Washington and Lee Law Review

Volume 54 | Issue 4 Article 4

Fall 9-1-1997

Sanctioning "Thousands Upon Thousands of Petty Indignities": The Supreme Court's Creation of a Constitutional Free Zone for Police Seizure of Innocent Passengers in Maryland v. Wilson

George M. Dery III

Sanctioning "Thousands Upon Thousands of Petty Indignities": The Supreme Court's Creation of a Constitutional Free Zone for Police Seizure of Innocent Passengers in *Maryland v. Wilson*

George M. Dery III*

I. Introduction

In *Maryland v. Wilson*,[1] the United States Supreme Court crafted an absolute prerogative for police to order all passengers out of lawfully stopped vehicles.[2] Chief Justice Rehnquist, writing for the majority, characterized the Court's action as nothing more than an extension of *Pennsylvania v. Mimms*'s[3] rule enabling officers to order, as a matter of course, drivers to exit their cars.[4] On the surface, the *Wilson* Court's ruling seems underwhelming: seven justices all agreed to slightly expand a rule so unremarkable that it originated in a per curiam opinion not even meriting oral argument.[5] Indeed, a commentator suggested that Attorney General Janet Reno (who argued for the United States as amicus curiae) chose to argue this case in part because of its "minimal risk of loss."[6] However, a more penetrating analysis of the Court's

---

* Associate Professor, Division of Political Science and Criminal Justice, California State University Fullerton; Former Deputy District Attorney, Los Angeles, California; J.D., 1987, Loyola Law School, Los Angeles; B.A., 1983, University of California, Los Angeles.

1. 117 S. Ct. 882 (1997).

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

3. 434 U.S. 106 (1977).

4. *Wilson*, 117 S. Ct. at 886; Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977).

5. *Wilson*, 117 S. Ct. at 886. *Mimms*, 434 U.S. at 111; *see* State v. Wilson, 664 A.2d 1, 4 (Md. Ct. Spec. App. 1995) (describing *Mimms* as "a six page, unsigned opinion explaining a summary disposition reached without benefit of oral argument"), *rev'd*, 117 S. Ct. 882 (1997).

6. *Periscope: Reno Goes to Supremes*, NEWSWEEK, Sept. 9, 1996, at 6, 6. *Newsweek* reported:

> Attorney General Janet Reno plans to argue her first – and perhaps last – case before the Supreme Court this fall. After Justice Officials scoured the docket for

new rule exposes stark fallacies in the Court's reasoning and potentially dangerous consequences stemming from its logic.

The per se right *Wilson* gives police tears a hole in the fabric of the protections that the Fourth Amendment guarantees.[7] Among its safeguards, this amendment forbids any unreasonable seizure of the person. Further, at the time of the Fourth Amendment's adoption, the reasonableness of warrantless searches and seizures was measured by the existence of probable cause as the threshold level of individualized suspicion needed for official intrusion.[8] Yet, the *Wilson* Court turned a blind eye to this constitutional history. Its decision allows officers to detain hapless passengers for *no* reason whatsoever, whenever the vehicle they occupy is legally stopped.

> a simple issue requiring little preparation and posing minimal risk of loss, Reno has all but settled on a search-and-seizure case involving a police officer's right to order a passenger out of a car. . . .

Id.

7. U.S. CONST. amend. IV. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

8. *See* Carroll v. United States, 267 U.S. 132, 155-56 (1925) (requiring that probable cause exist for search of automobiles believed to be transporting contraband liquor). In *Carroll*, the Court stated:

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

Id. at 149; *see also* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2398 (1995) (O'Connor, J., dissenting). In *Acton*, Justice O'Connor offered the following interpretation of *Carroll*:

> The [*Carroll*] Court also held, however, that a warrantless car search *was* unreasonable unless supported by some level of individualized suspicion, namely probable cause. Significantly, the Court did not base its conclusion on the *express* probable cause requirement contained in the Warrant Clause, which, as just noted, the Court found inapplicable. Rather, the Court rested its views on "what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted" and "[what] will conserve public interests as well as the interests and rights of individual citizens."

Id. (O'Connor, J., dissenting) (quoting *Carroll*, 267 U.S. at 149).

Carving out such a free zone for official discretion was no small feat. The Supreme Court has recognized the privacy value protected by the Fourth Amendment – the "right to be let alone" – as among the most crucial to a free society.[9] Nearly half a century ago, Justice Jackson admonished:

> [Fourth Amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[10]

The *Wilson* Court, in establishing a per se privilege for officers to seize passengers without any individualized justification, has opened the door to the kind of "uncontrolled search and seizure" denounced by Justice Jackson. Of course, Chief Justice Rehnquist might view the "additional intrusion" of having a passenger exit a vehicle to be of little consequence.[11] Yet, *it is an intrusion.* The Fourth Amendment, in prohibiting *all* unreasonable seizures, should require reasoned justification for *any* seizure, no matter how insignificant.[12] The ability to order innocent passengers out of cars without reason is therefore the very antithesis of the Fourth Amendment.

In Part II, this Article reviews the erosion of individualized suspicion as a bulwark of personal security in Fourth Amendment Supreme Court jurisprudence. Part III critically examines *Wilson*'s creation of law enforcement's absolute right to order any passenger out of a lawfully stopped vehicle. Finally, Part IV explores the logical inconsistencies and the dangerous consequences of the *Wilson* Court's curtailment of Fourth Amendment security for the person.

---

9. Olmstead v. United States, 277 U.S. 438, 478 (1928). This "right to be let alone" has been deemed "the most comprehensive of rights and the right most valued by civilized men." *Id.* One commentator asserts: "There is, perhaps, no aspect of criminal jurisprudence more important than that which governs the decision to deprive an individual of his or her freedom of movement prior to adjudication of guilt or innocence." Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771, 771 (1982).

10. Brinegar v. United States, 338 U.S. 160, 180 (1949).

11. Maryland v. Wilson, 117 S. Ct. 882, 886 (1997). Chief Justice Rehnquist determined that "the additional intrusion on the passenger [in being ordered out of the car] is minimal." *Id.*

12. *See id.* at 890 (Kennedy, J., dissenting). In dissent, Justice Kennedy explained that "[i]f a person is to be seized, a satisfactory explanation for the invasive action ought to be established by an officer who exercises reasoned judgment under all the circumstances of the case." *Id.* (Kennedy, J., dissenting).

II. The Devolution of the Individualized Suspicion Standard for Seizures of Motorists

Until recently, the Supreme Court accepted the simple axiom that Fourth Amendment seizures must be based on specific grounds.[13] *Carroll v. United States*,[14] a prohibition era case, demonstrated this fundamental premise.[15] The *Carroll* Court, in approving a warrantless stop and search of an automobile for intoxicating liquor, created the automobile exception to the warrant requirement.[16] Even though it thus broadened governmental search and seizure rights, the Court explicitly denounced any rule providing officials with an absolute right of search and seizure of motorists:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search .... [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.[17]

Thus, in 1925 the Court mandated that any seizure and search of a vehicle be justified by circumstances creating suspicion *in the individual case*. Further, the level of justification required before a vehicle's "free passage" could even be "interrupted," or seized, was that of probable cause, now the highest level of suspicion applied to street encounters.[18]

For decades, the Court continued its adherence to the probable cause requirement for seizure of motorists and search of their cars, despite its cost to law enforcement.[19] Indeed, when confronted in *Di Re v. United*

---

13. *Carroll*, 267 U.S. at 153-54. The specific grounds requirement did have some traditional, narrowly tailored exceptions. For instance, all persons could be stopped at international borders without formation of individualized suspicion: "Travellers [sic] may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Id.* at 154.

14. 267 U.S. 132 (1925).

15. Carroll v. United States, 267 U.S. 132, 153-54 (1925).

16. *Id.* at 149.

17. *Id.* at 153-54.

18. *Id.* at 154-56. The Supreme Court decided *Carroll* in 1925. In *Carroll*, the Court applied the only level of suspicion then available, probable cause. *Id.* The "reasonable suspicion" standard supporting an investigatory detention was established decades later in Terry v. Ohio, 392 U.S. 1, 27 (1968).

19. *See* Henry v. United States, 361 U.S. 98, 104 (1959); Di Re v. United States, 332 U.S. 581, 594-95 (1948).

States[20] with the loss of the opportunity to bring criminals to justice, the Court relied on the original balance of interests struck by the framers:

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them.[21]

A quarter century later, the Court still maintained its probable cause standard in *Brinegar v. United States*,[22] another case involving the illegal transportation of alcohol.[23] In upholding a conviction based on evidence recovered from an automobile exception search, the *Brinegar* Court emphatically rejected the notion that "every traveler along the public highways may be stopped and searched at the officers' whim, caprice or mere suspicion."[24] Instead, the Court reaffirmed that official intrusion required individualized suspicion in the form of probable cause.[25]

The Court's mandatory minimum of probable cause ended with *Terry v. Ohio*.[26] In *Terry*, Detective McFadden, a Cleveland Police officer with 39 years of experience, observed three men repeatedly walk past, peer into, and confer about a particular store window.[27] Suspecting the three of "casing a job, a stick-up," Detective McFadden approached and identified himself as an officer.[28] The men mumbled responses, causing the detective to grab Terry,

---

20. 332 U.S. 581 (1948).
21. Di Re v. United States, 332 U.S. 581, 595 (1948).
22. 338 U.S. 160 (1949).
23. Brinegar v. United States, 338 U.S. 160, 177 (1949).
24. *Id.* at 177.
25. *Id.* The *Brinegar* Court reasoned:

> In such a case the citizen who has given no good cause for believing he is engaged in (criminal) activity is entitled to proceed on his way without interference. But one who recently and repeatedly has given substantial ground for believing that he is engaging in the forbidden transportation [of alcohol] has no such immunity, if the officer who intercepts him in that region knows that fact at the time he makes the interception and the circumstances under which it is made are not such as to indicate the suspect is going about legitimate affairs.

Id. (footnote omitted).
26. 392 U.S. 1 (1968).
27. Terry v. Ohio, 392 U.S. 1, 5-6 (1968).
28. *Id.* at 6-7.

pat him down, and recover a .38 caliber revolver.[29]

These facts wedged the Court into a bind. "Unquestionably [Terry] was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland."[30] Yet, equally apparent was Detective McFadden's need – even in the absence of probable cause – to be able to respond effectively to the potential threat of a dangerous gunman.[31] To extricate the Court from the front between these warring interests, Chief Justice Warren, writing for the majority, sought a middle course. He retained the requirement that police account for their seizures of persons with individualized suspicion; however, he lessened the level of justification.[32] This compromise meant abandoning probable cause.

Terry rationalized its dilution of the level of suspicion by suggesting that the probable cause mandate had relevance only within the warrant context.[33] Chief Justice Warren then placed Detective McFadden's actions outside of the warrant requirement and therefore beyond the boundaries of the explicit probable cause mandate:

> [W]e deal here with an entire rubric of police conduct – necessarily swift action predicated upon the on-the-spot observations of the officer on the beat – which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.[34]

However, even with *Terry*'s recognition of the impracticality of warrants, its rejection of the probable cause standard, and its serious concern for officer safety, the Court took great care to maintain the requirement of individualized suspicion. Chief Justice Warren stated: "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts

---

29. *Id.* at 7.

30. *Id.* at 9 (citations omitted).

31. *Id.* at 10. The *Terry* Court recognized that "[o]n the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess." *Id.*

32. *Id.* at 21-22.

33. *Id.* at 20. The *Terry* Court asserted: "If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place. However, that is not the case." *Id.* This of course, represented a dramatic departure from *Carroll*, where the Court crafted the automobile exception to the traditional warrant requirement, *as long as police had probable cause* to believe the automobile contained contraband. Carroll v. United States, 267 U.S. 132, 149 (1925).

34. Terry v. Ohio, 392 U.S. 1, 20 (1968).

which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[35]

A "reasonable suspicion" standard was necessary for the Fourth Amendment to operate in any practical sense. Police will act most cautiously when they realize that judges will monitor their behavior. Further, judges can only truly check police abuse when they are able to assess official conduct by a measurable standard. Thus, *Terry* announced:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.[36]

Therefore, one of the key ingredients of Fourth Amendment reasonableness was a specific justification for intrusion.[37] However, the lessened standard of reasonable suspicion itself suffered potential undermining because the Court created it in the context of a balancing analysis. Because the Court disregarded the warrant and probable cause signposts, it needed some formula to determine the reasonableness of official intrusion. *Terry* decided that reasonableness would be weighed by balancing the government's interests justifying the intrusion against the individual's interest against invasion.[38]

---

35. *Id.* at 21.

36. *Id.*

37. Later, the Court more directly asserted its conclusion that police may accost an individual upon a level of suspicion not amounting to probable cause. Adams v. Williams, 407 U.S. 143, 145-46 (1972). In *Adams*, then Justice Rehnquist characterized *Terry* as follows:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Id. (citations omitted). In *United States v. Brignoni-Ponce*, the Court characterized *Terry* and *Adams* as "together establish[ing] that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime." United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975).

38. *Terry*, 392 U.S. at 20-21. In *Terry*, Chief Justice Warren, writing for the Court, offered the following analysis:

> In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other

Unfortunately, this balancing approach became too tempting for future justices to resist.

The 1970s witnessed the full implementation of reasonableness balancing for vehicle stops. In *United States v. Brignoni-Ponce*,[39] the Court weighed the "public interest" against "the individual's right to personal security free from arbitrary interference by law officers."[40] *Brignoni-Ponce* was a "roving patrol" case in which Border Patrol agents pulled over a car that was traveling on a highway near the international border solely because its occupants "appeared to be of Mexican descent."[41] To determine whether the Fourth Amendment permitted such "random vehicle stops in the border areas," Justice Powell, writing for the majority, considered the competing interests and found that the government's concerns were "valid" but its intrusion on the individual was merely "modest."[42] Thus, based on the balance of interests, and particularly "the limited nature of the intrusion," *Brignoni-Ponce* allowed roving patrols to stop cars near the border "on facts that do not amount to the probable cause required for an arrest."[43] However, the Court still mandated that specific facts justifying the intrusion support each stop: "[W]e hold that when an officer's *observations lead him reasonably to suspect* that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion."[44]

In *Brignoni-Ponce*, due to the balance of interests in favor of the State, and the lack of "practical alternatives," the Court was willing to lower the justification threshold to *Terry's* reasonable suspicion standard.[45] However, it would go no further. Justice Powell drew the line:

> We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops. In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government.[46]

---

than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."

Id. (quoting Camara v. Municipal Ct., 387 U.S. 523, 534-37 (1967)).

39. 422 U.S. 873 (1975).

40. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

41. *Id.* at 874-75.

42. *Id.* at 879-80.

43. *Id.* at 880.

44. *Id.* at 881 (emphasis added).

45. *Id.*

46. *Id.* at 882 (footnote omitted).

The reasons behind this stand are particularly interesting. The *Brignoni-Ponce* Court expressed concern about the impact that a per se privilege to stop all vehicles would have on the huge group of innocent motorists. Justice Powell worried:

> To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.[47]

This "interference" was a concern, despite the fact that the Court considered it to be relatively minor. After all, the government had assured the justices that roving patrol seizures typically consume "no more than a minute," involve no search of the car or its occupants, and entail a visual inspection "limited to those parts of the vehicle that can be seen by anyone standing alongside."[48] Thus, even with this modest impact on individual interests, the Court adhered to its reasonable suspicion mandate.

In the very next term, the Court revisited Fourth Amendment issues specific to border control in *United States v. Martinez-Fuerte*.[49] In *Martinez-Fuerte*, Border Patrol officers stopped and briefly questioned motorists at permanent checkpoints.[50] The Border Patrol maintained permanent checkpoints, "the most important" part of the nation's inland traffic-checking operations, near the intersections of important roads leading away from the border.[51] Administrators weighed several variables to determine a check-

---

47. *Id.* In fact, the Court had gone so far as to crunch the numbers:

> Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens.

Id.

48. *Id.* at 880. Of course, the *Brignoni-Ponce* Court could not foresee future decisions allowing greater visual inspections accompanying police orders for occupants to exit the vehicles. *See* Maryland v. Wilson, 117 S. Ct. 882, 884 (1997) (reversing grant of motion to suppress evidence discovered as passenger existed vehicle); Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977) (upholding conviction of defendant for carrying concealed weapon, which was noticed after defendant was ordered out of car he was driving).

49. 428 U.S. 543 (1976).

50. United States v. Martinez-Fuerte, 428 U.S. 543, 545 (1976).

51. *Id.* at 552, 556.

point's best placement to detect and limit illegal immigration.[52] The permanent checkpoint at San Clemente, California, appeared to be typical. It possessed various indicators of legitimate official authority, such as large black and yellow signs (i.e., "STOP HERE – U.S. OFFICERS"), flashing yellow lights, marked Border Patrol vehicles and officers in full dress uniform.[53] A "point" agent visually screened all vehicles driving through the checkpoint, bringing them to "a virtual, if not a complete halt."[54] In "a relatively small number of cases," the point agent would direct a car to a "secondary inspection area, where their occupants [were] asked about their citizenship and immigration status."[55] Neither the visual screening nor the secondary inspection area referrals were based on any individualized suspicion.

As in *Brignoni-Ponce*, the Court balanced the competing interests in *Martinez-Fuerte*. However, the *Martinez-Fuerte* Court reached a different result. Both cases implicated the substantial government interest in controlling illegal immigration. However, *Martinez-Fuerte*'s permanent checkpoints were "far less intrusive" on individual interests than *Brignoni-Ponce*'s roving patrols.[56] To measure intrusion, Justice Powell bifurcated the analysis of the impact on the motorist into the "objective intrusion" and the "subjective intrusion."[57] The objective intrusions of roving patrols and checkpoints, that of briefly stopping and questioning motorists along with a limited visual inspection, were essentially the same.[58] The difference arose in the subjective intrusion, the "generating of concern or even fright on the part of lawful travelers."[59] Roving patrols might "frighten motorists," for they struck at random, at any time, "day or night, anywhere within 100 air miles of the 2,000-mile border."[60] In contrast, a permanent checkpoint, by definition, was at a fixed location and, therefore, would interfere with motorists' travels only

---

52. *Id.* at 553. The administrators considered the following factors:

> (i) distant enough from the border to avoid interference with traffic in populated areas near the border, (ii) close to the confluence of two or more significant roads leading away from the border, (iii) situated in terrain that restricts vehicle passage around the checkpoint, (iv) on a stretch of highway compatible with safe operation, and (v) beyond the 25-mile zone in which "border passes" . . . are valid.

Id. (citing United States v. Baca, 368 F. Supp. 398, 406 (S.D. Cal. 1973)).

53. *Id.* at 545-46 (quoting United States v. Ortiz, 422 U.S. 891, 893 (1975)).

54. *Id.* at 546.

55. *Id.*

56. *Id.* at 558 (quoting *Ortiz*, 442 U.S. at 894).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 558-59 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975)).

once.[61] Further, drivers would be forewarned of the checkpoint's approach by the flashing lights, the orange cones, and other "visible signs of the officers' authority."[62] Moreover, observing other vehicles being stopped in a regularized manner would reassure those stopped.[63] Perhaps most importantly, checkpoints lacked the roving patrol's danger of "unreviewable discretion" in stopping cars because the location of the checkpoint vehicle stop was determined not by the officer in the field, but by administrators who had previously selected the best location based on a variety of neutral factors.[64]

There was a method to the Court's madness in delving into the contrasting details between roving patrols and checkpoints. Justice Powell, in minimizing the intrusiveness of checkpoints, set the stage for the removal of the fundamental protection of all travelers: individualized suspicion. *Martinez-Fuerte*, in determining permanent checkpoints to be "limited" and even "reassuring," ultimately held that the checkpoint stops and questioning were reasonable even in the "absence of any individualized suspicion."[65] The Court went even further, finding referrals to the secondary inspection areas, although perhaps annoying, to involve such minimal intrusion as to require "no particularized reason" for justification.[66] Justice Powell acknowledged the defendants' correct contention that "to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure."[67] However, he offered an ominous response: "But the Fourth Amendment imposes no irreducible requirement of such suspicion."[68]

Context was crucial in *Martinez-Fuerte*. Justice Powell jettisoned the reasonable suspicion requirement in *Martinez-Fuerte* because he felt checkpoints created *special circumstances* of security for the motorist. Indeed, he equated certain assurances provided by checkpoints to those given by a search warrant.[69] The Court relied heavily on the particular facts in *Martinez-Fuerte* in relieving the government of the traditional individualized suspicion mandate.[70]

---

61. *Id.* at 559.

62. *Id.* at 558 (quoting United States v. Ortiz, 422 U.S. 891, 895 (1975)).

63. *Id.* at 559.

64. *Id.* (citations omitted).

65. *Id.* at 557, 559, 562.

66. *Id.* at 560, 563.

67. *Id.* at 560.

68. *Id.* at 561.

69. *Id.* at 565.

70. *Id.* at 561. As part of its contextual analysis, the Court contrasted the circumstances in the case with "the sanctity of private dwellings," noting "one's expectation of privacy in an

The Court applied its balancing analysis outside of the border patrol context in *Pennsylvania v. Mimms*.[71] In *Mimms*, two Philadelphia patrol officers saw Harry Mimms driving a car with an expired license plate.[72] The officers lawfully pulled Mimms over for the purpose of issuing him a traffic summons and asked him to step out of his vehicle.[73] When he complied, one officer noticed a "large bulge" under Mimms' sports jacket and, fearing Mimms possessed a weapon, performed a *Terry* frisk.[74] During this pat down, the officer recovered a .30 caliber revolver and immediately arrested Mimms.[75]

The officer ordered Mimms out of the car simply because it was his "practice to order all drivers out of their vehicles as a matter of course whenever they had been stopped for a traffic violation."[76] Therefore, the sole issue was whether police should have the *absolute* right to order lawfully stopped drivers to alight from their vehicles.[77] To answer this question, the Court accepted *Terry*'s invitation to balance the competing interests of the government and the individual.[78] On the government side of the equation, the Court opined: "We think it too plain for argument that the State's proffered justification – the safety of the officer – is both legitimate and weighty."[79] The Court bolstered its assertion by citing statistics of police shootings that occur when an officer "approaches a person seated in an automobile" and also by noting the "hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle."[80] In contrast, *Mimms* deemed the intrusion on the individual driver as "*de minimis*."[81] Essential to the *Mimms* Court's reasoning was the *context* of the government invasion. Noting that the police had already lawfully stopped the driver, the Court explained:

---

automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *Id.* (citations omitted).

71. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

72. *Id.* at 107.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 110. Indeed, the State "freely" conceded that its officer "had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior." *Id.* at 109.

77. *Id.* The Court framed the issue as follows: "[W]e need presently deal only with the narrow question of whether the order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment." *Id.*

78. *Id.*

79. *Id.* at 110.

80. *Id.* at 110-11.

81. *Id.* at 111.

> [T]he only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "'petty indignity.'"[82]

Thus, the driver, *having violated the law*, can be lawfully detained. Once legally within official control, it is of virtually no legal weight that officers order a driver out of his vehicle. Indeed, the Court seemed almost perturbed that it was called upon to decide that being lawfully detained outside of a car was constitutionally no different than suffering through the same stop behind the wheel.[83]

The next term, the Court came across a case meriting greater attention. In *Delaware v. Prouse*,[84] a New Castle County police officer randomly stopped Prouse's car.[85] Even though the patrol officer witnessed "neither traffic or equipment violations nor any suspicious activity," the officer seized the car, as he later explained, because "[he] saw the car in the area and wasn't answering any complaints, so [he] decided to pull them off."[86] Prouse himself apparently was a passenger in his own automobile at the time the arresting officer stopped the car.[87] During the approach, the officer smelled and ultimately seized marijuana, which Prouse later moved to suppress.[88]

At the outset, Justice White, writing for the majority of the Court, readily recognized that the officer's interference with Prouse's travels constituted a Fourth Amendment seizure, despite its brevity and limited purpose.[89] Further,

---

82. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 17 (1968)).

83. *Id.*; *see* State v. Wilson, 664 A.2d 1, 4 (Md. Ct. Spec. App. 1995) (noting *Mimms* Court disposed of case in per curiam opinion without hearing oral argument), *rev'd*, 117 S. Ct. 882 (1997). However, the *Mimms* Court did concede, albeit seemingly begrudgingly, that the officer's "request" to get out of the car was at least an "incremental intrusion" beyond the initial stop. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

84. 440 U.S. 648 (1979).

85. Delaware v. Prouse, 440 U.S. 648, 650 (1979).

86. *Id.* at 650-51 (citation omitted).

87. *Id.* at 650 n.1. The *Prouse* Court noted:

> In its opinion, the Delaware Supreme Court referred to respondent as the operator of the vehicle. However, the arresting officer testified: "I don't believe [respondent] was the driver.... As I recall, he was in the back seat...;" and the trial court in its ruling on the motion to suppress referred to respondent as one of the four "occupants" of the vehicle. The vehicle was registered to respondent.

Id. (citations omitted).

88. *Id.* at 650.

89. *Id.* at 653 (citations omitted). Justice White simply stated: "The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief." *Id.*

the Court noted that the Fourth Amendment's reasonableness standard usually required, "at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test."[90] However, the *Prouse* Court also acknowledged that in certain situations in the past, the Court had balanced away this fundamental mandate of individualized suspicion. Generally, the Court would take such a dramatic step only when other safeguards existed to preserve Fourth Amendment rights.[91]

Consequently, Justice White balanced the interests to determine whether the government's random vehicle stops for license and registration checks fell within this special category of cases. On the government's side, the Court identified as "vital" the State's interest in promoting public safety on its roads and recognized "the danger to life and property posed by vehicular traffic and . . . the difficulties that even a cautious and an experienced driver may encounter."[92] Yet, the *Prouse* Court was not content to measure merely the magnitude of the government interests at stake. Justice White also weighed the efficacy of Delaware's program: "The question remains, however, whether in the service of these important ends the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail."[93] To answer his own query, Justice White applied some simple logic. He noted that the "foremost method" of promoting highway safety was "acting upon observed violations."[94] Further, unlicenced motorists were either less safe drivers, or they were not. If those driving without a valid license were indeed less safe, their dangerous "propensities" would "exhibit themselves" in their driving, thus enabling officers to detect them by observation.[95] If, on the other hand, the unlicenced drivers were not less safe drivers, then the very practice of licensing drivers would itself

---

90. *Id.* at 654 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1969)) (footnotes omitted).

91. *Id.* at 654-55. The *Prouse* Court noted: "In those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Id.* (footnote omitted). Embedded within this assertion was a footnote to *Martinez-Fuerte*, the case in which the Court suspended the individualized suspicion requirement in part because the checkpoint itself limited official discretion. *See supra* notes 49-70 and accompanying text (discussing *Martinez-Fuerte*). Additionally, the Court cited *Camara v. Municipal Court*, which loosened the probable cause standard due in part to the restraints on official discretion written into the administrative scheme of housing inspections. Camara v. Municipal Court, 387 U.S. 523, 532 (1967).

92. Delaware v. Prouse, 440 U.S. 648, 658 (1979).

93. *Id.* at 659.

94. *Id.*

95. *Id.*

"hardly be an effective means of promoting roadway safety."[96] Thus, the most effective way to catch unlicenced, and therefore presumably unsafe drivers was simply to look out for them on the highway. In contrast, the state's spot checks were not "sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment."[97]

Delaware's program seemed all the more feeble when its indiscriminate scope was considered: "It seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicenced operator will be large indeed."[98] Impact on the innocent motorist became key. When it came to weighing the individual's side of the scales, the *Prouse* Court experienced no difficulty in envisioning the effect such a broad and absolute police prerogative would have on all drivers. Justice White continued:

> The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure – limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable – at the unbridled discretion of law enforcement officials. To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches. . . ." This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.[99]

---

96. *Id.*

97. *Id.* at 660.

98. *Id.* at 659-60.

99. *Id.* at 661 (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)). Additionally, perhaps in answer to earlier statements of the Court minimizing the Fourth Amendment interests of motorists, Justice White asserted:

> Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio* . . . recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Id. at 662-63; *see* United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (minimizing Fourth Amendment interests of motorists).

In the 1977 and 1978 terms, the Court established a two-step analysis pertaining to seizures of motorists. *Prouse* forcefully reasserted the traditional Fourth Amendment limit that officers must justify virtually all traffic stops with some kind of objective individualized suspicion. However, *Mimms* enabled police, having lawfully stopped a vehicle based upon a constitutional level of suspicion, to automatically demand the driver exit his or her car without any further justification.

A majority of the Court finally obtained the opportunity to explain the underpinnings of *Mimms* in *New York v. Class*.[100] In *Class*, two New York City police officers pulled Benigno Class over after observing him commit two traffic violations – speeding and driving with a cracked windshield.[101] Class emerged from his car on his own initiative and approached one officer while the other opened the car door to inspect the Vehicle Identification Number (VIN) on the door jamb.[102] Finding no VIN, the officer reached into the car to move papers that were blocking the dashboard VIN, causing him to see a gun sticking out from under the driver's seat.[103] The officers recovered the gun and arrested Class.[104]

In deciding whether the trial judge should have suppressed the gun, Justice O'Connor, writing for the majority, isolated two official intrusions: (1) detaining Class briefly outside of his vehicle after he had chosen to alight from it, and (2) searching inside the car for the VIN which was necessary only because of Class's detention outside of the car.[105] After all, the officers could have avoided the search of the car by having Class return to his driver's seat and by having him remove the papers obscuring the dashboard VIN. However, demanding such action by police would be contrary to *Mimms*:

> To have returned respondent immediately to the automobile would have placed the officers in the same situation that the holding in *Mimms* allows officers to avoid – permitting an individual being detained to have possible access to a dangerous weapon and the benefit of the partial concealment provided by the car's exterior.[106]

Justice O'Connor therefore had to assess whether the officer's actions in *Class* fell within the *Mimms* automatic privilege. To make this determination, Justice O'Connor identified three crucial factors: (1) "the safety of the officers was served by the governmental intrusion," (2) "the intrusion was

100. 475 U.S. 106 (1986).
101. New York v. Class, 475 U.S. 106, 107-08 (1986).
102. *Id.* at 108.
103. *Id.*
104. *Id.*
105. *Id.* at 116.
106. *Id.*

minimal," and (3) "the search stemmed from some probable cause focusing suspicion on the individual affected by the search."[107] As to the first variable, Justice O'Connor found the officer's search for the VIN while keeping the driver outside the vehicle, presumably to keep him from obtaining access to a dangerous weapon, was "justified."[108] Similarly, the *Class* court deemed the intrusion sufficiently minimal to satisfy the second prong because "[t]he search was focused in its objective and no more intrusive than necessary to fulfill that objective."[109] The third factor, regarding probable cause, was easily met: "Indeed, here the officers' probable cause stemmed from directly observing respondent commit a violation of the law."[110]

Class's reliance upon *Mimms* put the earlier per curiam opinion in an entirely new light. Justice O'Connor hardly made it easy for future courts to extend an officer's per se right to order drivers out of lawfully stopped vehicles. Instead, she created three significant hurdles to clear before officers could intrude on Fourth Amendment protections without first establishing some kind of individualized suspicion.[111]

In 1990, the Court returned to the suspicionless checkpoint stops it had previously considered in *Martinez-Fuerte*. In *Michigan Department of State Police v. Sitz*,[112] Chief Justice Rehnquist, writing for the majority, held that Michigan's sobriety checkpoint program did not violate the Fourth Amendment.[113] In *Sitz*, a Sobriety Check Point Advisory Committee established guidelines for checkpoint operations, site selection, and publicity.[114] Pursuant to the Committee's procedures, officers stopped all vehicles passing though

---

107. *Id.* at 117-18.

108. The *Class* Court opined: "[T]he governmental interest in highway safety served by obtaining the VIN is of the first order, and the particular method of obtaining the VIN here was justified by a concern for the officers' safety." *Id.* at 118. Additionally, the Court noted: "In light of the danger to the officers' safety that would have been presented by returning respondent immediately to his car, we think the search to obtain the VIN was not prohibited by the Fourth Amendment." *Id.* at 116.

109. *Id.* at 118.

110. *Id.*

111. *Id.* at 117-18.

112. 496 U.S. 444 (1990).

113. Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 447 (1990).

114. *Id.* The site selection committee in *Sitz* had the same administrative nature as that in *Martinez-Fuerte*: "The director appointed a Sobriety Checkpoint Advisory Committee comprising representatives of the State Police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute." *Id.* Likewise, it is likely that, as it was in *Martinez-Fuerte*, the members of *Sitz*'s committee lacked the temptation typically facing the officer on the beat to expand his or her search and seizure authority. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) (assuming administrators would be "unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class").

a sobriety checkpoint while the drivers were briefly examined for signs of intoxication.[115] If such symptoms were detected, the motorist would be directed to a location out of traffic flow where police would check the driver's license and car's registration.[116] If needed, officers would conduct field sobriety tests, which could result in arrests.[117] "All other drivers would be permitted to resume their journey immediately."[118] In *Sitz*, the sobriety checkpoint ran only once (for 75 minutes) and resulted in the seizure of 126 vehicles (for an average of 25 seconds each).[119] Ultimately, the police detained two drivers for field sobriety testing and one of these was arrested for driving under the influence.[120] One motorist drove through without stopping and also was arrested for driving under the influence.[121]

In gauging the reasonableness of sobriety checkpoint seizures, the *Sitz* Court found *Martinez-Fuerte* particularly helpful.[122] Chief Justice Rehnquist employed *Martinez-Fuerte* to defend the *Sitz* Court's use of balancing in a setting outside of the typical "special needs" context. Because the *Martinez-Fuerte* Court had balanced the interests when dealing with "police stops of motorists on public highways," so too could the *Sitz* Court, even though it assessed the *nonspecial* government need of police detection of driving under the influence.[123] In this sense, *Sitz* was an explicit expansion of special needs balancing into the criminal law investigation realm.

In following *Martinez-Fuerte*'s lead, the *Sitz* opinion applied essentially the same balancing test, with remarkably similar results. As in *Martinez-Fuerte*, the *Sitz* Court found the weight of the government's interests to be substantial, stating: "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."[124] *Martinez-Fuerte*'s impact was even more strongly felt "on the other scale – the measure

115. *Sitz*, 496 U.S. at 447.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 448.

120. *Id.*

121. *Id.*

122. *Id.* at 452-53. The seizures included "the initial stop of each motorist passing through [the] checkpoint and the associated preliminary questioning and observation by checkpoint officers." *Id.* at 450-51.

123. *Id.* at 450.

124. *Id.* at 451. Chief Justice Rehnquist compared the highway death toll with the casualties of war: "The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield." *Id.* (quoting Breithaupt v. Abram, 352 U.S. 432, 439 (1957)).

of the intrusion on motorists"[125] – because Chief Justice Rehnquist essentially equated the invasions stemming from immigration and sobriety checkpoints: "We see virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary to the effectuation of these two types of checkpoints, which to the average motorist would seem identical save for the nature of the questions the checkpoint officers might ask."[126] Thus, after consideration of *Martinez-Fuerte*'s "objective intrusion" and "subjective intrusion" factors, the *Sitz* Court determined that the impact on the motorist from immigration and sobriety checkpoints was "indistinguishable."[127] However, in assessing the subjective intrusion prong, the *Sitz* Court again emphasized the circumstances *unique* to fixed checkpoints, such as each driver's ability to see other motorists being subjected to the same treatment and the "visible signs of the officers' authority."[128] Once again the Court, in upholding a scheme in which officers were able to seize motorists without individualized suspicion, emphasized the peculiar nature of the fixed checkpoint, in contrast to the typical traffic stop.

Sitz is important for still another development. It expanded the Court's evaluation of the "effectiveness" portion of reasonableness balancing. Concerned about usurping the policy making role of the more "politically accountable" branches, Chief Justice Rehnquist set the bar measuring the "effectiveness" of the relevant government program at an extremely low level.[129] In identifying the threshold of effectiveness the Fourth Amendment requires, the *Sitz* Court considered the prior cases of *Prouse* and *Martinez-Fuerte*. It noted that *Prouse* failed to establish effectiveness because the government offered "*no* empirical evidence" that random stops for license checks would promote highway safety.[130] In contrast, *Martinez Fuerte* provided numbers. At one of the case's checkpoints, "illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint."[131]

---

125. *Id.*

126. *Id.* at 451-452.

127. *Id.* at 445.

128. *Id.* (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976)).

129. *Id.* at 453. The *Sitz* Court recognized:

> Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.

Id. at 453-54.

130. *Id.* at 454.

131. *Id.* at 455.

This percentage, although extremely small, contributed to the *Martinez-Fuerte* Court's seeing "a rather complete picture of the effectiveness of the San Clemente checkpoint."[132] To prove effectiveness, the government must merely provide *some* information, beyond simply nothing, to establish a link between the State program and a concrete result.

The result of the checkpoint cases is a balancing analysis skewed in favor of abandoning the fundamental right of individualized suspicion. In the cases that appeared before the Court, the government activities intruding upon motorists were aimed at problems having a wide scope: immigration and drunken driving. Such a context resulted in the collection of statistics from across the nation, enabling the government to characterize its interests in the weightiest terms. Further, *Martinez-Fuerte* and *Sitz* combined to create an especially forgiving standard for the effectiveness of the official program under review. In contrast, the individual's interest, which suffered only a temporary intrusion (under the safety of public eyes on the roadway and in the collective security of blanket stops), was minimized.

After decades of undermining the Fourth Amendment's individualized suspicion requirement, the Court returned to it in *Whren v. United States*.[133] In fact, the *Whren* Court applied the strictest standard of suspicion on the street: probable cause.[134] In *Whren*, plain-clothes vice-squad officers, while patrolling a "high drug area" of Washington, D.C., noticed two youths seated in a truck at a stop sign.[135] The officers observed that the driver was looking down into the lap of the passenger and further noted that the truck remained stopped for over 20 seconds, "an unusually long time."[136] When the unmarked police car made a U-turn to head back toward the truck, the truck suddenly turned, without signaling, and sped away.[137] The police followed and ultimately approached the truck, resulting in a plain view seizure of cocaine from Whren's hands by Officer Soto.[138] Whren moved to suppress the cocaine. Although he did not contest that the officers possessed probable cause to believe that the driver of the truck had committed various traffic violations, he contended that the officers' "asserted ground for approaching the vehicle – to give the driver a warning concerning traffic violations – was pretextual."[139]

---

132. *Martinez-Fuerte*, 428 U.S. at 554.

133. 116 S. Ct. 1769 (1996).

134. Whren v. United States, 116 S. Ct. 1769, 1772 (1996).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* The driver violated the traffic laws by failing to "give full time and attention to the operation" of his vehicle, turning without signaling, and speeding. *Id.* at 1772-73 (quoting

When the case appeared before the Supreme Court, Whren focused on the subjective motivations behind Officer Soto's actions. Whren argued that traffic regulations were "unique," because:

> the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible[.] [Therefore,] a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists.[140]

Whren therefore contended that probable cause should *not* be enough to justify traffic stops.

Justice Scalia, writing for a unanimous Court, found this argument unavailing. The *Whren* Court echoed a fundamental principle already considered as a given by the time of *Prouse* and *Mimms*: "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."[141] Thus, if a reasonable officer in Officer Soto's shoes could objectively formulate probable cause that Whren's driver violated the traffic laws, the traffic stop was lawful, despite any ulterior motives harbored by Officer Soto himself.[142] Indeed, Justice Scalia announced, "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[143] The same held true for reasonableness in general: "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."[144]

When Whren contended that the balance of interests weighed in his favor, the Court conceded that every Fourth Amendment case, turning as it

---

D.C. Mun. Regs. tit. 18, § 2213.4 (1995)).

140. *Id.* at 1773.

141. *Id.* Indeed, the Court cited both *Prouse* and *Mimms* as authority for this basic tenet. *See id.* at 1772 (citing Delaware v. Prouse, 440 U.S. 648, 659 (1979); Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977)).

142. *Id.* at 1774. Justice Scalia repeatedly and emphatically drove this point home: "Not only have we never held . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth amendment; but we have repeatedly held and asserted the contrary." *Id.* He continued: "We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification." *Id.* Additionally, Justice Scalia explained: "[W]e said that '[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional'. We . . . established that 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" *Id.* (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

143. *Id.*

144. *Id.* at 1775.

does on "reasonableness," involved a balancing exercise.[145] However, when the search or seizure at issue was supported by probable cause, "the result of that balancing is not in doubt."[146] In fact, Justice Scalia offered *Prouse* and *Martinez-Fuerte* as illustrations that "detailed" balancing was required only when probable cause was *lacking*.[147] In contrast, when probable cause existed, true balancing was needed in only the most extreme cases, such as in the use of *deadly force* or *physical penetration* of the body.[148]

Justice Scalia's statements are disturbing because they point toward result-oriented reasoning. When the government can justify its actions in the form of probable cause, the Court will find no need to go through the motions of a balancing analysis. However, if the State falls short because its agents acted in the absence of probable cause, the Court might oblige by balancing the government out of its own mess.

The Court reaffirmed its adherence to the objective reasonableness standard in *Ohio v. Robinette*,[149] which it decided only three months before *Wilson*.[150] In *Robinette*, Deputy Sheriff Roger Newsome pulled over Robert D. Robinette for speeding in a construction zone on the interstate.[151] Deputy Newsome asked for and received Robinette's driver's license, determined by computer that Robinette had no previous violations, ordered Robinette out of his car, and turned on the patrol car's video camera.[152] After issuing a verbal traffic warning to Robinette, Deputy Newsome asked: "One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"[153] When Robinette responded, "No," Deputy Newsome asked for and received consent to search the car, resulting in the recovery of marijuana and methylenedioxymethamphetamine.[154]

Robinette, who was arrested following the discovery, moved to suppress the evidence Deputy Newsome discovered.[155] Ultimately, the Ohio Supreme Court, concerned with the average motorist's ignorance as to a traffic stop's proper scope, created a "bright-line" warning requirement that:

---

145. *Id.* at 1776.
146. *Id.*
147. *Id.*
148. *Id.*
149. 117 S. Ct. 417 (1996).
150. Ohio v. Robinette, 117 S. Ct. 417, 421 (1996).
151. *Id.* at 419.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

> citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.[156]

Chief Justice Rehnquist, writing for the majority, rejected any per se warning requirement. Echoing *Whren*, he admonished that Fourth Amendment reasonableness was "measured in objective terms by examining the totality of the circumstances."[157] In assessing this reasonableness, the Chief Justice announced, "we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."[158] The repudiation of bright lines occurred despite the citation to *Mimms*'s automatic police prerogative to order drivers out of cars, which was cited only two paragraphs earlier in the *Robinette* opinion.[159] The plain inference was that *Mimms* was a marginalized exception to the general rule "eschewing" bright lines in Fourth Amendment cases. This point was further emphasized by later references to the Court's refusal to adopt a per se rule in other Fourth Amendment cases.[160] Thus, Chief Justice Rehnquist, who only months later would author *Wilson*, established an explicit record of Supreme Court rejection of bright-line rules.

III. Maryland v. Wilson*'s Creation of an Absolute Right of Police to Order Passengers Out of Lawfully Stopped Vehicles*

A. Factual Background

At about 7:30 p.m. on June 8, 1994, Maryland State Trooper David Hughes observed a white Nissan Maxima speeding sixty-four miles per hour in a fifty-five mile-per-hour zone of Interstate 95 in Baltimore County.[161]

---

156. *Id.* at 419-20 (quoting State v. Robinette, 653 N.E.2d 695, 696 (Ohio 1995), *rev'd*, 117 S. Ct. 417 (1996)).

157. *Id.* at 421.

158. *Id.*

159. *Id.*

160. *Id.* The *Robinette* Court noted:

> We have previously rejected a *per se* rule very similar to that adopted by the Supreme Court of Ohio in determining the validity of a consent to search. In *Schneckloth v. Bustamonte*, it was argued that such a consent could not be valid unless the defendant knew that he had a right to refuse the request. We rejected this argument....

Id. (citation omitted). In addition, the Court cited other cases in which it refused to craft an absolute rule. *See* Florida v. Bostick, 501 U.S. 429, 439 (1991); Michigan v. Chesternut, 486 U.S. 567, 572-73 (1988); Florida v. Royer, 460 U.S. 491, 506 (1983).

161. Brief for Petitioner at 2, Maryland v. Wilson, 117 S. Ct. 882 (1997) (No. 95-1268).

Trooper Hughes noticed that the car lacked license plates, except for "a paper tag kind of hanging half off, half on that said Enterprise Rent-A-Car."[162] Trooper Hughes activated his cruiser's lights and siren to pull the car over, but the car continued for one and one-half miles before finally stopping.[163] During the pursuit, the trooper observed three occupants in the car.[164] The front seat passenger turned and looked at him several times, while both passengers "continuously ducked below the seat level and then reappeared."[165] Once stopped, Trooper Hughes still observed "a lot of movement in the car," which caused him to hesitate in approaching it.[166] When he exited his cruiser, Hughes observed that the driver, Mr. McNichol, had already alighted from the Maxima.[167] Trooper Hughes had McNichol meet him between the two cars where he advised McNichol that he had been speeding.[168] Hughes then asked to see McNichol's license and registration.[169] McNichol complied and produced a valid Connecticut license, explaining that his destination was South Carolina.[170] McNichol appeared to Hughes to be "unusually nervous"[171] because he was "trembling" and answering "every question with a question."[172] McNichol explained that the rental papers were in the car and the trooper told him to retrieve them.[173] The front seat passenger, Jerry Lee Wilson, was himself "sweating and extremely nervous."[174] Concerned for his own safety, Trooper Hughes asked Wilson to exit the Nissan.[175] Wilson initially refused

---

162. *Id.* (citation omitted).

163. *Id.*

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

165. Brief for Petitioner at 2, *Wilson* (No. 95-1268).

166. *Id.* at 2-3.

167. *Id.* at 3.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* (citation omitted).

172. State v. Wilson, 664 A.2d 1, 2 (Md. Ct. Spec. App. 1995), *rev'd*, 117 S. Ct. 882 (1997).

173. Brief for Petitioner at 3, Maryland v. Wilson, 117 S. Ct. 882 (1997) (No. 95-1268).

174. *Id.*

175. *Id.* The Court of Special Appeals of Maryland noted Trooper Hughes's response when asked why he had directed Wilson out of the car:

> Well, due to the movement in the vehicle I thought possibly there could be a handgun in the vehicle. I had concern for my safety. At that time when Mr. McNichol went back to the car, I asked Mr. Wilson to step out, that is [sic] my whole purpose of not approaching the vehicle, by myself, with three occupants in the vehicle, I wanted each one out at a time to speak to each individual, for my safety.

Wilson, 664 A.2d at 3.

and then opened the door and took one step out, causing crack cocaine to fall to the ground.[176] Wilson, who was arrested and charged with possession of cocaine with the intent to distribute, moved to suppress the evidence, arguing that Hughes's order to exit the car was an unreasonable seizure.[177]

B. Rulings in the Lower Courts

The Circuit Court for Baltimore County found that Trooper Hughes's ordering of Wilson out of the car constituted an unreasonable seizure under the Fourth Amendment and therefore granted Wilson's motion to suppress.[178] On appeal, the Court of Special Appeals of Maryland affirmed, refusing to extend *Mimms*'s per se rule to passengers.[179] The appeals court's ruling was based on a myriad of intricate arguments, some persuasive, others based on misinterpretations of law. Interestingly, both the state court's cogent contentions and its erroneous rationales offer insight into the Supreme Court's holding in *Wilson*.

The central theme of the Court of Special Appeals of Maryland's opinion was that *Mimms* was never meant to be more than a narrow rule allowing police the prerogative of ordering *drivers* from their cars. Judge Moylan, writing for a unanimous court, cautioned against extending *Mimms*:

> It is treacherous to attempt to extract too much meaning from *Pennsylvania v. Mimms*. It is a six-page, unsigned opinion explaining a summary disposition reached without benefit of oral argument. One must be careful not to read more meaning into such an opinion than the authors ever intended to put there.[180]

The court further noted that *Mimms* was "completely silent" regarding any automatic right to order the passenger out of a car.[181] This is of particular interest because such a passenger did exist in *Mimms*: "There had coincidentally been a second occupant of Harry Mimms's vehicle who, it turned out, was carrying a .32 caliber revolver. Once that narrative fact was mentioned, however, the armed passenger dropped totally from sight and the opinion does not further allude to him even obliquely."[182] Moreover, Judge Moylan recognized that the *Mimms* Court "went out of its way to disclaim any consideration

176. Brief for Petitioner at 3, *Wilson* (No. 95-1268).

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

178. *Id.*

179. *Id.*; State v. Wilson, 664 A.2d 1, 10 (Md. Ct. Spec. App. 1995), *rev'd*, 117 S. Ct. 882 (1997).

180. *Wilson*, 664 A.2d at 4.

181. *Id.* at 5.

182. *Id.*

of the rights or vulnerabilities of passengers."[183]

Thus, any extension of *Mimms*'s per se power to order vehicle exits had to survive the state court's careful balancing of the competing interests. On the "societal-interest pan of the balance," Judge Moylan identified two interests deserving protection in *Mimms*: (1) protecting the officer from harm from "oncoming traffic," and (2) protecting the officer from harm "at the hands of the driver."[184] The state court considered the traffic concern in *Mimms* to be weightier than it would be in the typical case involving passengers because stopped vehicles usually pull to the right, thus exposing the officer only if he or she approached the driver's side of the car.[185] The lessening of the traffic risk bothered Judge Moylan little because he deemed *Mimms*'s traffic factor as "clearly little more than a makeweight," its absence therefore having virtually no effect on the overall balance of interests.[186] *Mimms*'s "predominant societal interest" of protecting the officer from an armed and dangerous driver weighed the same as the government's interest in protecting police from armed and dangerous passengers.[187] Thus, the overall "societal interest is just as great when considering protecting an officer from a passenger as it is when protecting an officer from a driver."[188]

However, the similarities ended when the focus shifted to the scale's other pan – that holding the passenger's interests.[189] Judge Moylan observed that a traffic stop directly subjects the driver to detention "on an *in personam* basis."[190] The driver is "not permitted to walk away from the scene and disappear into the sunset," but must instead remain to offer evidence of a valid driver's license and registration and further to submit to receiving a ticket or being placed under custodial arrest.[191] Because the driver is indeed already

---

183. *Id.* at 6. The court quoted *Mimms*: "The State does not, and need not, go so far as to suggest that an officer may frisk the occupants of any car stopped for a traffic violation. Rather, it only argues that it is permissible to order the driver out of the car." *Id.* (quoting Pennsylvania v. Mimms, 434 U.S. 106, 110 n.5 (1977)). Further, Judge Moylan accurately, albeit harshly, characterized the Supreme Court's stray references in later opinions, such as *Michigan v. Long*'s "police may order *persons* out of an automobile" statement, as "no more than . . . careless, casual, and passing instances of the most *obiter* of *dicta*." *Id.* at 6 (quoting Michigan v. Long, 463 U.S. 1032, 1047-48 (1983) (citations omitted)).

184. *Id.* at 8.

185. *Id.* at 8-9.

186. *Id.* at 9.

187. *Id.* Judge Moylan noted: "[I]t is self-evident that an armed and dangerous passenger poses just as great a threat to an officer as does an armed and dangerous driver." *Id.*

188. *Id.*

189. Maryland v. Wilson, 117 S. Ct. 882, 886 (1997).

190. State v. Wilson, 664 A.2d 1, 9 (Md. Ct. Spec. App. 1995), *rev'd*, 117 S. Ct. 882 (1997).

191. *Id.*

detained by virtue of the traffic stop, the request to exit the car is a "small incremental intrusion."[192] In contrast, the passenger, having done nothing wrong, cannot receive even a traffic citation.[193] While the driver is stuck with the police, "[t]he passenger is presumptively free to abandon the driver to the clutches of the law and to hail a cab."[194] Therefore, the demand of the *passenger*, unlike that of the driver, to get out of the car is "not a mere shift of the location of [an] already established detention," but the *creation* of a detention itself.[195] This difference in individual interests between drivers and passengers prevented the state court from extending *Mimms*'s absolute police prerogative to passengers.

The state of Maryland, however, did not place all its faith in *Mimms* because it had a fallback argument. Its second line of defense was simple: Trooper Hughes's ordering of Wilson out of the car was a valid *Terry* stop.[196] The state court vehemently rejected this contention, derisively labeling it "A False Trail."[197] Ultimately, Judge Moylan adopted an entirely different guideline for passenger order-outs. The court based its analysis on procedural grounds, misinterpretation of Fourth Amendment law, and fear.

At the outset, Judge Moylan would not permit any argument that the passengers' behavior created reasonable suspicion for a *Terry* stop because the state had failed to make this contention at the suppression hearing.[198] However, he then went on to criticize the *Terry* stop argument on its merits. Judge Moylan believed that *Terry*'s "articulable suspicion" literally must be *articulated* by the officer acting upon it.[199] Failure to do so, even in the face of

192. *Id.* at 10.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 3.

197. *Id.*

198. *Id.* This was not the only procedural obstacle identified by the state court. Judge Moylan also noted: "If these were not impediments enough, the State urges us to exercise our own independent constitutional appraisal on a *de novo* basis. Such appellate latitude is not available to us." *Id.* This is not an accurate statement of the law today. *See* Ornelas v. United States, 116 S. Ct. 1657, 1663 (1996) (holding that determinations of reasonable suspicion and probable cause made during searches or seizures unsupported by warrants should be reviewed de novo).

199. State v. Wilson, 664 A.2d 1, 3 (Md. Ct. Spec. App. 1995), *rev'd*, 117 S. Ct. 882 (1997). The state court ruled:

> Articulable suspicion, for either a stop or a frisk, requires not simply the external circumstances that would justify such particularized suspicion. It requires, in addition, that the officer purporting to act on the basis of such suspicion actually *articulate* such a purpose and such a basis for action.... It is, moreover, the officer who must do the articulating, not the Attorney General by way of appellate afterthought.

Id.

"external circumstances that would justify such particularized suspicion" was fatal to the stop's legality.[200] As a result, Judge Moylan rejected the *Terry* justification despite a wealth of facts pointing toward reasonable suspicion: "[The conclusion of the judge who granted the motion to suppress] 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."[201]

The force of this illogic created fundamental errors in the state court opinion. Judge Moylan's fixation with the officer's subjective motivations caused *State v. Wilson* to run afoul of the Supreme Court's holding in *Whren* that an officer's subjective mental state is irrelevant so long as his actions can be justified by objective reasonableness. Equally troubling, the state court's misapprehension of the law caused its opinion to derail. Judge Moylan veered away from concluding that the stop was supported by reasonable suspicion, a ruling grounded not only upon a wealth of facts but on well-established law, toward a vulnerable balancing analysis regarding the extension of *Mimms*.

Since the state court refused to extend *Mimms*'s per se rule to cover Wilson's exit from the vehicle, it searched for another formula to guide police in the future. Judge Moylan concluded that an officer's exit order to a passenger did require "some individualized or particularized suspicion."[202] However, perhaps due to its confusion about what constituted "articulable facts," Judge Moylan shied away from reasonable suspicion, instead adopting a "heightened caution" level of justification which was "less than, and different from" *Terry*'s threshold.[203] Thus, apparently due to a misinformed fear of reasonable suspicion, Judge Moylan created yet another level of suspicion, complicating an officer's duties and setting up an appeal to the Supreme Court.[204]

---

200. *Id.* The court concluded: "In the absence of such a purpose, whether there might, in the abstract, have been a constitutional basis for a frisk is immaterial." *Id.*

201. *Id.* at 4. The state court considered this point so important that it returned to it later in its opinion:

> Had Judge Bollinger [, who granted the motion to suppress,] found that Trooper Hughes had reason to fear that Wilson might be in possession of a weapon and had ordered Wilson out of the vehicle in order to frisk him for a weapon, we are *not* holding that such a conclusion and such an action on the trooper's part would have been unreasonable. That, however, is not the decision before us for review. Judge Bollinger found, to the contrary, that the trooper had no such fear and we simply hold that Judge Bollinger was not clearly erroneous in so finding.

Id. The "clearly erroneous" standard has been disapproved by the Supreme Court in this context. *See Ornelas*, 116 S. Ct. at 1663 (rejecting clearly erroneous standard in favor of de novo review).

202. *Wilson*, 664 A.2d at 12.

203. *Id.* at 13.

204. Maryland v. Wilson, 117 S. Ct. 882, 884 (1997). Maryland initially challenged

C. The Wilson *Court's Ruling and Rationales*

The Supreme Court's majority opinion, at three pages, is quite brief.[205] This is perhaps due not only to Chief Justice Rehnquist's laconic style, but also to his ready acceptance of a series of assumptions. *Wilson* opens: "In this case we consider whether the rule of *Pennsylvania v. Mimms*, that a police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle, extends to passengers as well."[206] This framing of the issue caused the Court, after its presentation of the facts, to launch immediately into a discussion of *Mimms* and the balancing analysis it entails.[207] Indeed, without any exploration of the appropriateness of the balancing process itself as the means to decide the issue, Chief Justice Rehnquist summarily determined that, when assessing the weight of the government's interests, "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger."[208] The *Wilson* Court bolstered this conclusion with statistics: "In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops."[209] Further, although the Court did acknowledge that the danger of "standing in the path of oncoming traffic" typically would not exist in the case of passengers, it took care to recognize that even this hazard remained with "a passenger in the left rear seat."[210] Moreover, the *Wilson* Court counterbalanced any reduction in traffic danger in the passenger context by noting that the presence of more than one occupant in a vehicle "increases the possible sources of harm to the officer."[211]

Chief Justice Rehnquist, when considering the "personal liberty side of the balance," conceded that "in one sense" passengers had a stronger case than

---

the decision rendered by the Court of Special Appeals of Maryland in state court. However, the Maryland Court of Appeals denied certiorari. State v. Wilson, 667 A.2d 342 (Md. 1995).

205. *Wilson*, 117 S. Ct. at 884-86. Chief Justice Rehnquist's majority opinion covers less than three pages in West's *Supreme Court Reporter*. *Id.*

206. *Id.* at 884.

207. *Id.* at 884-85 (citation omitted).

208. *Id.* at 885. The organization of the sentences in its opinion demonstrates the Court's ready acceptance of balancing. The *Wilson* Court first recognized that "[w]e must therefore now decide whether the rule of *Mimms* applies to passengers as well as to drivers." *Id.* Then, with no explanation, the next sentence begins the balancing process: "On the public interest side of the balance...." *Id.*

209. *Id.*

210. *Id.*

211. *Id.* This point was important enough to mention a second time: "[D]anger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Id.* at 886.

did drivers.[212] After all, with traffic stops, there is probable cause to believe the driver has violated the law. No such reason exists to stop or detain the passenger.[213] Yet, the Court did not attach significance to this distinction: "But 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."[214]

With this observation, the *Wilson* Court slipped back into a consideration of *government* interests. Chief Justice Rehnquist noted the benefit to law enforcement stemming from ordering a passenger out of a vehicle – denial of access to weapons in the car's interior.[215] He identified as a danger the possibility that "a more serious crime might be uncovered during the stop," providing a motivation to resort to violence "every bit as great" for passengers as it is for drivers.[216] Thus, in the midst of determining the intrusion on individual rights, the Court accidentally found itself once again concerned with societal interests.

The *Wilson* Court concluded by analogizing its traffic stop to the execution of a search warrant for narcotics in *Michigan v. Summers*.[217] Chief Justice Rehnquist quoted approvingly from *Summers*:

> 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.[218]

Just as in *Summers*, the balance of interests in *Wilson* tilted in the government's favor.[219] This balancing process provided the Court with a rationale to hold that *Mimms*'s rule which gives police an absolute right to order drivers out of lawfully stopped cars extends to passengers as well.[220]

---

212. *Id.* at 886.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*; 452 U.S. 692 (1981).

218. Maryland v. Wilson, 117 S. Ct. 882, 886 (1997) (quoting Michigan v. Summers, 452 U.S. 692, 702-03 (1981)).

219. *Id.*

220. *Id.* at 884, 886.

IV. Concerns Created by the Court's Establishment of an Automatic Law Enforcement Privilege to Compel a Passenger to Exit from a Car

A. The Wilson *Rule Is Based on an Improper Balancing Analysis*

Chief Justice Rehnquist's readiness to jettison any individualized suspicion analysis in favor of balancing the competing interests of Trooper Hughes and Jerry Lee Wilson to determine Fourth Amendment reasonableness represents a dramatic departure from search and seizure fundamentals. True, as recently as 1996, the *Whren* Court recognized that "in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors."[221] Yet, *Whren* immediately noted that the result of such balancing is simply "not in doubt where the search or seizure is based upon probable cause."[222] This is because the balancing process envisioned in the Fourth Amendment actually occurred over two centuries ago, and its fruits are found in the words of the Amendment itself. Indeed, Justice Stewart realized this truism in his dissent in *Michigan v. Summers*: "[T]he general rule [is] that the Fourth Amendment itself has already performed the constitutional balance between police objectives and personal privacy."[223] In *New Jersey v. T.L.O.*,[224] Justice Blackmun was even more explicit: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."[225]

Courts should avoid balancing because it is hazardous. When the Court chooses to weigh the competing interests in order to determine whether it will

---

221. Whren v. United States, 116 S. Ct. 1769, 1776 (1996).

222. *Id.*

223. *Summers*, 452 U.S. at 706 (Stewart, J., dissenting).

224. 469 U.S. 325 (1985).

225. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). Justice Blackmun also stated:

> While the Fourth Amendment speaks in terms of freedom from unreasonable [searches], the Amendment does not leave the reasonableness of most [searches] to the judgment of courts or government officers; the Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause.

Id. (quoting United States v. Place, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring). Even in Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995), a case in which the Court made liberal use of the balancing approach, Justice Scalia, writing for the majority, conceded that balancing was not the norm in the context of a criminal investigation. The *Acton* Court noted that "where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant." *Id.* at 2390.

apply the fundamentals of the Fourth Amendment, the very nature of the analysis prevents reliance upon the traditional Fourth Amendment anchors of probable cause and the warrant requirement. In the absence of guidance provided by these basic mandates, the Court may simply substitute its own subjective notions regarding "the acceptability of certain sorts of police conduct," causing Fourth Amendment protections to reach "the evaporation point."[226]

Such subjectivity manifested itself in *Wilson*. Notably, the Court encountered difficulty upon balancing the case's *very first set of facts*. Chief Justice Rehnquist, when placing a value upon the "public interest," weighed the numbers of assaults upon and killings of officers in traffic stops *and* pursuits.[227] Yet, any injuries or deaths occurring during *pursuits*, as tragic as they are, have nothing to do with allowing police to order passengers out of *stopped* vehicles. Even if the *Wilson* per se prerogative existed in the pursuit cases, it would have provided no protection because officers would not have – indeed could not have – exercised it while any car was in motion.[228]

Even if the Court properly narrowed these data to include only attacks and fatalities stemming from traffic *stops*, any resulting linkage between the majority's statistics and its extension of *Mimms* would be unwarranted. The data failed to provide the numbers of assaults or killings committed by passengers rather than drivers, or the number that occurred while the attacker was inside instead of outside of the car, or the quantity that could have been prevented by an officer's order to a passenger to exit the vehicle.[229] Indeed, the majority's statistics failed to prove the number of assaults or killings that occurred in the absence of "any articulable basis for concern about the officer's safety," a fact crucial to promoting a rule enabling police to intrude without such individualized suspicion.[230] The dearth of solid information caused Justice Stevens to conclude in his dissent that "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 risk."[231]

The majority opinion gave the sense that the Court was ever alert to prevent *any* diminution of government interests *anywhere*. For instance, the

---

226. Chimel v. California, 395 U.S. 752, 764-65 (1968).

227. Maryland v. Wilson, 117 S. Ct. 882, 885 (1997).

228. *Id.* at 888 n.4 (Stevens, J., dissenting). In his dissenting opinion, Justice Stevens recognized this analytical flaw: "The majority's data aggregates assaults committed during '[t]raffic [p]ursuits and [s]tops.' In those assaults that occur during the *pursuit* of a moving vehicle, it would obviously be impossible for an officer to order a passenger out of the car." *Id.* (citation omitted).

229. *Id.* at 887.

230. *Id.*

231. *Id.*

state court acknowledged that officers were exposed to less traffic danger when approaching passengers than drivers.[232] In contrast, Chief Justice Rehnquist appeared reluctant to allow the shrinkage of even this "makeweight" state interest.[233] He begrudgingly conceded the lessened traffic danger in the case of passengers. However, he noted that it would still exist for occupants "in the left rear seat."[234] Then, before even leaving this sentence, the Chief Justice replaced any lost weight on the government's side with the fact that an increase in the number of a vehicle's occupants creates a corresponding increase in danger to the officer.[235]

The Court showed no such deference to individual interests. Although he admitted that "the case for passengers is in one sense stronger than that for the driver," Chief Justice Rehnquist ultimately determined the per se rule's only practical impact upon passengers "is that they will be outside of, rather than inside of, the stopped car."[236] Then, belying the judicial thumb on the scales, the remainder of the paragraph purportedly devoted to the rights of the passenger was curiously transformed into a further discussion of government interests. Leaving intrusions on the individual behind, the Chief Justice instead discussed the relative motivations of passengers and drivers for violence upon officers.[237]

The *Wilson* Court's compulsion to wallow in government concerns had its limits. The Court was curiously silent when it came to assessing the *efficacy* of the order-out prerogative in promoting officer safety. This omission was all the more curious because the *Prouse* Court considered an intrusion's productivity in advancing state interests to be an integral part of its balancing analysis.[238] *Prouse* and *Wilson* shared significant similarities: both concerned traffic stops, both involved the vital state interest of preserving safety, and both required a choice between per se and fact-based rules. Interestingly, when the Court actually bothered to go through the efficacy analysis in *Prouse*, it concluded that the "most effective" means of maintaining safety was reliance upon officers' observation of facts in the individual case. The *Wilson* decision made no similar attempt to measure the order-out rule's effectiveness. Instead, Chief Justice Rehnquist explained in a footnote that "there is 'a strong public interest in minimizing' the number of assaults

232. State v. Wilson, 664 A.2d 1, 8 (Md. Ct. Spec. App. 1995), *rev'd*, 117 S. Ct. 882 (1997). As previously noted, this was because: "stopped vehicles generally pull to the right-hand curb." *Id.*

233. *Id.* at 9.

234. Maryland v. Wilson, 117 S. Ct. 882, 885 (1997).

235. *Id.*

236. *Id.* at 886.

237. *Id.*

238. Delaware v. Prouse, 440 U.S. 648, 659 (1978).

on law officers, . . . and we believe that our holding today is more likely to accomplish that result than would be the case if [Justice Stevens's] views were to prevail."[239] Such an unsupported hope would not even pass the diluted *Sitz* efficacy test because the Court in that case still required *some* empirical evidence linking efficacy to need.[240]

In the half-paragraph that the majority devoted to personal liberty, it seriously undervalued the individual rights that the per se rule put at stake. *Wilson*'s prerogative will allow unjustified government invasion in the very context where arguably most people interact with police. The Court itself has previously recognized that "[b]ecause of the extensive regulation of motor vehicles and traffic, . . . the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office."[241] The aggregation of each of these invasions of the person in literally millions of stops every year easily amounts to "significant law enforcement activity."[242] Yet, *Wilson* signaled that it could not be bothered with providing the citizenry the same kind of in-depth consideration it gave the government. The Court did not even go through a pretense of bifurcating the individual's interests into *Martinez-Fuerte*'s "subjective" and "objective" intrusions. The Court also failed to mention variables once seen as particularly relevant, such as the randomness of the location of the intrusion, the unreviewability of the officer's choice in making the invasion, and the impact on innocent individuals. Such factors, for decades warranting attention in any balancing analysis, did not even make a blip on the *Wilson* Court's radar screen.

Perhaps the most telling pronouncement in the Court's balancing analysis was its analogy to the execution of a search warrant in *Summers*. The *Summers* Court recognized that warrants often involve dangers of sudden violence or destruction of evidence and, therefore, any such risk would be minimized if police "routinely exercise unquestioned command of the situation."[243] *Summers* permitted officers to detain a person headed out of a residence while they conducted their search of the premises pursuant to a warrant.[244] *Wilson* equated the execution of a narcotics search warrant, a situation where officers possess enough information to convince a detached and neutral magistrate that *probable cause* exists that evidence of a *felony* is

239. *Wilson*, 117 S. Ct. at 886 n.2.

240. Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 454 (1990).

241. Cady v. Dombrowski, 413 U.S. 433, 441 (1973).

242. Maryland v. Wilson, 117 S. Ct. 882, 888 (1997) (Stevens, J., dissenting). In dissent, Justice Stevens noted: "In Maryland alone, there are something on the order of one million traffic stops each year." *Id.*

243. *Id.* at 886 (quoting Michigan v. Summers, 452 U.S. 692, 702-03 (1981)).

244. *Id.*; *Summers*, 452 U.S. at 695.

at a particular location, to every traffic stop no matter how minor. The facile nature of the balancing process enabled Chief Justice Rehnquist to compare the treatment of felons subject to full-scale investigations to that of innocents who happen to be in cars with drivers who commit any infraction, including insignificant violations such as a broken tail light. The Court applied this approach even though the myriad traffic stops that occur daily presumably dwarf the number of warrant executions.[245]

Summers itself would not have made such a leap. Justice Stevens, who authored the majority opinion in *Summers* – but who dissented in *Wilson* – crafted a three-factor test for seizures: (1) the seizure "constitutes [a] limited intrusion[ ] on the personal security of those detained," (2) the seizure is "justified by such substantial law enforcement interests that they may be made on less than probable cause," and (3) "police have an articulable basis for suspecting criminal activity."[246]

In determining that the seizure of Summers's person constituted a limited intrusion, Justice Stevens considered the context of the invasion to be "[o]f prime importance."[247] *Summers* saw the existence of a warrant to search the house to be particularly significant because it meant that "[a] neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there."[248] Thus, the Court placed Summers's seizure in the bigger picture of a search of his home: "The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself."[249] Likewise, Justice Stevens based several other assumptions regarding the seizure's lack of intrusiveness on the fact that it occurred within the larger invasion of a search of a home. The seizure was not an onerous imposition because most people would actually wish to remain anyway "in order to observe the search of their possessions."[250] Moreover, officers likely would not exploit the detention to obtain information because the surest source of evidence would be the search itself.[251] Finally, since the detention occurred within Summers's own home, it at most "only minimally" would add to the stigma already flowing from the search itself and would not involve the indignity or inconvenience connected to seizures occurring outside of a resi-

245. *Wilson*, 117 S. Ct. at 888 (Stevens, J., dissenting).
246. *Summers*, 452 U.S. at 699.
247. *Id.* at 701.
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*

dence.[252] Hence, the *Summers* Court's ultimate finding of minimal intrusion was intimately linked to the particular facts surrounding the detention: this was not an isolated stop on a public street, but instead was one within the privacy provided by the home and dwarfed by the larger invasion of a search pursuant to a warrant.

The second factor, that of justification by substantial law enforcement interests, was similarly anchored to *Summers*'s particular facts. Justice Stevens listed three reasons that provided justification in the specific context of "detention of an occupant of premises being searched for contraband pursuant to a valid warrant": "preventing flight," "minimizing risk of harm to the officers," and "orderly completion of the search."[253] Again, all were uniquely tied to the execution of the warrant. Flight was a concern because the warrant might result in turning up "incriminating evidence."[254] Further, safety issues were connected not only to the unique nature of warrant searches, but also to the particular object of these searches: "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."[255] Read in the context of the opinion as a whole, these words take on a meaning entirely different from that intended by the *Wilson* Court.

Finally, the third element of "articulable facts supporting the detention" was also tied to the special characteristics of the seizure at issue. In *Summers*, the Court deemed it "appropriate" to consider not only the mere existence of individualized suspicion, but also its "nature."[256] *Summers*'s individualized suspicion was of the highest level required for seizures – probable cause. Further, this probable cause was not merely arrived at by a law enforcement official, but also by a judicial officer involved in the warrant process. Justice Stevens found the presence of a warrant in *Summers* to be particularly relevant:

> The existence of a search warrant . . . provides an objective justification for the detention. A judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime. Thus a neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the privacy of a home. The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.[257]

---

252. *Id.* at 702.
253. *Id.* at 702-03.
254. *Id.* at 702.
255. *Id.* (emphasis added).
256. *Id.* at 703.
257. *Id.* at 703-04.

Summers's seizure was not justified by some per se right to detain him. Instead, *Summers*'s holding clearly established that probable cause and a warrant were the requisite ingredients for this particular detention: "We hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[258]

In *New York v. Class*, decided five years after *Summers*, the Court adhered to its restrictive interpretation of the seizure right crafted by Justice Stevens in *Summers*.[259] Justice O'Connor, writing for the *Class* majority, reiterated *Summers*'s three factors with slightly different phrasing: (1) "the safety of the officers was served by the governmental intrusion", (2) "the intrusion was minimal," and (3) "the search stemmed from some probable cause focusing suspicion on the individual affected by the search."[260] However, as noted above, *Class* contained an even more thought-provoking pronouncement than its assertion that the three factor test applied to *Summers*.[261] It identified *Mimms* as a case built on *Summers*'s three prongs.[262] *Mimms*, the precedent most central to *Wilson*'s holding, was based on a test which included the *formation of individualized suspicion* toward the person affected by the intrusion. In fact, *Class* made *Mimms*'s requirement of individualized suspicion explicit: "In *Pennsylvania v. Mimms* . . . the officers had personally observed the seized individual in the commission of a traffic offense before requesting that he exit his vehicle."[263]

The *Summers* three-factor test was incorporated in the *Mimms* rule.[264] However, although Chief Justice Rehnquist cites *Summers* to support his balancing of interests in *Wilson*,[265] the *Summers* three-factor test is conspicuously absent. Yet, in order to determine if *Wilson* falls within the *Summers/Mimms/Class* line of case law, an officer's demand of a passenger to exit a vehicle needs to be tested against this three-factor formula. The first factor, which involves the "safety of the officers . . . served by the governmental intrusion," may at first blush seem to be in the government's favor.[266] Yet, *Class* recharacterized this first hurdle, making it more difficult to clear. A genuine officer safety issue would arise when "a search or seizure has as its

258. *Id.* at 705.
259. New York v. Class, 475 U.S. 106, 117-18 (1985).
260. *Id.*
261. *See supra* notes 106-11 and accompanying text (discussing *Class*).
262. *Class*, 475 U.S. at 117-18.
263. *Id.* at 117.
264. *Id.* at 117-18.
265. Maryland v. Wilson, 117 S. Ct. 882, 886 (1997).
266. *Id.* at 117.

immediate object a search for a weapon."[267] However, "[w]hen the officer's safety is less directly served by the detention, something more than objectively justifiable suspicion is necessary to justify the intrusion if the balance is to tip in favor of the legality of the governmental intrusion."[268] Interestingly, the *Class* Court then offered *Mimms as an example where an officer's safety is "less directly served."*[269] In this "less direct" situation, not only was individualized suspicion necessary for official action, *probable cause* also must exist.[270] This requirement simply cannot be satisfied in *Wilson*. Unlike *Mimms*, in which the personal observations of law breaking related to the person ultimately seized, in *Wilson* the violations were connected to a third party, the driver. When Trooper Hughes ordered Wilson out of the car, he had *no* probable cause whatsoever that Wilson caused the car to speed sixty-four miles per hour in a fifty-five mile-per-hour zone. Thus, *Wilson* founders upon the first factor.

Wilson fares no better with the second factor: "[t]he intrusion was minimal."[271] Perhaps Chief Justice Rehnquist would offer that for all practical purposes the only change resulting from Trooper Hughes's order was to place Wilson outside of the car rather than inside of it.[272] Yet, this is not what is meant by "minimal." Again, context is crucial. Seizing Summers was minimal because it was less intrusive than the search of his home by warrant.[273] Ordering Mimms out of his car was minimal, or "*de minimis*," because the police had already lawfully detained him.[274] But Wilson, a passenger who happened to be in a car driven by a speeder, was subject to no such comparable authority. Therefore, detaining his person did not take place within the backdrop of greater official intrusion, but instead took place within a vacuum.

The third element of the three factor test, "the search stemmed from some probable cause focusing suspicion on the individual affected by the search," is the factor left most wanting in *Wilson*.[275] Again, Summers' home was previously targeted in a search warrant, and Mimms had been seen personally violating the traffic laws. Meanwhile, Wilson merely sat in a passenger seat of a lawfully stopped car.[276]

---

267. New York v. Class, 475 U.S. 106, 117 (1985).
268. *Id.*
269. *Id.* (emphasis added).
270. *Id.* at 117-18.
271. *Id.*
272. Maryland v. Wilson, 117 S. Ct. 882, 886 (1997).
273. Michigan v. Summers, 452 U.S. 692, 702-03 (1981).
274. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977).
275. New York v. Class, 475 U.S. 106, 117-18 (1986).
276. *Wilson*, 117 S. Ct. at 884. Of course, it might be tempting to argue that Trooper

Close inspection of *Summers* and *Mimms* reveals that these cases cut against *Wilson*'s reasoning. Far from being invitations for extensions of per se police power, these decisions adhered to justifications in the individual case. Yet, logical inconsistency offered no obstacle for the Court in *Wilson*. After all, *Whren* demonstrates balancing is often trotted out as a way to approve a state intrusion when the government does not have sufficient evidence.[277] Balancing may therefore have been employed at the start because Trooper Hughes's reasons for ordering Wilson to exit failed to sway the lower courts.

B. The Per Se Nature of Wilson*'s Rule Is Both Unfounded and Inconsistent*

In *Wilson*, Chief Justice Rehnquist balanced his way into crafting the flat rule that police may order any passenger out of a lawfully stopped vehicle. This was in spite of his equally unequivocal statement in *Robinette* – itself only months old – that the Court had "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."[278] Wilson pointed out this inconsistency, prompting the Chief Justice to respond:

> Respondent argues that, because we have generally eschewed bright-line rules in the Fourth Amendment context, . . . we should not here conclude that passengers may constitutionally be ordered out of lawfully stopped vehicles. But, that we typically avoid *per se* rules concerning searches and seizures does not mean that we have always done so; *Mimms* itself drew a bright line, and we believe the principles that underlay that decision apply to passengers as well.[279]

This unabashed selective use of balancing borders upon intellectual dishonesty. Certainly there should be some set of standards for determining when a bright-line rule is appropriate and when it is not. Professor Wayne LaFave, whom the Supreme Court in *New York v. Belton*[280] quotes regarding

---

Hughes saw Wilson make various furtive movements and that he therefore suspected Wilson of illegal activity. Yet, unfortunately, this was not the focus of the probable cause prong of the three-part test. Summers and Mimms were seizable despite a lack of facts specifically pointing to their *danger* because other circumstances had *previously connected them with criminality*. If indeed facts regarding an individual's apparent danger to the officer were relevant to the inquiry (in other words, if the Court had limited an officer's right to order out passengers to only those whom officers reasonably suspected were armed and dangerous), then *Wilson* would have been a different case. In fact, it would have been nothing more than a restatement of *Terry*.

277. Whren v. United States, 116 S. Ct. 1769, 1776 (1996).

278. Ohio v. Robinette, 117 S. Ct. 417, 421 (1996).

279. Maryland v. Wilson, 117 S. Ct. 882, 885 n.1 (1997) (citation omitted).

280. 453 U.S. 454 (1980).

the benefits flowing from bright lines offers "four questions" to consider when pondering whether to adopt a bright-line rule:

> (1) Does [the bright line rule] have clear and certain boundaries, so that it in fact makes case-by-case evaluation and adjudication unnecessary? (2) Does it produce results approximating those which would be obtained *if* accurate case-by-case application of the underlying principle were practicable? (3) Is it responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable? (4) Is it not readily subject to manipulation and abuse?[281]

In applying LaFave's four questions to *Wilson*, the Court's rule started out strong because it easily met the first criterion of having "clear and certain boundaries."[282] The police right to order out passengers is simply the right to compel them to exit the vehicle they are occupying. The right triggered clearly enough; the officer may exercise the right whenever the officer lawfully stops a vehicle. However, it falls far short of adequately answering the second question's concerns because its results do not even attempt to "approximate those which would be obtained if accurate case-by-case application" were practicable.[283] The *Wilson* order-out rule was meant to protect officers from passengers posing danger while seated in automobiles. Yet, it applies to *all* passengers, even those showing no signs whatsoever of danger. Thus, it will scoop up all individuals, harmless as well as dangerous. In contrast, a case-by-case evaluation based on *Terry*'s traditional and, for decades, apparently workable reasonable suspicion standard would a cast a much more narrowly tailored net that identified only those the officer suspects of posing a risk of harm.

---

281. Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 325 (1982) [hereinafter LaFave, *Fourth Amendment*]. The Supreme Court quoted the following language:

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

New York v. Belton, 453 U.S. 454, 458 (1980) (quoting Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141).

282. LaFave, *Fourth Amendment*, *supra* note 281, at 325.

283. *Id.*

Wilson's per se rule fares no better with LaFave's third question.[284] There is no genuine need to forego a case-by-case inquiry into a passenger's dangerousness.[285] Officers, having daily (for three decades) applied *Terry*'s reasonable suspicion standard in a variety of contexts to determine the potential of a suspect being armed and dangerous, should be able to employ this common sense test with passengers.[286]

Finally, *Wilson* creates concerns as to the fourth question, whether the rule is "readily subject to manipulation and abuse."[287] *Robinette* offered a prime example of *Wilson*'s potential hazards to personal security. Like Jerry Lee Wilson, Robert Robinette was ordered out of a car during a lawful traffic stop.[288] Interestingly, once he had Robinette out of the car, Deputy Newsome felt free to quiz him regarding possession of contraband, such as weapons or drugs.[289] In fact, he framed his question to Robinette as one that should be answered "before you get gone," despite the fact that he no longer had a legal justification for restricting Robinette's movement.[290] Had crack cocaine not fortuitously fallen from Wilson's person, one could easily see Wilson receiving similar questioning.

Hence, LaFave's standards offer no insight into the Court's selection of when to draw a bright line in Fourth Amendment litigation. Recent cases considering bright lines point to both an answer and a disturbing pattern. In *Robinette*, the Court rejected a per se rule that would have created an obligation for police to warn citizens of certain Fourth Amendment rights. Specifically, the Ohio Supreme Court mandated that the officer inform persons stopped for traffic offenses "when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation" in order to request consent to search.[291] The *Robinette* Court found that voluntariness of consent was an issue of fact "determined from all the circumstances" and not just from the existence or absence of a warning.[292] In reaching this result,

---

284. *Id.*

285. *See id.* (listing need to forego case-by-case inquiry as factor in adopting bright-line rule).

286. *See infra* Part IV.C (applying *Terry* to *Wilson*'s facts).

287. LaFave, *Fourth Amendment*, *supra* note 281, at 325.

288. *See supra* notes 149-55 and accompanying text (discussing *Robinette*'s facts in detail).

289. Ohio v. Robinette, 117 S. Ct. 417, 419 (1996).

290. *Id.*

291. *Id.* at 420. The state supreme court offered the following language as an example: "At this time you legally are free to go." State v. Robinette, 653 N.E.2d 695, 696 (Ohio 1995), *rev'd*, 117 S. Ct. 417 (1996).

292. *Robinette*, 117 S. Ct. at 421 (citing Schenckloth v. Bustamonte, 412 U.S. 218, 231 (1973)).

the *Robinette* Court cited *Schneckloth v. Bustamonte*,[293] in which the Court refused to adopt a warning requirement that persons be advised that they have a right to refuse to consent to a search.[294] The reasoning in *Schneckloth* centered on the Court's concern for an accurate reading of "the totality of all the circumstances" to determine voluntariness.[295] In both *Robinette* and *Schneckloth*, the Court stressed the need for accuracy on a case-by-case basis rather than adopting a per se requirement providing a clear sign of voluntariness in each case. Interestingly, the lack of accuracy which would result from the implementation of the warning requirements of "you are free to go" and "you are free to refuse consent" would be to the government's detriment. The concern is that cases could occur in which the individual did voluntarily consent, yet an unheeded warning requirement would still vitiate the permission to search. Thus, the Court eschewed the bright line warning mandate because it deemed accuracy in considering all the facts a better protector of government interests.

The Court has demonstrated the same solicitous concern for societal rights in Fourth Amendment cases outside of the warning context. In *Florida v. Bostick*,[296] the Florida Supreme Court laid down a per se rule that all questioning of passengers aboard a bus constituted a seizure because the individual approached always felt that he or she was not free to leave.[297] The Supreme Court refused to let this rule stand, announcing that the proper inquiry analyzed "all the circumstances surrounding the encounter."[298] Once again, the accuracy sacrificed by a bright-line test would harm government interests. A flat rule would define Fourth Amendment seizures more broadly, covering even some circumstances when an individual did not feel the need to comply with police requests.[299] Thus, the Court has maintained a consistent track record of rejecting bright-line rules that curb police power.

The Court experiences no such distaste for per se rules that increase the reach of government power in the Fourth Amendment context. In a per curiam opinion, the *Mimms* Court expanded police authority to order drivers out of cars. *Wilson* further expanded this power to passengers in a similarly expeditious fashion. Moreover, when the Court expanded the search incident to the arrest right in *Belton* to include the entire passenger compartment of

293. 412 U.S. 218 (1973).

294. *Robinette*, 117 S. Ct. at 421; Schenckloth v. Bustamonte, 412 U.S. 218, 231-33 (1973).

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

296. 501 U.S. 429 (1991).

297. Bostick v. State, 554 So. 2d 1153, 1154 (1989), *rev'd*, 501 U.S. 429 (1991).

298. Florida v. Bostick, 501 U.S. 429, 439 (1991).

299. *Id.* at 435-37.

stopped vehicles, it argued that this bright line was a positive development because it clarified Fourth Amendment rights: "In short, '[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'"[300] Thus, the Fourth Amendment should be made bright-line simple so that officers easily may apply it.

Strangely, the Court has taken on the least pressing of causes: aiding police in the avoidance of missteps in the criminal justice system. The justices concern themselves with the time constraints and the lack of expertise of police, the *law enforcement professionals* who have chosen to train and to operate daily within the intricacies of the law. Meanwhile, the Court has shown no similar consideration for average citizens, who are too busy with their own careers and families to apprise themselves of every layer of nuance that the Court adds with each new Fourth Amendment case. These are the true lay persons in the most need of guidance through warnings or bright lines.

C. Wilson*'s Rule Exposes the Court's Irrational Fear of the Reasonable Suspicion Standard*

In defending his use of statistical data from concerns raised by Justice Stevens, Chief Justice Rehnquist noted: "Justice Stevens agrees that there is 'a strong public interest in minimizing' the number of assaults on law officers, and we believe that our holding today is more likely to accomplish that result than would be the case if his views were to prevail."[301] Certainly, expanding the powers of police to control citizens might indeed promote officer safety. So would limiting other constitutional freedoms. In fact, law enforcement longevity could probably increase dramatically by suspending the Fourth Amendment entirely.

The willingness of the Court to leave itself open to such "slippery slope" criticism is telling. Despite decades of decisional law explicitly hewing to individualized suspicion and Chief Justice Rehnquist's own months-old description of the Court consistently eschewing bright-lines, the *Wilson* Court, without a sentence of hesitation, simply balanced its way to a per se rule. Why would the Court choose to suffer such selective amnesia? Perhaps, like other amnesiacs, it chose to forget something too frightening to face. Here, the peril the Court irrationally avoided was reasonable suspicion's concrete constraint on law enforcement.

---

300. New York v. Belton, 453 U.S. 454, 458 (1980) (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1981)).

301. Maryland v. Wilson, 117 S. Ct. 882, 886 n.2 (1997) (citation omitted).

Reasonable suspicion, however, is a very straightforward and workable idea. The Court has taken great pains to define probable cause, the level of individualized suspicion embedded within the Fourth Amendment itself, as a simple concept: "Among the adjectives used to describe the standard were 'practical,' 'fluid,' 'flexible,' 'easily applied,' and 'nontechnical.' The probable-cause standard was to be seen as a 'commonsense' test whose application depended on an evaluation of the 'totality of the circumstances.'"[302] Moreover, the Court recognized the realities of the law enforcement profession and aimed to preserve probable cause's usefulness even in the haste typical of criminal investigations.[303] Of course, reasonable suspicion is an even *less* demanding standard, developed as a means for allowing police action on facts falling short of probable cause.

The Court's granting of certiorari in *Wilson* demonstrated its aversion to even reasonable suspicion's lessened level of individualized suspicion. This case possessed a wealth of specific and articulable facts to support reasonable suspicion. Trooper Hughes's ordering of Jerry Lee Wilson out of the car was not based on a groundless whim.[304] The trooper found himself alone at night, chasing a car filled with three occupants that refused to yield to his siren and lights for a mile and a half.[305] During this pursuit, both of the vehicle's passengers repeatedly looked at him and ducked below sight level.[306] When the car finally did stop, its driver abruptly changed tactics by exiting the car to meet Trooper Hughes away from the car.[307] Hughes noted that the driver's trembling nervousness was matched only by the passenger's sweaty agitation.[308] The driver's initial disregard of authority, the passenger's furtive movements, the driver's unsolicited exit, and the palpable nervousness easily suggest that the car's occupants had something terribly incriminating and possibly dangerous to hide inside the car. In fact, it would seem that only the dullest or most courageous of officers would not, in this tense atmosphere, fear that these persons might pose immediate danger.

A prosecutorial blunder barred *Terry* from providing the most straightforward solution to this matter. At the suppression hearing, the State never advanced reasonable suspicion as a basis for Trooper Hughes's ordering

---

302. New Jersey v. T.L.O., 469 U.S. 325, 364 (1985) (Brennan, J., concurring in part and dissenting in part) (citations omitted).

303. Illinois v. Gates, 462 U.S. 213, 235 (1983).

304. *See supra* Part III.A (discussing facts in *Maryland v. Wilson*).

305. *Wilson*, 117 S. Ct. at 884.

306. *Id.*

307. *Id.*

308. State v. Wilson, 664 A.2d 1, 2 (Md. Ct. Spec. App. 1995), *rev'd*, 117 S. Ct. 882 (1997).

Wilson out of the car.[309] Thus, the judge at the hearing thus never ruled on the reasonable suspicion issue.[310] Maryland's Court of Special Appeals held that the government did not properly preserve this claim for appellate review.[311] The Supreme Court, with its broad discretion over case selection via certiorari, curiously chose a passenger-order-out case in which the reasonable suspicion issue was not before it. Thus, it could frame the matter as an all-or-nothing case: allow an officer to make the small request that a passenger get out of a car that was already stopped or risk the lives of police officers. The resulting diminution of the Fourth Amendment's individualized suspicion mandate demonstrates how poor a choice *Wilson* was for Supreme Court review.

The Court's distrust of its own *Terry* standard is particularly troubling, as evidenced by the lower court's decision in *Wilson*. Having rejected the per se prerogative the prosecution sought, Judge Moylan hesitated to demand a full showing of reasonable suspicion, opting instead for a third, lesser level of justification that he labeled "heightened caution."[312] The state court's willingness to create unnecessary complexity in the form of a new level of suspicion represents the potential acceleration of a vicious cycle. Judges, uncomfortable with weighing all the specific and articulable circumstances needed for reasonable suspicion when officer safety is at stake, may back away from applying the standard. Lack of use of reasonable suspicion causes it to become increasingly rare and exotic. This uniqueness, in turn, makes the application of reasonable suspicion a still more daunting analytical task, possibly causing courts to marginalize its use still further. The result is ironic – a standard specifically designed to ease the officer's job and to promote his or her safety may increasingly be seen as unworkable and even dangerous.

D. Wilson*'s Rule Tears a Hole in the Constitutional Protection of Passengers and Creates a Free Zone for Official Discretion and Abuse*

Arguably, the *Wilson* Court was not entirely incorrect when it characterized as "minimal" its granting of police authority to summarily order passengers from their vehicles.[313] In the bigger picture of the assault upon the Fourth Amendment, this case was simply the latest advance against the right

309. *Id.* at 3.

310. *Id.*

311. *Id.*; *see also* Maryland v. Wilson, 117 S. Ct. 882, 887 n.1 (1997) (Stevens, J., dissenting).

312. *Wilson*, 664 A.2d at 13.

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

of individualized suspicion. After all, the mandate that police act only upon a justification based on observed facts has been slowly bled, over the decades, into virtual nonexistence. *Carroll*'s probable cause requirement was first diluted into reasonable suspicion in *Terry* by the same rationale relied on by the *Wilson* Court: officer safety. Further, the balancing process alluded to in *Terry* swallowed the general rule adhering to individualized suspicion, allowing cases such as *Martinez-Fuerte* and *Sitz* to simply eliminate any fact-based justification outright.

Yet, the devolution of the individualized suspicion requirement was not so simple or direct. *Martinez-Fuerte* and *Sitz* were initially viewed as representing the exception rather than the rule. After all, the justices authoring the opinions stressed the unique factual contexts of checkpoints. *Brignoni-Ponce* and *Prouse* countered the balancing approach by reasserting the need for individualized suspicion in the context of the typical roadway stop. Even *Mimms*'s per se order-out rule, with the gloss given to it by *Class*, was limited to specific circumstances, one of which required the existence of probable cause to believe that the individual affected had engaged in wrongdoing. Therefore, *Wilson*'s per se prerogative, which cut against the caution expressed in *Prouse* and ignored the three factors undergirding *Mimms* and *Class*, did not in the final analysis create a merely "minimal" intrusion on the individual.

For all the passengers on our nation's roads, the loss of protection from an individualized suspicion standard is difficult to overstate. Justice Kennedy understood the implications of the Court's rule:

> The distinguishing feature of our criminal justice system is its insistence on principled, accountable decisionmaking in individual cases. If a person is to be seized, a satisfactory explanation for the invasive action ought to be established by an officer who exercises reasoned judgment under all the circumstances of the case.[314]

Justice Kennedy then connected *Wilson* with *Whren*, noting the cumulative impact of these two cases:

> The practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances. When *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police. If the command to exit were to become commonplace, the Constitution would be diminished in a most public way.[315]

Add *Robinette* into the mix and, suddenly, citizens in the passenger seat could find themselves pulled over for someone else's minor traffic violation,

314. *Id.* at 890 (Kennedy, J., dissenting).

315. *Id.*

ordered out of the car for no reason, and questioned about items as exotic as guns or drugs. The invasions caused by the combination of *Wilson*, *Whren*, and *Robinette* are now an ever-present reality on our roads. Such a precipitous erosion of Fourth Amendment rights was wholly unnecessary because the simple tool of reasonable suspicion stood ready to aid officers in determining the dangerous from the innocent.[316]

Further, *Wilson*'s careless reasoning muddied other Fourth Amendment issues. Chief Justice Rehnquist's flat assertion that the only change suffered by passengers ordered out of a vehicle is that "they will be outside of, rather than inside of, the stopped car," is based on silent assumptions inconsistent with an entire line of case law defining Fourth Amendment seizure.[317] In *California v. Hodari D.*,[318] the Court confronted with the issue of whether a person was seized during a police foot pursuit.[319] Justice Scalia, writing for the majority, concluded that an arrest (seizure) of a person occurs with "*either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority."[320] Stepping out of a vehicle pursuant to the command of a uniformed officer who has pulled the car over by lights and sirens clearly constitutes the passenger's submission to police authority. It is a seizure according to law crafted by the Court as late as 1991. However, since Chief Justice Rehnquist has deemed that the only difference visited upon the passenger by *Wilson* is a change in location in reference to the car, logic dictates that the passenger was *also seized before* he was commanded out of the vehicle.

Such a conclusion flies in the face of other, equally current, seizure-of-the-person precedent. For example, in *Florida v. Bostick*, police approached a bus passenger as he remained seated during a scheduled stop.[321] The Court determined that such police-citizen contacts do not automatically constitute seizures even though the individual, wishing to remain to continue his ride on the bus, may not feel "free to leave."[322] The confinement an individual feels in a bus cannot be charged to police, because it is not caused by official conduct, but by the person's desire to fulfill his own business – to be on the bus when it departs.[323]

---

316. *Id.* Justice Kennedy noted: "As the standards suggested in dissent are adequate to protect the safety of the police, we ought not to suffer so great a loss." *Id.*

317. *Id.* at 886.

318. 499 U.S. 621 (1991).

319. California v. Hodari D., 499 U.S. 621, 623 (1991).

320. *Id.* at 626.

321. Florida v. Bostick, 501 U.S. 429, 431 (1991).

322. *Id.* at 435-38.

323. *Id.* at 435-36.

It could be argued that, like the bus passenger in *Bostick*, Wilson could not be considered as "seized" simply because he was in a stopped vehicle. Indeed, the state court envisioned passengers as perfectly free to abandon the driver and hail a cab.[324] Further, Justice Stevens echoed this logic: "The passengers [in the lawfully stopped car] had not yet been seized at the time the car was pulled over, any more than a traffic jam caused by construction or other state-imposed delay not directed at a particular individual constitutes a seizure of that person."[325]

It is doubtful that Chief Justice Rehnquist meant (by his cavalier statement that an order-out only changes a passenger's location) to revisit the definitional boundaries of seizure of the person. Judge Moylan would tell us as much because he cautioned against investing too much in judicial language falling outside of the holding.[326] Of course, this points to the very problem. When it comes to weighing individual rights, the Court is all too ready to carelessly minimize the interests at stake.[327] Thus, a thoughtless and all too malleable balancing analysis has replaced the concrete protections of individualized suspicion.

V. Conclusion

Imagine yourself as a passenger in a car, unaware that the driver is speeding. Perhaps you have taken special care over your hair or suit because you are about to make a presentation at a business meeting, seek a loan, or meet your new boss. Or possibly, you hold a delicate item in your lap: a flower arrangement for a friend or a birthday cake for your child's party. Maybe you simply have spent the better part of a quarter of an hour getting yourself situated just right so that you no longer feel that chronic back pain, or you have just gotten comfortable after stowing away your wheelchair. These concerns, albeit minor to anyone else, are the cares of everyday life. However, when the police light flashes behind you, they lose all value.

---

324. State v. Wilson, 664 A.2d 1, 10 (Md. Ct. Spec. App. 1995), *rev'd*, 117 S. Ct. 882 (1997).

325. Maryland v. Wilson, 117 S. Ct. 882, 889 (1997).

326. *Wilson*, 664 A.2d at 6-7.

327. *See, e.g.*, Vernonia School Dist. 47J v. Acton, 115 S. Ct. 2386, 2393 (1995) (finding "privacy interests compromised" by school coaches and teachers who compelled urinalysis of student athletes as "in our view negligible"); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451 (1990) (finding sobriety checkpoint's "intrusion on motorists" to be "slight"); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 626-27 (1988) (comparing forced urinalysis of railroad employees akin to "regular physical examination"); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (describing "additional intrusion" on driver ordered to exit his vehicle as "*de minimis*"); United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (characterizing intrusion caused by checkpoint as "quite limited").

Regardless of the inclement weather outside, the splashing of the passing cars, the fragility of the gift on your lap, or even the pain in your back, an officer has an absolute right to order you out of the car. This is so even if you exhibit no signs of danger to the officer's safety. Indeed, it is true even if you are completely innocent of any wrongdoing. Simply because of your unlucky choice in drivers, you have lost control over one of the most basic freedoms: the location and movement of your body.

There was a time when the Court itself was aware of the enormity of the individual right implicated by seizures of the person: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[328] However, the sanctity of this basic right has recently been threatened. Chief Justice Rehnquist, the author of the majority opinion in *Wilson*, had previously labeled the motorist's freedom from random seizures as: "only the most diaphanous of citizen interests."[329] The short shrift that he gave to the individual's interests in his *Wilson* balancing analysis demonstrates that the Chief Justice considers the passenger's rights equally lightweight. Therefore, since the right of the citizen is insignificant, especially in light of the government's ever important safety goals, it can be balanced away. In fact, it can even be dismissed as "minimal."[330]

Even if the Court's dubious diminution of Wilson's seizure interests were somehow accepted as accurate, its characterization of Trooper Hughes' actions would still fail to address a crucial Fourth Amendment concern: How can the Court tolerate *any unjustified invasion* of constitutional dimension, however "minimal"? The balancing process, in understating the individual interests at stake, equates small with nonexistent. By participating in such sophistry, the Court has failed to heed a basic lesson embedded in its own precedent: any seizure, even one "limited in magnitude" compared to other invasions, is still "constitutionally cognizable," and therefore must meet the basic Fourth Amendment mandates.[331]

In the past, the Court's vision was more acute, because it could recognize intrusions upon individuals even smaller than the intrusion in *Wilson*. In *Brignoni-Ponce*, the Court was able to discern the potential of "unlimited interference with [motorists'] use of the highways" stemming from stops

328. Terry v. Ohio, 392 U.S. 1, 9 (1968); Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

329. *Wilson*, 117 S. Ct. at 890, n.12 (Stevens, J., dissenting); Delaware v. Prouse, 440 U.S. 648, 650 (1978) (Rehnquist, J., dissenting).

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

331. *Prouse*, 440 U.S. at 661.

lasting "no more than a minute" and occurring only in certain geographic regions of the country.[332] Curiously, the Court failed to recognize similar dangers arising out of the seizure in *Wilson*, even though it was potentially longer in duration and subject to strike anywhere in the nation.

Moreover, the unreviewable discretion that the Court built-in to the *Wilson* prerogative will impose its daily burden much more on the innocent than on the guilty. Quite simply, the vast majority of people on our roads are "innocent citizens."[333] *Wilson*, by viewing each exit demand to a passenger in artificial isolation, distorted the cumulative impact of its rule on law abiding individuals: "[C]ountless citizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands may well consider the burden to be significant."[334] It is this aggregation of "thousands upon thousands of petty indignities" that the *Wilson* Court undervalues.[335] In so doing, it underrates the Fourth Amendment itself.

332. United States v. Brignoni-Ponce, 422 U.S. 873, 880, 882 (1975).

333. *Id.* at 882.

334. Maryland v. Wilson, 117 S. Ct. 882, 888 (Stevens, J., dissenting).

335. *Id.*