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NOTE

JUST ALONG FOR THE RIDE: THE TRIBULATIONS OF *MARYLAND v. WILSON*

I. INTRODUCTION

The Fourth Amendment of the United States Constitution provides a measure of protection from unreasonable police interference.¹ However, in February of 1997, the United States Supreme Court ruled that this protection is more limited than once realized.² In its reversal of the Maryland Court of Appeals, the Supreme Court ruled that police officers have the power to order passengers from legally stopped motor vehicles regardless of the reason.³ In its 7-2 decision, the Court broadened the application of its decision in *Pennsylvania v. Mimms* to apply to passengers as well as drivers.⁴ The Court re-emphasized that "the touchstone of Fourth Amendment analysis is the reasonableness of the particular governmental invasion of a citizen's personal security."⁵ When considered in context with two previous Fourth Amendment decisions, *Wilson* raises many startling questions about the future of individual liberties, police power, and the limits of Fourth Amendment protection.⁶ This note criticizes the Court's decision in *Wilson* on several bases: (1) the Court's safety rationale is flawed and misleading; (2) such a rule allows for an unreasonable seizure of passengers without any showing of probable cause; (3) the Court created a bright-line rule which is not subject to any standard of review, thus it is easily

1. "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." U.S. CONST. amend. IV.

2. See *Maryland v. Wilson*, 519 U.S. 408 (1997).

3. See *id.* at 886.

4. See *id.* at 885. In *Mimms*, the Court held that a police officer may order a driver out of his vehicle as a matter of course during a traffic stop. See *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

5. See *Wilson*, 117 S. Ct. at 883.

6. See *Ohio v. Robinette*, 519 U.S. 33 (1996); *Whren v. United States*, 517 U.S. 806 (1996).

abused; and (4) when examined in context with other recent Fourth Amendment decisions, the ruling represents an undesirable erosion of personal liberty.

II. HISTORICAL BACKGROUND

Fourth Amendment jurisprudence has enjoyed a rich legacy in the last fifty years.⁷ However, civil liberties plus automobiles often equals diminished protections for individuals. The long road to lost Fourth Amendment protection began seventy-four years ago with *Carroll v. United States*.⁸

Carroll represented the birth of the "automobile exception".⁹ This exception allows the police to search an automobile without first securing a warrant.¹⁰ The Court recognized the Fourth Amendment protections of individuals within vehicles, but its ruling greatly reduced those protections nevertheless.¹¹ The Court's rationale stated that high mobility of automobiles justifies the lesser degree of protection:

[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.¹²

This "ready mobility" rationale continued to be the primary argument by the Court for many decades following *Carroll*.¹³ However, the Court would soon expand the "automobile exception's" scope.

In addition to "ready mobility," the Court's other rationale for the "automobile exception" concerns a passenger's expectation of privacy.¹⁴ In *South Dakota v. Opperman*,¹⁵ the Court held that "[b]esides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."¹⁶ This ruling demonstrated the courts' continually evolving attitude towards the rights of

7. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1969); *Adams v. Williams*, 407 U.S. 143 (1972); *Cupp v. Murphy*, 412 U.S. 291 (1973); *Reid v. Georgia*, 448 U.S. 438 (1980); *Maryland v. Buie*, 494 U.S. 325 (1990).

8. 267 U.S. 132 (1925).

9. See *Carroll v. United States*, 267 U.S. 132 (1925).

10. See *id.*

11. See *id.*

12. *Id.* at 153.

13. See, e.g., *Cooper v. California*, 386 U.S. 58, 59 (1967); *Chambers v. Maroney*, 399 U.S. 42, 52 (1970); *Cady v. Dombrowski*, 413 U.S. 433, 442 (1973); *Cardwell v. Lewis*, 417 U.S. 583, 588 (1974); *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976); *United States v. Ross*, 456 U.S. 798, 806 (1982).

14. See *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

15. 428 U.S. 364 (1976).

16. *Id.*

individuals while in their vehicles.

Eventually, the Court began to expand upon the “lesser privacy” rationale. In *Caddy v. Dombrowski*,¹⁷ the Court emphasized that actual “ready mobility” need not even exist.¹⁸ The automobile in *Cady* was not capable of movement, yet the simple presence of the occupants within the vehicle acted to lessen their privacy interests.¹⁹ A further expansion occurred with *Cardwell v. Lewis*,²⁰ in which the Court held that a lesser expectation of privacy existed, because vehicle windows provide a plain view of sight.²¹

The original “automobile exception” case applied the exception to encompass the interior of vehicle upholstery.²² Even with this already broad treatment of the “privacy interest” rationale, the Court continued with an ever expansive trend. In *United States v. Ross*,²³ the Court upheld the search of a sealed package within a locked trunk.²⁴ In *United States v. Johns*,²⁵ the Court held likewise for wrapped packages within a covered pickup.²⁶

The Supreme Court applied a third theory which further diminished the already weakened protection for individuals within automobiles. In *Opperman*, the Court stated that, “[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls . . .”.²⁷ Thus, the high degree of regulation upon automobiles serves to lessen a privacy interest. “[I]ndividuals [have] always . . . been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate’s prior evaluation of those facts.”²⁸

These combined rulings have had not only a chilling affect upon a vehicle passenger’s ability to be searched, but recent cases also permit government sanctioned seizure. Under *Terry v. Ohio*,²⁹ an individual may be “seized” if the police have, “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”³⁰ Thus, a dual judicial inquiry determines whether the detention of a passenger is reasonable: first, the court examines, “whether the officer’s action was justified at its inception”,³¹ and second, the court determines whether the officer’s action, “was reasonably related in scope to the circumstances which justified the interference in the first place.”³²

17. 413 U.S. 433 (1973).

18. *See id.* at 442 (1973).

19. *See id.*

20. 417 U.S. 583 (1974).

21. *See Cardwell v. Lewis*, 417 U.S. 583, 588 (1975).

22. *See Carroll v. United States*, 267 U.S. 132 (1925).

23. 456 U.S. 798 (1982).

24. *See id.* at 806.

25. 469 U.S. 478 (1985).

26. *See id.*

27. *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976).

28. *Ross*, 456 U.S. at 807 n.8.

29. 392 U.S. 1 (1968).

30. *Id.* at 21.

31. *Id.* at 20.

32. *Id.*

The Court has greatly expanded upon the *Terry* analysis. In *United States v. Brignoni-Ponce*,³³ the Supreme Court carved an exception which permits the seizure of immigrants at the U.S. border for the purpose of questioning their citizenship.³⁴ *Whren v. United States*³⁵ proved to be a large expansion. The *Whren* Court held that the detention of a motorist by an officer does not violate the Fourth Amendment's prohibition of unreasonable "seizures," regardless of the officer's subjective intent for the vehicle.³⁶ In *Ohio v. Robinette*,³⁷ the Court ruled that an officer need not inform stopped motorists that they are 'legally free to go' before pursuing investigative ends other than those which precipitated the stop in the first place.³⁸ Both of these cases will be examined in detail later in this paper.

Thus, we turn to the heart of this paper, *Maryland v. Wilson*.³⁹ This case represents the greatest expansion to date of the "automobile exception". Namely, that vehicle passengers may be subject to police detention, even though no probable cause exists to suspect them of any wrong-doing at all.⁴⁰ Should this case prove to be insightful of the Court's future Fourth Amendment "seizure" decisions, then motorists in this country should feel a collective chill creeping down their spines.

III. STATEMENT OF THE CASE

On June 8, 1994, a Maryland State Trooper noticed a suspicious 1994 Nissan Maxima. The vehicle was speeding southbound along Interstate 95. The trooper determined the vehicle was traveling nine miles per hour above the speed limit, then gave chase.⁴¹

The trooper made some observations which left him puzzled. He observed a total of three individuals within the automobile. The two passengers were behaving strangely; they hid from sight and reappeared alternatively, all while looking back at the trooper.⁴² The trooper also observed that the automobile did not have front or rear licence plates, but instead a paper tag hung loosely from the rear. After considering these circumstances, the trooper stopped the vehicle.⁴³ The vehicle continued traveling for one and one-half miles before the driver acknowledged the siren by pulling over. Before the trooper was able to approach the vehicle on foot, the driver exited his car and walked towards the police car. The trooper ordered the driver to step back and the two met halfway between the vehicles. The trooper

33. 422 U.S. 873 (1975).

34. *See id.*

35. 517 U.S. 806 (1996).

36. *See id.*

37. 117 S. Ct. 417 (1997).

38. *See id.*

39. 117 S. Ct. 882 (1997).

40. *See id.*

41. *See Maryland v. Wilson*, 664 A.2d 1 (Md. App. 1995).

42. *See id.* at 2. The trooper later testified that this erratic movement by the two passengers made him concerned that they might have a gun and therefore he feared for his safety. *See id.* at 3.

43. *See id.* at 2.

informed the driver why he was stopped and ordered him to produce a license and registration card. The driver produced a Connecticut drivers' license and explained that the vehicle was a rental. The trooper ordered the driver to return to the vehicle and retrieve the rental papers.⁴⁴

At this point, the trooper realized that the driver was "extremely nervous" during their encounter. He stated, "[h]e appeared at times to be trembling and answered every question with a question," and this increased his overall suspicion.⁴⁵ He also observed that one of the passengers was "sweating and extremely nervous."⁴⁶ Based on his observation of the passenger's suspicious behavior, the trooper ordered the passenger out of the vehicle.⁴⁷ As the passenger exited and approached the officer, an amount of crack cocaine fell onto the ground.⁴⁸ The trooper arrested the passenger, who was later indicted for, "possession of cocaine with intent to distribute."⁴⁹

The passenger filed a motion to suppress the physical evidence against him, because his Fourth Amendment right against unreasonable search and seizure had been violated.⁵⁰ The trial court granted this motion and the State appealed.⁵¹

The singular issue in *Maryland v. Wilson* is whether the rule of *Pennsylvania v. Mimms*⁵² applies to passengers as well as drivers. May a police officer order a passenger from a vehicle *per se*?⁵³

A. Personal Liberty Wins the Day at the Maryland Supreme Court

The State of Maryland made four arguments supporting its proposition that evidence should be admissible against the passenger: (1) the trooper possessed sufficient suspicion to stop the passenger for questioning;⁵⁴ (2) the trooper possessed sufficient suspicion to frisk the passenger for weapons;⁵⁵ (3) the *Mimms* ruling itself

44. *See id.*

45. *Id.*

46. 664 A.2d at 2.

47. *See id.* at 3. Later, the trooper explained exactly why he ordered the passenger from the vehicle: 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 the time when [the driver] went back to his car, I asked [the passenger] to step out, that is my whole purpose of not approaching the vehicle, by myself, with the three occupants in the vehicle, I wanted each one out at a time to speak to each individual, for my safety.

Id.

48. *See id.* at 2-3.

49. *See Wilson*, 177 S. Ct. at 884.

50. *See Wilson*, 664 A.2d at 2.

51. *See id.*

52. 434 U.S. 106 (1977).

53. *See Wilson*, 117 S. Ct. at 885-886.

54. A police officer may lawfully "stop" an individual if the officer has probable cause to believe that the individual may be involved in criminal activity. *See Maryland v. Wilson*, 664 A.2d at 3 (1995) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

55. If an officer makes the determination during his "stop" that his safety or the safety of others is in danger, then he may "frisk" the suspect for weapons. The "frisk" is limited to a search of the individual's outer clothing (referred to as a "pat down") for possible weapons which might be used against the officer or others. *See Maryland v. Wilson*, 664 A.2d at 3, 6 (1995) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

already extends to passengers as a matter of legal authority;⁵⁶ and (4) the *Mimms* ruling itself already extends to passengers as a matter of logical inference.⁵⁷ Each of these arguments will be examined in turn.

First, Maryland argued the trooper possessed sufficient suspicion to stop the passenger for questioning.⁵⁸ The Maryland Court of Special Appeals rejected this argument:

What must be articulated to justify a Terry “stop” is a particularized suspicion that a crime has occurred, is then occurring, or is about to occur . . . The societal purpose served by a “Terry” stop is the prevention or detection of a crime. The justification for a “stop,” therefore, must be framed and phrased in terms of suspected crime. . . . [The trooper] articulated nothing with respect to any crime that he suspected [the passenger] of being involved in. The absence of an articulated basis for a Terry “stop” is . . . absolute here. . . .⁵⁹

The court stated that suspicion of past, present, or future criminal activity justifies a “stop” only when the officer stipulates that the reason for the stop is actually based on such a premise.⁶⁰

Indeed, the trooper never stated that he ever suspected the passenger of engaging in any crime in the past, present, or future. He merely stated that he ordered the passenger from the car because he feared for his own safety.⁶¹ In any case, the appellate court also rejected the “safety” argument and supported the lower court’s ruling that the safety concern was unreasonable.⁶²

Next, Maryland argued the trooper possessed sufficient suspicion to frisk the passenger for weapons.⁶³ The court rejected this argument and cited the trooper’s lack of any articulated purpose as to why a frisk was proper:

[T]he overarching fact is that [the trooper] never remotely articulated having entertained any such purpose. He did, to be sure, express some fear that, “possibly there could be a handgun in the vehicle.” The ostensible purpose for ordering [the passenger] out of the car, however, was to take [the passenger] out of proximity to such a possible weapon rather than to frisk him for a weapon.⁶⁴

56. See *Maryland v. Wilson*, 664 A.2d at 3 (1995).

57. See *id.*

58. See *id.* at 4.

59. See *id.* at 3.

60. See *id.* (citation omitted).

61. See 664 A.2d at 3.

62. See *id.* at 4. The lower court felt the “safety” argument unreasonable:

In this case the officer’s experience is 13 months as a trooper and this Court finds that when the officer allowed the driver of the vehicle to return to the car to obtain the rental documents he could not have had a reasonable suspicion that the person was armed and dangerous; and, therefore, any future intrusion into the right of the occupants of the car are violative of one’s Fourth Amendment proscription of unreasonable searches and seizures.

Id.

63. See *id.* at 3 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

64. *Wilson*, 664 A.2d at 3.

The trooper never stated that he suspected the passenger of possessing a weapon. He merely stated, "I had concern for my safety."⁶⁵

Even though this does constitute a "purpose" for ordering the passenger from the vehicle, (i.e., to separate him from any possible hidden weapon), it is not a valid "purpose" to conduct a Constitutionally impermissible "frisk."⁶⁶ The court's reasoning "split hairs," because the two purposes are essentially the same. However, the court clarified this by stating that it was not ruling whether or not the officer's actions were reasonable.⁶⁷ The court stipulated that its powers limited analysis to whether the lower court finding of "reasonableness" was erroneous.⁶⁸ The court held that reasonableness was justified.⁶⁹

Third, Maryland argued that the *Mimms* ruling extended to passengers as a matter of legal authority for three reasons.⁷⁰ First, the State argued that the Supreme Court applied *Mimms* to passengers through its decision in *Michigan v. Long*.⁷¹ The *Long* Court referenced the *Mimms* decision as follows:

In *Pennsylvania v. Mimms*, we held that police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous. Our decision rested in part on the "inordinate risk confronting an officer as he approaches a person seated in an automobile."⁷²

The Maryland court considered the State's argument misguided, because *Mimms* was not actually considered in the *Long* decision.⁷³ The court stated that casual singular or plural word usage by a court does not determine judicial weight and "[e]very word that is uttered in a legal opinion is not legal authority."⁷⁴

In the alternative, the State argued that the Supreme Court applied *Mimms* to passengers through *Rakas v. Illinois*.⁷⁵ The Maryland court disagreed, stating that the State misinterpreted the *Rakas* reference to *Mimms* and, in any case, the reference

65. *Id.*

66. *See id.*

67. *See id.* at 4.

68. *See id.*

69. *See Wilson*, 664 A.2d at 4.

70. *See id.* at 6.

71. 463 U.S. 1032 (1983).

72. *Wilson*, 664 A.2d at 6 (citation omitted).

73. *See id.* The court stated, "[t]he only significance that could conceivably be derived from this quotation for present purposes is that twice the word 'persons' appeared in the plural rather than the singular."

74. *Id.*

75. *See id.* In this case, the petitioners were passengers in a suspected robbery getaway car. Police stopped the car and upon searching it, they discovered a rifle under the passenger seat and box of shells in the glove compartment. The petitioners moved to suppress this evidence, claiming it violated the Fourth Amendment. The Supreme Court ruled that since the petitioners have neither a possessory or property interest in the car nor the rifle and shells, they had no expectation of privacy. The fact the petitioners were merely passengers did not entitle them to challenge the search under the passenger seat or inside the glove compartment. The Court ruled that Fourth Amendment rights are personal in nature, thus the petitioners lack of ownership prevented judicial standing to object to the search. *See Rakas v. Illinois*, 493 U.S. 128 (1978).

was mere dicta from a concurrence.⁷⁶ The court explained, “[t]he footnote in the *Rakas* opinion was responding to the dissent in the case and was making the point that an automobile generally, with no distinction even considered between driver and passenger, enjoys a lesser expectation of privacy than one may expect in his home.”⁷⁷

In summary, the Maryland court admonished the State for misinterpreting arguments in order to further its own position, “stare decisis is ill served if readers hang slavishly on every casual or hurried word as if it had bubbled from the earth at Delphi. Obiter dicta, if noticed at all, should be taken with a large grain of salt.”⁷⁸

The State finally insisted that if *Mimms* did not apply to passengers as legal authority, then it did apply as a matter of logical inference.⁷⁹ The Maryland court agreed and engaged in the same balancing test as the Supreme Court had in *Mimms*, applying it to passengers.⁸⁰

The court considered the additional intrusion from ordering a driver from an already-stopped vehicle to be “de minimis”.⁸¹ However, when the intrusion was upon the passenger, the court considered the intrusion greater, holding as follows:

A police interference with the presumptively unfettered liberty of a mere passenger, by contrast, cannot so easily be dismissed as “de minimis” or as something “hardly ris[ing] to the level of a petty indignity.” The passenger has not committed any wrongdoing, even at the level of a traffic infraction. The passenger may not be issued a traffic ticket or citation, let alone subjected to custodial arrest. The passenger is not required to furnish identification or any other documentation. Once the automobile has slowed down sufficiently for the passenger safely to alight, moreover, the passenger is subject to no mandatory detention whatsoever.⁸²

The court pointed out that warrantless activity is presumed invalid, unless the State can persuade a court otherwise.⁸³ Even though police safety is not an unreasonable argument, it is not enough to warrant such an intrusion upon a passenger.⁸⁴ The right to order a passenger from a vehicle is not automatic.⁸⁵ Since the State failed to meet its required burden of reasonableness, the Maryland court agreed that the passenger’s Fourth Amendment rights were violated; thus, the court suppressed the evidence.⁸⁶

76. See *Wilson*, 664 A.2d at 7.

77. *Id.*

78. See *id.* at 8. (citation omitted).

79. See *id.*

80. See *Wilson*, 664 A.2d at 8.

81. See *id.* at 10 (citation omitted).

82. *Id.*

83. See *id.*

84. See *id.*

85. The court pointed out that warrantless activity is presumed invalid, unless that State can persuade a court otherwise. Even though police safety is not an unreasonable argument, it is not enough to warrant such an intrusion upon a passenger. See *id.*

86. See *id.*

B. The Supreme Court Analysis

The United States Supreme Court accepted this case on Writ of Certiorari and listened to arguments in December 1996.⁸⁷ In a 7-2 decision, the Court overruled the Maryland Supreme Court and applied the *Mimms* rules to passengers.⁸⁸

The Supreme Court applied the same *Mimms* balancing test and explained, "reasonableness 'depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" "⁸⁹ The Court considered the government's interest in the safety of its police officers the same regardless of whether the occupant was a driver or passenger.⁹⁰ The Court reasoned that the presence of passengers increases the possibility of harm to an officer during a traffic stop.⁹¹

The Court weighed the officer's safety against the personal liberties of the passengers. The Court conceded a passenger's personal liberty interest is stronger than that of a driver; it stated: "[t]here is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers."⁹² However, the Court noted that when a vehicle is stopped, the passenger is stopped along with the driver; this occurs even though it was the driver's traffic infraction which predicated the stop.⁹³ The Court stated, "[t]he only change in [the passenger's] 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."⁹⁴ Further, the Court emphasized, "the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop."⁹⁵

The Court found support for its ruling in *Michigan v. Summers*.⁹⁶ In *Summers*, the Court held that persons may be seized within homes while police execute search warrants.⁹⁷ While *Summers* concerned the execution of a search warrant in a home, the Court ruled that the rationale was the same. The safety of police officers is less questionable when the officer fully takes charge of the situation.⁹⁸

87. See *Wilson*, 117 S.Ct. at 882.

88. See *id.* at 883.

89. See *Wilson*, 117 S.Ct. at 884-5 (citations omitted).

90. See *id.* at 885.

91. See *id.*

92. See *id.* at 886.

93. See *id.*

94. *Wilson*, 117 S.Ct. At 886.

95. *Id.*

96. See *id.* at 882 (citing *Michigan v. Summers*, 452 U.S. 692 (1981)).

97. See *Michigan v. Summers*, 452 U.S. 692 (1981).

98. The risk of harm to . . . police . . . is minimized if the officers routinely exercise unquestioned command of the situation. See *Wilson*, 117 S.Ct. at 882 (quoting *Michigan v. Summers*, 452 U.S. 692, 702-3 (1981)).

IV. ANALYSIS

Some may question the overall impact of the *Wilson* decision. "So I'm ordered out of the car my friend had been driving - no big deal." Indeed, some might not even consider this a personal invasion at all. What difference does it make if the passenger waits outside of the car instead of in the passenger's seat? This is the very logic behind *Wilson*.⁹⁹ Indeed, in this context the significance of the case seems trivial.

One criminal procedure expert supports the Court's rationale. Yale Law School Professor Akhil Reed Amar feels that "the ruling itself is not particularly significant."¹⁰⁰ Moreover, Amar explains that *Wilson* represents further evidence of how the Supreme Court is moving towards a general standard of reasonableness for all search and seizure cases.¹⁰¹ Amar considers the reasonableness standard much more practical than evaluating each case by considering "whether police had probable cause for a search or had properly obtained a warrant."¹⁰²

Despite what academics think, *Wilson* is anything but insignificant. This case represents one in a group of traffic stop cases which has been decided by the Court during recent terms. *Whren v. United States*¹⁰³ and *Ohio v. Robinette*¹⁰⁴ are further examples where the Court ruled in favor of police at the expense of the Fourth Amendment.¹⁰⁵ These factors transform *Wilson*'s effect from insignificant to far reaching.

A. A Safer Police Officer?

Police safety should always be of paramount importance to us all, but the Court's total reliance upon it was misguided. The heart of the *Wilson* rationale is officer safety.¹⁰⁶ The Court found safety, "both legitimate and weighty," and "too plain for argument."¹⁰⁷ Even so, the Court cited only 5,762 officer assaults and 11 officer deaths during 1994 as support for its rationale.¹⁰⁸ The majority conceded to the limitations on the data, remarking, "[i]t is, indeed, regrettable that the empirical data on a subject such as this are sparse, but we need not ignore the data which [does] exist simply because further refinement would be more helpful."¹⁰⁹

The dissent found that the statistics relied upon by the majority to be

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

100. See Mark Hansen, *Rousting Miss Daisy? U.S. Supreme Court Says Police Can Order Passengers Out Of Cars During Routine Traffic Stops*. 83 A.B.A.J. 22, May, 1997.

101. See *id.*

102. *Id.*

103. 116 S. Ct. 1679 (1996).

104. 117 S. Ct. 417 (1996).

105. See *infra* Part V.

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

107. *Id.* at 885 (citation omitted).

108. See *id.*

109. *Id.* at 885 n.2.

inconclusive.¹¹⁰ Even if police safety is “too plain for argument,”¹¹¹ the proffered statistics provided no support for the conclusion that the ruling will somehow affect the data.¹¹² Since the statistics say nothing about the number of passengers involved in these attacks, one is forced to speculate how many passengers commit assaults. As the dissent explained, “[a]ssuming that many of the assaults were committed by passengers, we do not know how many occurred after the passenger got out of the vehicle, . . . [or when] the passenger remained in the vehicle.”¹¹³ In short, the statistical hypothesis is too vague because it equally supports the proposition that the ordering of passengers from a vehicle reduces the likelihood of police injury as it does that it actually *increases* it.¹¹⁴

The dissent further questioned the number of stops in which a police officer is actually at risk of an assault, instead of the more likely routine stops which occur everyday.¹¹⁵ Assuming that Maryland’s share of officer assaults is comparable to the national average, the dissenting Justices reasoned that Maryland probably experiences about one hundred officer assaults per year during traffic stops.¹¹⁶ Based upon this data, the dissenting Justices found that even if passengers caused one-quarter of the total assaults within the state, then the Court’s ruling protects officers during only twenty-five stops per year, if that many.¹¹⁷

Of course, the other side of this argument is equally forceful. Even if *Wilson* only saved one police officer per year from injury or death, then *Wilson* would have served its purpose. The value of officer lives cannot be measured by statistics alone, yet one must carefully balance this rationale against the great number of lives which would most likely be affected. Fourth Amendment protections should benefit all society, not just law enforcement. If the statistics cited in *Wilson* are correct, then that protection is sacrificed in favor of perhaps protecting a few hundred police officers within the State of Maryland during any given year, and even this figure might be inflated.¹¹⁸ Even across the nation, it seems that few officers would benefit. Simply stated, the Court’s argument prioritizes the protection of a few over that of millions.

Admittedly, law enforcement officers must face life and death decisions. Their courage deserves and demands the appreciation of a grateful nation. Individual citizens greatly outnumber police and they deserve equal protection. With this ruling, the Supreme Court “balancing beam” seems shamefully uneven.

When examined from a practical perspective, it is difficult to see the beneficial effect from this ruling. Like the *Wilson* dissenters, one legal expert suggests that

110. *See id.* at 887 (Stevens and Kennedy, J., dissenting).

111. *Wilson*, 117 S. Ct. at 885 (citation omitted).

112. *See id.* at 887 (Stevens and Kennedy, J., dissenting).

113. *Id.*

114. *See id.*

115. *See id.* at 888.

116. *See Wilson*, 117 S. Ct. At 888.

117. *See id.* at n.4. The national data upon which the majority relied considered assaults committed during, “[t]raffic [p]ursuits and [s]tops.” Obviously, it is impossible for a police officer to order a passenger from a moving vehicle. *Id.*

118. *See id.* at 888.

common sense dictates an officer is safer from the possibility of attack if the passenger remains inside the car.¹¹⁹ It seems a reasonable assumption that passengers are less likely to panic and feel an attack upon an officer is necessary if that passenger is allowed to remain in the vehicle.¹²⁰ A driver motivates a traffic stop, not the passenger, so it is reasonable to assume that the officer is much more focused on the driver; a seated passenger would seemingly feel less threatened.¹²¹

Even if a passenger feels compelled to attack an officer, the opportunity for such an attack seems lessened if the passenger remains inside the vehicle; "the danger . . . from an unfrisked passenger who is outside the stopped vehicle [is apparent]."¹²² Sound logic supports this proposition. If an officer is primarily concerned with a driver during a traffic stop, then an unfrisked passenger is more dangerous if allowed outside of a vehicle, where his movements are less restricted.¹²³

Notice that the passenger is referenced as "unfrisked". *Wilson* only permits the ordering of a passenger from a vehicle, not the frisking of that passenger.¹²⁴ The authority to "stop and frisk" must be based upon a reasonable suspicion that criminal activity is afoot.¹²⁵ Power over passengers appears empty without the ability to search their person. The Court's rationale fails to address seemingly obvious issues, and this allows one to make reasonable assumptions as to a likely course of action when an officer exercises his *Wilson* rights. If a passenger is outside of a stopped vehicle, then an officer would tend to pay less attention to the passenger's incidental body movements. A passenger could reach for a weapon with a finesse unnoticeable to an officer who is concerned with the driver. The passenger could then bring the weapon to bear upon the officer with more ease, since both are outside of the vehicle.

Practically speaking, *Wilson*'s safety rationale appears unsupported. At the very least, the proposition that *per se* ability to order a passenger from a vehicle will somehow make an officer safer seems suspect. At its worst, this ruling could have the opposite effect and create a more dangerous environment for officers. *Wilson* may indirectly encourage officer harm. Now that police may summarily order passengers from vehicles, the practice could become so ingrained in the routine that an officer may order a passenger from a vehicle without first thinking through the situation. The consequences of such a decision may prove life-threatening.

In light of these arguments, the Court's safety rationale loses much of its perceived luster. Unfortunately, the Supreme Court failed to find any meaningful data which supported its argument. The Court's unwillingness to fully address the possible implications behind its rationale is unsatisfactory and unfortunate.

119. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.5 (3d. ed. Supp. 1997).

120. *See id.*

121. *See id.*

122. *See id.*

123. *See id.*

124. *See Wilson*, 117 S Ct. at 882.

125. *See Terry v. Ohio*, 392 U.S. 1, 10 (1968).

B. *Seizure of the Passenger*

What constitutes the “seizure” of an individual must be determined, as it is paramount to the *Wilson* decision. The Fourth Amendment states, “[t]he right of persons to be secure in their persons, . . . against unreasonable . . . seizures, shall not be violated.”¹²⁶ How exactly should seizure be defined? Several definitions exist, and the context of how the word is used determines its exact application. For example, in *United States v. Albert*,¹²⁷ the Fourth Circuit Court of Appeals held that seizure of an individual occurs during the taking of an individual into custody and detaining him, no matter whether that detention is actual or constructive.¹²⁸ The court held that so long as an individual’s freedom is deprived in a way which interrupts his liberty of movement, then he has been “seized”.¹²⁹ Another example of “seizure” comes from *Robins v. Harum*.¹³⁰ In *Harum*, the Ninth Circuit Court of Appeals ruled that “seizure” occurs anytime an individual’s freedom to walk away from authorities is lacking.¹³¹

One clear definition of “seizure” in the context of *Wilson* came from *United States v. Mendenhall*.¹³² In *Mendenhall*, Justice Stewart stated:

We adhere to the view that a person is “seized” only when, by means of physical force or show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but “to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.”¹³³

When the *Mendenhall* definition of “seizure” is applied to *Wilson*, then the *Wilson* holding seems not to offend the Fourth Amendment. *Wilson* only gives an officer the *per se* ability to order passengers from vehicles.¹³⁴ In fact, the opinion went to great lengths to explain that this is the only proposition it supports; nothing more was decided or inferred.¹³⁵ The trooper in *Wilson* arrested the passenger upon probable cause, thus the issue of whether passengers may be detained minus probable cause was not ripe for review.¹³⁶

Perhaps the best definition of “seizure” in the *Wilson* context comes from

126. U.S. CONST. amend. IV.

127. 816 F.2d 958.

128. *See United States v. Albert*, 816 F.2d 958 (4th Cir. 1987).

129. *See id.*

130. 773 F.2d 1004.

131. *See Robins v. Harum*, 773 F.2d 1004, 1009 (9th Cir. 1985).

132. 446 U.S. 544 (1980).

133. *United States v. Mendenhall*, 446 U.S. 544, 553-4 (1980) (citation omitted).

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

135. *See id.* at 886 n.3. The Court refused to answer the question of whether an officer may “forcibly detain a passenger for the entire duration of the stop.” *Id.*

136. *See id.*

*Whren v. United States*¹³⁷ In *Whren*, the Court ruled , “[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’.”¹³⁸ This holding makes no distinction between passenger and driver. It appears that the Supreme Court decided when ruling on *Wilson* to ignore the logic behind *Whren*, because *Whren’s* holding indicates that if a passenger is detained because of the driver’s actions, then that passenger has been “seized”.

Is passenger detention against his will reasonable within the Fourth Amendment? One hopes not, but the definitive answer is unclear. Perhaps the Court failed to address “seizure” because when the *Wilson* ruling is considered with the *Whren* holding in the context of “seizure” an unwanted Constitutional dilemma is created. The Supreme Court decides what issues must be heard and which may be deferred. However, the Court should have addressed this crucial question. “Seizure” deserved judicial recognition in this case.

By refusing to address “seizure” of the passenger, the Court failed to address many practical considerations. For example, what happens if a passenger becomes tired of standing and wishes to reenter the vehicle? What if the passenger chooses to leave the scene of the stop and go about his business? May an officer forcibly compel the passenger to remain in place? From a practical standpoint, what can an officer do if a passenger elects one of these options? The Court chose not to address this types of questions. However, a police officer on the scene has no such luxury.

Obviously, the power to order passengers from vehicles is meaningless without the power to control their movement. How much safer is a police officer when he is given the power to order passengers from vehicles, yet cannot exercise any control over their movements? Common sense suggests that passengers who retain freedom of movement while outside of the vehicle are *more* dangerous than if left inside. Officers are forced to chose: either passengers will retain complete freedom of movement or they must be forcibly detained. One can easily assume which alternative is most appealing to the officer on the scene.

One hopes that the Supreme Court recognized its quandary. Even though the Court intended to defer on the issue of passenger seizure,¹³⁹ its ruling has done so indirectly. No doubt, the Supreme Court recognizes that police officers will wish to have as much control over the situation as possible, thus the passenger will be detained. By not ruling on the issue,¹⁴⁰ the Court permits officers to seemingly contradict the protection of the Fourth Amendment. This issue will likely be forced upon the Court again. How will the Justices treat it then?

One can readily see why the Court failed to reconcile the conflict between the natural tendency of safety-conscious officers to restrain passengers and those

137. 517 U.S. 806 (1996).

138. *Id.* at 809-10 (citations omitted).

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

140. *See id.* at n.3.

passengers' Fourth Amendment rights.¹⁴¹ To rule against forcible detention of passengers undermines the Court's entire officer safety rationale. Conversely, ruling in favor of forcible detention requires tricky and reckless application of the Constitution. How could the Court reconcile the ability to detain passengers without offending the Bill of Rights? Is the forcible detention of a passenger reasonable within the Fourth Amendment?

While the Court avoided the issue of forcible detention of passengers,¹⁴² it attempted to dismiss any dilemma by analogy to *Michigan v. Summers*.¹⁴³ In *Summers*, the police officer arrived at the defendant's home to execute a search warrant for drugs.¹⁴⁴ As the officers arrived, the defendant walked down his front steps to meet them.¹⁴⁵ The defendant was ordered to return and remain in his home while the officers executed the search.¹⁴⁶ "Whether the officers had the authority to require him to re-enter the house and remain there while they conducted their search," was the pivotal issue in *Summers*.¹⁴⁷ In addressing this issue, the Court held the risk of harm to police officers is diminished when they assert absolute control over a situation.¹⁴⁸ Interestingly enough, the Court failed to address whether a guest in the home could also be detained during the search of a home. Perhaps the Court must be squeamish of the "seizure" issue.

While police control of an unpredictable situation may improve safety, the Court improperly analogizes *Summers*. Further, its emphasis in *Wilson* is misplaced.¹⁴⁹ The facts of the two cases are far too dissimilar.

Summers concerned the execution of a search warrant.¹⁵⁰ Accordingly, police executed the search having knowledge of probable wrongdoing. While the officer in *Wilson* also had probable cause to search the passenger, probable cause does not exist when the passenger does not arouse any measure of reasonable suspicion.¹⁵¹ Accordingly, police should not be permitted to detain such a passenger.

The *Summers* rationale turned upon probable cause.¹⁵² In *Summers*, the Court noted:

A judicial officer has determined that police have probable cause to believe that

141. *See id.*

142. *See id.*

143. 452 U.S. 692 (1981).

144. *See id.* at 693.

145. *See id.*

146. *See id.*

147. *Id.* at 695.

148. *See* 452 U.S. at 702. The Court stated:

Although no special danger to police is suggested by evidence in this record, the execution of a search 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.

Id.

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

150. *See Summers*, 452 U.S. at 692.

151. *See Wilson*, 117 S. Ct. at 886 n.3.

152. *See Summers*, 452 U.S. at 692.

someone in the home is committing a crime. Thus a neutral magistrate rather than an officer in the field has made the crucial determination that the police should be given 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 the detention of that occupant.¹⁵³

The Court emphasized the fact that a magistrate, not a police officer, determined that the suspect's detention was justified.¹⁵⁴ In *Wilson*, the opposite was true. There was no judicial determination of whether probable cause existed to detain a passenger, as the officer on the scene made the sole determination. The Court seemingly inferred an extension of a rationale which was specifically designed to support house detention as a result of a judicially granted warrant to also include the detention of a passenger, outside of his vehicle, without a warrant.¹⁵⁵ The scenarios lack even a scintilla of similarity.

Second, *Summers* dealt with the search and seizure of illegal drugs.¹⁵⁶ The Court felt that the search for illegal drugs by police may cause a suspect to act frantically and destroy evidence, thus warranting the detention of the suspect for the duration of the search.¹⁵⁷ This seems an unlikely scenario with vehicle passengers. True, a passenger may have similar motives for destroying evidence, (assuming that an officer is fortunate enough to notice a passenger in possession of contraband). However, one wonders how successful a passenger could be in such an endeavor, considering that they have nowhere in which to hide.

By extending the *Summers* decision,¹⁵⁸ the *Wilson* Court grants police the power to detain passengers without probable cause based upon a rationale which was never meant to be applied to a case of this kind. The Court fails to justify why this application is warranted, other than to state that police have an interest in maintaining control over situations.¹⁵⁹ This application is unacceptable.

153. *Id.* at 703 & n.18.

154. *See id.*

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists of requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also of grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a police man or other government enforcement agent.

Id. at 704 n.18 (quoting *Johnson v. United States*, 333 U.S. 10, 13-4 (1948)).

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

156. *See Summers*, 453 U.S. at 693.

157. *See id.* at 702-03.

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

159. *See id.*

The *Summers* dissent provided support for a rejection of its application to *Wilson*.¹⁶⁰ The *Summers* dissent argues that the Court's rationale contradicts the Fourth Amendment.¹⁶¹ According to the *Summers* dissent, only two kinds of seizures do not require a showing of probable cause: the "stop and frisk" scenario, where police have a reasonable suspicion that a suspect is armed, dangerous, and that criminal activity is apparent,¹⁶² and the brief detention of vehicles on international borders, in order to question the occupants about their citizenship.¹⁶³

The dissent stressed that before a detention without probable cause can be deemed reasonable, "the government must demonstrate an important purpose beyond the normal goals of criminal investigation, or must demonstrate an extraordinary obstacle to such investigation."¹⁶⁴ Does the passenger involved in a traffic stop constitute an extraordinary obstacle to a proper investigation? Apparently, the *Wilson* Court felt it did.¹⁶⁵

According to the dissent in *Wilson*, the Fourth Amendment imposes "significant restraints upon . . . traditional police activities, even though the police and the courts may find those restraints unreasonably inconvenient."¹⁶⁶ A passenger who retains freedom of movement after being ordered from a vehicle may become an inconvenience for the officer on the scene. However, this inconvenience should not be used as a basis for detention without some showing that the passenger poses some sort of genuine threat to officer safety.

Obviously, the issue of passenger detention is a delicate one. Its importance is not diminished simply because the *Wilson* Court overlooked it.¹⁶⁷ The seizure of one's person is not a mere annoyance, but is a serious governmental intrusion into people's lives. Perhaps in the future the Court will see fit to impart its wisdom in this area. The danger lies in the fact that the Court may use the *Wilson* decision to justify the erosion of further Fourth Amendment protections in the future.

C. A Bright-Line Rule

The *Wilson* respondent argued the Supreme Court should not grant the police the power *per se* to order passengers from vehicles, underscoring the Court's general avoidance of such bright-line rules in Fourth Amendment cases.¹⁶⁸ However, the Court embraced its bright-line holding with a brief statement: "[b]ut, that we typically avoid *per se* rules concerning searches and seizures does not mean that we

160. See *Summers*, 452 U.S. at 706 (Stewart, J., Brennan, J., and Marshall, J., dissenting).

161. See *id.* The dissenting Justices agreed some seizures are less intrusive upon an individual's right to privacy, but "to escalate this statement into some kind of a general rule is to ignore the protections that the Fourth Amendment guarantees to us all." *Id.*

162. See *id.* at 706 (citation omitted).

163. See *id.* at 708 (citation omitted).

164. *Id.*

165. See *Wilson*, 117 S. Ct. at 882.

166. *Summers*, 452 U.S. at 709.

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

168. See *id.* at 885 n.1.

have always done so; *Mimms* itself drew a bright line, and we believe the principles that underlay that decision apply to passengers as well."¹⁶⁹ The Court's response is wholly unsatisfactory and leaves several key questions unanswered.

Noted University of Illinois criminal procedure expert Wayne R. LaFave poses four questions about the extent of the *Wilson* bright-line rule: (1) are the boundaries set in this rule clear enough that case-by-case evaluation of the facts is unnecessary?;¹⁷⁰ (2) are ends which result from this rule mirror those which would result if they were determined on a case-by-case basis?;¹⁷¹ (3) is a case-by-case analysis of this rule possible?;¹⁷² and (4) does this rule present an opportunity for abuse?¹⁷³

First, LaFave asks whether the boundaries of this rule are clear enough to make case-by-case evaluation unnecessary.¹⁷⁴ "Passengers" seems self-explanatory, but exactly how far does this label extend? For example, does "passenger" refer to, "all the passengers on a bus, to passengers who are aged, infirm or handicapped, or to instances in which an exiting passenger would be exposed to cold, rain, or snow?"¹⁷⁵ These same concerns over defining "passenger" troubled the *Mimms* dissent.¹⁷⁶

Justice Harlan's famous concurrence in *Katz v. United States*¹⁷⁷ states that Fourth Amendment protection is warranted when an individual has a subjective expectation of privacy, and society recognizes this expectation as reasonable.¹⁷⁸ Will society accept the rousting of an elderly woman passenger from the safety of the vehicle as reasonable? What about her grandchildren?

LaFave next asks whether the ends which are achieved by a bright line rule mirror those attained by evaluating the facts on a case-by-case basis.¹⁷⁹ Based on earlier discussions, the obvious answer is no. Bright-line rules apply with equal force, regardless of the evidence used to support their application.¹⁸⁰ Most Fourth Amendment issues require the state to satisfy a particular judicial test to be deemed proper.¹⁸¹ Why is this not true with *Wilson*? Such permissive arbitrary police power

169. *Id.*

170. See WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.5 (3d. ed. Supp. 1997).

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

176. See *Pennsylvania v. Mimms*, 434 U.S. 106, 120-21 (1977) (Stevens, J., and Marshall, J., dissenting). The dissent named its own concerns:

A woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority.

Id.

177. 389 U.S. 347 (1967).

178. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

179. See LAFAVE, *supra* note 130.

180. See LAFAVE, *supra* note 130, at 36.

181. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz*, 389 U.S. 347 (1967); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

seems almost recklessly misplaced.

Third, LaFave questions whether case-by-case analysis is possible.¹⁸² If not, then this arbitrary police power over passengers seems more palatable. Unfortunately, this is not so. In *Wilson*, the trooper noticed the passengers appeared nervous as they ducked from sight.¹⁸³ These facts served as appropriate probable cause to order the passengers from the vehicle.

Why did the Court refuse to institute police officer guidelines for ordering passengers from vehicles?¹⁸⁴ The *Wilson* Court considered officer safety "too plain for argument," considering that the concern for officer safety is, "both legitimate and weighty."¹⁸⁵ A simple judicial test is workable and appropriate. A judicial standard should require an officer's reasonable suspicion that his safety is in danger before the passenger is ordered from the vehicle. If the facts of the situation fall short of this, then the passenger should be left alone.

LaFave's fourth question asks whether the bright-line rule presents an opportunity for abuse.¹⁸⁶ This is the most important argument against a bright-line rule. The answer is easily predictable, but no less troubling. The possibility for police abuse is unmistakable.¹⁸⁷ The *Wilson* Court discussed the necessity for police protection, yet no requirement exists to determine what constitutes a threat to an officer.¹⁸⁸ Unfortunately, the *Wilson* Court permitted broad police power to go unchecked.¹⁸⁹ Justice Stevens' reflection on unchecked police power resulted in an unsurprising revelation: an opportunity exists for State sanctioned racism, sexism, and other forms of discrimination.¹⁹⁰ As one recent bar journal article pointed out, "[t]he problem with the rules on vehicle stops always has been that they are wide

182. See LAFAVE, *supra* note 130.

183. See *Wilson*, 117 S. Ct. at 884.

184. See *id.* at 886.

185. *Id.* at 885 (citation omitted).

186. See LAFAVE, *supra* note 130 at 36.

187. See LAFAVE, *supra* note 130 at 36. Professor LaFave eloquently expresses his concerns:

But my greatest concern about the *Wilson* case has to do with . . . whether the bright-line rule is readily subject to manipulation and abuse. It most certainly is! Again, the likely impact of *Wilson* is not that *all* traffic stops passengers will be ordered out of their vehicles as a matter of routine, but instead that police will sometimes give such an order. But because the *Wilson* case confers upon the police an automatic right to require a passenger to exit the vehicle, there will be no mechanism for regular judicial review of individual police decisions, and thus it is very possible that these decisions will be based on considerations having no legitimate connection with any risk of harm to the officer.

Id.

188. See *Wilson*, 117 S. Ct. 885-86.

189. See *id.*

190. See *Pennsylvania v. Mimms*, 434, U.S. 106, 122 (1977) (Stevens, J., dissenting).

Justice Stevens realized the possible implications of the *Mimms* decision. Those same arguments carry equal weight when discussing the implications of *Wilson*:

But to eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits. Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin—may escape it entirely.

Id.

open to the subjective interpretations by the police officers applying them."¹⁹¹ Sadly, there exists in this world officers who subjectively believe certain races and lifestyles are "inherently suspect".¹⁹² While much of society believes that police officers are beyond reproach, human nature shows otherwise. Even if police choose not to abuse their new *Wilson* power, is society willing to take the chance that abuse will occur? This seems unlikely.

V. *WILSON*, TRAFFIC CASES, AND THE CONSERVATIVE TREND

In 1979, the Supreme Court in *Delaware v. Prouse*.¹⁹³ upheld the suppression of evidence based upon a Fourth Amendment violation.¹⁹⁴ Justice Rehnquist represented the sole dissenting voice in the case.¹⁹⁵ Rehnquist felt the burden for determining whether a random stop is inconsistent with the Fourth Amendment depends on a balancing of the motorist's privacy and the State's interests.¹⁹⁶ Justice Rehnquist's views supported broad police power.¹⁹⁷

Today, Chief Justice Rehnquist's vision for broad police power is a reality. Some recent Court rulings on Fourth Amendment protection for individuals within their cars all indicate a posture favoring State intervention over individual freedoms.¹⁹⁸ As discussed thus far, *Wilson's* rationale is troubling. However, when *Wilson* is considered in context with *Whren v. United States*¹⁹⁹ and *Ohio v. Robinette*,²⁰⁰ then the erosion of Fourth Amendment protections becomes particularly evident. As one will come to realize, *Wilson* is another nail in the Fourth Amendment coffin.

First, consider *Whren v. United States*.²⁰¹ In *Whren*, a plainclothes police officer observed a truck stopped at an intersection for an extended period of time; the officer considered the location to be a frequent drug area.²⁰² The officer overtook the

191. Tracey Maclin, *Court Rulings on Traffic Stops Undercut Fourth Amendment Protections*, 83 A.B.A. J. 46 (1997). One example cited was of a southern sheriff, who explained that during the 1960s anyone driving a Volkswagen van with a peace sign on the bumper was automatically a target for a police stop. *See id.* He considered this, "rolling probable cause." *Id.*

192. *See, e.g., Angie Cannon, DWB: Driving While Black; Motorists are Fighting Back Against Unfair Stops and Searches*, U.S. NEWS & WORLD REPORT, March 15, 1999, at 72.

193. 440 U.S. 648 (1979).

194. *See Delaware v. Prouse*, 440 U.S. 648, 663 (1979). This case concerned random police stops. *See id.* at 650. The Supreme Court held stopping a vehicle and detaining a driver in order to check the driver's license and registration are unreasonable under the Fourth Amendment, except where "there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law. . . ." *Id.* at 663.

195. *See id.* at 664-67 (Rehnquist, J. dissenting).

196. *See id.*

197. *See id.* Rehnquist opined that if a vehicle is stopped on a state maintained highway, then the balance leans in favor of the State to make the stop. *See id.*

198. *See, e.g., Whren v. United States*, 517 U.S. 806 (1996); *Ohio v. Robinette*, 117 S. Ct. 417 (1996).

199. 517 U.S. 806.

200. 117 S. Ct. 417.

201. 517 U.S. 806.

202. *See id.* at 808.

vehicle after it turned suddenly and sped away.²⁰³ As the officer approached the driver's door, he "observed two large plastic bags of what appeared to be crack cocaine. . . ."²⁰⁴ The officer arrested the truck's occupants; they were charged with violating federal drug laws.²⁰⁵

The petitioners moved to suppress the evidence against them.²⁰⁶ They contended the officer's stop was unjustified because he had no probable cause or reasonable suspicion to believe the petitioners were involved in drug activities.²⁰⁷ Moreover, the petitioners argued that the traffic stop acted as a mere pretext for the underlying drug investigation.²⁰⁸ While the petitioners conceded that the officer had probable cause to believe a traffic violation had occurred, they argued that, "in the unique context of civil traffic regulations[,] probable cause is not enough."²⁰⁹ They further argued compliance with all traffic rules is almost impossible, because vehicle usage is heavily regulated by the State.²¹⁰ Traffic stops had become a convenient excuse for investigating other criminal activity.²¹¹ In order to avoid this dilemma, the petitioners argued, "the Fourth Amendment test for traffic stops should be, not the normal one . . . of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given."²¹²

The Supreme Court rejected these arguments.²¹³ The Court could not discern any legal principle supporting the petitioner's proposed judicial standard.²¹⁴ The Court agreed that every Fourth Amendment case turns upon "reasonableness" of State action as measured by a "balancing of all relevant factors."²¹⁵ However, the existence of probable cause acts as the perfect balance, ensuring search and seizure is permissible.²¹⁶ Probable cause justifies the stop and detention of a motorist, even when that probable cause is based upon an activity which is pretextual to another investigative end.²¹⁷

Whren represents another possibility for police misconduct. When *Whren* and *Wilson* are considered together, the opportunity for police abuse radically increases. Justice Kennedy realized this in his *Wilson* dissent.

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

203. *See id.*

204. *Id.* at 809.

205. *See id.*

206. *See Whren*, 517 U.S. at 806.

207. *See id.* at 806.

208. *See id.*

209. *Id.* at 810.

210. *See id.*

211. *See Whren*, 517 U.S. at 810.

212. *Id.*

213. *See id.* at 806.

214. *See id.* at 808-19.

215. *Id.* at 817.

216. *See Whren*, 517 U.S. at 819.

217. *See id.* at 816-19.

control by police. If the command to exit [for passengers] were to become commonplace, the Constitution would be diminished in a most public way. . . . [W]e ought not to suffer so great a loss.²¹⁸

These two cases effectively allow for massive police interference. The use of an automobile should not lessen Fourth Amendment protections. How far is the Court willing to go in order to grant greater police power over automobile users?

Race and racism characterize one of the most debated topics in this nation. In *Whren*, the Court emphasized that enforcement of the law based upon race is unconstitutional.²¹⁹ The *Whren* ruling “practically guarantees that minority motorists will continue to be targets of pretext stops.”²²⁰ Indeed, many minorities complain they are commonly targeted for traffic stops in order to investigate for drugs, something even the police admit as true.²²¹ Because of *Wilson*, police pretexts for vehicle stops could be expanded to include passengers.²²² The automobile represents great freedom, yet those who take advantage of their cars must also cope with the government power to stop and seize motorists. One wonders if this irony is lost on the Court.

Next, *Wilson* can be examined in context with *Ohio v. Robinette*.²²³ In *Robinette*, an officer stopped a motorist for excessive speed.²²⁴ The officer checked the motorist’s driving record and discovered no previous violations.²²⁵ The officer ordered the motorist from the car and issued him a verbal warning.²²⁶ At this point, the officer inquired whether the driver was transporting weapons or drugs.²²⁷ The officer asked for and was granted consent to search the vehicle.²²⁸ The search revealed illegal drugs, and the driver was subsequently arrested and convicted.²²⁹ The Ohio Court of Appeals and the Ohio Supreme Court reversed the conviction, citing the seizure of the driver as unlawful.²³⁰ The Ohio Court held that if the motivation for the seizure of a motorist is not related to the motivation for the original stop, then any further detention of the motorist is illegal, unless separate facts create a

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

219. See *Whren*, 517 U.S. at 813.

220. Maclin, *supra* note 151, at 47.

221. See *id.*

222. See *Maryland v. Wilson*, 117 S. Ct. 882 (1997).

223. 117 S. Ct. 417 (1996).

224. See *Ohio v. Robinette*, 117 S. Ct. 417, 419 (1997).

225. See *id.*

226. See *id.*

227. See *id.*

228. See *id.*

229. See *Robinette*, 117 S. Ct. at 419.

230. See *id.* at 419-20. The Ohio Supreme Court found a “bright-line prerequisite” necessary before a consensual search:

The right guaranteed by the federal and Ohio Constitutions, to be secure in one’s person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase “At this time you are legally free to go” or by words of similar import.

Id. (quoting *Ohio v. Robinette*, 653 N.E.2d 695, 696 (1995)).

justification.²³¹ The Supreme Court disagreed and reversed the Ohio Court.²³² After the Supreme Court determined it had jurisdiction to review the decision, it considered the Ohio Court's ruling.²³³

First, the Supreme Court cited *Whren* as justification for reversing the Ohio Supreme Court.²³⁴ As discussed earlier, *Whren* held a police officer's subjective intent for a vehicle stop is immaterial, so long as probable cause for the stop exists.²³⁵ Thus, the fact the officer had probable cause to stop and order the *Robinette* petitioner from his vehicle made questioning permissible regardless of the officer's motives.²³⁶

Next, the *Robinette* Court specifically rejected the use of a "bright-line" rule.²³⁷ The Court emphasized that the "touchstone of the Fourth Amendment is reasonableness,"²³⁸ and reasonableness is "measured in objective terms by examining the totality of the circumstances."²³⁹ The Court cited several cases in which it rejected "bright-line" rules.²⁴⁰ As a result of *Robinette*, police officers need not inform stopped motorists that they are "legally free to go" before pursuing any other investigative ends.²⁴¹

Justice Stevens criticized the Court for its narrow holding.²⁴² He felt the Court's holding was correct, but misinterpreted the Ohio Court's language.²⁴³ He also noted, "it is important to emphasize that nothing in the Federal Constitution—or in this Court's opinion—prevents a State from requiring its law enforcement officers to give detained motorists the advice [that they are 'free to go']."²⁴⁴ Regrettably, it seems doubtful that any State would choose a tighter restriction than mandated by the *Robinette* Court.

Interestingly enough, less than three months after the Court decided *Robinette*, it specifically embraced a "bright-line" rule in *Wilson*.²⁴⁵ Unfortunately, the Court did not elaborate on the justification for such a rule, other than to say the Court had supported them in the past.²⁴⁶ These cases indicate a loose application by the Court of *stare decisis* in Fourth Amendment cases—not a pleasant thought, especially for

231. *See id.* at 420.

232. *See Robinette*, 117 S. Ct. at 417.

233. The Ohio Supreme Court spoke generally about the federal and Ohio Constitutions in its decision. The Supreme Court ruled that when a state court decision rests on a mixture of federal and state law it is permissible for the decision to be reviewed at the federal level. Federal law was deemed of primary importance in this case, since the cited section of the Ohio Constitution is identical to the Fourth Amendment. *See id.* at 420.

234. *See id.* at 420 (citing *Wren v. United States*, 517 U.S. 806 (1996)).

235. *See Whren*, 517 U.S. at 806.

236. *See Robinette*, 117 S. Ct. at 420-21.

237. *See id.* at 421.

238. *See id.* (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)).

239. *See Robinette*, 117 S. Ct. at 421.

240. *See id.* (citing *Florida v. Royer*, 460 U.S. 491 (1983); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Florida v. Bostik*, 501 U.S. 429 (1991)).

241. *See Robinette*, 117 S. Ct. at 419-24 (1997).

242. *See id.* at 424-28 (Stevens J., dissenting).

243. *See id.* "As I read the state court opinion, however, the prophylactic rule announced . . . was intended guide as a decision of future cases rather than an explanation of the decision in this case." *Id.*

244. *Id.*

245. *See Maryland v. Wilson*, 117 S. Ct. 882, 885 n.1 (1997).

246. *See id.*

those convicted and now seeking relief.

How does the *Robinette* ruling affect passengers? Presumably, it applies both to drivers and to passengers with equal force. May an officer now question a passenger because of a stop based upon the driver's actions and without advising the passenger that he is "free to go"? One begins to see how *Robinette*, along with *Wilson* and *Whren*, creates a chilling result.

Seemingly, a police officer compelled to question a driver about the possession of contraband would wish to do so with a passenger. Because of *Wilson*, *Whren*, and *Robinette*, police may subject passengers to intrusive seizures and questions through "probable cause by association" to the driver. This inquisitorial police power tragically reminds us of how vulnerable we become to State intrusion once we get into an automobile.

Wilson v. United States,²⁴⁷ *Whren v. United States*,²⁴⁸ and *Ohio v. Robinette*²⁴⁹ indicate an alarming shift in the Court's willingness to permit governmental interference in our lives. The interpretation of their holdings as individual cases connote a preference towards strong police powers in Fourth Amendment cases. When looked at together, these cases become the worst nightmare for any passenger in a vehicle. What a frightful thought, considering the passenger is just along for the ride.

VI. CONCLUSION

The *Wilson* decision was not the Supreme Court's finest hour. It poses more questions than it answers. Its rationale is weak and easily subjected to contradiction.

First, the police safety rationale is flawed and misleading. This *per se* rule permitting passengers to be ordered from their cars is based upon the need for officer safety. Yet, the statistics supporting this rationale are inconclusive, leaving one to guess whether the ruling would have any impact at all on the situation.

Next, the ruling indirectly permits the unreasonable seizure of passengers without any showing of probable cause. The Court fails to address the critical question of whether police may detain passengers who elect to leave the scene of the traffic stop, when there is no probable cause that the passenger committed an illegal act. One hopes such a detention would be considered unreasonable and outrageous, but the Court's lack of guidance leaves one guessing.

Third, the Court creates a "bright-line" rule concerning police power without subjecting it to any judicial standard of review. Police power without judicial review creates opportunities for police abuse within our criminal justice system. The Court obviously assumes that most police officers are beyond reproach. Unfortunately, human nature proves otherwise.

Finally, *Wilson* represents an undesirable erosion in personal freedom when

247. 117 S. Ct. at 882 (1997).

248. 517 U.S. at 806 (1996).

249. 117 S. Ct. at 417 (1996).

considered in context with *Whren v. United States* and *Ohio v. Robinette*. As a result of *Wilson*, passengers are now subjected to a wide range of police interference. Lady Justice surely hangs her head in shame when innocent passengers are subjected to state sanctioned oppression.

Perhaps police will realize the implications behind *Wilson* and use their new power sparingly. Should police readily abuse this power, the possibility for explosive tension between society and police becomes evident. Hopefully, all of these concerns are for naught. Even so, they should not be forgotten.

Skyler J. Greco

