University of Richmond Law Review

Volume 31 | Issue 2 Article 8

1997

Liberty From Officials by Grace: The Fourth Amendment's Application to Automobile Passengers in Maryland v. Wilson

Michael Begland
University of Richmond

LIBERTY FROM OFFICIALS BY GRACE: THE FOURTH AMENDMENT'S APPLICATION TO AUTOMOBILE PASSENGERS IN *MARYLAND V. WILSON*

Get your motor running,
head out on the highway,
Looking for adventure
and whatever comes our way.[1]

On February 19, 1997, the United States Supreme Court handed down its decision in *Maryland v. Wilson*,[2] and put an end to twenty years of speculation regarding a police officer's authority to order a passenger out of a lawfully stopped automobile. In finding that such an order does not violate a passenger's Fourth Amendment privacy interests, the Supreme Court reversed Maryland's Court of Special Appeals and sided with the majority of states that have considered this narrow issue.[3] The Court's decision provides important insight into the current state of Fourth Amendment jurisprudence and the Supreme Court's increasing willingness to sacrifice individual liberties, particularly in the automobile context, to further law enforcement objectives.

The Supreme Court's 1977 decision in *Pennsylvania v. Mimms*,[4] provided the touchstone for the Court's analysis in *Wilson*. In *Mimms*, after balancing societal interests against the privacy interests of a driver, the Court held that an officer may

1. STEPPENWOLF, Born to Be Wild, on BORN TO BE WILD RETROSPECTIVE 1966-1990 (MCA Records 1991).

2. 117 S. Ct. 882 (1997).

3. *See* Doctor v. State, 573 So. 2d 157 (Fla. App. 1991); People v. Salvator, 602 N.E.2d 953 (Ill. App. Ct. 1992); Warr v. State, 580 N.E.2d 265 (Ind. App. 1991); State v. Landry, 588 So. 2d 345 (La. 1991); People v. Martinez, 483 N.W.2d 868 (Mich. 1992); State v. Ferrise, 269 N.W.2d 888 (Minn. 1978); State v. Reynolds, 753 S.W.2d 1 (Mo. Ct. App. 1988); People v. Robinson, 543 N.E.2d 733 (N.Y. 1989); State v. Gilberts, 497 N.W.2d 93 (N.D. 1993).

4. 434 U.S. 106 (1977).

order a driver out of a lawfully stopped vehicle.[5] In extending *Mimms* to passengers, the Court employed the same balancing test to examine the reasonableness of the government's actions.[6] Balancing police officer safety against the privacy interests of automobile passengers, the Court in *Wilson* recognized that the balance of interests for passengers differs only slightly from that of drivers.[7] However, the Court ultimately found that because the presence of passengers is likely to increase the risk to officers, and the additional intrusion on the passenger is minimal, an automatic police prerogative to order a passenger out of a vehicle is reasonable.[8]

While the result in *Wilson* is not surprising, the decision is important in three respects. First, *Wilson* demonstrates the Court's willingness to withdraw Fourth Amendment protections where many would argue an individual has a reasonable expectation of privacy. Second, *Wilson* illustrates that the automobile has acquired a distinct "taint" for purposes of the Fourth Amendment, separate from its historical justifications.[9] Because of this taint, the Court is less willing to extend Fourth Amendment protections to individuals or property in an automobile. While the Court in *Wilson* did not expressly address the role this automotive taint played in its holding, a review of the Court's analysis strongly suggests that the automobile taint lies at the root of its decision. Third, the Court in *Wilson* expressly reserved the question of whether a passenger, once ordered out

---

5. *See id.* at 109-12.

6. *See Wilson*, 117 S. Ct. at 885-86. While the Court stated that it was balancing society's interest in police officer safety against a passenger's privacy interests, a cursory review of the analysis illustrates that the Court's "balancing" was at best token. *See infra* notes 89-125 and accompanying text.

7. *See Wilson*, 117 S. Ct. at 886.

8. *See id.* The Court used a single study detailing police officer assaults and deaths during traffic stops to suggest that an order to passengers to alight from a car will increase police officer safety. The lack of empirical data to support such a proposition suggests that other factors controlled the Court's decision.

9. "Taint" is *not* used as a term of art in this context and does not implicate broader Fourth Amendment issues. For purposes of this case note, "taint" is analogous to contaminated, infected, or suspect.

of a car, may be detained.[10] To the chagrin of those concerned with the diminishing protections of personal liberty, the decision in *Wilson* strongly suggests that when the Supreme Court is eventually presented with the issue, it will find that a passenger can be detained for the duration of the stop.

Part I of this case note discusses the historical context in which *Wilson* was decided, and explores how lower courts ruled on the issue. Part II reviews the facts in *Wilson* and addresses the Maryland Court of Special Appeals' reliance on *Mimms'* Fourth Amendment reasonableness inquiry. Part III discusses the Supreme Court's decision. Part IV discusses how, after *Wilson*, the Supreme Court will likely resolve other Fourth Amendment issues raised in the automobile context. Part V concludes by briefly discussing the full implications of *Wilson*.

I. *PENNSYLVANIA V. MIMMS* AND ITS APPLICABILITY TO PASSENGERS

A. Pennsylvania v. Mimms

Pennsylvania v. Mimms,[11] is the landmark case under which *Wilson* was decided. The Supreme Court in *Mimms* considered whether a police officer, after having lawfully detained a motor vehicle for a traffic violation, may order the driver to alight from the vehicle without violating the Fourth Amendment proscription of unreasonable searches and seizures.[12] In *Mimms*, a vehicle was stopped for an expired license tag.[13] Although the

---

10. *See Wilson*, 117 S. Ct. at 886.

> Maryland urges us to go further and hold that an officer may forcibly detain a passenger for the entire duration of the stop. But respondent was subjected to no detention based on the stopping of the car once he had left it; his arrest was based on probable case to believe that he was guilty of possession of cocaine with intent to distribute. The question which Maryland wishes answered, therefore, is not presented by this case, and we express no opinion upon it.

Id. at 886 n.3.

11. 434 U.S. 106 (1977).

12. *See id.* at 108-12.

13. *See id.* at 107.

officer did not suspect any specific criminal activity, he ordered the driver to step out of the vehicle and produce identification.[14] The officer did so in accordance with a departmental policy which had been adopted as a precautionary measure.[15] However, once the driver was outside the vehicle, the officer noticed a large bulge in his jacket, frisked him, and found a loaded revolver.[16] The driver was ultimately convicted for carrying a concealed weapon and argued on appeal that the officer had no authority to order him from the vehicle based merely on the underlying traffic offense.[17]

The touchstone of the Court's analysis under the Fourth Amendment was "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."[18] The Court in *Mimms* recognized that "[r]easonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'"[19] Thus, the Court reviewed the reasonableness of the officer's order by balancing the increased safety of the officer against the "intrusion into the driver's personal liberty."[20] Ultimately, the Court found that the officer's order was reasonable and did not violate the driver's Fourth Amendment protections. "What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety."[21]

While the Court considered several factors in determining the reasonableness of the order, officer safety was likely paramount. The Court explained: "We think it too plain for argument that the State's proffered justification—the safety of the officer—is

---

14. *See id.*
15. *See id.* at 109-10.
16. *See id.* at 107.
17. *See id.*
18. *Id.* at 108-09 (citing Terry v. Ohio, 392 U.S. 1, 19 (1968)).
19. *Id.* at 109 (citing United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).
20. *Id.* at 111. It is important to note that in *Mimms* the Court recognized that "there is no question about the propriety of the initial restrictions on respondent's freedom of movement." *Id.* at 109. The narrow question before the Court was the reasonableness of "the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped." *Id.*
21. *Id.* at 111.

both legitimate and weighty."[22] While the Court recognized that "the officer had no reason to suspect foul play from the particular driver at the time of the stop,"[23] it buttressed the safety argument by pointing to the "inordinate risk confronting an officer as he approaches a person seated in an automobile."[24] The Court was persuaded by a single study which detailed the high number of shootings that occur when police officers approach suspects seated in automobiles.[25] Additionally, the Court found that in *United States v. Robinson*,[26] it had previously "expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations."[27]

Another important factor considered by the Court in *Mimms* was the incremental nature of the intrusion into the driver's personal liberty.[28] For the Court, recognizing that the driver had already been stopped by the police, the only question was whether or not "he shall spend that period sitting in the driver's seat of his car or standing along side it."[29] The Court explained that "[t]he driver is being asked to expose to view very little more of his person than is already exposed."[30]

In his dissent, Justice Stevens criticized the majority's use of the Bristow study to support its contention that a police officer can protect himself by ordering a driver out of a vehicle.[31] Justice Stevens pointed out that the author of the study made no attempt to obtain a random selection of cases involving automo-

22. *Id.* at 110.
23. *Id.* at 109.
24. *Id.* at 110.
25. *See id.* (referring to Bristow, *Police Officer Shootings—A Tactical Evolution*, 54 J. CRIM. L.C. & P.S. 93 (1963)). While the majority could have undoubtedly offered more compelling statistics to bolster their claim that traffic stops are dangerous encounters, the fact they did not again suggests that other factors guided the Court's decision.
26. 414 U.S. 218 (1973).
27. *Mimms*, 434 U.S. at 110 (citing *Robinson*, 414 U.S. at 234).
28. *See id.* at 111.
29. *Id.*
30. *Id.*
31. *See id.* at 118 (Stevens, J., dissenting).

biles.[32] In fact, many of the cases in the study involved shootings in which the police officer was in his police car, dismounting from his vehicle, or shot by a passenger in the vehicle.[33] Most importantly, Justice Stevens argued that the study lended no support for the Court's "assumption" that ordering a driver out of his car in any way enhances the officer's safety.[34] Justice Stevens cited several experts who recommended that police officers can best protect themselves by ordering the driver to remain in the car.[35]

Mimms provided an easy-to-understand, bright-line standard for police officers dealing with the driver of a lawfully stopped vehicle. In spite of the fact that the Court made a passing reference to a passenger in Mimm's car, the Court limited its holding to drivers.[36] While Justice Stevens argued that *Mimms* must apply to passengers as well as drivers,[37] the past nine-

---

32. *See id.* at 118 n.7 (Stevens, J., dissenting).

33. *See id.* at 118 (Stevens, J., dissenting) (citation omitted).

34. *Id.* at 119 (Stevens, J., dissenting).

35. *See id.* (Stevens, J., dissenting). "Never allow the violator to get out of the car and stand to its left. If he does get out, which should be avoided, walk him to the rear and right side of the car. Quite obviously this is a much safer area to conduct a conversation."

Id. (Stevens, J., dissenting) (citing V. FOLLEY, POLICE PATROL TECHNIQUES AND TACTICS 95 (1973)).

> The officer should stand slightly to the rear of the front door and doorpost. This will prevent the violator from suddenly opening the door and striking the officer. In order to thoroughly protect himself as much as possible, the officer should reach with his weak hand and push the lock button down if the window is open. This will give an indication to the driver that he is to remain inside the vehicle. It will also force the driver to turn his head to talk with the officer. The officer should advise the violator why he was stopped and then explain what action the officer intends to take, whether it is a verbal or written warning, or a written citation. If the suspect attempts to exit his vehicle, the officer should push the door closed, lock it, if possible, and tell the driver to 'please stay in the car!' Then he should request [the] identification he desires and request the violator to hand the material out of the window away from the vehicle. The officer should not stare at the identification but [should] return to his vehicle by backing away from the suspect car. As the patrolman backs away, he should keep his eyes on the occupant(s).

Id. (Stevens, J., dissenting) (citing A. YOUNT, VEHICLE STOPS MANUAL, MISDEMEANOR AND FELONY 2-3 (1976)).

36. *See id.* at 107, 111-12. It is interesting to note that the passenger in Mimms' automobile was also carrying a revolver. However, other than this passing reference, there is no discussion of passengers or passenger privacy interests.

37. *See id.* at 122-23 (Stevens, J., dissenting).

teen years have demonstrated that at least some courts disagree.

B. *The Applicability of* Mimms *to Passengers—Divided Lower Courts*

While resolving the constitutional ramifications of ordering a driver from a car, *Mimms* left the lower courts divided as to its applicability to passengers.[38] The majority of courts relied on the *Mimms*' analysis to find that an officer's order to a passenger to alight from a lawfully stopped vehicle is reasonable under the Fourth Amendment.[39] These courts found that the reasoning underlying *Mimms* "recognizes that when an officer detains a vehicle for violation of a traffic law, it is inherently reasonable that he or she be concerned with safety and, as a result, may order the *occupants* of the vehicle to alight from the car."[40]

> Because the balance of convenience and danger is no different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger. This is true even though the passenger has committed no traffic offense. If the rule were limited to situations in which individualized inquiry identified a basis for concern in particular cases, then the character of the violation might justify different treatment of the driver and the passenger. But when the justification rests on nothing more than an assumption about the danger associated with every stop—no matter how trivial the offense—the new rule must apply to the passenger as well as to the driver.

Id. (Stevens, J., dissenting).

38. *See* Doctor v. State, 573 So. 2d 157 (Fla. App. 1991); People v. Salvator, 602 N.E.2d 953 (Ill. App. Ct. 1992); Warr v. State, 580 N.E.2d 265 (Ind. App. 1991); State v. Landry, 588 So. 2d 345 (La. 1991); People v. Martinez, 483 N.W.2d 868 (Mich. 1992); State v. Ferrise, 269 N.W.2d 888 (Minn. 1978); People v. Robinson, 543 N.E.2d 733 (N.Y. 1989); State v. Gilberts, 497 N.W.2d 93 (N.D. 1993). *But see* State v. Becker, 458 N.W.2d 604 (Iowa 1990); State v. Smith, 637 A.2d 158 (N.J. 1994); State v. Johnson, 601 S.W.2d 326 (Tenn. Crim. App. 1980).

39. *See* Doctor v. State, 573 So. 2d 157, 159 (Fla. App. 1991); People v. Salvator, 602 N.E.2d 953, 962-63 (Ill. App. Ct. 1992); Warr v. State, 580 N.E.2d 265, 267 (Ind. App. 1991); State v. Landry, 588 So. 2d 345, 347 (La. 1991); People v. Martinez, 483 N.W.2d 868 (Mich. 1992); State v. Ferrise, 269 N.W.2d 888, 890 (Minn. 1978); People v. Robinson, 543 N.E.2d 733, 734 (N.Y. 1989); State v. Gilberts, 497 N.W.2d 93, 95-96 (N.D. 1993).

40. Commonwealth v. Brown, 654 A.2d 1096, 1102 (Pa. 1995) (emphasis added).

Two subsequent Supreme Court decisions seemed to reaffirm the contention that *Mimms* was not to be limited to drivers. One year after the Court announced its decision in *Mimms*, it handed down its opinion in *Rakas v. Illinois*.[41] In his concurring opinion, Justice Powell described the Court's holding in *Mimms* writing that "[l]ast Term, this Court determined that *passengers* in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made."[42] Additionally, in the landmark case of *Michigan v. Long*,[43] the Court described *Mimms* as holding that "police may order *persons* out of an automobile during a stop for a traffic violation."[44] While some courts relied solely on *Rakas* and *Long* to extend *Mimms'* automatic police prerogative to passengers,[45] the majority of courts took note of the Supreme Court's subsequent discussion of *Mimms* and independently balanced societal interests against the privacy interest of the passenger.

State v. Landry,[46] is representative of state court cases which have found that an automatic police prerogative to order passengers out of a stopped vehicle does not violate the Fourth Amendment. Indicative of those courts which have extended *Mimms* to passengers, *Landry* discussed at length the dangerous and confrontational nature of traffic stops in regard to society's interest in protecting police officers.[47] However, in completing the balancing analysis the court considered the costs

41. 439 U.S. 128 (1978).

42. *Id.* at 155 n.4 (Powell, J., concurring).

43. 463 U.S. 1032 (1983).

44. *Id.* at 1047-48 (emphasis added).

45. *See, e.g.*, State v. McCoy, 824 F. Supp. 467 (D. Del. 1993); State v. Soares, 648 A.2d 804 (R.I. 1994).

46. 588 So. 2d 345 (La. 1991).

47. *See id.* at 347. The court echoed the finding in *Mimms* that "[a] police officer who stops a vehicle for a routine traffic offense may be exposed, according to the circumstances, to a significant risk of attack . . . ." *Id.* This finding runs directly contrary to the courts earlier evaluation of traffic stops in *State v. Williams*, 366 So. 2d 1369 (La. 1978). There, the court questioned both the seriousness of the danger faced by officers in such circumstances and whether ordering the driver out of the vehicle actually increased the officer's safety. *See Williams*, 366 So. 2d at 1373-74.

of such an order to passengers de minimis.[48] The court concluded that the officer had a right to order the defendant out of the vehicle "in order to ensure the officer's safety."[49]

Commonwealth v. Brown[50] is another example where a lower court found that a police officer "may request both drivers and their passengers to alight from a lawfully stopped car without reasonable suspicion that criminal activity is afoot."[51] In applying the *Mimms* balancing analysis, the court in *Brown* detailed the safety risk to police officers but made no inquiry into the distinct privacy interests of passengers.[52] In fact, the extent of the court's discussion of the personal liberty analysis was a passing reference to the de minimis nature of the intrusion for the "occupants" of a stopped car.[53] The court not only adopted the finding of *Mimms*, that traffic stops pose a significant safety threat to police officers, but also went on to assert that "the potential danger to police increases, rather than diminishes, when passengers are present in a car."[54]

Both *Landry* and *Brown* upheld an automatic prerogative to order passengers out of a car by focusing almost exclusively on the safety concerns of police officers. The result of these decisions is that a police officer need not assess the circumstances of each traffic stop, but may, as a right, order all of the passen-

---

48. *See Landry*, 588 So. 2d at 347.

> Although the passenger was not detained because of a traffic violation, he was stopped as a matter of necessity when the vehicle was stopped for the violation. If the passenger desired to remain with the car during the time necessary for the officer to issue a ticket to the driver, the officer's merely removing the passenger from the vehicle during the brief period of detention of the driver constituted more of a slight inconvenience to the passenger than a serious intrusion upon his privacy interests.

Id.

49. *Id.*

50. 654 A.2d 1096 (Pa. Super. Ct. 1995).

51. *Id.* at 1102.

52. *See id.*

53. *See id.* The cursory treatment of a passenger's privacy interests in *Brown* is particularly telling when contrasted with other courts' treatment of the same issues. *See* State v. Smith, 637 A.2d 158 (N.J. 1994) (discussed *infra* notes 55-57 and accompanying text).

54. *Brown*, 654 A.2d at 1102.

gers out of a legally stopped vehicle. However, not all lower courts found that the *Mimms'* balancing of interests necessarily required this result.

In *State v. Smith*,[55] the New Jersey Supreme Court held that an automatic police prerogative to order passengers out of a stopped vehicle is unreasonable for Fourth Amendment purposes. Applying the *Mimms* balancing test, the court found that "[t]he safety concerns of a police officer unquestionably merit grave consideration."[56] However, in weighing the intrusion into the passenger's liberty, the court found that "[b]ecause the passenger has not engaged in culpable conduct, the passenger has a legitimate expectation that no further inconvenience will be occasioned by any intrusions beyond the delay caused by the lawful stop."[57] The court found that this distinction between a passenger's and driver's expectation of privacy after the vehicle is stopped is critical for Fourth Amendment purposes, and demands a result different from that reached in *Mimms*.

Professor Wayne LaFave, in his treatise on Fourth Amendment issues, agreed with the New Jersey Supreme Court's balancing of interests.[58] In his treatise, LaFave used *State v. Williams*[59] to illustrate what he believed to be the appropriate balancing of interests. LaFave suggested that police officers could adequately protect themselves during automobile stops by "allow[ing] passengers to remain in the stopped vehicle and instead [have] the driver accompany them to the police vehicle while the citation is prepared."[60] Whether LaFave's recommendation would adequately address police officer concerns is uncertain. However, it is interesting to note that *Williams*, relied upon by LaFave, was subsequently overruled by *Landry* in 1991.[61] Louisiana now recognizes that an automatic prerogative allowing police to order passengers from a car is reasonable under the Fourth Amendment.

---

55. 637 A.2d 158 (N.J. 1994).
56. *Id.* at 165.
57. *Id.* at 166.
58. WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.4(a), at 514-15 (2d ed. 1987).
59. 366 So. 2d 1369 (La. 1978).
60. LAFAVE, *supra* note 58, at 515.
61. *See* State v. Landry, 588 So. 2d 345 (La. 1991).

II. *MARYLAND V. WILSON*

In deciding *Maryland v. Wilson*,[62] the Supreme Court put an end to the uncertainty regarding the scope of *Mimms* and unequivocally found that the *Mimms* analysis applies equally to passengers.[63] While the Maryland Court of Special Appeals joined the minority of states declining to extend the *Mimms* analysis to passengers,[64] the Supreme Court adopted the rationale employed in *Landry* and *Brown*. In overturning the Maryland decision, the Court expounded on the dangers police officers face in traffic stops and only briefly mentioned the privacy interests of passengers.

A. *Facts of the Case*

In *Wilson*, Maryland State Trooper David Hughes observed a white 1994 Nissan Maxima driving at what appeared to be a high rate of speed.[65] Trooper Hughes paced the car for approximately a mile and determined it was traveling at sixty-four miles per hour in a fifty-five mile per hour zone.[66] Trooper Hughes also observed that the car lacked proper license plates.[67] At this point, he stopped the automobile.

As Trooper Hughes approached the vehicle, the driver spontaneously exited. Trooper Hughes informed the driver why he had been stopped and asked for his license and registration. The driver indicated that the registration papers were in the glove compartment and got back into the car. Trooper Hughes then ordered Wilson, the front seat passenger, out of the vehicle. When Wilson complied with the Trooper's directions to walk back towards the police vehicle, crack cocaine fell on the ground. Wilson was arrested.[68]

---

62. 117 S. Ct. 882 (1997).
63. *See id.* at 886.
64. *See* State v. Wilson, 664 A.2d 1, 2 (Md. 1995), *rev'd* 117 S. Ct. 882 (1997).
65. *See Wilson*, 117 S. Ct. at 884.
66. *See id.*
67. *See id.*
68. *See id.*

The trial court's findings rendered other facts moot, including Trooper Hughes' observation that the driver and Wilson appeared nervous. Judge Bollinger found that Trooper Hughes had no suspicion and possessed no fear that Wilson was armed and dangerous at the time he was ordered from the car.[69] Judge Bollinger's conclusion "was not that there was no basis for a reasonable suspicion that Wilson was armed and dangerous, but rather that Trooper Hughes entertained no such suspicion, reasonable or unreasonable."[70] This finding put squarely before the Court the narrow issue of whether a police officer may, without any level of suspicion, order a passenger out of a lawfully stopped car.

In granting Wilson's motion to suppress, Judge Bollinger found that the order violated Wilson's Fourth Amendment right against having his person unreasonably seized.[71] The Court of Special Appeals found specifically that a police officer's automatic right to order a driver to exit a vehicle during a routine traffic stop does not extend to passengers in the stopped vehicle and upheld the circuit court's determination. The Maryland Court of Appeals denied certiorari.

B. *Maryland's Court of Special Appeals' Decision*

In affirming the trial court's decision, the Maryland Court of Special Appeals joined the minority of states which recognized that balancing societal and passenger interests required a result contrary to *Mimms*. The Maryland court began its argument by attacking the precedential weight of subsequent references to *Mimms*, which stated that the holding applied to pas-

---

69. *See* State v. Wilson, 664 A.2d 1, 4 (Md. 1995), *rev'd*, 117 S. Ct. 882 (1997). Judge Bollinger's conclusion was not that the external circumstances did not add up to articulable suspicion. That, indeed, would have been a finding on a mixed question of law and fact and would be subject to *de novo* review. Judge Bollinger's finding, by way of contrast, was that Trooper Hughes did not even possess such a suspicion. That is a finding of pure fact that can be overturned only if clearly erroneous.

Id.

70. *Id.*

71. *See id.* at 3.

sengers as well as drivers.[72] The court dismissed as mere dicta references in *Long* and *Rakas*, in which the Supreme Court suggested that the *Mimms* holding applied to passengers.[73] Moreover, the court insisted that "[t]he *Mimms* opinion was completely silent on the police prerogative, if any, *vis-à-vis* a passenger."[74] However, the court was forced to reconcile its own holding in *Derricott v. State*,[75] where it stated that *Mimms* "established unequivocally that when the police have legitimately stopped an automobile, for a traffic offense or for any other reason, they are automatically entitled to order the driver and/or any of the passengers to alight from the vehicle."[76] To overcome its earlier statements, the court explained that "[t]he overly broad inclusion of the phrase 'and/or any of the passengers' [in *Derricott*] was simply wrong. *Pennsylvania v. Mimms* did not stand for so broad a proposition."[77] The Maryland court suggested that "*stare decisis* is ill served if readers hang slavishly on every casual or hurried word as if it had bubbled from the earth at Delphi. *Obiter dicta*, if noticed at all, should be taken with a large grain of salt."[78]

In addition to attacking the weight and significance of the precedent, the Maryland court also reviewed the Supreme Court's balancing analysis and detailed how that balance shifts when the privacy interests of a passenger are included.[79] The court concluded that "the societal benefit or societal interest is just as great when considering protecting an officer from a passenger as it is when protecting an officer from a driver."[80] However, the court recognized that the costs to a passenger are "significantly heavier" than those to a driver.[81] The court relied on the *Smith* analysis:

---

72. *See id.* at 3-4.
73. *See id.* at 6-7.
74. *Id.* at 5.
75. 578 A.2d 791 (1990).
76. *Id.* at 793-94.
77. State v. Wilson, 664 A.2d 1, 8 (Md. 1995), *rev'd*, 117 S. Ct. 882 (1997).
78. *Id.*
79. *See id.* at 8-12.
80. *Id.* at 9.
81. *Id.*

> The passenger has not committed any wrongdoing, even at the level of a traffic infraction. The passenger may not be issued a traffic ticket or citation, let alone subjected to custodial arrest. The passenger is not required to furnish identification or any other documentation. . . . The passenger is presumptively free to abandon the driver to the clutches of the law and to hail a cab.
>
> . . . To order a passenger to stay in the car or to get out of the car is the imposition of detention *per se*, and not a mere shift of the location of already established detention.[82]

According to the court, this distinct set of circumstances required a result contrary to *Mimms*. In explaining its decision, the court stated, "[w]e are simply holding that the prerogative is not automatic, but requires, for justification, some individualized or particularized suspicion—just as in the case of a frisk for weapons. Where officer safety is concerned, the reasonableness threshold is low, but there is a threshold."[83]

III. REALIZING THE FULL IMPLICATIONS OF *MIMMS*, THE SUPREME COURT DECISION IN *WILSON*

It was in this context that the Supreme Court considered *Wilson*. The majority of courts considering *Mimms*' applicability to passengers had adopted the *Mimms* balancing analysis and found that for purposes of the Fourth Amendment, ordering a passenger out of a lawfully stopped car is reasonable. A minority of courts, including the Maryland Court of Special Appeals, had reasoned that the costs to a passenger were greater than those considered by the Supreme Court in *Mimms*. As a result, these courts found that *Mimms* did not extend to passengers.

A. *The Majority*

Chief Justice Rehnquist, writing for the majority, began the Court's opinion by detailing the similarities between *Wilson* and

---

82. *Id.* at 10.
83. *Id.* at 12.

Mimms.[84] Recognizing several factual similarities, the majority pointed out that both *Mimms* and *Wilson* were heard by the Supreme Court after the respective lower courts had found the officers' orders unconstitutional.[85] The majority then reviewed the balancing analysis in *Mimms* citing the often quoted line that "we [think] it 'too plain for argument' that this justification—officer safety—was 'both legitimate and weighty.'"[86] On the other side of the balance, the Court noted that in *Mimms* because "the driver's car was already validly stopped for a traffic infraction . . . the additional intrusion of asking him to step outside his car [was] '*de minimis*.'"[87]

In determining whether or not *Mimms* extends to passengers, the majority purported to undertake an independent balancing of societal benefits and individual costs.[88] On the societal benefit side, the Court recognized that "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger."[89] To support the contention that "traffic stops may be dangerous encounters," the majority cited a Federal Bureau of Investigation crime report which showed that in 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops.[90] Without providing specific statistics to support its contention, the majority asserted that the presence of passengers "increases the possible sources of harm to the officer."[91] In response to Justice Stevens' attacks on the majority's use of these statistics, the majority conceded that the data did not detail the number of assaults by passengers and those by drivers.[92] The majority

84. Maryland v. Wilson, 117 S. Ct. 882, 884 (1997).

85. *See id.*

86. *Id.* at 885 (quoting Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977)).

87. *Id.* (quoting *Mimms*, 434 U.S. at 111).

88. *See id.* at 885-86. The Court's purported balancing analysis mirrors that employed in cases such as *Commonwealth v. Brown*, 654 A.2d 1096, 1102 (Pa. 1995). Its brevity, focus on police officer safety, and lack of empirical underpinnings strongly suggest that other factors directed the Court's decision and that the "balancing analysis," while employed by the Court, was without substance.

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

90. *Id.*

91. *Id.*

92. *See id.* at 885 n.2.

explained, however, that "we need not ignore the data which do exist simply because further refinement would be even more helpful."[93]

On the personal liberty side of the balance of interests, the majority recognized that, "the case for the passengers is in one sense stronger than that for the driver."[94] While an officer has probable cause to stop the driver of the car, the officer has no suspicion regarding the passenger.[95] However, the Court found that "*as a practical matter*, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car."[96] Without further discussion of the costs to passengers, the Court returned to its emphasis on the safety advantages to police officers.[97] The Court explained that by ordering a passenger out of a car, a police officer can remove a passenger from access to a possible weapon.[98]

Interestingly, the Court stated that its opinion in *Michigan v. Summers*[99] offered guidance by analogy.[100] In *Summers*, the Court upheld the detention of the defendant, without reasonable suspicion or probable cause, during the execution of a search warrant at a home. When the police arrived to execute

---

93. *Id.*

94. *Id.* at 886.

95. *See id.*

96. *Id.* (emphasis added). The fact that a passenger is stopped as a *practical matter* is distinct from the fact that a driver is stopped based on probable cause. However, nowhere does the Court recognize this distinction. By analogizing a passenger's circumstances to those of a driver, the Court states that in both situations the intrusion occasioned by an order to alight is de minimis. Justice Stevens, in his dissent, suggested that this obscures the real question at issue. *See id.* at 886 (Stevens, J., dissenting).

97. *See id.* at 886. After discussing the "personal liberty side of the balance" for only four lines, Rehnquist reverted to his focus on police officer safety. The fact that the majority cannot dedicate more than four lines to weighing the costs to passengers in these traffic stop situations illustrates the significant weight the Court places on "police officer safety." This focus on police officer safety would be more understandable if there were the slightest indication that the Court's holding would have the effect of eliminating some of the danger associated with traffic stops.

98. *See id.*

99. 452 U.S. 692 (1981).

100. *See Wilson*, 117 S. Ct. at 886.

the warrant, they encountered Summers leaving the house. In upholding the police officers' authority to require Summers to remain at the house during the search, the Court stated that "the risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."[101]

With no explanation of how *Summers* applied specifically in the *Wilson* context, the Court concluded that officers likely face greater danger from traffic stops where passengers are present than those in which only a driver is stopped.[102] The majority balanced this against what the Court viewed as a minimal additional intrusion on the passenger, and held that "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop."[103] In a footnote, the Court explained that Maryland urged the Court to find that "an officer may forcibly detain a passenger for the entire duration of the stop."[104] However, recognizing that the facts of the case did not include such circumstances, the Court expressed no opinion on that issue.[105]

B. *The Dissent*

Justice Stevens began his dissent by explaining that in *Mimms*, "the Court answered the 'narrow question' whether an 'incremental intrusion' on the liberty of a person who had been lawfully seized was reasonable."[106] Justice Stevens contrasted that narrow holding with the "separate and significant question" raised in *Wilson* of whether a State can seize someone without any level of suspicion whatsoever.[107] For Justice Stevens, these different questions required different results.

---

101. *Id.* at 886 (quoting *Summers*, 452 U.S. at 702-03).
102. *See id.*
103. *Id.*
104. *Id.* at 886 n.3.
105. *See id.*
106. *Id.* at 886 (Stevens, J., dissenting) (citing Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977)).
107. *Id.* (Stevens, J., dissenting).

Justice Stevens conceded that there is a strong public interest in police officer safety.[108] However, he attacked the majority's use of a single study and general statistics regarding police officer assaults and deaths to support the proposition that removal of passengers is reasonable.[109] Justice Stevens pointed out that the statistics relied upon by the majority did not distinguish traffic incidents involving passengers from those in which only a driver was present.[110] He noted that the statistics provided no insight into the number of police assaults or deaths that are caused by passengers ordered out of the vehicle as compared to assaults or deaths caused by passengers that remain inside the vehicle.[111] Additionally:

> There is no indication that the number of assaults was smaller in jurisdictions where officers may order passengers to exit the vehicle without any suspicion than in jurisdictions where they were then prohibited from doing so . . . . In short, the statistics are as consistent with the hypothesis that ordering passengers to get out of a vehicle increases the danger of assault as with the hypothesis that it reduces that risk.[112]

While Justice Stevens recognized the need to protect police officers, he was not persuaded that the majority's ruling would have that effect.

In addressing the cost side of the balancing of interests, Justice Stevens pointed out that a tremendous number of traffic stops are "routine stops" which "involve otherwise law-abiding citizens who have committed minor traffic offenses."[113] Justice Stevens found that "the aggregation of thousands upon thousands of petty indignities has an impact on freedom that [he] would characterize as substantial, and which in [his] view clearly outweighs the evanescent safety concerns pressed by the

---

108. *See id.* at 887 (Stevens, J., dissenting).

109. *See id.* (Stevens, J., dissenting) (Justice Stevens attacked the majority in *Mimms* for the same shortcoming).

110. *See id.* (Stevens, J., dissenting).

111. *See id.* (Stevens, J., dissenting).

112. *Id.* (Stevens, J., dissenting).

113. *Id.* at 888 (Stevens, J., dissenting).

majority."[114]

In his dissent, Justice Stevens also expanded on the important distinction between the Court's decision in *Mimms* and the majority's holding in *Wilson*.[115] In *Mimms*, the Court justified the additional intrusion into the driver's privacy interests based on the fact that the driver was already lawfully seized.[116] Thus, the additional intrusion of exiting the vehicle for the duration of the stop was considered de minimis by the Court.[117] Justice Stevens recognized that when reviewing a *Wilson* situation, a different analysis is required. Unlike the driver in *Mimms*, the initial intrusion into the passenger's privacy interests is a "necessary by-product of the lawful detention of the driver."[118] A passenger has not been seized for Fourth Amendment purposes when a car is stopped. As a result, the officer's subsequent order for the passenger to exit the vehicle is an initial seizure—one unsupported by any level of suspicion.[119]

Writing a separate dissent, Justice Kennedy discussed the implications of the Court's decision when coupled with the recent decision in *Whren v. United States*.[120] In *Whren*, the Court upheld a rule permitting vehicle stops "if there is some objective indication that a violation has been committed, regardless of the officer's real motives."[121] Justice Kennedy recognized that based upon the two decisions, "tens of millions of passengers [are] at risk of arbitrary control by the police."[122] Concluding, Justice Kennedy suggested that "[l]iberty comes not from officials by grace but from the Constitution by right."[123]

---

114. *Id.* (Stevens, J., dissenting).

115. *See id.* (Stevens, J., dissenting).

116. *See id.* at 888-89 (Stevens, J., dissenting) (quoting Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977)).

117. *See id.* at 888 (Stevens, J., dissenting).

118. *Id.* at 889 (Stevens, J., dissenting).

119. *See id.* (Stevens, J., dissenting).

120. 116 S. Ct. 1769 (1996).

121. *Wilson*, 117 S. Ct. at 890 (Kennedy, J., dissenting) (citing *Whren*, 116 S. Ct. 1769 (1996)).

122. *Id.* (Kennedy, J., dissenting).

123. *Id.* at 891 (Kennedy, J., dissenting). While Justice Kennedy's statement might appear intuitive, it runs directly contrary to the majority's apparent belief that police

C. *The Impact of the Automobile Taint in* Wilson

While the decision in *Wilson* is not altogether surprising, the Court's analysis is particularly interesting.[124] The majority purportedly undertook an independent balancing analysis. However, the Court's token reference to a passenger's privacy interests and the lack of empirical support for its holding strongly suggest that the Court was relying on other factors to reach its decision. One theory which helps explain the Court's treatment of these issues and its ultimate holding is the "tainted" nature of the automobile. After years of cases recognizing diminished Fourth Amendment protections and expectations of privacy for passengers in automobiles, the automobile has acquired a taint distinct from specific historical justifications. This taint has become increasingly significant for the Supreme Court's determination of Fourth Amendment issues in the automobile context. Now, the sheer fact that an item or an individual is present in an automobile has become determinative for the Court.

The proposition that the automobile has become a place nearly void of Fourth Amendment protections is strongly supported by the Supreme Court's historical treatment of the automobile. Since its ruling in *Carroll v. United States*,[125] the Supreme

---

officer discretion is the balm to alleviate the danger in traffic stop situations.

124. In addition to the Supreme Court's subsequent categorization of *Mimms*, the practical implications of *Michigan v. Long*, 463 U.S. 1032 (1983), suggested that the Supreme Court would overturn *Wilson*. In *Long*, the Court recognized the constitutionality of a *Terry* frisk of an automobile based on reasonable suspicion holding that

> the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Id. at 1049 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

Long recognized the right of police officers to search a car for weapons based on a reasonable belief that the driver is dangerous. At the same time the Court reiterated how hazardous these encounters are for police officers. *Id.* It is untenable that the Court would have required a police officer in a *Long* situation to frisk the passenger compartment of a car without first ordering any passengers out of the vehicle. It is easy to imagine the vulnerability of a police officer searching for weapons around a passenger seated in a car.

125. 267 U.S. 132 (1925).

Court has recognized that the automobile represents a unique context for Fourth Amendment issues. In *Carroll*, "the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office."[126] The Court in *Carroll* went on to state that

> the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[127]

While *Carroll* focused specifically on mobility in justifying the automobile exception to the Fourth Amendment's warrant requirement, later decisions have illustrated that a car's mobility is not the only basis for the exception.

In *California v. Carney*,[128] the Court reviewed recent cases to find that

> [b]esides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. . . . These reduced expectations of privacy derive . . . from the pervasive regulation of vehicles. . . . The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation.[129]

---

126. Chambers v. Maroney, 399 U.S. 42, 48 (1970) (describing the Court's holding in *Carroll*).

127. *Id.* at 48 (citing Carroll v. United States, 267 U.S. 132, 153 (1925)).

128. 471 U.S. 386 (1985).

129. *Id.* at 391-92 (citations omitted).

The Court has continued to offer other justifications to explain the reduced level of Fourth Amendment protection in automobiles. However, these justifications and the Court's Fourth Amendment analysis are often disjointed. The tainted nature of the automobile fills the void and is the key to understanding the Court's analysis.

In *New York v. Belton*,[130] the Supreme Court was willing to expand the temporal and spatial nexus requirements of the search incident to arrest doctrine because the events at issue took place in an automobile. The officer in *Belton* ordered all of the occupants out of an automobile after he developed reasonable suspicion to believe that drugs were present. After he confirmed his suspicion and arrested the occupants, he returned to the car and conducted a search incident to the arrest.[131] In upholding the constitutionality of the search, the Court broadly defined the *Chimel* standard to allow the full search of the passenger compartment of an automobile, if the passenger compartment was within reach of the arrestee.[132] Mobility, which historically provided the basis for the unique treatment of automobiles, provides insufficient justification for a search in the *Belton* context. Additional factors—the automobile taint—underlie the Court's decision.

Rakas v. Illinois[133] was another case in which the Supreme Court's determination of Fourth Amendment issues was significantly impacted by the tainted nature of the automobile. In *Rakas*, as in *Belton*, the Court was willing to limit Fourth Amendment protections because the case involved an automobile. Responding to a robbery report, police in *Rakas* stopped a vehicle they believed to be the getaway car.[134] After ordering all of the occupants out of the car, the police searched it and discovered a box of rifle shells and a sawed-off rifle.[135] The rifle and shells were admitted at trial, over the objections of the defendants, who were subsequently convicted of armed robbery.

---

130. 453 U.S. 454 (1981).
131. *See id.* at 456.
132. *See id.* at 460.
133. 439 U.S. 128 (1978).
134. *See id.* at 130.
135. *See id.*

The trial court found that the defendants, who did not own or drive the car, lacked standing to challenge the lawfulness of the search of the car, and thus, lacked standing to challenge the admissibility of the rifle and shells.[136]

Throughout *Rakas*, the Court emphasized the unique nature of an automobile. The "Court has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts."[137] However, more important was the Court's willingness to break with an established bright-line rule and find that passengers in an automobile lack standing to challenge the legality of an automobile stop or search. Under the standing rule developed in *Jones v. United States*,[138] the petitioners in *Rakas* had a very strong argument that as passengers they were "legitimately on the premises" and as such had standing to challenge the legality of the initial stop and subsequent search of the automobile.[139] The Court abandoned *Jones'* bright-line rule, which had stood for eighteen years. In its place, the Court articulated a standard based on reasonable expectations of privacy as articulated in *Katz v. United States*.[140] Based on the Court's historic recognition of a diminished expectation of privacy in an automobile, the new rule prevented passengers from challenging the constitutionality of automobile searches and seizures.

As the Court's proffered justifications for treating the automobile as distinct for Fourth Amendment purposes become increasingly rhetorical, and the Court repeatedly uses automobile cases to break new ground in the Fourth Amendment context, it is clear that the automobile taint is a determinative factor. In *Mimms*, and now *Wilson*, neither drivers nor passengers are free from this taint. In both cases, the Court relied on the inordinate risk of vehicle encounters to justify diminished

136. *See id.* at 131-32.
137. *Id.* at 154 (quoting United States v. Chadwick, 433 U.S. 1, 12 (1977)).
138. 362 U.S. 257 (1960).
139. *Id.* at 267.
140. 389 U.S. 347 (1967).

Fourth Amendment protections.[141] In both cases, the Court cited a single study to illustrate the dangers faced by police officers in traffic stop situations.[142] However, in his dissent, both in *Mimms* and *Wilson*, Justice Stevens detailed the specific findings of each study, arguing that this "inordinate risk" lacked an empirical foundation.[143]

Thus, the Court in *Wilson* relied on little more than a bare assumption regarding police officer safety to justify a bright-line rule permitting an officer to order all of the occupants of a vehicle to alight. This lack of empirical support, both for the alleged danger faced by police officers and the contention that ordering all of the occupants out of the vehicle will increase officer safety, supports the notion that the automobile taint was an important factor in the Court's determination. Were the Court required to make a strong showing that traffic stops pose a significant risk to police officers and that ordering occupants out of the vehicle helps diminish that risk, statistics specifically supporting these propositions undoubtedly could be uncovered. However, since the issue was raised in the automotive context, accurate statistics were not required. The automotive taint provided the basis for the Court's decision; statistics and balancing analysis were the packaging. Understanding this factor is critical to understanding the Court's willingness to overturn the Maryland court and recognize the seizure of an innocent passenger without any level of suspicion. Contrary to Justice Stewart's admonition in *Coolidge v. New Hampshire*,[144] the automobile has become "a talisman in whose presence the Fourth Amendment fades away and disappears."[145]

---

141. *See* Maryland v. Wilson, 117 S. Ct. 882, 885 (1977); Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977).

142. *See Wilson*, 117 S. Ct. at 885; *Mimms*, 434 U.S. at 110.

143. *Wilson*, 117 S. Ct. at 887 (Stevens, J., dissenting); *Mimms*, 434 U.S. at 118 (Stevens, J., dissenting).

144. 403 U.S. 433 (1971).

145. *Id.* at 461-62.

IV. WHERE *WILSON* WILL LEAD: THE SUPREME COURT'S NEXT STEPS IN FOURTH AMENDMENT AUTOMOBILE JURISPRUDENCE

As in *Mimms*, the decision in *Wilson* provides an easy-to-follow, bright-line standard for police officers in traffic stop situations. However, several questions remain unanswered by the Court's decision. In *Wilson*, Maryland urged the Court to find that "an officer may forcibly detain a passenger for the entire duration of the stop."[146] However, the Court expressed no opinion on the matter, stating that the facts of the case did not place the question before the Court.[147] The Court also avoided addressing the issue of whether an officer may frisk a passenger for weapons.

A. *An Automatic Police Prerogative to Detain Passengers*

The Court in *Wilson* specifically recognized that police officers must exercise unquestioned command of the situation if they are to protect themselves from the possible dangers associated with a traffic stop.[148] This same general principle supports an automatic police prerogative to detain the occupants of a lawfully stopped car for the duration of the stop. In fact, having ordered the passengers out of the vehicle, a police officer's need to detain them actually increases.

The Court in *Wilson* stated that police officers face greater danger when passengers are present in a stopped vehicle.[149] The danger to officers increases because there are more

---

146. *Wilson*, 117 S. Ct. at 886 n.3.

147. *See id.*

148. *See id.* at 886. The Court incorporated this principle into its decision by analogizing *Michigan v. Summers*, 452 U.S. 692 (1981), to the facts presented in *Wilson*, 117 S. Ct. at 886. In *Summers*, the Court expressly recognized that

> Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized *if the officers routinely exercise unquestioned command of the situation.*

Summers, 452 U.S. at 702-03 (emphasis added).

149. *See Wilson*, 117 S. Ct. at 885.

"possible sources of harm."[150] The Court suggested that it is safer to have the passengers outside of the vehicle, because once outside, the passenger is denied access to any weapons which may be concealed inside.[151] However, the Court immediately conceded that

> the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.[152]

The focus of the Court's inquiry in *Wilson* was limited to the risks posed by passengers seated in a stopped automobile. However, when turning to the risks these passengers represent when standing outside of the vehicle, most of the same concerns remain. In characterizing the risk passengers represent in traffic stop situations, the Court in *Wilson* did not suggest that a passenger's motivation to employ violence simply dissipates when they are ordered out of a vehicle. Additionally, while the Court did state that a passenger is denied access to a concealed weapon in the car, it did not address the very real possibility that a passenger might be carrying a concealed weapon on his or her person. This possibility becomes particularly important when a passenger is standing outside of a vehicle and can approach the officer from behind, unless the officer can detain him or her.[153]

While not cited by the *Wilson* majority, *State v. Landry*[154] parallels the Court's analysis in uncanny detail, and suggests that a police officer's prerogative to detain a passenger is reasonable.[155] In *Landry*, a police officer ordered the passenger

---

150. *Id.*

151. *See id.* at 886.

152. *Id.*

153. If an officer cannot detain passengers once they have been ordered out of a car, passengers could presumably leave the scene. However, officers are then faced with the very real possibility that a passenger, having left, will return to launch an attack against the unsuspecting officer.

154. 588 So. 2d 345 (La. 1991).

155. Compare *Wilson*, 117 S. Ct. at 885-86 with *Landry*, 588 So. 2d at 347, which

out of a lawfully stopped car and then asked the passenger for identification.[156] The court assumed, without deciding, that the passenger was seized when the police officer asked for his identification.[157] However, the court concluded that the request was "a limited additional intrusion into [the] defendant's privacy that was not unreasonable under the circumstances."[158]

A Supreme Court decision on this issue will almost certainly follow the same reasoning employed in *Landry*. The Court in *Wilson* described passengers as possible sources of harm.[159] The notion that these sources of harm are free to walk away from a stopped car, out of view of the police officer, is absurd given the Court's fixation with police officer safety. Unless a police officer is armed with the automatic prerogative to order passengers to remain at a specified location, the risk of attack from a passenger increases substantially.

For the Court, this risk should significantly outweigh the incremental intrusion in the passenger's privacy interest. The passenger is not being asked to expose anything more to the public by remaining at the scene for the duration of the stop. Additionally, as a practical matter, a passenger's only option in many circumstances will be to remain with the vehicle for the duration of the stop.[160] Thus, the Court will almost certainly characterize this additional intrusion on the passenger's privacy interest as de minimis and find that a temporary detention of a passenger is reasonable under the circumstances. To do otherwise would completely undermine a police officer's "unquestioned command of the situation."[161]

B. *Drawing the Line at* Terry *Frisks—No Physical Touching of*

---

uses an identical line of reasoning.

156. *See Landry*, 588 So. 2d at 345.

157. *See id.* at 348.

158. *Id.*

159. *See Wilson*, 117 S. Ct. at 885.

160. This is particularly true in situations where the traffic stop takes place on a highway or other road where "civilization" is more than a short walk away. The fact that someone is in a car suggests that their destination is not within walking distance. As a practical matter, many passengers will have no other option than to remain with the automobile until the completion of the stop.

161. *Wilson*, 117 S. Ct. at 886.

a Passenger Without Reasonable Suspicion

While the Supreme Court is likely to find that a police officer may, as a matter of right, detain passengers once they have been ordered out of a vehicle, it is unlikely that it will go so far as to permit officers to frisk these passengers without reasonable articulable suspicion that they are dangerous. In *Ybarra v. Illinois*,[162] the Supreme Court reviewed the constitutionality of patting down a bar patron during the execution of a search warrant. The Court was asked to "find that the first pat down search of Ybarra constituted a reasonable frisk for weapons under the doctrine of *Terry v. Ohio*."[163] However, the Court refused to find that the pat down was reasonable, citing the lack of a "reasonable belief that [Ybarra] was armed and presently dangerous."[164] The mere fact that Ybarra was present in a bar that was subject to a search warrant did not, without more, give police officers reasonable suspicion to believe that he was dangerous.[165]

While the facts in *Ybarra* were limited to the execution of a search warrant at a bar, the Court recognized that it had disposed of the same general issue thirty years before in an automobile case. In *United States v. Di Re*,[166] the Court reviewed the search of a car passenger which occurred during the arrest of the driver. In deciding the reasonableness of the search, the Court was not convinced that "a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."[167]

At the core of the Court's decisions in *Ybarra* and *Di Re* is a recognition of the sanctity of "the person" for Fourth Amendment purposes. Expressly protected by the Constitution, the person, like the house, enjoys a special status and heightened protections from police intrusion.[168] Although a person in an

162. 444 U.S. 85 (1979).

163. *Id.* at 92 (citations omitted).

164. *Id.* at 92-93.

165. *See id.* at 91. "But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.* (citing Sibron v. New York, 392 U.S. 40, 62-63 (1968)).

166. 332 U.S. 581 (1948).

167. *Id.* at 587.

168. U.S. CONST. amend. IV. "The right of people to be secure in their *persons*,

automobile is ultimately affected by the automobile taint, it is very likely that the historic recognition of the sanctity of the person will protect passengers from police pat downs that are not supported by an articuable reasonable suspicion.

V. CONCLUSION—THE IMPACT OF *WILSON*

While the Court's decision in *Wilson* ultimately is not surprising, the ramifications and likely implications of it are significant. As part of every traffic stop, regardless of the circumstances, a police officer may now order all of the occupants out of the vehicle. *Wilson* represents perhaps one of the more palatable set of circumstances in which the new rule will be applied. A healthy adult is ordered to alight from a car on a summer evening. Given the millions of traffic stops that occur each year, it is foreseeable that not all stops will be as straightforward.[169] Under the rule announced in *Wilson*, an officer may order an entire family, including young children, out of the family car and into a snowstorm. The Court makes no exceptions or allowances for the elderly or the disabled. Officers may, and likely will, order elderly passengers out of vehicles to stand on the side of a busy highway. Perhaps the majority would find the image of a paraplegic passenger, ordered out of a vehicle to sit in a pouring rain, no less compelling than the scenario presented in *Wilson*. The Court's decision certainly does not call for a different result.

But perhaps more alarming than the Court's isolated holding is the point raised by Justice Kennedy's dissent. The Court's decision in *Wilson*, coupled with *Whren*, "puts tens of millions of passengers at risk of arbitrary control by the police."[170] The Court in *Whren* found that an officer's actual motives in

---

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." *Id.* (emphasis added).

169. *See Wilson*, 117 S. Ct. at 888 (Stevens, J., dissenting) (citing the ANNUAL REPORT OF MARYLAND JUDICIARY 80 (1994-1995), which found that in the state of Maryland alone, there were well over one million non-tort motor vehicle cases during a one-year period).

170. *Wilson*, 117 S. Ct. at 890 (Kennedy, J., dissenting).

stopping a vehicle are irrelevant. As long as there is "some objective indication that a violation has been committed," courts will uphold the stop.[171] Thus, as long as there is some objective support for the stop, not only can police officers stop a vehicle based on insidious motive, they can indulge their bias a step further by ordering all of the occupants in the vehicle to alight. These circumstances seem to be more than the petty indignity that the majority in *Wilson* suggests such an order represents.

Justice Kennedy is likely correct when he stated that, "[m]ost officers . . . will exercise their new power with discretion and restraint; and no doubt this often will be the case."[172] He went on to point out, however, that this argument misses the point. "Liberty comes not from officials by grace but from the Constitution by right."[173] *Wilson* grants police officers the sole discretion to decide whether or not to order children, the elderly, the disabled, or any innocent passenger out of a stopped vehicle and onto the shoulder of a highway.

For almost one hundred years, Americans have gone to the highways looking for the freedom of the open road. Once an embodiment of individual freedom, the automobile has become a "talisman in whose presence the Fourth Amendment fades away."[174] With mobility and speed has come unfettered police discretion. This could hardly be what Steppenwolf was looking for when he headed out on the highway.

Michael Begland

171. *Id.* (Kennedy, J., dissenting).
172. *Id.* at 891 (Kennedy, J., dissenting).
173. *Id.* (Kennedy, J., dissenting).
174. Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971).