

## CASUAL OR COERCIVE? RETENTION OF IDENTIFICATION IN POLICE-CITIZEN ENCOUNTERS

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*In Bostick and Drayton, the Supreme Court announced that per se rules were inappropriate in answering the Fourth Amendment seizure question, “Would a reasonable citizen feel free to leave?” But when, if ever, can one factor in a pedestrian encounter with police be so inherently coercive that it becomes dispositive? The D.C. and Fourth Circuits explicitly disagree over whether police retention of identification documents constitutes such a factor. The D.C. Circuit has held that such retention is a per se seizure because a citizen cannot feel free to leave when her documents are in police hands. In contrast, the Fourth Circuit rejected this reasoning on the grounds that a citizen can always demand the return of her documents.*

*Contrary to its strong wording, however, the Supreme Court’s rejection of per se rules is not so absolute, and in fact, per se rules do apply where single factors are inherently coercive. Two related areas of Fourth Amendment jurisprudence—traffic stops and voluntariness of consent—demonstrate that courts typically recognize this inherent coercion in police retention of documents. Further, the Fourth Circuit’s approach fails to reflect accurately citizens’ true feelings of restraint in these contexts, as explored in recent empirical studies. Instead, the D.C. Circuit’s approach takes into account the power disparity present where police retain identification. Its per se rule not only clarifies the standard for courts but also creates clear conduct rules and places the burden of monitoring coercive force on the police, who are best equipped to do so.*

### INTRODUCTION

The controversy surrounding the “Show Me Your Papers” provision, recently upheld in *Arizona v. United States*,<sup>1</sup> exemplifies public concern over police-citizen encounters and the role of identification documents in those interactions.<sup>2</sup> This Note addresses one such concern: the role of

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1. *Arizona v. United States*, 132 S. Ct. 2492 (2012) (analyzing *Ariz. Rev. Stat. Ann.* § 11-1051 (2012)).

2. See, e.g., Bill Keller, Op-Ed., *Show Me Your Papers*, *N.Y. Times* (July 1, 2012), <http://www.nytimes.com/2012/07/02/opinion/keller-show-me-your-papers.html> (on file with the *Columbia Law Review*) (discussing nature of identification in immigration checks); John M. Glionna, *Arizona Immigration: “Show Me Your Papers” Enforcement to Begin*, *L.A. Times* (Sept. 18, 2012), <http://www.latimes.com/news/nation/nationnow/la-na-nn-arizona-immigration-20120918,0,4049494.story> (on file with the *Columbia Law Review*) (discussing Arizona judge’s decision to allow immediate enforcement of “Show Me Your Papers” law); *Supreme Court Makes 3 Key Rulings*, *NPR* (June 25, 2012),

these documents as a factor in determining whether a seizure has occurred for Fourth Amendment purposes. In particular, it highlights a longstanding and continuing disagreement between the Fourth and D.C. Circuits over the appropriate standard for police handling of these documents. The standard governs a seemingly minor act: police retention of identification during the lowest level of police-citizen engagement, the casual encounter. This Note uses the phrase “seizure by identification” to describe such an occurrence, where a casual encounter becomes a seizure solely through the officer’s retention of an individual’s documentation while making a request to search or asking other questions.

This Note advocates for the adoption of a *per se* rule that, in any police-citizen encounter, a seizure occurs if a police officer retains an individual’s identification while questioning her or asking for permission to search her. Though many circuits agree on the standard governing traffic stops,<sup>3</sup> they have articulated differing standards for situations where police approach and question individuals on the street. The disagreement between the D.C. and Fourth Circuits provides the clearest example of the competing rationales.<sup>4</sup> The D.C. Circuit sees the retention of identification during an encounter as a tense situation, in which the police have displayed a show of authority that exerts coercive force over the citizen. Consequently, the court has adopted a *per se* rule that retention of identification during questioning constitutes a seizure even during an otherwise casual encounter.<sup>5</sup> However, if one were to cross a river southwest to Virginia, the same interaction becomes, in the eyes of the Fourth Circuit, a mutually agreeable exchange with no pressure to continue beyond the citizen’s wishes. The Fourth Circuit has expressly rejected the D.C. Circuit’s *per se* approach and has refused to find a seizure in almost identical cases.<sup>6</sup>

For the past twenty years, the Supreme Court has refused to adopt *per se* rules in the area of Fourth Amendment seizure jurisprudence. The Court has consistently articulated a totality of the circumstances

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<http://www.npr.org/2012/06/25/155714576/supreme-court-makes-3-key-rulings> (on file with the *Columbia Law Review*) (discussing Arizona immigration ruling). Section 2(B) of Arizona’s S.B. 1070 requires police officers conducting any “lawful stop, detention, or arrest” to make a “reasonable attempt . . . to determine the immigration status of the person.” Ariz. Rev. Stat. Ann. § 11-1051(B). Though the Court concluded that federal immigration law preempted many of the provisions in Arizona’s law, section 2(B) survived the facial constitutional challenge—subject to future as applied challenges, as the majority carefully specified. *Arizona*, 132 S. Ct. at 2510.

3. See *infra* Part II.B.1 (explaining traffic stop jurisprudence).

4. See *infra* Part II.A (contrasting circuits’ approaches).

5. See *United States v. Jordan*, 958 F.2d 1085, 1086 (D.C. Cir. 1992) (“The inevitable effect produced by the police action in holding [Jordan’s] license was that he was not free to go about his business . . .”).

6. See *United States v. Weaver*, 282 F.3d 302, 310, 313 (4th Cir. 2002) (“To the extent that any of our sister circuits have adopted *per se* rules in this context, we respectfully decline to follow their example.” (citing *Jordan*, 958 F.2d at 1086–87)).

approach, repeating that no one factor should emerge as dispositive when evaluating whether a casual encounter has escalated into a seizure.<sup>7</sup> However, in oral arguments, several Justices have indicated their concern that the Court's articulation of the reasonable person's response may not capture the reality of the encounters.<sup>8</sup> In Part I, this Note addresses the development of the Supreme Court's reasonable person standard for seizures and the role of the *Mendenhall-Royer* pair of cases. Part II examines the doctrinal reasoning articulated by the D.C. and Fourth Circuits and then examines retention of identification in two other areas that provide helpful corollaries: traffic stops and voluntariness of consent analysis. Part III argues the coercive pressure when police retain identification conflicts with the Supreme Court's stated conceptualization of the police-citizen encounter as a voluntary, amiable interaction. To address this coercion, this Note concludes that the D.C. Circuit's per se rule not only employs clear judicial standards for the interaction but also shifts the burden of maintaining the boundary to the police, who are better equipped with both the knowledge and the capacity to mitigate the coercive force during the interaction, without imposing additional burdens on their ability to conduct these casual encounters.

#### I. THE DEVELOPMENT OF THE REASONABLE PERSON STANDARD

The retention of identification has played, somewhat surprisingly, a key role in the origins of the reasonable person standard. This Part begins with a brief summary of the *Terry v. Ohio* framework, which provides the general background to the dispute over when consensual encounters end and investigative stops begin. It then discusses the origins of the standard in the *Mendenhall-Royer* pair of cases and analyzes the way these cases deal with the issue of police retention of identification. It continues by discussing the key developments in the Court's seizure analysis, particularly the cases of *California v. Hodari D.*<sup>9</sup> and *Florida v. Bostick*.<sup>10</sup> Understanding these developments is critical to the next Part's discussion of the role of identification in the seizure context.

In 1968, the Supreme Court decided *Terry v. Ohio*, which set out a framework under which encounters between citizens and the police

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7. See *infra* Part I.C (discussing Court's rejection of per se rules).

8. See Transcript of Oral Argument at 33, *Brendlin v. California*, 551 U.S. 249 (2007) (No. 06-8120) (Kennedy, J.) ("Now, we don't have empirical studies and so forth, but at some point the Court takes judicial notice . . . I just think you have no social or empirical documentation for that proposition."); *id.* at 43 (Breyer, J.) ("[T]he law points us to the direction of what would a person reasonably think . . . , and we can look at five million cases, but we don't know. So what do we do if we don't know? I can follow my instinct. . . . Or I could say, let's look for some studies."); *id.* at 44 (Scalia, J.) ("Maybe we can just pass until the studies are done?").

9. 499 U.S. 621 (1991).

10. 501 U.S. 429 (1991).

would be analyzed.<sup>11</sup> The decision essentially created three categories of interaction between citizens and police: casual encounters, investigative stops, and arrests.<sup>12</sup> The first category does not implicate the Fourth Amendment and operates solely on the basis of mutual consent between the citizen and the officer.<sup>13</sup> The Court conceptualized both the second and third categories as coercive “seizures”<sup>14</sup> but required different levels of suspicion for each to satisfy the Fourth Amendment. While a traditional arrest required probable cause and either a warrant or exigent circumstances,<sup>15</sup> an investigative stop required only reasonable suspicion based on articulable facts.<sup>16</sup> Under *Terry*, a court first determines which of these three categories describes the encounter and then applies the corresponding standard.<sup>17</sup>

The methodology for distinguishing between casual and coercive has serious implications for constitutional rights. First, whether courts adopt a *per se* rule impacts the practical ways in which police conduct their citizen interactions.<sup>18</sup> Second, it affects the way courts apply the exclusionary rule for evidence obtained in these encounters.<sup>19</sup> Third, as a collateral effect, whether or not a seizure has occurred and whether it was constitutionally justified affects the opportunities for civil suits against law enforcement officers who, through retention of identification, seize an individual without reasonable suspicion.<sup>20</sup> As this Part will demonstrate, police retention of identification played an early role in determining when an encounter transformed from casual to coercive.

#### A. *Two Peas in a Pod—The “Free to Leave” Cases*

In 1980 and 1983, the Supreme Court decided the near-parallel cases of *United States v. Mendenhall*<sup>21</sup> and *Florida v. Royer*.<sup>22</sup> Scholars of the

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11. 392 U.S. 1 (1968).

12. *Id.* at 16.

13. See *id.* at 34 (White, J., concurring) (“[T]he person approached may not be detained or frisked but may refuse to cooperate and go on his way.”).

14. Cf. *id.* at 16 (majority opinion) (“[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

15. *Id.* at 20.

16. *Id.* at 27.

17. *Id.* at 16–20.

18. See *infra* notes 238–243 and accompanying text (discussing effects of judicial rules on police conduct).

19. See *infra* notes 234–237 and accompanying text (discussing influence of exclusionary rule on courts and police).

20. See 42 U.S.C. § 1983 (2006) (creating civil right of action for parties deprived “of any rights, privileges, or immunities secured by the Constitution and laws”); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (holding plaintiff can recover monetary damages for injuries suffered due to Fourth Amendment violation).

21. 446 U.S. 544 (1980).

Fourth Amendment have largely understood the legacy of these two cases as the standard for seizure from Justice Stewart's concurrence in *Mendenhall*, which was adopted by a majority of the Court in later cases.<sup>23</sup> More interestingly for the purposes of this Note, however, the cases reach opposite conclusions despite almost identical sets of facts—and the retention of identification played a nontrivial role in Justice Powell's change in position between the two cases.

In *Mendenhall*, the defendant was stopped by two federal agents in an airport and asked for her identification.<sup>24</sup> When the names on her ticket and her driver's license failed to match, the agents asked her to accompany them to a room fifty feet away.<sup>25</sup> In that room, the defendant was asked twice if she consented to a search of her person;<sup>26</sup> after she agreed, she was taken to a private room where the policewoman searching her found heroin.<sup>27</sup>

In *Royer*, the defendant was stopped by two state police officers in an airport and asked for his identification.<sup>28</sup> When the names on his ticket and his driver's license failed to match, the officers asked him to accompany them to a room forty feet away.<sup>29</sup> In that room, the officers produced the defendant's bags and asked if they could search them;<sup>30</sup> the defendant opened one bag for them with a key and responded "go ahead" after being asked if the officer could open the second.<sup>31</sup> The Court's description of the facts reveals few differences between *Royer* and *Mendenhall*: the distance to the room to which the defendant was removed,<sup>32</sup> the physical dimensions of the room,<sup>33</sup> the search of *Mendenhall*'s person versus the search of *Royer*'s luggage,<sup>34</sup> and the

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22. 460 U.S. 491 (1983).

23. See, e.g., 3 Wayne LaFare, Search and Seizure § 5.1(a), at 3 (5th ed. 2012) [hereinafter LaFare, Search & Seizure] (referring to "*Mendenhall-Royer* definition of a Fourth Amendment seizure"); see also *infra* notes 52–53 and accompanying text (discussing literature and subsequent Supreme Court opinions).

24. *Mendenhall*, 446 U.S. at 547–48.

25. *Id.* at 548.

26. *Id.* at 548–49.

27. *Id.* at 549.

28. *Florida v. Royer*, 460 U.S. 491, 494 (1983).

29. *Id.*

30. *Id.*

31. *Id.* at 494–95.

32. Compare *Mendenhall*, 446 U.S. at 548 (describing location as "up one flight of stairs about 50 feet from where the respondent had first been approached"), with *Royer*, 460 U.S. at 494 (describing location as "a room, approximately 40 feet away, adjacent to the concourse").

33. Compare *Mendenhall*, 446 U.S. at 548 (describing room as "a reception area adjoined by three other rooms"), with *Royer*, 460 U.S. at 494 (describing room as "a large storage closet, located in the stewardesses' lounge and containing a small desk and two chairs" (internal quotation marks omitted)).

34. Compare *Mendenhall*, 446 U.S. at 549 ("As the respondent removed her clothing, she took from her undergarments two small packages, one of which appeared to contain

retention of identification in *Royer* but not in *Mendenhall*.<sup>35</sup> With these minor differences in mind, the Court's divergent analyses of the two cases may appear somewhat counterintuitive.

In *Mendenhall*, despite the (albeit marginally) greater distance removed and the search of Mendenhall's person, a majority of the Justices agreed that the initial encounter did not violate the Fourth Amendment but could not agree on the precise reason.<sup>36</sup> Two Justices held that no seizure had occurred, noting that the officers had asked for Mendenhall's identification and ticket but then returned them to her before continuing with their investigation.<sup>37</sup> Justice Powell—writing for himself, Chief Justice Burger, and Justice Blackmun—declined to rule on the issue, as in the lower courts the government had apparently assumed that a seizure had occurred.<sup>38</sup> Justice Powell's concurrence did, however, specifically mention retention of identification as a potential reason for disagreement with Justice Stewart's dicta that no seizure had occurred.<sup>39</sup> The four remaining Justices not only presumed a seizure had occurred but expressly noted that the retention of Mendenhall's identification objectively tended to show a seizure had occurred.<sup>40</sup>

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heroin, and handed both to the policewoman.”), with *Royer*, 460 U.S. at 495 (“The suitcase was pried open by the officers and more marihuana was found.”).

35. Compare *Mendenhall*, 446 U.S. at 548 (“After returning the airline ticket and driver's license to her, Agent Anderson asked the respondent if she would accompany him to the airport DEA office for further questions.”), with *Royer*, 460 U.S. at 494 (“The detectives did not return his airline ticket and identification but asked Royer to accompany them . . .”).

36. *Mendenhall*, 446 U.S. at 559–60.

37. See *id.* at 555 (opinion of Stewart, J.) (“[N]othing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation . . . and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.”); *id.* at 558 (observing “[t]he respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers”). The second Justice to join this opinion was then Justice Rehnquist.

38. See *id.* at 560 (Powell, J., concurring in part and concurring in the judgment) (“Because neither of the courts below considered the question, I do not reach the Government's contention that the agents did not ‘seize’ the respondent . . .”); see also *id.* at 551 n.5 (opinion of Stewart, J.) (noting both parties assumed seizure in lower courts but government raised issue at Supreme Court).

39. *Id.* at 560 n.1 (Powell, J., concurring in part and concurring in the judgment) (“I do not necessarily disagree with the views expressed in [Justice Stewart's opinion]. For me, the question whether the respondent in this case reasonably could have thought she was free to ‘walk away’ when asked by two Government agents for her driver's license and ticket is extremely close.”). Even presuming a seizure had occurred, the three Justices signing this concurrence nonetheless concluded that the seizure satisfied the *Terry* standard for an investigative stop. *Id.* at 561, 565; cf. *supra* text accompanying notes 11–17 (describing *Terry* and its framework).

40. *Mendenhall*, 446 U.S. at 570 & n.3 (White, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.) (“Not the least of these factors [indicating seizure occurred] is the fact that the DEA agents for a time took Ms. Mendenhall's plane ticket and driver's license

In *Royer*, six Justices came to the exact opposite conclusion on the issue of seizure. This time, Justice White, author of the *Mendenhall* dissent, authored the plurality opinion, joined by two other *Mendenhall* dissenters—Justices Marshall and Stevens—as well as Justice Powell.<sup>41</sup> The *Royer* plurality concluded that the officers’ actions had transformed an initial casual encounter into a seizure.<sup>42</sup> In so finding, the Justices relied primarily on the facts that the officers had identified themselves as officers, told the defendant of their suspicion of drug trafficking, and asked him to accompany them to a private area “while retaining his [identification] and without indicating in any way that he was free to depart.”<sup>43</sup> The other *Mendenhall* dissenter, Justice Brennan, wrote separately to explain his belief that even the initial request for identification constituted a seizure,<sup>44</sup> because it was ludicrous to think someone could feel himself free to leave when the police have retained his identification.<sup>45</sup>

The officers’ treatment of the defendants’ identity documents also seemed to be the factor that motivated Justice Powell to find a seizure in *Royer* but not in *Mendenhall*. His *Mendenhall* concurrence noted in dicta that “the question whether the respondent in this case reasonably could have thought she was free to ‘walk away’ when asked by two Government agents for her driver’s license and ticket is extremely close.”<sup>46</sup> When he joined the plurality’s reasoning in *Royer*, he wrote his own concurrence covering less than a page, giving three facts distinguishing *Mendenhall* from *Royer*: the confines of the room, the officers’ possession of *Royer*’s luggage, and the retention of his identification.<sup>47</sup>

The plurality opinion in *Royer* produced two separate dissents. Justice Blackmun agreed with the plurality’s finding that a seizure had occurred, though he did not specify precisely when it had taken place.<sup>48</sup>

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from her.”). The dissenting Justices also found the officers lacked the requisite articulable suspicion to justify the seizure under *Terry*. *Id.* at 573.

41. *Florida v. Royer*, 460 U.S. 491, 493 (1983) (plurality opinion).

42. *Id.* at 501–02.

43. *Id.* at 501 (emphasis added).

44. *Id.* at 511 (Brennan, J., concurring in the judgment).

45. *Id.* at 512.

46. *United States v. Mendenhall*, 446 U.S. 544, 560 n.1 (1980) (Powell, J., concurring in part and concurring in the judgment).

47. *Royer*, 460 U.S. at 508–09 (Powell, J., concurring). But see *supra* notes 32–36 and accompanying text (noting minor differences in facts and suggesting further distance and search of person’s body in *Mendenhall* may actually represent greater interests at stake than those in *Royer*); *infra* Part III.B.1 (arguing initial retention of identification changed tone of entire encounter).

48. *Royer*, 460 U.S. at 514 (Blackmun, J., dissenting) (“I do not quarrel with the plurality’s conclusion that at some point in this encounter, that threshold [for seizure] was passed.”). His reason for dissenting was that he found the seizure to be a “lesser intrusion” and held it justified under the reasonableness standard, instead of applying a requirement

The remaining three Justices did not expressly address whether a seizure had occurred but found that the officers' actions satisfied the Fourth Amendment requirement of reasonableness,<sup>49</sup> even including the retention of the identification.<sup>50</sup>

Notably, the issue of identification played an important role in the Court's analyses, and several Justices remarked explicitly on the coercive influence of an officer retaining an individual's documents.<sup>51</sup> However, the thicket of nuanced opinions in the *Mendenhall-Royer* pair of cases did not make clear its lasting legacy. In fact, the only clear recognized doctrinal result of these cases was the adoption of Justice Stewart's *Mendenhall* formulation of what constitutes seizure<sup>52</sup>: a show of official authority such that a reasonable person would have believed she was not free to leave.<sup>53</sup> Based on this standard, a seizure occurs if a court concludes that a reasonable person would not have felt free to leave, and the typical *Terry* analysis for reasonableness would then determine its constitutional acceptability. Consequently, the question moving forward from *Mendenhall* and *Royer* seemed to be how to determine when an individual felt free to leave. However, the treatment of identification as a critical factor in that analysis sat unrecognized for several years.<sup>54</sup>

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of probable cause. *Id.* at 516 (citing *Dunaway v. New York*, 442 U.S. 200, 212 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881–82 (1975)).

49. *Id.* at 526 (Rehnquist, J., dissenting, joined by Burger, C.J. & O'Connor, J.).

50. *Id.* at 528.

51. E.g., *id.* at 511 (Brennan, J., concurring in the judgment) ("For plainly *Royer* was 'seized' . . . when the officers asked him to produce his driver's license and airline ticket."); *Mendenhall*, 446 U.S. at 560 n.1 (Powell, J., concurring in part and concurring in the judgment) ("[W]hether the respondent in this case reasonably could have thought she was free to 'walk away' when asked by two Government agents for her driver's license and ticket is extremely close."); *id.* at 570 n.3 (White, J., dissenting) ("Not the least of these factors [showing seizure] is the fact that the DEA agents for a time took Ms. *Mendenhall*'s plane ticket and driver's license from her.").

52. For some contemporaneous literature attempting to parse the complicated opinions in these cases, see, e.g., George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 *Duke L.J.* 849, 867 (suggesting *Royer* indicates Court "largely adopted" Stewart's standard); Wayne R. LaFave, "Seizures" Typology: Classifying Detentions of the Person to Resolve Warrants, Grounds, and Search Issues, 17 *U. Mich. J.L. Reform* 417, 421 (1984) ("The uncertainty arising from this three-way split [in *Mendenhall*] was put to rest in *Florida v. Royer*, where the Stewart standard was unobscuredly accepted by a majority of the Court." (footnote omitted)); see also *State v. Reid*, 276 S.E.2d 617, 621 & n.4 (Ga. 1981) (applying Stewart's formulation of seizure standard).

53. *Mendenhall*, 446 U.S. at 554 (plurality opinion). In *Royer*, all nine Justices employed this definition, even when coming to different conclusions. *Royer*, 460 U.S. at 502 (plurality opinion); *id.* at 511 (Brennan, J., concurring in the judgment); *id.* at 514 (Blackmun, J., dissenting); *id.* at 523 n.3 (Rehnquist, J., dissenting).

54. See *infra* note 200 and accompanying text (noting recognition by Fifth, Seventh, and D.C. Circuits of this element in *Mendenhall-Royer*).



B. *Choosing Between a Contextual and a Bright-Line Rule for Different Kinds of Seizures*

This section explains the progression in the methodology used by the Supreme Court in evaluating whether a seizure has occurred. It discusses the beginning of the Court's distinction between types of seizure and its adoption of a contextual analysis for the "free to leave" standard. The legacy of the *Mendenhall-Royer* pair of cases seemed to be limited, given the fractured nature of the opinions, to the creation of the reasonable person standard for seizure analysis.<sup>55</sup> Subsequent cases dealing with seizure analysis referenced *Mendenhall* and *Royer* solely for this test, as well as Justice Stewart's list of factors tending to show seizure.<sup>56</sup> The open question of what methodology the Court would use to apply the test received its first answer in the unanimous opinion in *Michigan v. Chesternut*,<sup>57</sup> in which police officers in a patrol car followed a man who ultimately discarded illegal drugs while fleeing the police on foot.<sup>58</sup>

The Court held that the police pursuit did not constitute a seizure, explicitly applying a "contextual approach" in place of a bright-line rule.<sup>59</sup> In the words of the Court, the police conduct "would not have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."<sup>60</sup> Emphasizing this contextual approach, the Court suggested that a pursuit could constitute a seizure if it in fact contained enough factors to communicate "an attempt to capture or otherwise intrude upon respondent's freedom of movement."<sup>61</sup> Calling the test "necessarily imprecise," the Court reiterated its goal of assessing coercive force as a whole, rather than focusing on the minutiae of particular acts.<sup>62</sup> Consequently, the interpretation of *Mendenhall* and *Royer* began to solidify as a totality of the circumstances approach in seizure analysis.

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55. See, e.g., Edwin Butterfoss, *As Time Goes By: The Elimination of Contemporaneity and Brevity as Factors in Search and Seizure Cases*, 21 Harv. C.R.-C.L. L. Rev. 603, 603 n.4 (1986) (noting confusion in reconciling these cases); Dix, *supra* note 52, at 859-60 (describing holdings of *Mendenhall* and *Royer* as "uncertain at best").

56. See, e.g., *INS v. Delgado*, 466 U.S. 210, 215 (1984) (citing *Mendenhall* and *Royer* together for reasonable person standard); *id.* at 228 (Brennan, J., concurring in part and dissenting in part) (observing *Mendenhall* formulation of seizure had been adopted by majority of Court).

57. 486 U.S. 567, 572-73 (1988). In *Chesternut*, the Court affirmed *Mendenhall's* rule and rejected categorical rules in favor of the totality of the circumstances approach used in *Delgado*. *Id.*

58. *Id.* at 569.

59. *Id.* at 572-73.

60. *Id.* at 569.

61. *Id.* at 575.

62. *Id.* at 573.

This clarity lasted three years, until the Court once again confronted the issue of a police chase in *California v. Hodari D.*<sup>63</sup> In very similar facts to *Chesternut*, a group of young men fled when they saw police approach, and the police ran after them on foot.<sup>64</sup> While the defendant was running, he tossed aside a small rock of crack cocaine.<sup>65</sup> The Court ruled, as it had in *Chesternut*, that no seizure had taken place.<sup>66</sup> However, rather than adhering closely to *Chesternut's* reasoning, the Court took a step further and extended its seizure analysis.

Justice Scalia's majority opinion for seven Justices defined two types of seizure: physical detention—"the quintessential 'seizure of the person'"<sup>67</sup>—and submission to a show of authority.<sup>68</sup> The former constituted a seizure whenever the slightest application of physical force occurred.<sup>69</sup> In the latter category, the Court characterized the *Mendenhall* formulation as "a *necessary*, but not a *sufficient*, condition for seizure—or, more precisely, for seizure effected through a 'show of authority.'"<sup>70</sup> It then added a second requirement to the analysis—a finding that the individual had submitted to that authority.<sup>71</sup> The Court distinguished *Chesternut* by saying that it had not found a sufficient show of authority and so had not considered whether submission would be necessary.<sup>72</sup>

Thus, the Court's separation of two seizure categories lessened the reach of *Mendenhall's* factors. In all cases other than traditional physical seizure, it seemed, *Mendenhall's* show-of-authority test would be applied through the totality of the circumstances.<sup>73</sup> Physical restraint, however, automatically required the police to satisfy Fourth Amendment standards of reasonableness.

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63. 499 U.S. 621 (1991).

64. *Id.* at 622–23.

65. *Id.* at 623.

66. *Id.* at 629.

67. *Id.* at 624–25.

68. *Id.* at 627–28.

69. *Id.* at 624 ("[T]he mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient [to effect a seizure].").

70. *Id.* at 628.

71. *Id.* at 626.

72. *Id.* at 628.

73. See Wayne R. LaFare, Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?, 1991 U. Ill. L. Rev. 729, 734 [hereinafter LaFare, Pinguitudinous Police] (noting *Hodari D.* covers conduct under different standards than *Mendenhall-Royer*); The Supreme Court, 1990 Term—Leading Cases, 105 Harv. L. Rev. 297, 305–06 (1991) (noting discrepancy between physical seizure rules in *Hodari D.* and *Mendenhall-Royer* totality of circumstances test); see also, e.g., Randolph Alexander Piedrahita, Note, A Conservative Court Says "Goodbye to All That" and Forges a New Order in the Law of Seizure—*California v. Hodari D.*, 52 La. L. Rev. 1321, 1332, 1336–37 (1992) (reading *Hodari D.* as abandoning *Mendenhall* framework for at least physical seizure).

C. *Rejecting Per Se Rules for Show-of-Authority Seizures*

This section describes the confirmation of the Supreme Court's distaste for per se rules in the show-of-authority category of seizures, as well as the shrinking nature of protections against coercive pressure in these seizures. The ink had barely dried on the *Hodari D.* decision before the Supreme Court backed even further away from an expansive seizure definition. In *Florida v. Bostick*, the defendant was seated on a bus at a bus terminal when officers approached, requested his identification, and asked him questions.<sup>74</sup> Bostick claimed the process constituted a seizure, relying on the language of *Mendenhall* and *Chesternut* that a reasonable person would not feel "free to leave" when he could not leave without missing his bus.<sup>75</sup>

However, the Court took the opportunity to tweak the interpretation of *Mendenhall* once again. Justice O'Connor, writing for a six-Justice majority, said that the defendant's lack of freedom to leave was a result of his own private choice to take the bus.<sup>76</sup> Consequently, the proper analysis in such circumstances asks whether a reasonable person would have felt not "free to leave" but "free to decline the officers' requests or otherwise terminate the encounter."<sup>77</sup> The Court also clarified the objective standard by further defining a reasonable person as an "innocent person," citing *Royer* and *Chesternut*.<sup>78</sup> The Court emphasized as a fact "particularly worth noting" that the police had advised Bostick of his right to refuse consent.<sup>79</sup>

Additionally, the Court reaffirmed its earlier position in *Chesternut* by strongly rejecting the application of a per se rule.<sup>80</sup> It stated once again that no one factor or situation is dispositive and prescribed an analysis using the totality of the circumstances.<sup>81</sup> Finally, the Court firmly upheld the principle from its cases that police may approach, ask questions, and ask consent for searches without implicating the Fourth Amendment, so long as their conduct does not suggest that compliance is required.<sup>82</sup>

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74. 501 U.S. 429, 431–32 (1991).

75. *Id.* at 435 (explaining defendant's reliance on *Chesternut* and other cases to show infringement of "free to leave" test).

76. *Id.* at 436 ("Like the workers in [*Delgado*], Bostick's freedom of movement was restricted by a factor independent of police conduct . . .").

77. *Id.*

78. *Id.* at 438.

79. *Id.* at 432. However, the Court declined to rule on whether or not a seizure had occurred, due to the limited record available, and remanded the case. *Id.* at 437. On remand, in an eight-sentence per curiam opinion, the Supreme Court of Florida affirmed the trial court ruling that no seizure had occurred. *Bostick v. State*, 593 So. 2d 494, 495 (Fla. 1992) (per curiam).

80. *Bostick*, 501 U.S. at 440.

81. *Id.* at 439.

82. *Id.* at 434–35 ("[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the

This approach to seizure analysis proved lasting, as the case of *United States v. Drayton* demonstrated in 2002.<sup>83</sup> In a setting identical to *Bostick*, drug enforcement officers boarded a bus with the driver's consent before the bus left a scheduled stop.<sup>84</sup> In fact, the only discernible difference between the facts of *Bostick* and *Drayton* was that, in the latter, the officer did not explicitly inform the defendant of his right to refuse to allow the police to search his bags.<sup>85</sup> This time, the Court ruled directly that no seizure had occurred.<sup>86</sup> In doing so, it expressly rejected what it read to be the Eleventh Circuit's *per se* rule requiring officers to inform individuals of their right to refuse.<sup>87</sup> Importantly, the Eleventh Circuit had not itself formalized a *per se* rule to that effect; instead, the Supreme Court read a *de facto per se* rule from the circuit's precedents.<sup>88</sup> Thus, *Bostick* and *Drayton* have articulated a seizure analysis strongly opposed to *per se* rules or single dispositive factors, whether formally expressed or functionally applied.<sup>89</sup>

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individual's identification, and request consent to search . . . as long as the police do not convey a message that compliance with their requests is required." (citing *Florida v. Rodriguez*, 469 U.S. 1, 5–6 (1984); *INS v. Delgado*, 466 U.S. 210, 216 (1984); *Florida v. Royer*, 460 U.S. 491, 501 (1983) (plurality opinion); *United States v. Mendenhall*, 446 U.S. 544, 557–58 (1980)).

83. 536 U.S. 194, 201 (2002) ("[F]or the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of 'all the circumstances surrounding the encounter.'" (quoting *Bostick*, 501 U.S. at 439)).

84. *Id.* at 197.

85. *Id.* at 198.

86. *Id.* at 203 ("Applying the *Bostick* framework to the facts of this particular case, we conclude that the police did not seize respondents when they boarded the bus and began questioning passengers.").

87. *Id.* ("Under these cases, it appears that the Court of Appeals would suppress any evidence obtained during suspicionless drug interdiction efforts aboard buses in the absence of a warning that passengers may refuse to cooperate. The Court of Appeals erred in adopting this approach.").

88. *Id.* ("Although the Court of Appeals has disavowed a *per se* requirement, the lack of an explicit warning to passengers is the only element common to all its cases.").

89. See, e.g., *United States v. Comstock*, 531 F.3d 667, 678 (8th Cir. 2008) (reading *Bostick* and *Drayton* to foreclose *per se* rules in seizure analysis); *United States v. Romain*, 393 F.3d 63, 75 (1st Cir. 2004) (same); *United States v. Esparza-Mendoza*, 386 F.3d 953, 959 (10th Cir. 2004) (same); *United States v. Robertson*, 305 F.3d 164, 171 (3d Cir. 2002) (same); see also, e.g., John T. Parry, Rights and Discretion in Criminal Procedure's "War on Terror," 6 Ohio St. J. Crim. L. 323, 328–29 (2008) (describing *Drayton's* rejection of *per se* rules); Kathryn R. Urbonya, Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths, 40 Am. Crim. L. Rev. 1387, 1430 & n.302 (2003) (describing Court's frequent rejection of *per se* rules in analyzing police-citizen encounters). But see *Maryland v. Wilson*, 519 U.S. 408, 413 n.1 (1997) ("[T]hat we typically avoid *per se* rules concerning searches and seizures does not mean we have always done so . . .").

*Wilson* is an example of a particular strain of seizure cases concerning traffic stops, in which the Court has proven extremely comfortable with bright-line rules. See, e.g., *Brendlin v. California*, 551 U.S. 249, 251 (2007) (holding passengers as well as drivers are *per se* seized by traffic stops). Interestingly, the only Supreme Court revision of the

*D. Identification Redux—Stop-and-Identify Statutes*

Recently, in 2004, the Court took up *Hiibel v. Sixth Judicial District Court*, in which it upheld a Nevada “stop-and-identify” statute that, as its name suggests, required individuals detained in a *Terry* stop to disclose their name.<sup>90</sup> Though not directly addressing this Note’s concern that retention of identification itself constitutes a seizure, the decisions surrounding stop-and-identify statutes show continuing understanding by at least some members of the Court that the production of identification has serious Fourth Amendment implications. Previously, the Court had struck down a Texas “stop-and-identify” statute that lacked any requirement the stop be upon reasonable suspicion<sup>91</sup> and a California statute that required “credible and reliable” identification, which the Court found too vague.<sup>92</sup> In *Hiibel*, however, five Justices upheld the statute based on two grounds. First, the Court noted that the Nevada statute required only disclosure of the individual’s name, not the production of any documentary identification.<sup>93</sup> Second, disclosure served important interests of a valid *Terry* stop, which already requires a showing of reasonable suspicion.<sup>94</sup>

In contrast, Justice Stevens dissented on the Fifth Amendment ground that compulsory identification violated the privilege against self-incrimination.<sup>95</sup> Justice Breyer, in a dissent joined by Justices Souter and Ginsburg, strongly challenged the majority’s reading of past precedent, reiterating what he understood to be a “generation-old statement of the law” that, even in a *Terry* stop, individuals cannot be compelled to answer police questions.<sup>96</sup> These opinions produce two important insights. First, as the four dissenters note, mere identification of oneself to the police may have significant ramifications and thus has historically entitled individuals to significant control over when and how it occurs. Second, even the majority left open the question of the statute’s legitimacy if it had in fact required the production of a document, suggesting there is a difference when police obtain (and thus presumably retain) an identification document.

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*Bostick/Drayton* approach occurred in *Brendlin*, where the Court vaguely cited *Drayton* but held that a traffic stop automatically constitutes a seizure upon both driver and passenger because of a “societal expectation of ‘unquestioned police command.’” *Id.* at 258 (citing *Wilson*, 519 U.S. at 414). For further discussion of seizure analysis in the traffic stop context, see *infra* Part II.B.

90. 542 U.S. 177, 182–89 (2004) (upholding Nev. Rev. Stat. § 171.123 (2003)).

91. *Brown v. Texas*, 443 U.S. 47, 53 (1979).

92. *Kolender v. Lawson*, 461 U.S. 352, 353–54 (1983).

93. *Hiibel*, 542 U.S. at 185.

94. *Id.* at 187–88.

95. *Id.* at 191–96 (Stevens, J., dissenting).

96. *Id.* at 197–99 (Breyer, J., dissenting) (citing *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring)).

## II. PINNING DOWN WHAT THE FOURTH AMENDMENT PROTECTS

The debate over seizure by identification has largely escaped public or scholarly notice despite existing in some circuits ever since *Mendenhall* and *Royer*.<sup>97</sup> But the tension between the approaches to identification remains an ongoing dialogue between courts. As recently as late 2010, the District Court for the Western District of Virginia noted a sharp circuit split over the issue.<sup>98</sup> The court followed the Fourth Circuit's refusal to apply a per se rule but noted that both the D.C. Circuit and Tenth Circuit advocate for one in this context.<sup>99</sup> Other district courts, state supreme courts, and scholars have all similarly noted the discrepancy in approaches among courts deciding this issue.<sup>100</sup>

Part II.A begins by explaining the specific contours of the conflicting cases in the D.C. and Fourth Circuits. Part II.B continues with a discussion of related issues in the traffic stop context, where circuits have proven more open to bright-line rules. Part II.C addresses the underlying rules on voluntary consent that may be affected by retention of identification.

A. *Conflicting Views of the Same Situation*—United States v. Jordan and United States v. Weaver

This section explains the two opposing cases of *United States v. Jordan*<sup>101</sup> in the D.C. Circuit and *United States v. Weaver*<sup>102</sup> in the Fourth Circuit. In the former, the court concluded that the single factor of retention of identification transformed a consensual encounter into a seizure; in the latter, the court expressly declined to do the same thing. Part II.A.1 sets the stage for both cases, highlighting the relevant doctrinal factors indicating seizure that the two circuits confronted, while Part II.A.2 focuses on the articulated reasons to accept or reject the per se rule in that context.

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97. See, e.g., 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, 518 & n.61 (2001) (noting in just one sentence that retention of identification “may” give rise to seizure and offering examples on either side).

98. *Rutledge v. Town of Chatham*, No. 4:10CV00035, 2010 WL 4791840, at \*4 (W.D. Va. Nov. 18, 2010) (comparing *United States v. Lopez*, 443 F.3d 1280, 1285 (10th Cir. 2006), and *United States v. Jordan*, 958 F.2d 1085, 1087 (D.C. Cir. 1992), with *United States v. Weaver*, 282 F.3d 302, 312 (4th Cir. 2002)), *aff'd per curiam sub nom. Rutledge v. Roach*, 414 F. App'x 568 (4th Cir. 2011).

99. *Id.*

100. See generally, e.g., *United States v. Maine*, No. 3:07-00096, 2008 WL 686215, at \*13 (M.D. Tenn. Mar. 5, 2008) (discussing disagreement and treating identification as only one factor in seizure analysis); *State v. Martin*, 79 So. 3d 951, 955 (La. 2011) (noting disagreement in federal circuits and rejecting per se rule); 4 LaFare, *Search & Seizure*, *supra* note 23, § 9.4(a), at 585 n.81 (collecting cases on both sides of debate).

101. 958 F.2d 1085 (D.C. Cir. 1992).

102. 282 F.3d 302 (4th Cir. 2002).

1. *Setting the Stage: A Pedestrian Encounters the Police.* — The facts of *Jordan* and *Weaver* lend themselves well to contrasting analysis, as both cases deal with the same basic problem: A pedestrian is approached by police, who ask for her identification and hold onto it while continuing to make requests. The results, however, can seem counterintuitive under the most straightforward reading.

*Jordan* involved two police officers approaching a man in a parking lot and asking to see his identification.<sup>103</sup> The officers were dressed in plain clothes, with concealed weapons, and they spoke conversationally, without physically blocking Jordan's way.<sup>104</sup> While retaining Jordan's identification, the officer obtained Jordan's consent to search his bag, revealing drugs.<sup>105</sup> Similarly, in *Weaver*, a police officer approached the defendant in a public parking lot and asked for his identification.<sup>106</sup> This time, however, the officer was in uniform and carrying a visible gun, though he spoke conversationally and used no physical restraint.<sup>107</sup> The officer obtained Weaver's consent to take him in a police cruiser to two nearby banks to permit the tellers to determine whether Weaver resembled a bank robber from the week prior.<sup>108</sup> When a teller confirmed the officer's suspicions, Weaver was arrested, and the officer discovered marijuana in his pocket.<sup>109</sup>

Reading through the facts as summarized, if one were to guess which case resulted in a seizure, the logical reading from the *Mendenhall-Royer* cases<sup>110</sup> would seem to be that *Jordan* did not involve a seizure while *Weaver* did. First, in *Jordan*, the officers did not have the passive cues of authority that uniforms and openly displayed weapons invoke. Further, the entire interaction took place in the parking lot where the officers first approached Jordan. In contrast, *Weaver* involved a uniformed officer with a visible weapon, and the defendant was taken in a police cruiser to two different banks. The search that occurred in *Weaver* was of the defendant's person after he was handcuffed,<sup>111</sup> while *Jordan* involved a consensual search of his bag, echoing the distinction between *Mendenhall* and *Royer* once again.<sup>112</sup> Comparing the severity of the two police-citizen

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103. 958 F.2d at 1086.

104. *Id.* at 1087.

105. *Id.* at 1086.

106. 282 F.3d at 307, 312.

107. *Id.*

108. *Id.*

109. *Id.*

110. See *supra* notes 21–40 (discussing facts of *Mendenhall* and *Royer*).

111. The facts seem to indicate that this action fell under a *Terry* stop-and-frisk rather than an arrest, as it was not until after they discovered marijuana that the officers informed Weaver that he was under arrest. *Weaver*, 282 F.3d at 307.

112. See *supra* notes 24–35 and accompanying text (discussing differences in search in *Mendenhall* and *Royer*).

interactions, both instinct and review of the doctrinal framework would seem to suggest that Weaver was seized while Jordan was not.

2. *The Plot Thickens: The Reasonably Practical Person Versus the Reasonably Assertive Person.* — In a strange reversal of the natural reading, the D.C. Circuit concluded that Jordan had been seized based solely on a single factor that “reflect[ed] a distinct departure from the typical consensual scenario.”<sup>113</sup> That single factor was the officers’ retention of Jordan’s identification during the time they questioned him and asked for consent to search his bag.<sup>114</sup> Though the court dutifully cited *Bostick* for the “totality of the circumstances” analysis, they nonetheless held that “rare instances . . . produce an inexorable conclusion that a seizure has occurred.”<sup>115</sup>

Conversely, the *Weaver* court directly attacked this proposition, stating that any “elevat[ion] [of] one factor above all others in determining whether a seizure has occurred” contravenes *Bostick*.<sup>116</sup> The Fourth Circuit only briefly addressed the other factors indicating seizure, holding that despite the uniformed and armed appearance of the officer, he did not threaten or brandish a weapon at Weaver and so did not coerce Weaver into consenting to accompany him.<sup>117</sup> In concluding no seizure had occurred, the court described the interaction as “Weaver [choosing] to stay and have a dialogue with Officer Leeds and accompany him to the two banks in question.”<sup>118</sup>

Looking at the opinions in these cases, the issue of retention of identification clearly dominates the courts’ analyses.<sup>119</sup> Their opposite results can be winnowed down to a fundamental disagreement about the true capacity of citizens to protect their own rights. The *Jordan* court, citing *Royer*, made it clear that the reasonably practical person could not possibly leave the encounter without her identification. The court’s opinion characterized the abandonment of one’s personal identification as “simply not a practical or realistic option for a ‘reasonable’ traveler in this day and age.”<sup>120</sup> Its analysis was factually grounded, pointing to the fact that the encounter occurred in a parking lot, which Jordan planned

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113. *United States v. Jordan*, 958 F.2d 1085, 1087 (D.C. Cir. 1992).

114. *Id.*

115. *Id.* at 1086.

116. *Weaver*, 282 F.3d at 313.

117. *Id.* at 312.

118. *Id.* at 313.

119. The seizure analysis in *Weaver* lasts four pages, three of which discuss retention of identification. See *id.* at 309–13. The discussion section of the *Jordan* opinion similarly focuses three of its four pages on the identification issue. See *Jordan*, 958 F.2d at 1086–88.

120. *Jordan*, 958 F.2d at 1087 (citing *Florida v. Royer*, 460 U.S. 491, 501–02 (1983) (plurality opinion)); accord *United States v. De La Rosa*, 922 F.2d 675, 684 (11th Cir. 1991) (Clark, J., dissenting) (“By giving over what may be his only piece of personal identification to an agent of the state, that person knows that he is *effectively* immobilized even if he could physically walk away from the officer.”).



to exit in his car, making his driver's license particularly crucial to his "go[ing] about his business."<sup>121</sup> The "inevitable effect" of the police retention, in the court's view, was that Jordan "was not free to disregard the police."<sup>122</sup> The D.C. Circuit's reasonable person thus operates under the practical constraints of modern society, where the choice between abandoning one's identification and demanding it from the police functions as coercive pressure.<sup>123</sup>

In contrast, the Fourth Circuit seemed to base its conclusion on the actions of a reasonably assertive person. Regarding the initial approach by the police, the court observed that Weaver "could have walked away from the encounter," which, it admitted, would have created "an awkward situation."<sup>124</sup> Further, once Weaver had produced his identification voluntarily for the police, he could have, at any point, "request[ed] that his license be returned to him so that he could end the encounter."<sup>125</sup> The fact that "[f]or whatever reason, Weaver chose not to do this" did not vitiate the court's interpretation of the dynamics of the situation as entirely consensual.<sup>126</sup> Consequently, the Fourth Circuit's reasonable person not only knows her right to terminate an encounter or demand that her identification be returned<sup>127</sup> but also feels free to exercise those rights while uniformed police officers question her about a bank robbery.

#### B. *Different Standards for Traffic Stops—Retention of Identification While in Transit*

Though this Note's principal focus is on pedestrian encounters with the police, many circuit courts have used examples from the traffic stop context to bolster their arguments for or against per se rules governing

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121. *Jordan*, 958 F.2d at 1088 (citing *Michigan v. Chesternut*, 486 U.S. 567, 576 (1988)).

122. *Id.*

123. See *id.* ("[I]f [police] conduct transmitted a clear signal that the individual was not free to leave, the law does not require that he validate that impression by affirmatively challenging the police retention of his license."); see also *United States v. Borys*, 766 F.2d 304, 310 (7th Cir. 1985) ("Suspects deprived of their ticket and identification are effectively deprived of the practical ability to terminate the questioning and leave."); *United States v. Waksal*, 709 F.2d 653, 660 (11th Cir. 1983) ("We fail to see how appellant could have felt free to walk away from police officers when they still possessed the documents necessary for him to continue his journey."); cf. *LaFave, Pinguitudinous Police*, *supra* note 73, at 739 (criticizing reasonable person standard because it ignores realities of pressure to comply with police).

124. *Weaver*, 282 F.3d at 311–12 ("[B]ut awkwardness alone does not invoke the protections of the Fourth Amendment, particularly so when the test employed is an objective one.").

125. *Id.* at 312.

126. *Id.* at 313.

127. But cf. *United States v. Drayton*, 536 U.S. 194, 206–07 (2002) (holding police do not have to inform citizens of their right to refuse consent-based searches).

seizure by identification. Part II.B.1 lays out some of the traffic stop jurisprudence, while Part II.B.2 identifies ways in which courts' treatment of identification in traffic stops affects their analysis in the pedestrian setting.

1. *Bright-Line Rules for Traffic Stops and Prolonging the Stop.* — Though the general warnings against *per se* rules are followed in most search and seizure law, the traffic stop context is one in which courts at all levels have been more than willing to entertain bright-line rules.<sup>128</sup> In *Maryland v. Wilson*, for example, the Supreme Court was explicit that its ordinary disfavor for *per se* rules did not necessarily apply to traffic stop situations.<sup>129</sup> Other Supreme Court decisions have articulated clear bright-line rules that a traffic stop automatically constitutes a seizure of both the driver<sup>130</sup> and the passengers of the vehicle,<sup>131</sup> and thus requires either reasonable suspicion or probable cause to satisfy Fourth Amendment standards. Further, even if a stop is constitutional at its inception, it may become unlawful “if it is prolonged beyond the time reasonably required to complete” the purpose of the initial stop.<sup>132</sup>

Retention of identification in the traffic stop context thus takes a very different form than in pedestrian encounters. Since all traffic stops are *per se* seizures, the retention of identification does not in itself create the seizure. Instead, courts have taken to analyzing whether the retention of identification during a traffic stop unconstitutionally extends the stop past the duration necessary to accomplish its initial purpose.<sup>133</sup> In doing so, most courts have recognized that retention of identification exerts no

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128. See generally, e.g., Daniel T. Gillespie, *Bright-Line Rules: Development of the Law of Search and Seizure During Traffic Stops*, 31 *Loy. U. Chi. L.J.* 1 (1999) (detailing trend in Supreme Court's traffic stop jurisprudence toward bright-line rules); Douglas M. Smith, Comment, *Ohio v. Robinette: Per Se Unreasonable*, 29 *McGeorge L. Rev.* 897, 942–43 (1998) (detailing numerous instances in which Court has adopted bright-line rules for traffic stops).

129. 519 U.S. 408, 413 n.1 (1997) (“[T]hat we typically avoid *per se* rules concerning searches and seizures does not mean that we have always done so . . .”). In *Wilson*, the Court extended the bright-line rule from *Pennsylvania v. Mimms*—that police officers can routinely order drivers out of the car during traffic stops—to cover passengers as well. *Id.* at 413, 415 (citing *Mimms*, 434 U.S. 106 (1977) (*per curiam*)).

130. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

131. *Brendlin v. California*, 551 U.S. 249, 263 (2007) (unanimous opinion).

132. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

133. See, e.g., *Warrantless Searches and Seizures*, 40 *Geo. L.J. Ann. Rev. Crim. Proc.* 44, 58 & n.138 (2011) (giving examples of cases where retention of identification made traffic stop unconstitutionally delayed); *Warrantless Searches and Seizures*, 38 *Geo. L.J. Ann. Rev. Crim. Proc.* 43, 57 & n.133 (2009) (same).

small degree of coercive force.<sup>134</sup> This kind of extension analysis has also been applied to the pedestrian context.<sup>135</sup>

Some circuits, including the Fourth Circuit, have backed into this analysis by holding that the return of identification ends the traffic stop and de-escalates the interaction from a traffic stop to a consensual encounter, as it communicates the end of the restrictive force that prevents the driver from leaving.<sup>136</sup> Some, like the Fifth Circuit, have directly noted the coercive effect of retention of identification during a traffic stop but stopped short of creating a bright-line rule.<sup>137</sup> The Tenth Circuit has been the most explicit in describing its standard as a bright-line rule: A police officer conducting a traffic stop must return an individual's identification before asking questions or conducting searches unrelated to the initial stop.<sup>138</sup>

2. *Corollaries to Pedestrian Stops: Retention as Quasi-Physical Restraint.* — Both *Weaver* and *Jordan* referred to traffic stop analysis in their respective opinions on retention of identification. In *Weaver*, the Fourth Circuit attempted to distinguish the pedestrian context from its own traffic stop jurisprudence, where it considered retention of identification sufficient evidence of seizure.<sup>139</sup> In particular, it pointed out that because driving without a license was illegal, a driver in a traffic stop had to choose between remaining at the stop or breaking the law by driving away—clearly not a free choice at all.<sup>140</sup> Perhaps most interestingly, it cited to cases in other circuits it characterized as “traffic stop” cases.<sup>141</sup>

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134. See, e.g., *United States v. \$25,000 U.S. Currency*, 853 F.2d 1501, 1511 (9th Cir. 1988) (“If the agents retained [the suspect’s] identification . . . then the degree of coerciveness present would [constitute] [an] impermissible seizure . . .”).

135. E.g., *United States v. Lopez*, 443 F.3d 1280, 1285 (10th Cir. 2006) (holding retention of identification created seizure when identification was retained longer than necessary to check identity); *United States v. Thomas*, 128 F. App’x 986, 990 (4th Cir. 2005) (holding return of identification “promptly” after identity check was evidence contradicting seizure).

136. See, e.g., *United States v. Lattimore*, 87 F.3d 647, 653 (4th Cir. 1996) (en banc) (holding questioning after return of identification was consensual); *United States v. White*, 81 F.3d 775, 778–79 (8th Cir. 1996) (holding return of defendant’s identification during traffic stop made subsequent search consensual).

137. E.g., *United States v. Macias*, 658 F.3d 509, 524 (5th Cir. 2011) (noting retention of identification in traffic stop exerts pressure that may vitiate consent sought even after its return); *United States v. Chavez-Villarreal*, 3 F.3d 124, 128 (5th Cir. 1993) (noting in dicta that retention of identification after traffic stop would be sufficient coercive force for seizure).

138. E.g., *United States v. Mendez*, 118 F.3d 1426, 1430 (10th Cir. 1997); *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995).

139. *United States v. Weaver*, 282 F.3d 302, 311 (4th Cir. 2002).

140. *Id.*

141. *Id.* (citing, e.g., *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997); *United States v. Winfrey*, 915 F.2d 212, 216 (6th Cir. 1990); *United States v. Jefferson*, 906 F.2d 346, 349 (8th Cir. 1990)).

However, three of the four cases cited by the *Weaver* court actually occurred *outside* of the traffic stop context, though they involved individuals in and around their cars. In *United States v. Chan-Jimenez*, for example, an officer approached a car that had pulled over to the side of the road but did not stop the car himself.<sup>142</sup> In *United States v. Winfrey*, officers approached an individual nearing his car in a parking garage;<sup>143</sup> in *United States v. Jefferson*, officers approached a parked car in which two individuals were sleeping.<sup>144</sup> All three courts articulated reasoning that relied heavily,<sup>145</sup> if not exclusively,<sup>146</sup> on the retention of identification as a coercive force constituting a seizure. The *Weaver* court thus implicitly recognized that the retention of identification interferes with an individual's liberty in these situations, where individuals were at least one step removed from the immediate in-transit analysis that characterizes the traffic stop context.

Once removed from the flow of traffic, so to speak, the individual's decision to stay or leave is constrained by her plans to travel in a particular fashion—the same kind of constraint that Justice Kennedy in *United States v. Drayton* called “the natural result of choosing to take the bus.”<sup>147</sup> If, as *Drayton* seems to suggest, the private choice of travel by bus, rather than police conduct, is what prevents an individual from leaving the police encounter, an individual whose identification is retained while not currently driving her car is no more constrained. Yet even *Weaver* recognizes that these kinds of situations are coercive.

The opinion in *Jordan* expressly took this practical approach, moving to the logical conclusion that abandonment of one's identification was both impractical and unrealistic for a modern citizen.<sup>148</sup> It did so in the context of noting that Jordan's “immediate business” was “getting into a waiting car . . . in order to leave the scene altogether.”<sup>149</sup> Technically, the only restraint imposed here by the police was preventing him from continuing on the path he wanted and intended to follow; he did have other options not foreclosed to him, such as leaving his identification behind and returning to the bus terminal. The *Jordan* court considered that barrier to his desired conduct as sufficient to constitute a seizure; the *Weaver* court—though citing analogous circumstances as good law—saw

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142. 125 F.3d at 1325.

143. 915 F.2d at 214.

144. 906 F.2d at 347.

145. See *Winfrey*, 915 F.2d at 216 (finding seizure where officers retained Winfrey's identification and ordered him to wait for DEA agents); *Jefferson*, 906 F.2d at 350 (finding seizure based upon retention of identification and officer's request for defendant to leave car).

146. *Chan-Jimenez*, 125 F.3d at 1326 (finding seizure based upon retention of identification after police confirmed defendant's identity).

147. 536 U.S. 194, 201 (2002).

148. *United States v. Jordan*, 958 F.2d 1085, 1087 (D.C. Cir. 1992).

149. *Id.* at 1088 (internal quotation marks omitted).

alternative options, however unpalatable, as evidence that Weaver had not been seized.

C. *Voluntariness of Consent—Retention of Identification and Saying No*

Another context in which retention of identification often becomes a question for courts is the evaluation of consent given to a search while the officers are holding an individual's documentation. In several cases, a consent-based search occurs contemporaneously with a traffic stop, but courts conceptualize the voluntariness of consent to the search as a separate question. Part II.C.1 identifies cases that use voluntariness to evaluate retention of identification, and Part II.C.2 analyzes how these insights affect the way seizure by identification may exist in the pedestrian context in its own right.

1. *Contextual Analysis for Retention of Identification and Consent.* — Unlike with traffic stops, the Supreme Court's jurisprudence on the voluntariness of consent to a search has been staunchly resistant to bright-line rules. One of the seminal cases in this area, *Schneekloth v. Bustamonte*, articulated the requirement that consent to a search must be "voluntary" under the Fourth Amendment but made explicit that no one factor determined what constituted voluntary consent.<sup>150</sup> One of the potential rules put forward by the defendant, that an individual had to know he had a right to refuse consent, was expressly rejected as a determinative factor.<sup>151</sup> Twenty-three years later, the Court reaffirmed its stance just as strongly in *Ohio v. Robinette*, reversing an Ohio Supreme Court decision creating a per se rule requiring officers to inform individuals of their right to refuse consent.<sup>152</sup> Since then, the cases analyzing voluntariness of consent have stayed firmly away from bright-line rules or determinative factors.<sup>153</sup>

In several cases, police have retained identification while asking for consent to search, and the courts have faced the question of whether retention vitiates the voluntariness of the consent obtained. In general,

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150. 412 U.S. 218, 232–33 (1973).

151. *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.")

152. 519 U.S. 33, 39–40 (1996). All nine Justices agreed with this reading of the Fourth Amendment. See *id.* (majority opinion); *id.* at 42 (Ginsburg, J., concurring in the judgment); *id.* at 45 (Stevens, J., dissenting). Only Justice Ginsburg expressed a view that the Ohio Supreme Court could ground a prophylactic per se rule in its state constitution. *Id.* at 44–45 (Ginsburg, J., concurring in the judgment).

153. See generally, e.g., 4 LaFave, *Search & Seizure*, supra note 23, § 8.2 (describing totality of circumstances regime for consent searches); Andrew McLetchie, Note, *The Case for Bright-Line Rules in Fourth Amendment Jurisprudence: Adopting the Tenth Circuit's Bright-Line Test for Determining the Voluntariness of Consent*, 30 *Hofstra L. Rev.* 225, 234–39 (2001) (tracing origins of totality of circumstances approach in voluntariness of consent analysis); Smith, supra note 128 (critiquing totality of circumstances approach in consent analysis).

even if they avoid treating it as dispositive, retention of identification is often a key factor in undermining the voluntariness of consent.<sup>154</sup> Additionally, as with the traffic stop cases, some courts have held that the return of identification removes coercive force and thus subsequent consent can be found voluntary.<sup>155</sup> In one case, the Fifth Circuit held that coercive pressure lasted even beyond the return of the identification when consent was sought only moments after an illegal detention ended.<sup>156</sup>

2. *Undermining Voluntary Consent by Retaining Identification.* — As early as *Royer*, the issues of valid consent and illegal seizure have gone hand in hand.<sup>157</sup> An illegal seizure taints the consent obtained while it is occurring,<sup>158</sup> though that taint can be purged by “an intervening independent act of a free will.”<sup>159</sup> Consequently, a seizure prompted by—even if only in part—retention of identification may also be taken as evidence that the consent was not voluntary.<sup>160</sup>

Two cases dealing with retention of identification in the consent context provide helpful perspective on the dynamics of the situation. First, in *United States v. Chavez-Villarreal*, the Fifth Circuit found the element most probative of a coercive environment was the officer’s retention of Chavez-Villarreal’s registration card.<sup>161</sup> As in the prolonged detention analysis of traffic stops, the court noted that the officer’s retention of the documents extended “[a]fter he had ascertained the

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154. See, e.g., *United States v. Cavitt*, 550 F.3d 430, 439 (5th Cir. 2008) (highlighting retention of identification as particularly indicative of coercion); *United States v. Ledesma*, 447 F.3d 1307, 1314 (10th Cir. 2006) (including retention of identification in list of factors undermining consent); *United States v. Robinson*, 690 F.2d 869, 875 (11th Cir. 1982) (placing special emphasis on retention of identification undermining consent).

155. See, e.g., *United States v. Guerrero*, 472 F.3d 784, 789–90 (10th Cir. 2007) (holding return of identification ended traffic stop and consent subsequently obtained was valid); *United States v. Robinson*, 625 F.2d 1211, 1218 (5th Cir. 1980) (noting returned identification as factor establishing voluntariness of consent (citing *United States v. Mendenhall*, 446 U.S. 544, 557 (1980))).

156. *United States v. Macias*, 658 F.3d 509, 524 (5th Cir. 2011) (citing *United States v. Jones*, 234 F.3d 234, 241 (5th Cir. 2000)).

157. See, e.g., Brian A. Sutherland, Note, *Whether Consent to Search Was Given Voluntarily: A Statistical Analysis of Factors that Predict the Suppression Rulings of the Federal District Courts*, 81 N.Y.U. L. Rev. 2192, 2216 (2006) (noting high statistical correlation between illegal seizures and findings of involuntary consent).

158. *Florida v. Royer*, 460 U.S. 491, 507–08 (1983) (plurality opinion).

159. *Wong Sun v. United States*, 371 U.S. 471, 486 (1963).

160. See *Macias*, 658 F.3d at 524 (noting retention of identification in traffic stop exerts pressure that may vitiate consent sought even after its return).

161. 3 F.3d 124, 128 (5th Cir. 1993). This case is particularly helpful given the fact that the seizure did not escalate from a consensual encounter but occurred because of the per se seizure inherent in automobile stops. See *supra* notes 130–131 and accompanying text (discussing per se seizure rules for traffic stops). Thus, when analyzing the consent, the court analyzed the retention of the identification separately as a factor undermining the voluntariness of Chavez-Villarreal’s consent.

legal immigration status of Chavez-Villarreal and his passenger.”<sup>162</sup> Interestingly, the court found the consent involuntary even in light of the officer advising Chavez-Villarreal of his right to refuse to consent to the second search.<sup>163</sup> The Eleventh Circuit reached the opposite result in *United States v. De La Rosa*, where it concluded that the defendant’s consent was voluntary notwithstanding the police’s retention of his driver’s license.<sup>164</sup> The encounter took place on the street just outside the defendant’s home, and the court noted that the retention of identification “did not preclude the appellant from terminating the encounter by going into his apartment.”<sup>165</sup>

Notably, both courts place great weight on the practical significance of the identification in question. *Chavez-Villarreal* emphasized the significant burden placed on the defendant when his identification was retained;<sup>166</sup> similarly, *De La Rosa* distinguished between defendants sitting in their cars and ones merely walking home when evaluating coercive pressure.<sup>167</sup> However, the latter’s attempt at practicality stops one step short of the realities of the situation. Even if a citizen brought herself to walk away without any of her possessions, she is almost certainly unlikely to consider abandoning a driver’s license, due to its centrality to a variety of contexts in everyday life.<sup>168</sup> As the dissenting judge in *De La Rosa* points out, the burden of abandoning or relinquishing one’s identification carries significant consequences—consequences that the police exploit by retaining it while asking consent to search.<sup>169</sup>

Understanding the involuntariness of consent as an inability to say no aids the understanding of the true problems with *Weaver*’s approach to seizure by identification. To say one’s consent was involuntary is neces-

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162. *Chavez-Villarreal*, 3 F.3d at 128; see also supra notes 132–135 and accompanying text (discussing retention of identification’s role in extending detention).

163. See *Chavez-Villarreal*, 3 F.3d at 128 (“[The officer] told Chavez-Villarreal that he could refuse to consent to the second search but by then refusal seemed pointless . . .”).

164. 922 F.2d 675, 678 (11th Cir. 1991).

165. *Id.* at 678 n.2. The court distinguished this situation from an earlier case, *United States v. Thompson*, 712 F.2d 1356 (11th Cir. 1983), where the defendant was seated in his car and approached by police. In *Thompson*, the court held that “a person in a car whose license has been retained” could not reasonably “expect that he will be permitted to leave.” *Id.* at 1361.

166. *Chavez-Villarreal*, 3 F.3d at 128 (“The card was vital to Chavez-Villarreal’s legal presence in this country; without it, his disposition, *if indeed not ability*, to decline [the officer’s] request expectedly was significantly impaired.” (emphasis added)).

167. *De La Rosa*, 922 F.2d at 678.

168. See *id.* at 683–84 (Clark, J., dissenting) (“[A driver’s license] is considered by merchants, employers, government officials, and other relevant persons as definitive proof of an individual’s personal identity, age, and residence. Indeed, those who . . . lose their driver’s licenses know how completely disabled one is from participating in many of the incidents of everyday life . . .”).

169. *Id.* at 684 (“By giving over what may be his only piece of personal identification to an agent of the state, that person knows that he is *effectively* immobilized even if he could physically walk away from the officer.”).

sarily to say that one could not refuse. If courts have found that consent in these situations was involuntary because officers retained identification—that is, citizens could not have refused to comply—then placing the burden on citizens to demand their identification back, as in *Weaver*, or walk away and leave it behind, as in *De La Rosa*, ignores the realities of the power dynamics in play.<sup>170</sup>

### III. RESOLVING FOURTH AMENDMENT POWER DYNAMICS THROUGH A PER SE RULE

The examination of retention of identification from these three different angles—pedestrian encounters, traffic stops, and voluntary consent—reveals some common themes regarding the restrictive force present in the dynamics of police-citizen interactions. Part III.A begins by identifying the rationale that per se rules are sometimes necessary to give content to the rights in question. Part III.B then demonstrates how the *Weaver* approach systematically underprotects citizens in this context. Finally, Part III.C identifies the relevant burdens placed on police and citizens and closes with the benefits and drawbacks of each approach.

#### A. *The Use of Per Se Rules to Protect Critical Interests*

Despite oft-repeated iterations in both Supreme Court precedent and in *Weaver*, per se rules are not as categorically disfavored in seizure analysis as the cases claim. The Supreme Court itself has affirmed per se rules in the seizure context. Several circuit courts have also articulated functional per se rules in areas other than seizure by identification.

At the outset, it is important to note exactly what work per se rules perform. A per se rule, such as the one in *Jordan*, makes the presence of a single factor indicative that a seizure has occurred. At that point, the analysis shifts to determine whether the officers acted unreasonably—that is, whether they possessed the necessary level of suspicion to justify their conduct. Per se rules do not make all such conduct instantly unconstitutional; they merely invite inquiry by courts into its reasonableness. As described in this section, inviting that inquiry often operates to ensure protection of important interests.

The Supreme Court in both *Bostick* and *Drayton* strongly rejected categorical rules for evaluating when a seizure occurs.<sup>171</sup> Yet the case of

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170. See supra notes 124–127 and accompanying text (discussing *Weaver*'s emphasis on ability of citizen to request return of identification); see also Janice Nadler & J.D. Trout, *The Language of Consent in Police Encounters* 12 (Am. Bar Found., Research Paper No. 09-04, 2009), available at <http://ssrn.com/abstract=1485008> (on file with the *Columbia Law Review*) (discussing difficulty of citizens to feel free when conversing with police).

171. See *United States v. Drayton*, 536 U.S. 194, 201 (2002) (“[F]or the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of all the circumstances surrounding the encounter.”)



*Hodari D.* illustrates where such a bright-line rule may be appropriate. In that case, Justice Scalia described a *per se* rule as one of two ways of determining that a seizure had occurred.<sup>172</sup> A finding of seizure attaches at the slightest application of physical force—what the Court called “the quintessential ‘seizure of the person.’”<sup>173</sup> Thus, in the physical touch context, the Court applied a *per se* rule, despite having reiterated looking to the totality of the circumstances in show-of-authority seizures.<sup>174</sup> The normative principle behind this decision, at least according to Justice Scalia’s majority opinion, appears to be the similarity of such an action to a physical arrest.<sup>175</sup> Since an arrest is by far the most intrusive type of seizure,<sup>176</sup> the Court could have made a determination that the interest in freedom from actual physical restraint warrants a *per se* rule protecting against such actions without, at least, reasonable suspicion. In fact, at least one scholar has noted that the “most common single

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(internal quotation marks omitted)); *Florida v. Bostick*, 501 U.S. 429, 439–40 (1991) (“[A] court must consider all the circumstances surrounding the encounter . . . . The Florida Supreme Court erred in adopting a *per se* rule.”); see also *supra* notes 81–83 and accompanying text (discussing *Bostick* and *Drayton*’s emphasis on totality of circumstances).

172. *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (“[T]he mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient [to constitute a seizure].”).

173. *Id.*

174. *Id.* at 627–28. Post-*Hodari D.*, the Court has retained language referring to “some physical touching of the person” as a factor in its totality of the circumstances analysis. See, e.g., *Kaupp v. Texas*, 538 U.S. 626, 630 (2003) (*per curiam*) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). Some scholars, such as Thomas Clancy, have expressed doubt about physical seizure after *Kaupp*. E.g., Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* § 5.1.4.1.4, at 176 (2008) (“*Kaupp*, a more recent application of the test, is indistinguishable from a physical restraint situation and *Kaupp*’s seizure was so patent that it resulted in a *per curiam* unanimous opinion.”).

However, Professor Clancy’s concern can be explained by noting that before exerting physical force, the police expressed a request for the defendant to accompany them. *Kaupp*, 538 U.S. at 628. It was apparently on this basis that the Court evaluated the seizure under the show of authority analysis, since the physical interactions did not occur until after the defendant expressed consent to accompany them, which the Court found tainted by a coercive environment. *Id.* at 631 (“There is no reason to think *Kaupp*’s answer was anything more than ‘a mere submission to a claim of lawful authority.’” (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion))).

175. *Hodari D.*, 499 U.S. at 624 (“For most purposes at common law, [‘seizure’] connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control.”).

176. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 26 (1968) (“An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution.”); Christopher Slobogin, *Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 *St. John’s L. Rev.* 1053, 1073–76 (1998) (discussing hierarchy of invasiveness in Fourth Amendment jurisprudence with arrest as most invasive).

determinant of a seizure is physical touching or detention of the person.”<sup>177</sup>

Similarly, the Supreme Court has created per se rules governing the seizure of drivers and passengers in the context of traffic stops.<sup>178</sup> Here, the compelling interest can be identified as the scope of the intrusion—a traffic stop is no mere approach by police on the sidewalk. It involves flashing lights, occasionally sirens, and a forced deviation from one’s travel plans.<sup>179</sup> Especially considering that the Court has treated traffic stops as show-of-authority seizures—rather than physical-touch seizures—the Court has not consistently applied *Bostick* and *Drayton*’s antipathy to bright-line rules.<sup>180</sup>

Functionally, even circuits rejecting *Jordan*’s per se rule seem to accept functional per se rules in some contexts. For example, in *Weaver* the Fourth Circuit expressed support for per se rules for seizure by identification in the context of traffic stops.<sup>181</sup> Other circuits have openly called their rules regarding traffic stops “bright-line” rules.<sup>182</sup> The D.C. Circuit in *Jordan* noted that some factors, as a matter of common sense, lend themselves to a bright-line approach because of the increased weight of the factor.<sup>183</sup> Even circuits with ambiguous approaches to

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177. Steinbock, *supra* note 97, at 518.

178. See, e.g., *Brendlin v. California*, 551 U.S. 249, 255 (2007) (unanimous opinion) (holding passengers are seized in traffic stops); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (“[S]topping an automobile and detaining its occupants constitute a ‘seizure’ . . .”).

179. See *Prouse*, 440 U.S. at 657 (“[T]hese stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway[] by means of a possibly unsettling show of authority[,] . . . interfere with freedom of movement, are inconvenient, . . . consume time[,] . . . [and] may create substantial anxiety.”); see also Erica Flores, Comment, “People, Not Places”: The Fiction of Consent, the Force of the Public Interest, and the Fallacy of Objectivity in Police Encounters with Passengers During Traffic Stops, 7 U. Pa. J. Const. L. 1071, 1074 (2005) (“Of the countless encounters between citizens and the police, perhaps the most common is the dreaded traffic stop. Everyone knows the sinking feeling in the pit of the stomach that accompanies flashing lights in the rearview mirror.”).

180. See *Brendlin*, 551 U.S. at 259–60 (applying show-of-authority analysis to passengers); *id.* at 263 (holding passenger seized “from the moment [the driver’s] car came to a halt on the side of the road”).

181. *United States v. Weaver*, 282 F.3d 302, 311 (4th Cir. 2002).

182. See, e.g., *United States v. Mendez*, 118 F.3d 1426, 1430 (10th Cir. 1997) (“While determining whether an officer and driver are engaged in a consensual encounter typically requires . . . the totality of the circumstances in a particular case, this circuit has consistently applied at least one bright-line rule: an officer must return a driver’s documentation before the detention can end.”).

183. *United States v. Jordan*, 958 F.2d 1085, 1086 n.1 (D.C. Cir. 1992) (“If, for example, police were to aim drawn weapons, that circumstance alone would communicate to a reasonable person that he was not free to leave.”).

identification have created bright-line rules for certain weighty factors, such as an order to remain.<sup>184</sup>

In offering comments on *Bostick*, Wayne LaFave seems to downplay its iterations against per se rules.<sup>185</sup> He points to the differing rules applied to traffic stops—which are considered per se seizures—and to pedestrian stops.<sup>186</sup> Consequently, if the critical interest in seizure cases is the freedom of an individual to refuse consensual encounters, the central question should ask whether the *effect* of any or all factors intrudes on that freedom to a significant extent. A single, sufficiently demonstrative coercive act—such as application of physical force or even a verbal order to remain—can seriously infringe on these interests, as seen above. Thus, the next logical question is whether retention of identification exerts that level of functional restraint.

#### B. *The Restrictive Power of Retention of Identification*

When police retain an individual's identification, the act could be conceived either as a physical restraint (seizure *of* identification) or as a show of authority (seizure *by* identification).<sup>187</sup> In fact, early in the Court's seizure analysis, Justice Brennan's concurrence in *Royer* articulated the view that merely asking for identification effected a kind of physical restraint.<sup>188</sup> However, since *Royer*, the Court has consistently rejected the principle that merely asking for and receiving a person's identification constitutes a seizure.<sup>189</sup> Something one step further into the restraint realm is required. If holding on to a citizen's physical property were comparable to physically restraining her person, the Court's

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184. See, e.g., *United States v. Brown*, 448 F.3d 239, 245–46 (3d Cir. 2006) (holding order to remain automatically imposes seizure).

185. See LaFave, *Pinguitudinous Police*, supra note 73, at 746 (noting *Bostick's* “totality of the circumstances” test does not mean that each and every circumstance in the case must be assumed to have precisely the same degree of relevance and weight”).

186. *Id.*

187. See Clancy, supra note 174, § 5.1.4.1.4, at 176 (“Yet, *Royer's* facts significantly resembled a physical seizure: by retaining *Royer's* driver's license and airline ticket and obtaining his luggage without his consent, the police had physical control over his possessions and means of travel.”)

188. *Florida v. Royer*, 460 U.S. 491, 512 (1983) (Brennan, J., concurring in the judgment) (“It is simply wrong to suggest that a traveler feels free to walk away when he has been approached by individuals who have identified themselves as police officers and asked for, and received, his airline ticket and driver's license.”)

189. See, e.g., *Hibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185 (2004) (“In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment.”); *United States v. Drayton*, 536 U.S. 194, 200–01 (2002) (citing *Florida v. Bostick*, 501 U.S. 429, 434–35 (1991)) (“Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen.”).

jurisprudence would be inconsistent.<sup>190</sup> Consequently, to remain faithful to the Court's conceptualization of retention of identification, it must be analyzed as a show-of-authority seizure rather than as a physical seizure of the citizen.<sup>191</sup>

1. *Lessons from Mendenhall and Royer.* — In *Mendenhall* and *Royer*, a majority of Justices recognized this coercive force, despite the badly fractured opinions characterizing both cases.<sup>192</sup> The two cases make an excellent study to determine the precise nature of the impact that an officer's retention of identification has on the situation.<sup>193</sup> Several scholars have noted the opposite results of the two cases in light of the key difference being the retention of identification.<sup>194</sup>

The first potential answer to this paradox is simply one of varying degree. The factors in *Mendenhall* may have had some restrictive force but failed to reach the amorphous threshold of seizure.<sup>195</sup> Perhaps the additional factor of identification in *Royer*—while not dispositive—simply served to nudge the entire process over the line.<sup>196</sup> However, this answer ultimately does not satisfy, considering the sharp contrast between the manners in which the Court characterized the cases in its respective decisions. Compare the following passages from the two cases in the facts they describe and the tone in which they describe them:

[T]he respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification

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190. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (defining seizure of property as “meaningful interference with an individual’s possessory interest in that property”).

191. See *supra* notes 167–169 and accompanying text (comparing discussions by majority and dissent in *De La Rosa* over physical restraint versus functional restraint imposed by retention of identification).

192. See *supra* notes 39–51 and accompanying text (discussing Justices’ treatment of identification in their opinions).

193. See *supra* notes 24–35 and accompanying text (discussing parallel facts in *Mendenhall* and *Royer*).

194. See, e.g., Robert M. Bloom, *Searches, Seizures, and Warrants* 65 (2003) (“[T]he situation [in *Royer*] was similar to *Mendenhall*, except for the fact that the officers did not return the ticket or driver’s license . . . .”); Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 *J. Crim. L. & Criminology* 437, 449 (1988) (“The only difference [between *Mendenhall* and *Royer*] in this litany of factors is the retention of the license and ticket.”); James Spallino, Jr., *Note, The Search for the Fourth Amendment Seizure: It Won’t Be Found on a Bus—Florida v. Bostick*, 25 *Akron L. Rev.* 457, 462 (1991) (noting difference in outcomes “appeared to rest on one factual difference”).

195. See *supra* notes 36–40 and accompanying text (discussing Court’s treatment of circumstances in *Mendenhall*).

196. See *supra* notes 41–50 and accompanying text (discussing Court’s treatment of circumstances in *Royer*).

were returned to her before she was asked to accompany the officers.<sup>197</sup>

Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment.<sup>198</sup>

The Court uses the same term—"asked"—to describe the way in which the officers posed the request to relocate to the respective defendants but portrays the interactions in completely different lights, despite their apparent similarities. In neither case did the officers threaten either defendant, and in both instances the officers identified themselves as narcotics officers investigating drug smuggling.<sup>199</sup>

Read together, these two cases demonstrate how the mere retention of an airline ticket and driver's license can transform the same request to accompany officers to a room fifty feet away from casual to coercive. The D.C. Circuit in *Jordan*, as well as the Fifth Circuit and Seventh Circuit, explicitly relied on this precedent from *Mendenhall* and *Royer* to demonstrate the coercive influence that seizure by identification possesses.<sup>200</sup>

2. *Empirical Studies of "Free to Leave."* — In oral arguments in *Brendlin v. California*, a traffic stop case decided in 2007, multiple Justices referenced the lack of empirical studies addressing the issue of when citizens feel "free to leave" under the Court's current seizure analysis.<sup>201</sup> Justice Breyer posed a pointed question to the counsel for the state about how the reasonable person would respond: "How do you suggest we decide this[?] . . . I really don't know what the majority [of citizens] think and

197. *United States v. Mendenhall*, 446 U.S. 544, 557–58 (1980).

198. *Florida v. Royer*, 460 U.S. 491, 501 (1983) (plurality opinion).

199. Compare *Mendenhall*, 446 U.S. at 547–48 ("[T]he agents approached her as she was walking through the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket. . . . Agent Anderson then specifically identified himself as a federal narcotics agent . . ."), with *Royer*, 460 U.S. at 493–94 ("As Royer made his way to the concourse which led to the airline boarding area, the two detectives approached him, identified themselves as policemen working out of the sheriff's office, and asked if Royer had a 'moment' to speak with them; Royer said 'Yes.'").

200. *United States v. Jordan*, 958 F.2d 1085, 1087 (D.C. Cir. 1992) ("In *Royer* the Court found that when the police asked the defendant to go with them to an interview room *while* retaining his ticket and license, they had restrained his movements to a degree that implicated the [F]ourth [A]mendment."); accord *United States v. Chavez-Villarreal*, 3 F.3d 124, 128 n.16 (5th Cir. 1993) (holding retention of alien's identification card imposed coercive restraint and citing cases including *Royer* and *Jordan*); *United States v. Cordell*, 723 F.2d 1283, 1285 (7th Cir. 1983) (comparing facts of case to those in *Royer*).

201. See, e.g., Transcript of Oral Argument at 33, *Brendlin v. California*, 551 U.S. 249 (2007) (No. 06-8120) (Kennedy, J.) ("Now, we don't have empirical studies and so forth, but at some point the Court takes judicial notice . . .").

yet it would seem totally relevant. How could we find out?”<sup>202</sup> After a few minutes involving heated questioning by multiple Justices, Justice Breyer summarized the difficulty:

[T]he law points us to the direction of what would a person reasonably think in general in such circumstances, and we can look at five million cases, but we don’t know. So what do we do if we don’t know? I can follow my instinct. . . . Or I could say, let’s look for some studies.<sup>203</sup>

When counsel suggested the Court apply consensual encounter analysis, Justice Scalia quipped, “Maybe we can just pass until the studies are done?”<sup>204</sup>

Though humorous, this exchange demonstrates a real problem with the Court’s seizure analysis as it stands. The Court must decide cases by applying standards based on the reasonable person without any concrete data on what the reasonable person thinks. However, in the last few years, several scholars have conducted empirical studies examining the actual restrictive force present in police-citizen encounters.<sup>205</sup> These studies have indicated that the legal understanding of what constitutes restrictive force vastly underestimates the amount of actual restrictive force present in a police-citizen encounter.<sup>206</sup>

For example, in addressing the Court’s related consent doctrine, Professor Janice Nadler has articulated serious concerns with the correlation between the legal reasonable person standard and the actual

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202. *Id.* at 37 (Breyer, J.).

203. *Id.* at 43.

204. *Id.* at 44 (Scalia, J.).

205. See generally, e.g., David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment’s Seizure Standard*, 99 *J. Crim. L. & Criminology* 51 (2009) (describing results of previous studies and providing conclusions from his own study); Ilya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the “Voluntary” Waiver of Fourth Amendment Rights*, 44 *How. L.J.* 349 (2001) (conducting empirical study on waiver in Ohio following *Robinette*); Nadler & Trout, *supra* note 170, at 18 (gathering empirical surveys on consent); Ilya Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry into the “Consensual” Police-Citizen Encounter* (Oct. 1999) [hereinafter Lichtenberg, *Voluntary Consent*] (unpublished Ph.D. dissertation, Rutgers University) (on file with *Columbia Law Review*) (analyzing coercive force in consensual encounters).

206. E.g., Kessler, *supra* note 205, at 61–64, 81–87 (summarizing empirical and experimental studies and arguing that courts ignore these studies); Lichtenberg, *Voluntary Consent*, *supra* note 205, at 124 (“[T]here tends to be agreement among social scientists that when a police officer gives an order, command, or makes a request he expects compliance.”). For some additional discussions of how race and gender affect police-citizen interaction under the Fourth Amendment, see generally, e.g., Devon W. Carbado, (E)Racing the Fourth Amendment, 100 *Mich. L. Rev.* 946 (2002); Orit Gan, Third-Party Consent to Search: Analyzing Triangular Relations, 19 *Duke J. Gender L. & Pol’y* 303, 324–27 (2012); Kit Kinports, *Criminal Procedure in Perspective*, 98 *J. Crim. L. & Criminology* 71, 140–41 (2007).

reasonable person on the street.<sup>207</sup> In another study, around half of respondents indicated they would feel “not free to leave” or less than “somewhat free to leave” in a mere conversation with the police on the sidewalk.<sup>208</sup> Including the number of respondents who indicated they would feel only “somewhat free to leave,” the percentage leapt to eighty percent.<sup>209</sup> Similarly, an article by John M. Burkoff references a study that demonstrates people would not consider themselves free to leave after refusing to consent to a vehicle search.<sup>210</sup>

Thus, it appears that any interaction with a police officer, even at the lowest level of intrusiveness, makes most citizens feel that they are not free to leave.<sup>211</sup> The area of seizure by identification presents a singular opportunity to critique the effects of this analysis at the most basic level of interaction between citizens and the police. The Court has repeatedly reaffirmed the ability of police and citizens to engage in encounters by consent;<sup>212</sup> anything less would impose untenable restrictions on the police’s ability to approach and engage with a citizen on the street. However, the Court should recognize that the baseline of a police-citizen encounter already operates asymmetrically.<sup>213</sup> When retention of identification—which *Mendenhall* and *Royer* identified as coercive—is introduced into the encounter, it pushes the dynamics even more toward curtailing the citizen’s ability to disengage. The D.C. Circuit’s approach appropriately addresses the actual coercive force added by the retention

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207. Janice Nadler, No Need to Shout: Bus Sweeps and the Psychology of Coercion, 2002 Sup. Ct. Rev. 153, 156 (“[T]he Court’s Fourth Amendment consent jurisprudence is either based on serious errors about human behavior and judgment, or else has devolved into a legal fiction of the crudest sort—a mere device for attaining the desired legal consequence.”).

208. Kessler, *supra* note 205, at 75–76.

209. *Id.* at 75.

210. John M. Burkoff, Search Me?, 39 Tex. Tech L. Rev. 1109, 1119–20 (2007) (quoting undergraduate study indicating most people feel restricted by requests to search).

211. 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, 521–37 (2001) (critiquing reasonable person standard as inaccurate given psychological response to authority); Russell L. Weaver, The Myth of “Consent,” 39 Tex. Tech L. Rev. 1195, 1199 (2007) (“When a police officer stops an individual . . . , the individual is inevitably apprehensive about the encounter given that the officer has the power to arrest and to bring charges. . . . [W]hen a police officer requests permission to search, the police officer inevitably retains a distinct psychological advantage over the suspect.”).

212. See, e.g., *Hibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185 (2004) (“In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment.”); *United States v. Drayton*, 536 U.S. 194, 201 (2002) (noting police may search with consent without implicating Fourth Amendment (citing *Florida v. Bostick*, 501 U.S. 429, 434–35 (1991))).

213. Lichtenberg, Voluntary Consent, *supra* note 205, at 138 (“An asymmetrical power relationship in the police-citizen encounter appears to exist.”).

of identification by requiring the police to respect the boundary affirmatively.

3. *Understanding the Burdens.* — This Note's principal conclusion is that the key point of distinction between the per se approach of *Jordan* and the amorphous approach of *Weaver* amounts to a decision as to where the burden of enforcing the line between encounter and seizure rests. The justifications offered by the Fourth Circuit and those who agree with it put the burden on the citizen to enforce the boundary. This totality approach seems to rely on two principles: Either the retention of identification will not interfere with the individual's immediate business, or the individual can merely ask for the return of her documents.<sup>214</sup>

*Weaver*, despite nominally adhering to the Supreme Court's stated disfavor of per se rules, nonetheless recognized the validity of per se rules in the traffic stop context, where retention of a driver's license places restraints on the individual driver's ability to leave.<sup>215</sup> The *Weaver* and *De La Rosa* courts held that retention of identification in the pedestrian context did not reach the level of seizure because the retention of a driver's license did not inhibit the individual from continuing about his business.<sup>216</sup> However, it seems extremely unlikely that any citizen would willingly leave behind any piece of property in the hands of the police<sup>217</sup>—much less property as vitally important in today's world as one's identification.<sup>218</sup> Consequently, the theoretical ability to walk away espoused by the *Weaver* and *De La Rosa* courts does not actually provide for citizen termination, placing the full weight of enforcing the boundary on their second stated reason: the ability to reclaim.

In *Jordan*, the D.C. Circuit explicitly rejected the district court's finding that retention of identification did not constitute a seizure because the individual could request its return.<sup>219</sup> The court observed that the imposition of a burden to reclaim identification and terminate the

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214. See supra notes 124–126 and accompanying text (describing Fourth Circuit's justifications for finding no seizure in *Weaver*).

215. See *United States v. Weaver*, 282 F.3d 302, 311 (4th Cir. 2002) (noting with approval existence of per se rules for seizure by identification in traffic stops).

216. See *id.* at 310 n.4, 311–12 (observing *Royer* involved retention of airline ticket necessary to boarding plane and contrasting this with *Weaver*'s ability merely to leave); *United States v. De La Rosa*, 922 F.2d 675, 678 & n.2 (11th Cir. 1991) (observing defendant could have entered his apartment, leaving his identification behind).

217. See supra notes 205–210 and accompanying text (discussing empirical studies demonstrating public unwillingness to terminate encounters with police).

218. See *De La Rosa*, 922 F.2d at 683–84 (Clark, J., dissenting) (“In our society, the most valuable piece of personal identification possessed by most citizens is their driver's license. . . . By giving over what may be his only piece of personal identification . . . , that person knows that he is *effectively* immobilized even if he could physically walk away from the officer.”).

219. *United States v. Jordan*, 958 F.2d 1085, 1088 (D.C. Cir. 1992) (basing analysis on whether police conduct communicated message of restraint).



encounter blurred the line between encounter and seizure.<sup>220</sup> In contrast, the Fourth Circuit in *Weaver* noted that the absence of any other coercive element itself meant there was no barrier to a request to reclaim the identification.<sup>221</sup> However, this analysis turns the retention of identification into a nullity. In order to hold that the retention of identification does not exert restrictive force without other coercive circumstances, a court must ignore the restrictive force recognized by six Justices in *Royer*.<sup>222</sup> If, however, other coercive elements are present, those elements already constitute a seizure, and police retention of the citizen's identification merely adds to an already restrictive seizure.<sup>223</sup> Yet the empirical studies indicate that mere police presence imposes some restrictions on citizens' feelings of freedom.<sup>224</sup> In light of this baseline of restrictive pressure, *Weaver's* assertion that an individual can simply reclaim her identification rings hollow.

### C. *Balancing Interests in Policing the Boundaries*

If a court wishes to place the burden of monitoring the boundary of seizure on the police, it adopts a per se rule, such as in the traffic stop context or in *Jordan*, so as to notify and incentivize police to behave in the least coercive manner.<sup>225</sup> If, however, a court wishes to require that citizens affirmatively invoke their right to be free of restriction, it adopts an analysis, as *Weaver* did, in which retention of identification does not constitute a seizure because the individual can request its return.<sup>226</sup> One might ask whether a per se rule is necessary to accomplish the goal of

220. *Id.* (“It is likely that a person unintimidated enough to ask for his license back has not in fact been subjected to a cognizable restraint in the first place.”).

221. *Weaver*, 282 F.3d at 312 (“In light of these facts, *Weaver* was free at this point to request that his license be returned to him so that he could end the encounter.”).

222. See *supra* notes 192–200 and accompanying text (arguing *Royer* necessitates categorizing retention of identification as imposing restrictive force).

223. See, e.g., *Alvin v. Calabrese*, 455 F. App'x 171 (3d Cir. 2011) (holding police order to remain created seizure and noting retention of identification was additional but unnecessary evidence of seizure).

224. See *supra* notes 205–210 and accompanying text (discussing empirical studies).

225. See *Jordan*, 958 F.2d at 1088 (“The question of whether a seizure occurred in the first place depends on what the original *police conduct* reasonably communicated to the individual stopped . . .”); *supra* Part II.B (discussing traffic stop cases).

226. *Weaver*, 282 F.3d at 312 (suggesting *Weaver's* ability to request return of identification obviates restriction). But see *Jordan*, 958 F.2d at 1088 (rejecting that argument). The *De La Rosa* court adopted an even broader approach: Over a vehement dissent, the two judges in the panel majority held the ability to walk away without the identification, rather than the ability to request its return, constituted sufficient freedom to obviate a seizure. Compare *United States v. De La Rosa*, 922 F.2d 675, 678 & n.2 (11th Cir. 1991) (“[T]emporary retention of the license did not preclude appellant from terminating the encounter by going into his apartment.”), with *id.* at 684 (Clark, J., dissenting) (rejecting majority's view that “to avoid a police encounter, [persons] should reasonably be expected to abandon their driver's license in the possession of a police officer, walk away, and perhaps apply for a new license another day”).

inducing the police to respect this boundary; it is doubtful the *Weaver* court thought its approach left police with no responsibility to conform their behavior to Fourth Amendment standards. However, in situations where the amorphous, contextual approach is used, officers are free to counterbalance coercive force—retention of identification—with other mitigating factors that would indicate to a reviewing judge their conduct was permissible. For example, even if using polite language and not physically obstructing a citizen's path, the officer could nonetheless retain the citizen's identification and gain the advantage of that power dynamic.<sup>227</sup> A *per se* rule prevents such gamesmanship and ensures that police-citizen encounters develop a character of legitimacy and fairness.<sup>228</sup>

Further, a *per se* rule ensures that otherwise merely nominal protections become real. By ignoring baseline coercive pressure in every police-citizen encounter,<sup>229</sup> the *Weaver* approach only superficially protects citizens' right to refuse. While citizens may enjoy a theoretical right to demand their identification back or terminate the encounter, most citizens feel subjectively unable to take advantage of that freedom.<sup>230</sup> One of the empirical studies mentioned earlier indicated almost sixty percent of respondents did not know they had a right to refuse police-citizen encounters, and of the forty percent who did, the average result of the survey indicated that they felt only "somewhat free to leave."<sup>231</sup> The Supreme Court has repeated on numerous occasions that seizure analysis looks to objective, not subjective, criteria.<sup>232</sup> The *Weaver* approach defeats this objectivity, substituting a perfectly subjective standard: whether a citizen will have the mental or emotional fortitude to confront the police over her identification.

However, the Supreme Court has recently required Fifth Amendment rights against self-incrimination be affirmatively invoked in

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227. See Nadler & Trout, *supra* note 170, at 13–18 (discussing judicial misinterpretations of conversational cues that ignore coercive contextual elements).

228. For discussions of how police conduct during a stop-and-frisk affects legitimacy, see generally Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *Fordham Urb. L.J.* 457 (2000); Jeffrey Fagan, Tom Tyler & Tracey Meares, *Street Stops and Police Legitimacy in New York* (Sept. 22, 2011) (unpublished manuscript), available at [http://www.jjay.cuny.edu/Fagan\\_Tyler\\_and\\_Meares\\_Street\\_Stops\\_and\\_Police\\_Legitimacy\\_in\\_New\\_York.pdf](http://www.jjay.cuny.edu/Fagan_Tyler_and_Meares_Street_Stops_and_Police_Legitimacy_in_New_York.pdf) (on file with the *Columbia Law Review*).

229. See *supra* notes 205–210 and accompanying text (discussing citizens' feelings of restraint in mere police presence).

230. See *supra* notes 205–210 and accompanying text (discussing empirical studies to this effect).

231. Kessler, *supra* note 205, at 78.

232. See, e.g., *United States v. Drayton*, 536 U.S. 194, 202 (2002) ("The reasonable person test, the Court explained, is objective and 'presupposes an *innocent* person.'" (quoting *Florida v. Bostick*, 501 U.S. 429, 437–38 (1991))).

order to trigger protections.<sup>233</sup> This rule, along with the ideally reasonable person examined in seizure analysis, might indicate that the Court wants to place the primary burden of claiming protections on citizens rather than on police, whose activities might be hampered, especially at the margins. However, as argued below, the *Jordan* rule more clearly establishes acceptable conduct in the context of seizures, which better protects citizens' rights and prevents inconsistent application of the exclusionary rule.

The exclusionary rule's mandatory nature lurks behind every seizure analysis. Ever since *Mapp v. Ohio*,<sup>234</sup> Fourth Amendment violations have automatically triggered the exclusion of unconstitutionally obtained evidence. At the beginning of this chain of seizure cases, the *Terry* Court extensively discussed the influence the exclusionary rule exerted on its holding.<sup>235</sup> A contextual, totality of the circumstances analysis essentially "frontloads" the exercise of judicial discretion. In a case where exclusion seems harsh in light of the police action, the court has a contextual basis to find that no seizure occurred. In contrast, bright-line rules run the risk of triggering the mandatory exclusion of evidence in situations to which courts would be reluctant to see it applied. This concern might form a basis for the Court's determination that a contextual approach best serves judicial interests. However, if the Supreme Court chooses to move away from a strictly applied exclusionary rule, as some scholars have suggested recent cases indicate,<sup>236</sup> more ambiguity in determining whether or not seizures have occurred may not result in such severe costs to the justice system.

A second flaw in the *Weaver* approach is that it fails to provide clear fact-based standards both for police officers and for trial courts evaluating their encounters. A lack of clear standards forces police officers to operate under a nebulous understanding that everything they do affects the coercion analysis without knowing precisely what those effects may be. This ambiguity provides opportunities both for over- and under-

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233. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010) (holding defendant who had been silent during three-hour interrogation had not invoked right to remain silent without expressly saying so).

234. 367 U.S. 643 (1961).

235. *Terry v. Ohio*, 392 U.S. 1, 12–16 (1968); see also *supra* notes 11–16 and accompanying text (discussing *Terry's* genesis of modern seizure analysis).

236. See generally, e.g., Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 *J. Crim. L. & Criminology* 757 (2009) (lamenting limits on exclusion and predicting further erosion). The cases most often cited as evidence of a move to a discretionarily applied exclusionary rule are *Davis v. United States*, 131 S. Ct. 2419 (2011) (holding exclusionary rule does not apply to violations when police engage in conduct in reasonable reliance on binding appellate precedent), *Herring v. United States*, 555 U.S. 135 (2008) (holding exclusionary rule does not apply where good faith police recordkeeping error caused unlawful arrest), and *United States v. Leon*, 468 U.S. 897 (1984) (holding exclusionary rule does not apply where police relied in good faith on invalid warrant).

correction. Some police officers may feel hampered in their ability to initiate encounters with citizens, while others may fail to take precautions and end up triggering the mandatory exclusionary rule by their missteps. Ambiguity's impact on judicial factfinding is no less important: Under the Fourth Circuit's nebulous standards, a trial judge must make a significant constitutional determination based on a skeleton of general factors, amorphous impressions of a police officer's behavior, and the ever-difficult judgment of how a reasonable person might respond. In this undefined gray area, perhaps it is unsurprising that courts default to finding consensual encounters whenever officers phrase their statements in the form of a question.<sup>237</sup> A per se determination that the retention of identification is coercive and itself constitutes a seizure provides a more concrete hook for evaluating officer and citizen conduct. Even if witnesses lie or are mistaken about whether their identification was retained, the court is in the familiar territory of determining witness credibility and physical facts rather than making more difficult judgments about the emotional tenor that existed at the time of the encounter.

By recognizing a per se rule for seizure by identification, the D.C. Circuit has established not only a "decision rule" that recognizes the reality of the circumstances surrounding police-citizen encounters but also a "conduct rule" that encourages the protection of the citizen rights at stake.<sup>238</sup> Automatically transforming retention of identification into a seizure requiring some level of articulable suspicion, as was the case in *Jordan*,<sup>239</sup> has the benefit of placing the enforcement burden on the police. Whether or not the reasonable person standard has become a "legal fiction,"<sup>240</sup> the Court has already recognized through the *Mendenhall-Royer* pair of cases that retention of identification has the power to transform otherwise innocuous circumstances into a coercive environment.<sup>241</sup> Police officers, having both training and everyday exposure to these encounters, are in the best position to mitigate the restrictive force that might be first exercised by their mere presence and then exacerbated by a request for and retention of a citizen's identification.

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237. See Nadler & Trout, *supra* note 170, at 16–17 & n.16 (“[C]ourts routinely and mechanically point to the police officer’s polite tone of voice as a key basis for finding that the defendant voluntarily consented to being searched.”).

238. For a discussion of decision rules versus conduct rules in the Fourth Amendment context, see Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2534 (1996) (“[T]he police are very apt to ‘hear’ the decision rules that the Supreme Court makes (and that the lower federal and state courts apply) and thus to adjust their attitudes about what behavior ‘really’ is required by the Court’s conduct rules.”).

239. *United States v. Jordan*, 958 F.2d 1085, 1088–89 (D.C. Cir. 1992).

240. Nadler, *supra* note 207, at 156 (arguing Court’s standard relies on “implausible” assertions of citizen perceptions in encounters with police).

241. See *supra* notes 193–200 and accompanying text (discussing role of identification in *Mendenhall* and *Royer*).

Placing the burden on the police also mitigates the problem with citizens' psychological barriers to refusal or affirmatively reclaiming their identification. Finally, the burden as it actually stands on the police is minimal; there is no barrier to a request for identification,<sup>242</sup> merely an obligation, as the Tenth Circuit articulated in *Lopez*, to return the identification as soon as the citizen's identity has been verified.<sup>243</sup>

#### CONCLUSION

This Note has argued that failing to adopt a per se rule that retention of identification constitutes a seizure does not accurately account for the baseline of restrictive force present in police-citizen encounters. It has addressed the recognition of this restrictive force in three doctrinal areas: pedestrian encounters, traffic stops, and voluntariness of consent analysis. In advocating for the adoption of the D.C. Circuit's per se rule, it has noted that per se rules are not as categorically disfavored in the Supreme Court's seizure analysis as the language of *Bostick* and *Drayton* seems to suggest; particular factors—like physical restraint or traffic stop contexts—can give rise to automatic seizure whenever they are present. The approach taken by the Fourth Circuit in *Weaver* systematically underestimates the restrictive impact of police-citizen encounters on the citizen. By placing an affirmative burden on citizens to reclaim their identification after police obtain it, the approach underprotects a citizen's right to refuse continued participation in a consensual encounter. The per se rule in *Jordan* not only fulfills the purposes of the Supreme Court's articulated test but also reallocates the burden of monitoring the boundary to the police, who are best equipped to mitigate inherently coercive effects in police-citizen interactions.

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242. See supra note 189 and accompanying text (discussing Supreme Court holdings affirming police ability to request identification without implicating Fourth Amendment).

243. *United States v. Lopez*, 443 F.3d 1280, 1285 & n.2 (10th Cir. 2006) ("Within seconds of reviewing Lopez's license, Jackson was able to establish Lopez's identity and confirm that Lopez's address matched the address on the car registration. After that point in time, the continued retention of Lopez's license was undue.").

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