by Stanley Milgram and Leonard Bickman. In Milgram’s studies, the experimental subject was asked by an experimenter, dressed in a lab coat, to deliver electric shocks to another person in another room.⁷⁰ The shocks were administered whenever the second person committed errors.⁷¹ Unknown to the subject, both the experimenter and the person in the other room, whom the subject could hear but not see, were actors, and the person in the other room was not shocked. The shockers believed they were administering “severe” shocks to the person in the other room and could hear that person scream.⁷² Despite showing great concern for the person receiving shocks, the subjects continued to comply with the experimenter and administer more shocks when told by the experimenter that “[t]he experiment requires that you continue You have no choice; you must go on.”⁷³ Sixty-five percent

⁶⁷ For a thorough review of this literature, see Nadler, *supra* note 9. *Cf.* Simmons, *supra* note 57, at 801 (“[A] few legal scholars have applied various psychological experiments to the question of consent searches, and without exception they have concluded that the studies provide evidence that most of the ‘consents’ approved of by the Supreme Court are in fact involuntary.”).

⁶⁸ Nadler, *supra* note 9, at 173.

⁶⁹ The Court itself has recognized the power of psychological pressure to compel people to act in ways they would not otherwise act. For example, the Court recognized that students who listened to the reading of a prayer at a graduation ceremony might feel compelled to accept the religious messages even if they did not want to do so. *See Lee v. Weisman*, 505 U.S. 577, 588 (1992). Justice Kennedy wrote that the role of authority—the school district—in establishing the prayer “places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence This pressure, though subtle and indirect, can be as real as any overt compulsion.” *Id.* at 594.

⁷⁰ *See* STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974); *see also* Chanenson, *supra* note 65, at 448-50 (2004); Nadler, *supra* note 9, at 175-77 (discussing MILGRAM, *supra*); Simmons, *supra* note 57, at 802-08 (discussing MILGRAM, *supra*).

⁷¹ Simmons, *supra* note 57, at 802-08.

⁷² Nadler, *supra* note 9, at 176.

⁷³ *Id.* at 175-76.

of the subjects administered the maximum possible “shock” in the experiment.⁷⁴

Bickman’s experiments also suggested that people comply with requests from authority figures.⁷⁵ In those experiments, an experimenter stood on the street dressed as a civilian, a milkman, or an unarmed security guard.⁷⁶ The experimenter told passing people to perform a variety of tasks, such as picking up a bag from the ground.⁷⁷ Requests made by the security guard increased compliance rates between thirty-six and fifty-six percentage points relative to the rates generated when the experimenter dressed as a civilian.⁷⁸ A later replication of Bickman’s study using an experimenter in a fireman’s uniform instead of a security guard produced similarly greater levels of compliance relative to an experimenter in civilian clothes.⁷⁹

There are limitations on how much light Milgram’s and Bickman’s work sheds on the seizure question.⁸⁰ Neither set of experiments actually involved a police officer, and both sets of authority figures commanded, rather than asked, subjects to comply. Elements of the experiment may have made compliance more likely than in other situations involving authority figures.⁸¹ Later studies have also shown that other factors, such as whether the subject sees another person refuse to comply, reduce the likelihood that the subject himself will comply.⁸² However, none of these

⁷⁴ Martha Minow, *Living Up To Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence*, 52 MCGILL L.J. 1, 32 (2007).

⁷⁵ Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47 (1974).

⁷⁶ Simmons, *supra* note 57, at 808.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Brad J. Bushman, *Perceived Symbols of Authority and Their Influence on Compliance*, 14 J. APPLIED SOC. PSYCHOL. 501, 502-06 (1984); Simmons, *supra* note 57, at 809 n.191 (discussing Bushman’s experiment).

⁸⁰ Chanenson, *supra* note 65, at 449 (“Yet, it is not reasonable to rely on the studies as full and direct support for attacking the voluntariness of all consent searches.”); *cf.* Simmons, *supra* note 57, at 807 (“In summary, Milgram’s experiments are not very useful in helping us assign the appropriate level of police pressure in the context of consent searches. Many of those that obeyed protested vigorously; all did so knowing full well the results of their actions.”).

⁸¹ Minow, *supra* note 74, at 32; Moti Nissani, Comment, *A Cognitive Reinterpretation of Stanley Milgram’s Observations on Obedience to Authority*, 45 AM. PSYCHOL. 1384, 1384 (1990).

⁸² See, e.g., David Luban, Alan Strudler & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2362 (1992) (“Milgram discovered that compliance was extraordinarily sensitive to peer pressure. When the other team members refused to proceed with the experiment, only ten percent of the subjects remained obedient to the experimenter and ‘went all the way.’ Conversely, when a teammate rather than the

limitations refutes the underlying point of these psychological studies: people feel compelled to comply with authority figures. This observation holds true even in situations where the subjects believe they are causing harm, as in Milgram's experiment, or where they have no independent reason to comply, as in Bickman's experiment.

Other sets of experiments have revealed contingencies that suggest people do not feel free when dealing with police officers. For example, close proximity to authority figures creates "discomfort, anxiety, and tension," which makes people more likely to acquiesce to their requests.⁸³ In addition, the requirement that consent decisions be made quickly may reduce the effectiveness of the decision-making process. Research suggests that people answering questions with objectively correct answers commit more errors when under time pressure. Furthermore, people making decisions under time pressure "end their decision process prior to considering all the relevant information and alternatives."⁸⁴ The individual responses of motorists in a study of those stopped by the Ohio Highway Patrol support the conclusion that these psychological forces make freely-given consent difficult and unlikely.⁸⁵ Those motorists identified the feelings of pressure from authority that this psychological research suggests would exist.⁸⁶

None of the evidence reviewed above directly addresses whether or not citizens actually "feel free to leave" in situations where the Supreme Court believes that they should. The evidence suggests that people confronted by police officers do not act as freely as the Court believes.

C. WHETHER KNOWLEDGE OF THE RIGHT TO LEAVE AN ENCOUNTER WITH THE POLICE MAKES PEOPLE MORE LIKELY TO FEEL FREE TO LEAVE THOSE ENCOUNTERS IS UNCLEAR

Whether a person's knowledge of his right to decline a police officer's request increases the person's feeling of freedom to do so is widely debated. Some scholars who believe that knowledge of one's right to decline

subject took charge of physically administering the shock, 92.5% of the subjects went along with the experiment up to the maximum shock.").

⁸³ Nadler, *supra* note 9, at 193 ("In sum, people approached at a close distance by an authority in a tightly enclosed space with no opportunity to move further away or leave feel discomfort and tension; at the same time, people who find their space invaded in this manner are more willing to comply with the request of the person making them feel uncomfortable.").

⁸⁴ *Id.* at 194.

⁸⁵ See Lichtenberg, *supra* note 63.

⁸⁶ Some of the people who consented to the search gave answers such as: "I knew legally I didn't have to, but I kind of felt that I had to" or "I felt a little pressured that I didn't have much choice." Nadler, *supra* note 9, at 202-03 (citing Lichtenberg, *supra* note 63).

increases freedom to do so have suggested that the police be required to give *Miranda*-like warnings that people are free to leave or decline their requests.⁸⁷ The Supreme Court has repeatedly rejected that position.⁸⁸ Other scholars have argued that warnings will have little effect because knowledge of one's rights will not make one more likely to refuse consent.⁸⁹ Though the debate has focused primarily not on seizures themselves but on consent searches, the standards for whether a person is seized and for whether a person voluntarily consents to a search are quite similar,⁹⁰ and the arguments about knowledge in the consent search debate apply to the seizure context as well.

A number of scholars have called for the police to administer *Miranda*-like warnings before requesting anything at all of an individual. Some of those scholars contend that knowledge of one's rights is a necessary precondition for any sort of voluntary consent.⁹¹ Others argue that the benefits of informed consent, including greater protection of individual dignity⁹² or privacy, greatly outweigh the costs to law enforcement.⁹³ At least one judge agrees.⁹⁴ Still others have argued that a

⁸⁷ See *infra* notes 91-97.

⁸⁸ See *infra* notes 98-105.

⁸⁹ See *infra* notes 106-10.

⁹⁰ See, e.g., Simmons, *supra* note 57, at 782-83 (arguing that the two tests are really the same).

⁹¹ See, e.g., Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1466 (2000) ("Consent to lawful authority therefore does not necessarily evince a willingness to have the personal property in one's car thoroughly inspected. Absent knowledge of the right to withhold consent, a suspect is left with the belief that he has no choice.").

⁹² See Alan C. Michaels, *Rights Knowledge: Values and Tradeoffs*, 39 TEX. TECH L. REV. 1355, 1379 (2007) ("To the extent one believes the right is designed to protect individual dignitary interests, greater knowledge of the right would provide some further protection to individual autonomy . . .").

⁹³ See, e.g., *id.*; Loewy, *supra* note 11, at 554 ("The Court's suggestion that such [a warning] would destroy the informality of the interchange and be thoroughly impractical is so palpably false as to be laughable. A simple 'I'd like you to let me search your car Joe, but you don't have to' would add to the informality, while minimizing the show of force."); Simmons, *supra* note 57, at 821 ("The Supreme Court has shown concern that a notification would be an 'unrealistic' burden to put on law enforcement and would be 'thoroughly impractical;' but if the notification was brief enough, these concerns seem unjustified . . . Thus, there would be no harm and perhaps a bit of good in requiring a brief notification of a suspect's rights before a law enforcement officer can request consent."); Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 244-47 (arguing that the costs to law enforcement of a warning requirement would be small); Rebecca A. Stack, Note, *Airport Drug Searches: Giving Content to the Concept of Free and Voluntary Consent*, 77 VA. L. REV. 183, 206 (1991) ("[A]ll that is required for an effective warning are the six small words, 'You have the right to refuse,' appended to each

warning would help to reduce the greater coercion felt by minorities or by the poor when interacting with the police.⁹⁵ A final group of commentators suggests that warnings are a necessary, but not sufficient, part of a larger solution.⁹⁶

The Supreme Court has repeatedly rejected the possibility of such warnings.⁹⁷ The Court has based its rejection on its belief that the ability of a person to consent freely should be evaluated by a totality of the circumstances test in order to balance the citizen's rights against the needs of the police and society to obtain information and conduct investigations.⁹⁸ In *Schneckloth*, the Court established the rule that one can "voluntarily" consent to a search even if one does not know one has the right to refuse.⁹⁹ The Court argued that because voluntariness is "a question of fact to be determined from the totality of all the circumstances[.]" knowledge of rights is one factor in the mix; knowledge does not determine the issue.¹⁰⁰ In *Robinette*,¹⁰¹ the Court extended to the free-to-leave standard its belief

request for consent to search a suitcase. The gains in fairness to suspects far outweigh whatever minute losses in law enforcement efficacy such a warning may cause.").

⁹⁴ Gerard E. Lynch, *Why Not a Miranda for Searches?*, 5 OHIO ST. J. CRIM. L. 233, 245 (2007) ("I believe it would be an equally good thing if similar words accompanied police requests for consent to search. . . . Such a rule, like its *Miranda* parallel in custodial interrogation, would probably reduce the number of consents obtained, but most likely not by much.").

⁹⁵ See, e.g., Devon W. Carbado, (*E*)racing the Fourth Amendment, 100 MICH. L. REV. 946, 1030 (2002) (arguing that warnings about the right to refuse consent may help to counteract the greater coercion some races feel when interacting with the police); Carol S. Steiker, *How Much Justice Can You Afford? A Response to Stuntz*, 67 GEO. WASH. L. REV. 1290, 1294 (1999) ("Requiring police officers, when seeking consent to search, to advise all suspects of their right to refuse to consent would help to close the information and power gap currently existing between the rich and poor in their encounters with law enforcement agents.").

⁹⁶ See, e.g., Chanenson, *supra* note 65, at 465 (arguing that warnings alone are not enough).

⁹⁷ For a discussion of potential political reasons why the Court has not adopted this position, see Lynch, *supra* note 94.

⁹⁸ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 231 (1973) (arguing that "valid consent may be the only means of obtaining important and reliable evidence" and that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning"); see also Loewy, *supra* note 11, at 554 (arguing that a warning requirement would "[o]f course . . . decrease the number of consent searches").

⁹⁹ *Schneckloth*, 412 U.S. at 227. But see *id.* at 277 (Marshall, J., dissenting) ("I would have thought that the capacity to [consent to the police] necessarily depends upon knowledge that there is a choice to be made.").

¹⁰⁰ *Id.* at 227 ("While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.").

¹⁰¹ *Ohio v. Robinette*, 519 U.S. 33 (1996).

that ignorance of one's right does not impair the ability to choose freely. The *Robinette* Court held that a police officer does not need to inform someone that he or she has stopped that the person is free to go.¹⁰² The Court's primary concern during its brief discussion¹⁰³ of the issue was the impracticability of imposing such a requirement on police, rather than the effect such a warning might have on the person stopped by the officer.¹⁰⁴

Several articles have taken a middle position, suggesting that while informed consent is desirable in principle, it would have little actual effect on the rate of consent in interactions with the police. One author argues that warnings are not a "panacea" and might do little to reduce coercion;¹⁰⁵ the warnings would still come in the context of a coercive encounter, and many people believe police officers routinely ignore or violate rules, increasing the likelihood that the opportunity to decline a request is not a real one.¹⁰⁶ Others have expressed a similar concern that the overall coerciveness of the encounter would make requiring warnings ineffective—almost as many people would consent even if warned.¹⁰⁷ The Ohio Highway Patrol study also examined the rate at which people consented to search after the police began giving a *Miranda*-like warning informing motorists that they were not required to consent to a search.¹⁰⁸ The study found that the rate of consent actually went up slightly, suggesting that the warning did not make people feel more free to decline the request.¹⁰⁹ These articles thus argue that even informed consent would likely be coerced consent.

¹⁰² See *id.* at 39-40 ("[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.").

¹⁰³ Chief Justice Rehnquist devoted only two paragraphs to consideration of the potential need for informed consent. See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ Strauss, *supra* note 54, at 254.

¹⁰⁶ *Id.*

¹⁰⁷ Susan R. Klein, *Lies, Omissions, and Concealment: The Golden Rule in Law Enforcement and the Federal Criminal Code*, 39 TEX. TECH L. REV. 1321, 1322 (2007) ("Thus, the Court may be incorrect in its prediction that knowledge about rights will lead to the exercise of these rights, along with the negative effects on crime clearance."); Michaels, *supra* note 92, at 1380 ("The best guess here, though, is that the effect [of a warning] would, in any event, be minimal."); Nadler, *supra* note 9, at 205 ("Given the magnitude of situational pressures brought to bear on citizens in bus sweeps and similar situations, there is no reason to think that police advising citizens that they have a right not to cooperate with their request for consent to search will significantly reduce coercion experienced by citizens in this situation."). But see Loewy, *supra* note 11, at 554 (arguing that a warning requirement would "[o]f course . . . decrease the number of consent searches").

¹⁰⁷ *Robinette*, 519 U.S. 33.

¹⁰⁸ See Lichtenberg, *supra* note 63, at 367 (explaining that the percentage of people consenting to a search did not decrease when drivers were given a warning by the police).

¹⁰⁹ *Id.*

III. METHODOLOGY

This Part outlines the methodology used to gather concrete evidence to test the Court's use of its seizure standard. I collected data from a random sample of adults to determine how free they would feel to walk away from a police officer who asked them questions on the sidewalk or while they were riding a bus. I used a one-page, written questionnaire, distributed in four locations in Boston on four different dates in December 2007 and January 2008. This Part explains how the surveying was conducted, how the questionnaire was designed, and how the data were analyzed. Finally, it discusses potential sources of bias that these design and implementation choices might have created.

A. SURVEY PROCEDURE

In each location, the questionnaires were presented by teams of two or three Harvard Law School students.¹¹⁰ The surveyors were trained to use a standard prompt to ask people if they wanted to participate¹¹¹ and a standard response¹¹² to explain what the survey was about if people asked.¹¹³ Surveyors were trained to let the respondents circle or write their own answers; surveyors were to provide help only by saying that "there are no right answers" and that the respondent should "select whatever answer he thought made the most sense to him." Finally, surveyors were trained to track the number of people who declined to complete a survey or who did not respond in any way when asked, but they did not track the age, race, or gender of those who declined. Surveyors were warned to avoid favoring any particular demographic.¹¹⁴ Instead, they were asked simply to talk to everyone in the area, including both individuals and groups of people.

¹¹⁰ Eight students conducted surveys. All but one of the students were white and four were female. All the students were paid at an hourly rate through a grant from Harvard Law School.

¹¹¹ "Would you like to complete a one-minute, anonymous survey for Harvard Law School?"

¹¹² "How people interact with the police."

¹¹³ To test whether or not survey-takers might provide biased results by guessing the real purpose of the survey, I tested a draft questionnaire on a group of Harvard Law School first-year students who had not yet taken criminal procedure or studied the Fourth Amendment. Even among that relatively knowledgeable group, only nine out of sixty-five respondents, or 13%, believed the survey was meant to explore a search-and-seizure topic.

¹¹⁴ Surveyors did not use a truly random method, such as selecting every fifth person who walked past a reference point. It is unlikely, therefore, that the survey group was truly randomly selected. As the demographic data suggest, however, the sample did not seem skewed in any particular direction. See *infra* Part IV.A.

After being tested,¹¹⁵ the questionnaire was administered in four locations in the greater Boston area: Faneuil Hall / Quincy Market, the rail terminal in South Station, Porter Square, and the Government Center subway station / North Station rail terminal. These locations were selected to provide variety in the likely socioeconomic background of people present.¹¹⁶ In each location, a single surveyor approached both individual people and groups (surveyors did not work in teams). Respondents were responsible for filling in the answers themselves while the surveyor stood to the side.¹¹⁷ Respondents were not paid to participate in or to complete the survey.

B. QUESTIONNAIRE DESIGN

The one-page written questionnaire had three parts.¹¹⁸ The first part presented two scenarios—encounters between a civilian and police officer on a sidewalk and on a bus. The short prompts aimed to maximize the number of people who would be willing (and able) to read and complete the survey in a short period of time.¹¹⁹ Respondents indicated how free they would feel to leave such a situation on a scale from 1 to 5, where 1 meant “not free to leave or say no” and 5 meant “completely free to leave or say no.”¹²⁰ I will refer to this scale throughout the Article as the “free to leave scale” or “freedom to leave scale.”

¹¹⁵ Before it was used in the field, the questionnaire was tested on sixty-five Harvard Law School first-year students to ensure that it could be completed quickly and without confusion. See NORMAN M. BRADBURN, SEYMOUR SUDMAN & BRIAN WANSINK, *ASKING QUESTIONS: THE DEFINITIVE GUIDE TO QUESTIONNAIRE DESIGN* 319 (Rev. ed. 2004) (explaining that pilot tests need not be conducted with a sample identical to the one targeted in the actual surveying). The pre-test indicated that the survey needed no significant changes. See note 113, *supra* (describing pilot test).

¹¹⁶ The average person shopping in Quincy Market, for instance, is likely to be of a different background than the average person shopping at the supermarket in Porter Square. Three of the locations, Quincy Market and the two train stations, were likely to over-sample wealthier people, either shoppers or commuters returning to Boston’s suburbs.

¹¹⁷ Having respondents complete the survey themselves reduces, if not eliminates, bias that might have been attributable to differences in surveyors. See ROGER TOURANGEAU, LANCE J. RIPS & KENNETH RASINSKI, *THE PSYCHOLOGY OF SURVEY RESPONSE* 298 (2000). In addition, respondents’ self-administration of the survey reduced concern that respondents would mischaracterize how free they felt to leave a situation as a result of embarrassment. See *id.* at 306.

¹¹⁸ See *infra* app. A.

¹¹⁹ Respondents were told, “Assume you do not want to talk to the officer,” because the purpose of the survey was not to see whether people are generally helpful and cooperative with the police, but rather to explore the more legally significant question of whether people feel they must cooperate with the police even when they do not want to do so.

¹²⁰ See *infra* app. A. Continuous scales with between four and six options are used widely in surveys. KEITH F. PUNCH, *SURVEY RESEARCH: THE BASICS* 59 (2003). While the

The second part of the questionnaire consisted of one question and asked the respondent to indicate which of four options best described his legal rights in the encounter with the police officer.¹²¹ The answers were ordered from greatest obligation to the police to least obligation.¹²² The doctrinally “correct” answer was the fourth choice,¹²³ but it is worth noting that the third choice may be the most correct expression of reality.¹²⁴ Note also that respondents could provide, by circling a number, only one answer to the question even though the question seems to ask for two different answers (an answer for question one, regarding the sidewalk hypothetical, and an answer for question two, regarding the bus hypothetical).¹²⁵ That

survey might have been even more effective had the two ends of the scale been evenly balanced, the survey results all fall below the “somewhat free to leave” middle position, reducing any concern about imbalance.

¹²¹ See *infra* app. A.

¹²² Placing the “correct” answer, number four, at one extreme might have prompted people who were unsure about whether number three or number four was correct to select number three, inflating the number of people who seemed not to know their rights in the seizure situation. See HOWARD SCHUMAN & STANLEY PRESSER, QUESTIONS AND ANSWERS IN ATTITUDE SURVEYS: EXPERIMENTS ON QUESTION FORM, WORDING, AND CONTEXT 162-69 (1981) (discussing the tendency of people to discriminate against options at the extreme ends of a list). But someone who is unsure, for purposes of this study, is just like someone who is sure but wrong—neither person *knows* his rights.

¹²³ The correct answer read: “You have the legal right to refuse to talk with the officer with no consequence to yourself.” See *infra* app. A. No one is forced to comply with a police officer’s request for questions. As the Court has explained, “[t]he person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.” Florida v. Royer, 460 U.S. 491, 497-98 (1983). In addition, “refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.” Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (citing Florida v. Bostick, 501 U.S. 429, 437 (1991)); see Steinbock, *supra* note 9, at 530 (“Unless a police officer has ‘probable cause’ to make an arrest or a ‘reasonable suspicion’ to conduct a ‘stop and frisk’, a person has the legal right to walk away from a police officer.” (quoting PAUL BERGMAN & SARA J. BERMAN-BARRETT, THE CRIMINAL LAW HANDBOOK (3d ed. 2000)). Of course, doing more than merely refusing to cooperate might create such a justification. Wardlow, 528 U.S. at 124 (explaining that “unprovoked flight . . . [or] nervous, evasive behavior is a pertinent factor in determining reasonable suspicion”).

¹²⁴ The third option read: “You have a legal right to ignore the officer, but he may assume you are guilty of wrongdoing if you do.” See *infra* app. A. There is some concern that the Court’s decision in Wardlow, 528 U.S. 119, will open the door to allowing police to use refusal or retraction of consent as the source of probable cause. See Chanenson, *supra* note 65, at 416-32; see also Steinbock, *supra* note 9, at 543 (suggesting that good practice for a person walking away from the police is to “walk—do not run or otherwise seem to be ‘evading’ the police”); cf. WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2(f) (4th ed. 1996) (suggesting that “the suspect’s earlier refusal to give consent is a factor which is properly taken into account [in] the ‘totality of the circumstances’ in judging the later consent under the *Schneckloth* formula” for determining whether consent is voluntary).

¹²⁵ See *infra* app. A.

ambiguity should not affect the results.¹²⁶ The third part of the survey gathered demographic information.¹²⁷ Respondents filled in their ages and zip codes,¹²⁸ as well as a *yes* or *no* in response to the question, “Have you ever been stopped before by a police officer?”¹²⁹ After taking the survey back, the surveyors themselves recorded the gender and race of the respondents in two sets of boxes at the bottom of the page.¹³⁰

C. DATA CODING

The data from the surveys were coded following a standard procedure. In some cases, respondents’ answers to the first two questions were unclear. Because the numbers were listed horizontally, with space in between them, some respondents marked an area in between two numbers—indicating, for example, a 3.5. When this happened, I selected the whole number to which the mark seemed closer; whenever the mark was near the middle of the range, I rounded up in the more free to leave direction.¹³¹ The results for each respondent who told the surveyor that he or she was not from the United States or was a police officer were dropped, as were any surveys in

¹²⁶ This defect in the question is unlikely to have caused problems. If we think that people believe the law is the same regardless of location, there is no problem. If we believe that people feel their rights differ by location, there is still little cause for concern. Since the actual right does *not* vary by location, at least one of the two answers given in each case would have been incorrect, and therefore, the overall answer for that respondent would also have been incorrect. Thus, at minimum, the wording of this question has no effect on the number of people who got the answer “right”; at maximum, the wording causes the data to *understate* respondents’ legal ignorance.

¹²⁷ See BRADBURN, SUDMAN & WANSINK, *supra* note 115, at 262 (“Demographic questions are almost always asked at the end of an interview, after the substantive questions.”).

¹²⁸ Zip codes were later used as proxies for income, although it is unclear whether zip codes are an effective proxy for individual incomes. See, e.g., Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 86 (2001) (discussing problems with using zip codes as proxies for income); Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. WOMEN & L. 1, 14 n.56 (1995) (discussing a similar problem).

¹²⁹ This question was written without enough specificity to ensure consistent results. Some respondents believed the question included traffic stops, such as being pulled over for a red light, while others believed it only included situations like the ones mentioned in the first part of the survey. Thus the analysis of the survey does not include these results.

¹³⁰ See *infra* app. A. The two boxes on the lower left of the survey were to indicate male and female respectively, and the three boxes in the center corresponded to White, Black, and Other.

¹³¹ Only twenty-seven questionnaires, or 6.6% of responses, fell into this category. Even if all those questionnaires were dropped from the sample, the results discussed below would remain statistically significant and of the same order of magnitude.

which the results were illegible. These dropped surveys were counted¹³² in the denominator for response rates, but not in the numerator, in order to provide a conservative response rate.

D. POTENTIAL SOURCES OF BIAS

The methodological choices in this survey raise several concerns about bias. First, Boston may not be representative of the country as a whole. While there is no reason to believe that such a systematic bias would exist that the results would be wholly inapplicable to the rest of the country, only future surveys can reveal whatever regional differences exist. Second, there will be a sample selection bias since the approach described above is likely to over-represent certain groups, particularly people who are white, who work, and who live in the suburbs surrounding Boston rather than in the urban center. The survey locations, especially the two commuter rail stations and the upscale mall, likely featured higher concentrations of those demographics. The surveyors themselves, almost all white and almost all wearing clothing with the Harvard Law School (HLS) insignia, are also likely to have over-selected wealthier, whiter respondents and been more likely to get those groups of people to stop in the first place. While it would have been difficult to eliminate these demographic biases, there is reason to believe, as I discuss below, that they do not undermine the conclusions of this Article.¹³³

Finally, there will also be a response bias based on who chose to fill out the questionnaire, but it is unclear in which direction that bias would operate. The people who would be likely to stop to complete a survey might be the types of people who feel *less* free to terminate their encounters with the police. That is, they might be the type of people who generally feel more compelled to do what other people ask them to do. In that case, the results would understate the degree to which the average person would feel free to leave. However, the surveyors made it clear that people were not required to fill out the survey. In addition, it is difficult to imagine that the situational forces surrounding a law student's request to complete a survey are similar enough to a police officer's request to answer questions that the sample, consisting of people who are willing to stop for the law student, would be significantly skewed. On the other hand, if the people who stopped to talk to the mostly white surveyors were disproportionately white, high income, and educated, the sample would likely over-represent

¹³² There were eighteen surveys in this category.

¹³³ No specific demographic or racial group had an average freedom-to-leave score that was far different from the overall sample average. Even if the surveyors over-selected for young respondents, for instance, the results would not be very different. See *infra* text accompanying note 158.

exactly the kind of people who might be *more* likely to feel free to leave. In that case, these results would overstate the degree to which the average person feels free to leave. It will not be possible to determine the effects of this selection bias until subsequent research explores similar questions in other populations.

IV. RESULTS

There are three main findings. The data show that most people would not feel free to leave when they are questioned by a police officer on the street or on a bus. Some groups of respondents, women and people under twenty-five, would feel even less free to leave than the average. Even those people who know that they have a right to leave responded that they would not feel free to leave. There were no statistically significant differences between respondents of different races, different income levels, or those who had different experiences with the police.¹³⁴ This Part first reviews the demographics of the sample, and then presents those three main findings.

A. DESCRIPTION OF THE RESPONDENTS

The data in this Article come from 406 survey responses.¹³⁵ The response rate was 36.6%.¹³⁶ The vast majority of respondents completed the entire survey.¹³⁷ The average age of respondents was 36.9 years old, the youngest respondent was fifteen and the oldest respondent was eighty-five. Compared to the general population in Boston, this sample is roughly representative in terms of gender and people over the age of sixty-five (see Table 1). The sample over-represents people under twenty-five¹³⁸ and

¹³⁴ Income was measured using the median household income for each zip code from the 2000 U.S. Census. These results only suggest that no differences existed in this sample, and not that there are no differences between the groups in the actual world. More accurate measures of race and income, coupled with more diversity in the sample, might reveal differences. The question about previous stops by the police did not produce useable data. *See supra* note 129.

¹³⁵ The responses break down as follows: 93 responses from Faneuil Hall, 168 at South Station, 78 at Porter Square, and 67 at Government Center / North Station.

¹³⁶ Surveyors offered the questionnaire to a total of 1108 people. Four hundred and twenty-four people completed questionnaires, but eighteen results were discarded and counted as non-responses. *See supra* note 132. The response rate varied by survey site: 30.4% at Faneuil Hall, 65.2% at South Station, 19.2% at Porter Square, and 54.9% at Government Center / North Station. The higher response rates at the two train stations were likely the result of people having very little else to do while waiting for their trains.

¹³⁷ All 406 respondents provided answers for both scenarios. Ten respondents did not provide a zip code, five did not provide an age, and two did not respond to the knowledge-of-rights question.

¹³⁸ The larger-than-average number of people younger than twenty-five did not skew the data. *See infra* note 157.

under-represents non-white respondents, a result that might either be a function of the manner in which race was recorded or a function of the survey locations. When compared to the Boston suburbs or to the U.S. population as a whole (see Table 1), the sample is representative in terms of both gender and race, but still over-samples individuals under twenty-five years of age.¹³⁹

Table 1

Demographic breakdown of survey sample and comparative populations

	Sample	Boston ¹⁴⁰	Boston Suburb (Norfolk) ¹⁴¹	U.S. (over 18) ¹⁴²
% Female	52.0	51.9	51.9	51.7
% White	77.7	54.5	86.3	75.1
% > Age 65	10.0	10.4	13.9	12.4
% Age 15-24	26.7	N/A	N/A	13.9

B. PEOPLE WOULD NOT FEEL FREE TO LEAVE

Respondents reported that they would not feel free to leave in either the sidewalk or the bus scenario.¹⁴³ The sample had an average free-to-leave score of 2.61 for the sidewalk scenario and 2.52 for the bus.¹⁴⁴ Those

¹³⁹ Assuming the coding for race was accurate, this result makes sense. Two of the four locations were commuter rail terminals; therefore, the sample likely consisted of many people who lived *outside* of Boston.

¹⁴⁰ U.S. Census Bureau, Boston (City) QuickFacts from the U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/25/2507000.html> (last visited Jan. 7, 2009).

¹⁴¹ U.S. Census Bureau, Norfolk County QuickFacts from the U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/25/25021.html> (last visited Jan. 7, 2009).

¹⁴² U.S. Census Bureau, DP-1 Profile of General Demographic Characteristics for the United States: 2000 http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U (last visited Jan. 7, 2009).

¹⁴³ There is a difference between how respondents believe they would feel and how they would actually feel. However, as discussed above, there is little reason to believe that respondents are overstating how free they would feel. See *infra* text accompanying note 159.

¹⁴⁴ All 406 respondents answered both of these questions. While the averages at the four survey locations varied, the differences between averages for the sidewalk scenario were not statistically significant, and the differences for the bus scenario were different only at the ten percent level. The bus averages ranged from 2.81 to 2.39, but if each location had been weighted equally, the average freedom to leave would have been 2.55, reflecting almost no difference from the sample average. There was also no statistically significant difference between the overall average for the sidewalk and bus scenarios. The absence of a

averages are below even the mid-point of the free-to-leave scale in the survey, meaning respondents did not even feel “somewhat free to leave.” Those averages do not hide an underlying pattern of results that might suggest an overstatement of the degree to which people do not feel free. As the distribution of responses in both scenarios (Figure 1) shows, about half of the sample selected 1 or 2,¹⁴⁵ and almost 80% selected 3 or less.¹⁴⁶



C. WOMEN AND PEOPLE UNDER TWENTY-FIVE FEEL RELATIVELY LESS FREE TO LEAVE ENCOUNTERS WITH THE POLICE

Although respondents in general reported that they would not feel free to leave, both women and people under the age of twenty-five¹⁴⁷ reported that they would feel less free to leave than did men and people over the age of twenty-five. The average freedom-to-leave score for men was 2.77 for the sidewalk and 2.76 for the bus, while the averages for women were 2.45 and 2.30 (Table 2).¹⁴⁸ As Figures 2 and 3 show, women were also more

statistically significant difference may suggest that the primary cause for feeling a lack of freedom is not the particular circumstances of an event, but rather the presence of the police officer. This result supports what commentators who have discussed the general coercive power of authority figures have said. *See supra* Part II.C.

¹⁴⁵ 49.7% and 54.7%, respectively.

¹⁴⁶ 78.0% and 78.8%, respectively.

¹⁴⁷ The Census reports data in groups of ten years for people aged “25” and older, making “under 25” a natural category with which to capture high school students and college students. *See* U.S. Census Bureau, *supra* note 142.

¹⁴⁸ Three hundred ninety-two of 406 respondents were coded for gender. The differences between men and women are statistically significant at the 1% level. While the overall difference in the sample between genders was strongly significant, the differences between

likely to select 1, meaning "not free to leave," whereas men were more likely to select 5, meaning "completely free to leave."¹⁴⁹ The average freedom-to-leave score for respondents under twenty-five was 2.41 and 2.26, while the averages for respondents over twenty-five were 2.65 and 2.58 (Table 3).

Table 2

Average "Free to Leave" Scores by Gender

	Women[†]	Men
Sidewalk	2.45	2.77 ^{***}
Bus	2.30	2.76 ^{***}

[†] 52% of the sample were women

^{***} Difference between columns significant at the 1% level

Table 3

Average "Free to Leave" Scores by Age

	Under 25[†]	25 and older
Sidewalk	2.41	2.65 [*]
Bus	2.26	2.58 ^{***}

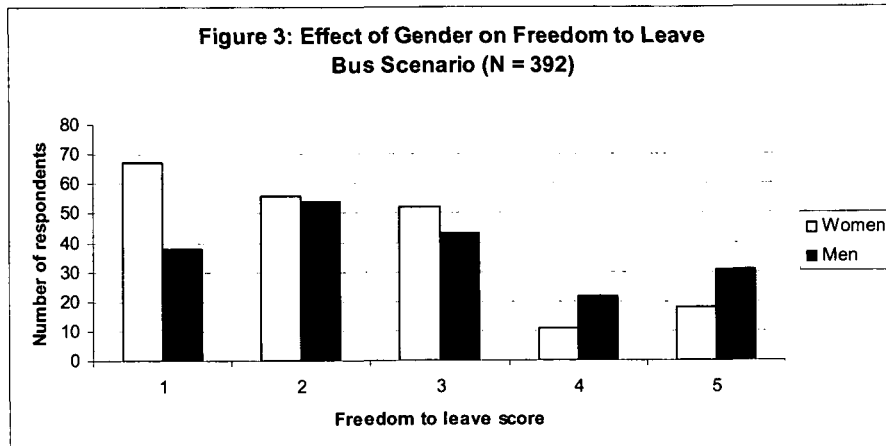
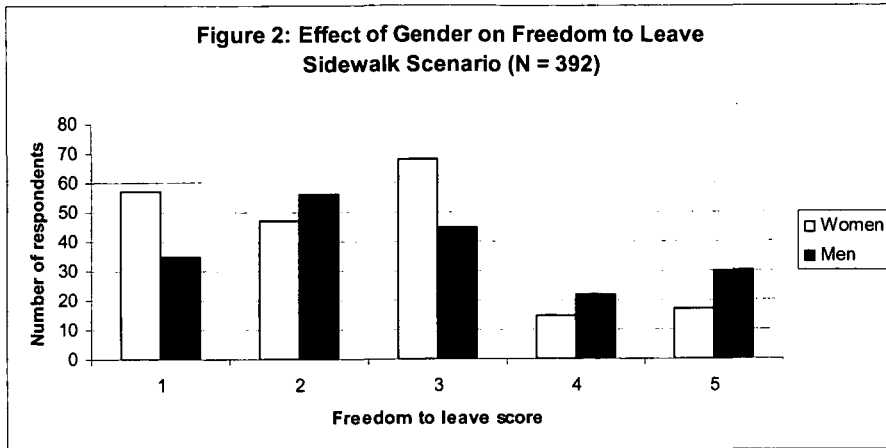
[†] 26.7.0% of the sample were under age 25

^{*} Difference between columns significant at the 10% level

^{***} Difference between columns significant at the 1% level

genders were not significant at three of the four survey locations. While some randomness is to be expected in sub-samples—which is the very reason one draws from multiple sub-samples—there is no reason to believe that there is an interaction effect between location and gender.

¹⁴⁹ The difference in these distributions is statistically significant at the 1% level.



These results indicate that certain groups feel the coercive pressure of police encounters more than others do. Several articles have suggested that the poor or racial minorities might be especially vulnerable to the power of authority because those groups generally feel they have less power in society.¹⁵⁰ While the data in this survey neither support nor refute that argument as it applies to the poor or to racial minorities,¹⁵¹ the data do indicate that other groups generally expected to feel especially vulnerable—the young and women—would in fact feel less free to leave in the face of police authority.

¹⁵⁰ See *supra* note 95.

¹⁵¹ There were no statistically significant differences between the racial categories or between levels of income.

D. EVEN PEOPLE WHO KNOW THEY HAVE A RIGHT TO LEAVE WOULD NOT FEEL FREE TO LEAVE

Even people who know they have a right to leave a police encounter reported that they would not feel free to do so. Although the group who did not know of their right to leave¹⁵² had an average free-to-leave score of 2.32 for the sidewalk scenario and 2.25 for the bus, the group who did know their rights still had averages of 3.04 and 2.93 (Table 4).¹⁵³ So while the people who knew their rights felt *more* free to leave, they still averaged only halfway up the one-to-five scale. Their answers indicate that they felt only “somewhat free to leave.”¹⁵⁴

Table 4

Average “Free to Leave” Scores by Knowledge

	Did Not Know Rights[†]	Knew Rights
Sidewalk	2.32	3.04****
Bus	2.25	2.93****

[†] 59.7% of the sample did not know their rights

**** Difference between columns significant at the 0.1% level

¹⁵² There were 241 respondents who did not know their rights and 163 who did. People coded as “knowing their rights” selected the fourth option for the third question in the survey: “You have the legal right to refuse to talk with the officer with no consequence to yourself.” Those coded as not knowing their rights selected one of the other three options. See *supra* Part III.B. That 60% of the sample did not know about their rights indicates “the truth of the matter, namely that most people do not expect that they have the right not to accede a police officer’s request that a search be authorized.” Burkoff, *supra* note 9, at 1138 (internal quotation marks omitted).

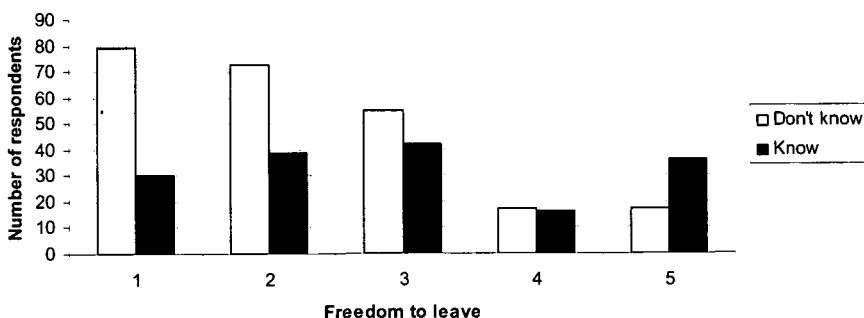
¹⁵³ The differences between the two groups are statistically significant at the 0.1% level.

¹⁵⁴ See *supra* Part III; *infra* app. A.

**Figure 4: Effect on Freedom to Leave of Knowing Your Rights
Sidewalk Scenario (N = 404)**



**Figure 5: Effect on Freedom to Leave of Knowing Your Rights
Bus Scenario (N = 404)**



The distribution of the results also supports this conclusion about knowledge of rights (Figures 4 and 5). Almost 60% of the respondents who did not know their rights reported they would feel either a 1 or a 2, while only thirteen of those respondents, or 5%, reported they would feel a 5.¹⁵⁵ Even though respondents who knew their rights were much more likely to feel “completely free to leave,” almost 40% of those knowledgeable respondents still reported they would feel a 1 or a 2,¹⁵⁶ and two-thirds reported a 3 or less.

¹⁵⁵ These percentages refer to the sidewalk scenario.

¹⁵⁶ Thirty-seven percent in the sidewalk scenario and 42% in the bus scenario.

E. SOME POSSIBLE CONCERNS

There are at least several possible criticisms of these findings, and I will address three here. First, as discussed above, the sample may over-represent groups who might feel less free to leave, such as people under age twenty-five (Table 1). But even if one considers only the data for people over twenty-five years of age, the conclusions remain the same.¹⁵⁷ Moreover, the sample population is quite representative of the overall U.S. population in other respects (see Table 1, above).

A second concern is that people cannot accurately know how they *would* feel in a situation they have not experienced; the forces that would act on them in the heat of the moment are difficult to express while filling out a piece of paper.¹⁵⁸ Even though this phenomenon is likely to exist in the data, there is little reason to believe it would lead respondents to *under-express* how free they would feel. The coercive pressures experienced when actually dealing with a police officer are likely to make one feel less free than when one is standing in a train station.

A third concern is that when people fill out a survey in a public space with the surveyor hovering near by, those respondents may feel pressured not to leave. They may then transfer that feeling of pressure into their answers about how free they would feel in the hypothetical situations in the survey, producing less reliable results. However, if that concern is correct, it suggests that such situational forces do exist, and the coercive pressure on an individual would not likely be *greater* when the authority figure is a surveyor rather than a police officer. In addition, an earlier version of the survey was administered to a group of law school students with no surveyor present. The results from that pilot survey are consistent with the results from the most appropriate comparison group in the larger sample, respondents under the age of twenty-five, suggesting that approaching people in public did not influence the results.¹⁵⁹

¹⁵⁷ For instance, the average freedom-to-leave score in the sidewalk scenario is 2.61. The average freedom-to-leave score for people over the age of twenty-four is 2.65, suggesting that over-representing young respondents does not falsely suggest that people do not feel free to leave.

¹⁵⁸ See, e.g., Nadler, *supra* note 9, at 171 (“[R]esearch confirms the difficulty of accurately imagining the extent to which situational constraints shape our behavior.”).

¹⁵⁹ In that sample of sixty-four Harvard Law School first-year students who had not yet taken criminal procedure, the average freedom to leave scores were 2.34 for the sidewalk and 2.13 for the bus. These results are slightly lower than the sample averages for people under twenty-five, 2.41 and 2.26 respectively.

V. DISCUSSION

The results of the survey suggest that the Supreme Court's use of its seizure standard has been inconsistent with the reality of how people feel when interacting with police officers. The Court's reasonable person should resemble the average person described by the survey results; but the reasonable person does not resemble the average person. Although the average survey result, lying between "not free to leave" and "somewhat free to leave," creates some ambiguity about how free people feel, the average person certainly does not feel free to leave, an assumption repeatedly articulated by the Court.¹⁶⁰ It is unclear how the disconnect between the Court's holdings and reality has come to be, but it is clear that the Court should change its approach to seizure cases. The results of the survey suggest that requiring a warning would not be an effective solution. Additionally, the Supreme Court should consider two other possible changes to its freedom-to-leave doctrine—applying empirical facts accurately to its current standard, or adopting a new standard entirely.

The average person does not feel the way the Court believes a reasonable person would, even though the reasonable person in law should resemble the average person in reality.¹⁶¹ The reasonable person standard is an objective standard.¹⁶² That means the fact-finder must not take into account subjective factors, such as the defendant's particular opinion of the police, past experience with law enforcement, or even guilt,¹⁶³ in determining whether a reasonable person in the same situation would have felt free to leave. There has been some debate about which particular

¹⁶⁰ See *supra* Part II.A. In none of the opinions using the *Medenhall-Bostick* standard does that Court introduce any qualifier to "free to leave" that might suggest that a person who feels "somewhat free to leave" is not seized.

¹⁶¹ See, e.g., Maclin, "*Black and Blue Encounters*," *supra* note 11, at 250-51 (treating the average person and reasonable person similarly); Steinbock, *supra* note 9, at 522-23 (explaining that the reasonable person standard "operates like a bell curve, with the reasonable person defined as a certain number of standard deviations from the mean [I]n a statistical sense, the reasonable person standard accurately captures the beliefs and attitudes of the general population"). In fact, Justice Breyer's dissent in *Yarborough v. Alvarado* went so far as to suggest that the reasonable person should be defined with even more, not less, particularity than merely the "average person." 541 U.S. 652, 673 (2004).

¹⁶² *California v. Hodari D.*, 499 U.S. 621, 628 (1991).

¹⁶³ See, e.g., LaFave, *supra* note 20, at 738 ("the subjective expectations of the particular suspect [are not] determinative"); Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 *How. L.J.* 239, 241 (1993) ("[T]he reasonable person test assumes that a person's interaction with the police is a generic experience"); see also *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (making it clear that the reasonable person is presumed to be innocent).

characteristics should be considered in defining the reasonable person.¹⁶⁴ But at a minimum, the reasonable person is not purely abstract; the reasonable person is a person with the general feelings and experience of the community.¹⁶⁵ Nor does there seem to be a prescriptive component of the reasonable person standard—the Court’s discussions never suggest that the reasonable person follows a stronger moral or ethical compass than does the average person.¹⁶⁶ Assuming the average results of this survey accurately reflect the feeling and experience of the community,¹⁶⁷ the average results in the survey should, at least approximately, describe the reasonable person referenced by the Court.¹⁶⁸

It is not clear why the Court has used the seizure standard in a way that does not reflect reality. One possibility is that the Court is unaware of how people actually feel when they interact with police officers.¹⁶⁹ Several articles have noted that the Court seems out of touch with the reality of how people feel about police encounters.¹⁷⁰ At least one Justice has noted that

¹⁶⁴ See, e.g., Maclin, “*Black and Blue Encounters*,” *supra* note 11, at 250 (arguing that the police and courts must consider the race of the person interacting with the police in determining if a seizure occurred); Martha Minow & Todd Rakoff, *Is the “Reasonable Person” a Reasonable Standard in a Multicultural World*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 40, 59-60 (Austin Sarat et al. eds., 1998) (arguing that the reasonable person should be defined relative to “group membership, social relations among groups, issues of knowledge, and issues of dominance and subordination”).

¹⁶⁵ See Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 720 (1998) (emphasizing the need for the Court to “direct[ly] access . . . the community’s shared understandings”); Minow & Rakoff, *supra* note 164, at 42 (“The imagined ‘reasonable person’ . . . acquires the morals, intelligence, and knowledge reflecting community standards and perceptions, whether or not the particular individual actually held them.”).

¹⁶⁶ See the discussion, for example, in *United States v. Mendenhall*, 446 U.S. 544, 553-55 (1980). Of course, the reasonable person envisioned by the Court is an *innocent* person. *Bostick*, 501 U.S. at 438.

¹⁶⁷ As discussed above, there is no reason to believe they do not. See *supra* Part IV.A.

¹⁶⁸ See Steinbock, *supra* note 9, at 51 (“Since the Court has phrased its predominant test in terms of the reasonable person, the constitutional question could clearly be merged with the factual one: how would the average American perceive certain police practices?”).

¹⁶⁹ See, e.g., Burkoff, *supra* note 9, at 1129 (“[J]udges are arguably not doing a very good job—after the fact and far removed from the scene—of appreciating the actual coercive impact of a police officer’s request for consent under these circumstances.”).

¹⁷⁰ See, e.g., Maclin, “*Black and Blue Encounters*,” *supra* note 11, at 249-50 (“Common sense teaches that most of us do not have the chutzpah or stupidity to tell a police officer to ‘get lost’”); Strauss, *supra* note 54, at 236 (“Numerous scholars and even judges have made the very basic observation that most people would not feel free to deny a request by a police officer.”); cf. Bacigal, *supra* note 165, at 720 (“[L]acking direct access to the community’s shared understandings, the Justices will not often find that a hypothesized reasonable person’s assessment of Fourth Amendment reasonableness differs from the Justices’ own assessment.”); Simmons, *supra* note 57, at 800 (“The most frequent criticism

empirical evidence should help determine seizure questions.¹⁷¹ A second possibility is that, while the Court is aware of how people feel when they interact with police officers,¹⁷² it has other reasons for inaccurately applying facts to the standard. The Court may feel bound by a strong sense of *stare decisis* to continue using the language of the standard,¹⁷³ but equally bound to declare that most people “feel free to leave” because it realizes that accurately applying the facts might result in an enormous increase in the number of seizures. Or the Court’s use of the standard may be—although not acknowledged as such—normative, or prescriptive, rather than positive,

of the consent search cases is that the Supreme Court is unaware of the realities on the street . . .”).

¹⁷¹ See *supra* note 60. Even beyond the discussion in *Brendlin*, the Court has sometimes been persuaded by empirical evidence in other areas of criminal law. See, e.g., *District of Columbia v. Heller*, 128 S. Ct. 2783, 2860 (2008) (Breyer, J., dissenting) (arguing that “the empirical evidence presented here [on gun control] is sufficient to allow a judge to reach a firm legal conclusion”); *Stogner v. California*, 539 U.S. 607, 649 (2003) (Kennedy, J., dissenting) (arguing that a legislature’s determination about child abuse should be upheld because it “is amply supported by empirical studies”); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (accepting results from polling data as evidence of a consensus against executing the mentally retarded); *Withrow v. Williams*, 507 U.S. 680, 714 (1993) (O’Connor, J., concurring in part and dissenting in part) (suggesting that the Court should reconsider *Miranda*’s rule “when presented with empirical data”). On the other hand, the Court has not always been convinced by, or even willing to accept, empirical evidence. See, e.g., David L. Faigman, “Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 588-94 (1991) (surveying a series of cases where the Court has rejected empirical evidence that social scientists find persuasive); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 57 n.4 (2008) (reporting the Court’s general resistance to empirical evidence in *Kansas v. Marsh*, 548 U.S. 163 (2006)); see also Dorf, *supra* note 59, at 38 (“The typical Supreme Court opinion cites dozens of other Supreme Court cases, but scarcely any empirical data . . .”). It is possible that the Court remains willing to consider empirical evidence only when the studies are “particularly unequivocal.” Shawn Kolitch, Comment, *Constitutional Fact Finding and the Appropriate Use of Empirical Data in Constitutional Law*, 10 LEWIS & CLARK L. REV. 673, 696 n.100 (2006).

¹⁷² See, e.g., Patricia M. Wald, *Guilty Beyond a Reasonable Doubt: A Norm Gives Way to the Numbers*, 1993 U. CHI. LEGAL F. 101, 106 (“Although judges daily proclaim piously that a reasonable person in those circumstances should have known she had the right to keep going, I doubt that any judge is completely convinced of that. Several of our D.C. Circuit cases have referred to it as a convenient, albeit necessary, fiction.”).

¹⁷³ Cf. Burkoff, *supra* note 9, at 1129 (“A second explanation for why judges routinely find such searches to be consensual is, to my mind, even more persuasive—and much more disturbing. Unfortunately, I believe that judges are holding that these searches are consensual strictly as a matter of what might be called knee-jerk, ‘result stare decisis.’ . . . [J]udges are following the lead of the Supreme Court in the application of prevailing consent doctrine, rather than following the consent-search doctrine itself and determining whether such consents have truly been tendered ‘freely and voluntarily,’ as the law requires.”).

or descriptive.¹⁷⁴ The Court may be holding citizens to a standard of conduct it believes should be the norm in society, the conduct of the idealized reasonable person.¹⁷⁵ Or the Court may have developed the standard not so much as a tool for itself, but as a tool for law enforcement, a guide about what actions are permissible. It is easier for law enforcement officials to know if their actions would make the reasonable person feel restrained than to know if their actions make the particular person with whom they are currently dealing feel that way.¹⁷⁶

The Supreme Court should change its current seizure doctrine, regardless of why that doctrine has taken its present form. The Court currently maintains that it is asking one question, but it is either wrong in how it answers that question or is in fact asking a completely different question. Such a situation is primarily troubling because the Court seems to be denying the protections of the Fourth Amendment to people who, under the Court's own standard, are seized and so deserve those protections. This situation is also troubling from the perspective of the lawyers, law enforcement officers, and lower court judges who are trying to work with, and be guided by, the Court's counterintuitive decisions.

The results of this study suggest that the Court should not consider changing its current doctrine by adding a warning requirement. If people who know their rights do not feel free to leave, the value of a warning is questionable. The Court's holding in *Robinette*, that an officer does not have to inform someone he has stopped that the person is free to leave, appears to be acceptable at least to the extent that the warning would likely have little effect on the person who is stopped. The Court's decision may not have worsened the situation for citizens who are stopped or questioned. Concern that requiring informed consent would reduce the number of consent searches, however, is not supported by the data. These data suggest that knowledge is not the panacea—other forces at work during even simple

¹⁷⁴ See Steinbock, *supra* note 9, at 537 (“[T]he Court’s conception of a reasonable person has an implicit normative effect.”).

¹⁷⁵ The Court has never explicitly indicated that it includes such a prescriptive component in its standard. Some commentators, however, have argued that the Court’s holdings in seizure cases can only be explained by a reasonable person who is “highly artificial,” Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 439 (1988), or even a reasonable “pachydermatous person”—a reasonable person with skin so thick that he still would believe he had a choice to leave when faced with police questioning. LaFave, *supra* note 20, at 739-40.

¹⁷⁶ See *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988) (“The test’s objective standard—looking to the reasonable man’s interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.”).

interactions with the police prevent individuals from feeling free to leave. It is possible that the immediacy of the warning would itself increase the likelihood that people would actually exercise the right about which they had been informed, but much of the writing on this topic suggests that the warning would have little effect.¹⁷⁷

But there are two changes the Court should consider based on the results of this Article. First, the Court should consider applying the free-to-leave standard more accurately to the facts in each case. The Court would maintain the current reasonable person standard, but analyze the facts of each case with a more critical eye, aware that most people feel coerced by even small interactions with law enforcement. The Court could accomplish this change gradually to avoid overturning its long line of precedents. Over a series of cases, the Court could distinguish prior fact patterns, moving the doctrine closer to an accurate description of reality.

The data in this Article suggest that applying an accurate reasonable person standard would require the Court to consider carefully the level of granularity at which it describes the reasonable person. Since women and young people feel less free to leave than other groups, the Court should consider, at minimum, adopting a “reasonable person of similar age” or “reasonable person of the same gender” standard. While the Court has occasionally given lip service to considering these characteristics in its reasonable person analysis,¹⁷⁸ it is unlikely the Court currently gives them proper weight.¹⁷⁹ Nonetheless, because some precedent for at least considering those characteristics exists, the Court could give those characteristics more weight without having to justify a major change in doctrine.

This change to the Court’s approach would lead to a large increase in the number of people considered seized within the meaning of the Fourth Amendment.¹⁸⁰ That result would lead to a reduction in the number of

¹⁷⁷ See *supra* text accompanying notes 106-08.

¹⁷⁸ The Court has rarely addressed the question of how to consider the reasonable person’s gender or age (or race). DRESSLER & MICHAELS, *supra* note 14, § 7.03(c)(3). Several justices in *Mendenhall* did suggest that age and gender were “not irrelevant factors” in the seizure analysis. See *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (plurality opinion); *cf.* *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (“In determining whether a defendant’s will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances Some of the factors taken into account have included the youth of the accused . . .”).

¹⁷⁹ For instance, in *Mendenhall*, the Court found that a reasonable person who was twenty-two years old and female would not feel coerced when interacting with older, male police officers. 446 U.S. at 558.

¹⁸⁰ LaFave, *supra* note 20, at 741 (“[A] literal application of the ‘not free to leave’ test would make virtually all police-citizen encounters of that type seizures . . .”).

encounters between police and citizens, since the police would have to establish probable cause before almost every interaction, or risk the later suppression of evidence. To the extent that one is concerned that the police are taking advantage of the current doctrine to stop and search far too many people, this result would be desirable. To the extent that one is concerned about hamstringing police investigations, this result would be less desirable.

The second change that the Court should consider to its seizure standard is to adopt a new standard entirely. A relatively easy option would be for the Court to slowly tighten the wording of the seizure standard. Over several cases, the Court could transition from asking whether a reasonable person felt free to leave to some narrower test, such as asking whether a reasonable person felt “restrained to such a degree that he had no possible choice other than to comply with the officer’s request.”¹⁸¹ This solution might be appealing from the Court’s perspective, because it would require neither a radical departure from precedent nor a sharp change in the way law enforcement operates. It would be less appealing for people who believe that the police currently have too much discretion to stop and search citizens without probable cause. This change would still require the Court to consider exactly how to describe the reasonable person.

A more radical option would be to shift the focus of the seizure standard away from the reasonable person entirely and towards a different perspective, such as that of a model citizen or of a police officer. If the Court wants to make this change, it could perhaps justify the alteration on a new understanding of what the “unreasonable” in the Fourth Amendment means. There is nothing in the wording of the Amendment that requires unreasonableness to be considered from the perspective of a reasonable person. The Court could instead ask how a model citizen, one who has some feeling of obligation to help the police and protect the community, would feel when interacting with law enforcement. Alternatively, the Court could ask whether a reasonable police officer, one who is aware of his duty to protect a citizen’s privacy interests as well as investigate crime, would believe the seizure to be reasonable under the circumstances.¹⁸² In either case, it is not clear what the result of the new standard would be because the result would depend on how the Court defined model citizen or reasonable police officer. These more radical changes, and any other of the many

¹⁸¹ The description Professor LaFare has provided of how the Court actually determines if a seizure occurs could also provide the wording for an alternative test. *See supra* note 20.

¹⁸² There is precedent for a standard that focuses on a “reasonable officer.” *See, e.g., Graham v. Connor*, 490 U.S. 386, 396 (1989) (“[T]he ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . .”).

possible alternatives in a similar vein,¹⁸³ would likely be less appealing to the Court; they would require the reversal of several decades of precedent.

VI. CONCLUSION

This Article has examined the first set of empirical data addressing the question of whether people would feel free to leave or otherwise terminate encounters with police officers in two scenarios in which the Supreme Court believes people would feel free. Those data were collected from 406 responses to a survey given in various locations in Boston. The results of this analysis suggest that people walking on the sidewalk or riding on a bus would not feel free to leave when approached by a police officer and asked questions. Women and people under twenty-five felt relatively less free to end the encounter. Even people who knew they had the right to leave or not talk to the police officer still did not feel free to leave.

These results suggest that the Court has been applying its Fourth Amendment seizure standard incorrectly. As a result, the Court is determining that people who do not in fact feel free to leave are free to leave, and it is therefore denying individuals the potential protections of the Fourth Amendment. This Article has discussed two possible changes to the Court's seizure doctrine—beginning to apply the standard more correctly, and adopting a new standard entirely.

However, more empirical research is needed before any change occurs.¹⁸⁴ This Article presents the first study of its kind, and future studies could build upon the initial work here. Future studies could more accurately collect information on race and income, include more and more complicated scenarios, and explore a broader set of locations throughout the country. In addition, future surveys could employ more sophisticated surveying techniques, such as randomizing the order of questions or introducing multiple choice answers. It seems unlikely that the underlying results will change, but additional empirical information will continue to build the case that people interacting with the police do not feel as free to leave police encounters as the Court has said they do.

¹⁸³ See, e.g., Butterfoss, *supra* note 175, at 442 (1988) (proposing a per se rule based on the subjective intent of the officer initiating the encounter).

¹⁸⁴ See Lynch, *supra* note 94, at 234 (“I don’t know that scholars can penetrate these mysteries, either, but the broader perspective that comes from systematically surveying large numbers of police officers and defendants may give a more realistic view of that process than judges have.”).

