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Exluding Automobile Passengers from Fourth Amendment Protection

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EXCLUDING AUTOMOBILE PASSENGERS FROM FOURTH AMENDMENT PROTECTION

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

I. INTRODUCTION

In *Maryland v. Wilson*,[1] the Supreme Court addressed whether police officers can order an innocent passenger to exit a vehicle when the driver is lawfully stopped for traffic violations.[2] The Court held that, as a matter of officer safety, police officers may order a passenger out of a lawfully stopped vehicle without having any particular reason to believe that the passenger poses a threat to the officer.[3] The Court weighed the public interest in effective law enforcement and the protection of police officers' lives against a passenger's liberty interest in remaining free from arbitrary government intervention.[4] The Court found in favor of the public interest: a command to a passenger to exit a vehicle may save an officer's life, while it affords only a petty indignity to a passenger.[5] Under *Wilson*, a police officer needs only a lawful reason to make a traffic stop; having made it, she is free to order all passengers to exit the vehicle for any, or no, reason.[6]

This Note argues that *Wilson* represents a departure from prior Supreme Court case law that required Fourth Amendment seizures to be based on specific, articulable facts that would lead a police officer to believe that she is in danger.[7] This Note contends that the *Wilson* Court erred by refusing to recognize that ordering the passenger to exit the vehicle constituted an illegal seizure.[8] This Note further argues that *Wilson* represents an iso-

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

[2] *Id.* at 884.

[3] *Id.*

[4] *Id.* at 885-86.

[5] *Id.*

[6] *Id.* at 886.

[7] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 27 (1968).

[8] *Id.* at 16 (noting that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person").

lated instance of Supreme Court authorization of the potentially arbitrary use of state power to seize an innocent, non-threatening person without any showing either of probable cause or reasonable suspicion.[9] This Note concludes by advising that citizens must now look to their state constitutions for any analogous Fourth Amendment protection in this context.[10]

II. BACKGROUND

The Fourth Amendment to the Constitution requires that searches and seizures be reasonable and that warrants be based upon probable cause.[11] The text of the amendment applies only to federal officers and does not contain a remedy on its face for violations.[12] Through the incorporation of the Fourth Amendment into the Fourteenth Amendment, the Supreme Court has applied the search and seizure provision of the Fourth Amendment to the individual states.[13] The primary importance of the

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[9] The Court has previously authorized seizures and searches of *all* persons in a specific category, as long as the seizure was sufficiently controlled by rules or regulations so as not to be random or capricious. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (finding that a sobriety checkpoint did not violate the Fourth Amendment when all cars were stopped for a drunk driving check, even without any individualized suspicion that the drivers were intoxicated); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (holding constitutional a stationary checkpoint at which all cars were stopped to check for illegal aliens, without any individualized suspicion that the car contained illegal aliens). *See also* United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (holding that a roving patrol that stopped cars to search for illegal aliens, without any reasonable or particularized suspicion that the car contained illegal aliens, violated the Constitution); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (same).

[10] *See, e.g.*, Sitz v. Dep't of State Police, 485 N.W.2d 135 (Mich. 1992) (holding that the sobriety checkpoint found unconstitutional by the United States Supreme Court under the Fourth Amendment violates the analogous provision of the Michigan State Constitution).

[11] The Fourth Amendment reads:

> 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.

[12] *But see* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 396 (1971) (holding that a private cause of action exists for Fourth Amendment violations).

[13] *See* Mapp v. Ohio, 367 U.S. 643, 654-55 (1961). The Fourteenth Amendment reads in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

application of the Fourth Amendment to the states is the imposition of the exclusionary rule[14] as a tool to control state authority and a remedy for Fourth Amendment violations.[15] Using the exclusionary rule, the courts have the ability both to oversee the use of state power and to control that power by refusing to authorize outrageous abuses of it.[16]

In earlier interpretations of the Fourth Amendment, the Supreme Court required state actors, such as police officers, always to show probable cause before seizing a person.[17] The state actor could show probable cause to a neutral magistrate before making a seizure, and thereby obtain a warrant authorizing the seizure,[18] or the state actor could make the showing after seizing a person when the person was on trial.[19] Absent a showing of probable cause that the individual was engaged in wrongdoing

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of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[14] *Mapp*, 367 U.S. at 654 (holding that the exclusionary rule, which allows courts to exclude evidence seized unlawfully, is an appropriate remedy for Fourth Amendment violations). The exclusionary rule acts as a deterrent to overzealous police officers, encouraging them to conform their behavior to constitutional standards. *See* Terry v. Ohio, 392 U.S. 1, 12 (1968). Requiring the officer to explain her actions to the judge keeps judicial control over state action. *Id.* Should the judge decide that the police officer's actions were capricious, unprincipled, or otherwise contrary to the Fourth Amendment, the judge can exclude any evidence seized, making conviction difficult. *Id.* A neutral judge, examining all of the circumstances, will be able to prevent police excesses from overrunning individual liberties. *Id.* at 21. Fourth Amendment protections work because at some point, the conduct of law enforcement officials is subjected to judicial scrutiny. *Id.* By excluding evidence seized illegally, the police will lose the incentive to make illegal or unreasonable searches and seizures. *Id.* There is some question, however, about the efficacy of the exclusionary rule in controlling police behavior. *See, e.g.*, Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 450-51 (1990); Robert Weisberg, *Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J. CRIM. L. & CRIMINOLOGY 832, 855 (1985) (suggesting that judicial review is too limited to offer any real protection against arbitrary police action).

[15] *Mapp*, 367 U.S. at 660.

[16] *Terry*, 392 U.S. at 12..

[17] *See, e.g., id.* at 20 (citing Katz v. United States, 389 U.S. 347 (1967); Beck v. Ohio, 379 U.S. 89 (1964); Chapman v. United States, 365 U.S. 610 (1961)).

[18] *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 15-16 (1977) (affirming the suppression of evidence seized without a warrant).

[19] *See, e.g., Terry*, 392 U.S. at 35 n.1 (Douglas, J., dissenting) (providing a short history of cases holding that an officer's probable cause justifies a search or seizure in the absence of a warrant).

at the time of the seizure, however, the seizure was found unconstitutional.[20]

A. *TERRY v. OHIO* AND REASONABLE SUSPICION

In *Terry v. Ohio*,[21] the Supreme Court authorized an exception to the Fourth Amendment's probable cause requirement.[22] The Court held that an officer's articulable suspicion may be sufficient to justify a warrantless stop and search.[23] The Court defined articulable suspicion as a belief, not rising to the level of probable cause, that the individual affords a danger to the officer.[24] The suspicion must be based on observable facts, as opposed to hunches, that can later be articulated to a judge.[25] The Court emphasized that the circumstances of each situation provide the justification for a warrantless stop and search.[26] Consequently, *Terry*-type cases are fact-intensive.[27]

The facts of *Terry* convinced the Court that the officer's seizure of the defendants was based on what he observed of their behavior, in conjunction with his law enforcement experience:[28] A police officer watched the defendant and another man taking turns walking back and forth in front of a store.[29] At the end of each trip past the front of the store, the defendant stopped to speak to the other man. After observing this behavior for more than ten minutes, the police officer approached the men.[30]

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[20] *See, e.g.*, Johnson v. United States, 333 U.S. 10, 16-17 (1948) (reversing the defendant's drug conviction because the government lacked both a warrant and probable cause when officers searched her apartment).

[21] 392 U.S. 1 (1968).

[22] *Id.* at 20, 27.

[23] *Id.* at 21, 22, 27. The case has coined the terms "*Terry* stop" and "*Terry* frisk," meaning brief stops and frisks that allow the police officer to determine if the detainee is armed. *See, e.g.*, Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981) (referring to a *Terry* stop as one allowing officers, on the basis of reasonable suspicion, to investigate possible criminality); Michigan v. DeFillippo, 443 U.S. 31, 44-45 (1979) (Brennan, J., dissenting) (referring to a *Terry* stop as one allowing police officers to "accost citizens on the basis of suspicion"); United States v. Robinson, 414 U.S. 218, 250 (1973) (Marshall, J., dissenting) (referring to a *Terry* frisk as a "narrowly drawn protective search for weapons").

[24] *Terry*, 392 U.S. at 27.

[25] *Id.* at 21.

[26] *Id.*

[27] *See id.* at 21-22.

[28] *Id.* at 30.

[29] *Id.* at 6.

[30] *Id.*

When the officer asked the men for their names, they only mumbled a reply, at which point the officer grabbed defendant Terry.[31] He patted the outside of Terry's jacket and felt a pistol.[32]

The police officer's observation of the defendant, coupled with the officer's experience, allowed him to conclude reasonably that the suspects afforded a threat to the officer.[33] The Court acknowledged that, given exigent circumstances (in this case, for example, a police officer observed two men "casing" a store), the police may not have time to seek a warrant in order to prevent a crime.[34] Although the officer did not have probable cause to arrest the men, his suspicion that the men were (or were about to be) engaged in criminality was reasonable.[35] If the officer were to leave the men to get a warrant, he would lose the opportunity to prevent crime.[36]

Using a balancing test, the Court weighed the public and private interests involved.[37] On the government side, the Court highlighted the interests in the detection and prevention of crime and in the safety of police officers.[38] On the private side of the scale, the Court found that the liberty interest of individual citizens was weighty, as the Fourth Amendment was written to protect citizens from arbitrary government interference with their liberty.[39]

Nonetheless, the Court found that the safety of the officer outweighed the private interest at stake.[40] The officer must have "specific reasonable inferences," not just "inchoate and unparticularized suspicion," that a certain suspect offers danger to her.[41] Thus, the *Terry* Court maintained that the Fourth

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[31] *Id.* at 7.

[32] *Id.*

[33] *Id.* Particularly, the men's refusal to give their names and provide a reasonable explanation for their perambulations in front of the store gave the officer reason to believe that the men were not engaged in legitimate behavior. *Id.*

[34] *Id.* at 24.

[35] *Id.* at 27-28.

[36] *Id.* at 20. The Court emphasized the "legitimate investigative function" served by the police officer's actions. *Id.* at 22.

[37] *Id.* at 22-27.

[38] *Id.* at 22-23.

[39] *Id.* at 24-25.

[40] *Id.* at 27.

[41] *Id.*

Amendment allows a seizure if a reasonable officer can point to specific, articulable facts not arising to the level of probable cause that lead him to believe that he should seize a suspect to protect his own safety.[42]

B. *PENNSYLVANIA V. MIMMS* AND THE RULE FOR DRIVERS

Since *Terry*, the Court has refined the balancing test that determines whether a particular search or seizure was reasonable. The Fourth Amendment proscribes only unreasonable seizures.[43] The seminal case in the area of seizures of motorists is *Pennsylvania v. Mimms*.[44] In *Mimms*, the Court determined the relative reasonability of a seizure by inquiring into the state interest in question and balancing it against the citizenry's liberty interest.[45]

In *Mimms*, police officers observed the defendant, Mimms, driving an automobile with an expired license plate tag.[46] They stopped the car to issue Mimms a citation.[47] An officer approached the vehicle and asked Mimms to step out of the vehicle and to produce his driver's license and registration.[48] As Mimms got out of the car, the officer saw a bulge under Mimms' jacket.[49] Believing that the bulge might be a concealed weapon, the officer *Terry* frisked[50] Mimms and discovered that the bulge

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[42] *Id.* Justice Douglas dissented in *Terry*, arguing that allowing police officers to seize citizens without probable cause gives the officers more authority and power than a judge, who cannot issue a warrant upon less than probable cause. *Id.* at 36-39 (Douglas, J., dissenting).

[43] *See* Pennsylvania v. Mimms, 434 U.S. 106 (1977); *see also supra* note 11 for the text of the Fourth Amendment.

[44] *Mimms*, 434 U.S. at 106.

[45] *Id.*

[46] *Id.* at 107.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See supra* note 23.

was, indeed, a loaded .38-caliber revolver.[51] The officer then arrested Mimms.[52]

The Court held that the police had probable cause to stop Mimms, and, therefore, concluded that the subsequent request to exit the vehicle was merely a request to change locations during a legal seizure.[53] The Court distinguished *Terry* on the basis that the initial stop or seizure in *Mimms* was clearly constitutional, while in *Terry* the legality of the initial stop was at issue.[54] Given the expired license plate tags, the officers had a right to stop Mimms.[55] Since Mimms had already been legally "seized" under the Fourth Amendment, the only issue before the Court was the "incremental intrusion" into the driver's liberty occasioned by the order to exit the vehicle.[56]

Following the logic of *Terry*, the Court articulated a balancing test to determine the reasonableness of the order to exit the vehicle.[57] Since the Fourth Amendment requires only that a seizure be reasonable, the Court weighed the state interest against the individual interest.[58] The *Mimms* Court maintained that it was "too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty."[59] The Court then examined the intrusion into the driver's liberty interest caused by the order to exit the vehicle.[60] The Court termed the order a "de minimus" intrusion, "a mere inconvenience," as it "expose[d] to view very little [more] of [the driver's] person than is already exposed."[61] Consequently, the Court held that the safety of an officer making a lawful traffic

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[51] Interestingly, there was a passenger in Mimms' car. After frisking Mimms, the officers also searched the passenger, who was carrying a .32-caliber revolver. No further mention is made of the passenger in the original case beyond the mention of his (and his gun's) presence. *See Mimms*, 434 U.S. at 107. After the Supreme Court's decision, the Supreme Court of Pennsylvania, on remand, noted that the passenger had pled guilty to the same charges of which Mimms was convicted. Commonwealth v. Mimms, 385 A.2d 334, 335 (Pa. 1978).

[52] *Mimms*, 434 U.S. at 107.

[53] *Id.* at 111.

[54] *Id.* at 109.

[55] *Id.* at 108-09.

[56] *Id.* at 109.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 110.

[60] *Id.* at 111.

[61] *Id.*

stop outweighed the individual citizen's liberty interest, and found that the officer could order the driver to exit the vehicle.[62]

C. *MICHIGAN V. SUMMERS* AND THE AUTHORITY OF POLICE OFFICERS TO CONTROL POTENTIALLY DANGEROUS SITUATIONS

The state interest in protecting law enforcement officials also led the Court to authorize officers to detain individuals at their residences when serving search warrants. The Court in *Michigan v. Summers*[63] held such a detention to be reasonable under the Fourth Amendment.

When police arrived at Summers' home to serve a search warrant, Summers was leaving the house.[64] The police stopped him and brought him into the house while they conducted their search pursuant to the warrant.[65] After finding drugs in the house, the police officers arrested Summers and searched him, finding more drugs in his pocket.[66]

Thus, the question presented to the Court was whether the officers had authority to detain Summers and require him to enter the house while they executed the warrant.[67] Noting that such an order constitutes a Fourth Amendment seizure, the Court compared the intrusion of such a seizure into a citizen's liberty with the state's interest in law enforcement.[68] Finding that the search warrant itself was more intrusive than the detention at issue, and noting that the warrant had judicial approval,

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[62] *Id.* Justice Marshall dissented on the ground that the order to Mimms to exit the vehicle was not related to the crime for which he had been stopped (driving with expired tags). *Id.* at 113-14 (Marshall, J., dissenting). Therefore, Marshall would not have extended *Terry* to cover a *Mimms* situation. Marshall also suggested to the Pennsylvania Supreme Court two alternate grounds on which they could achieve their original aim of reversing the conviction: they could base their decision on the Pennsylvania Constitution's analogue to the Fourth Amendment, or they could reverse the conviction and order a new trial on the ground that the prosecutor asked a witness improper questions about the religious affiliation of the defendant. *Id.* at 115 n.3 (Marshall, J., dissenting). The Pennsylvania Supreme Court chose the second option, ordering a new trial for Mimms (who had already completed his sentence for the offense) on the ground that his religious affiliation had been improperly introduced in evidence. *See* Commonwealth v. Mimms, 385 A.2d 334, 335 (Pa. 1978).

[63] 452 U.S. 692 (1981).

[64] *Id.* at 693 n.1.

[65] *Id.*

[66] *Id.* at 693.

[67] *Id.* at 694-95.

[68] *Id.* at 696, 700-01.

the Court found that the seizure was reasonable.[69] By granting a warrant, a "judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime."[70] In essence, the judgment of a neutral judicial officer supersedes the judgment of the officer in the field. Because of that neutral judicial officer's authorization, the police officers are reasonable to invade the liberty of a resident of the home while executing the warrant.[71] In addition, the Court mentioned that risk to the officers executing the warrant would be "minimized if the officers routinely exercise unquestioned command of the situation."[72] By allowing the officers to detain Summers while they searched the home, not only could the officers ask for his assistance in opening locked doors or cabinets, but they could protect themselves from a surprise return or attack.[73] Thus, the Court held the seizure to be reasonable in the interest of officer safety.[74]

D. *WHREN V.* UNITED STATES AND PRETEXTUAL SEIZURES

More recently, in *Whren v. United States*,[75] the Supreme Court held that the Fourth Amendment requires only that, in the absence of a warrant or an exception to the probable cause requirement, seizures must be based upon probable cause.[76] Because the officers had probable cause to seize the defendant, the Fourth Amendment was not implicated in *Whren*.[77]

Whren was a passenger in co-defendant Brown's vehicle, a Nissan Pathfinder with temporary plates.[78] Plainclothes Washington, D.C., vice squad detectives, in an unmarked car, observed Brown's vehicle stop at an intersection for about twenty

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[69] *Id.* at 701-02.

[70] *Id.* at 703.

[71] *Id.* at 705.

[72] *Id.* at 702-03.

[73] *Id.*

[74] *Id.*

[75] 116 S. Ct. 1769 (1996).

[76] *Id. See, e.g.*, Terry v. Ohio, 434 U.S. 1 (1968) (finding an exception for officer-protective pat-downs); Warden v. Hayden, 387 U.S. 294 (1967) (finding an exception for hot pursuit). For a more detailed analysis of *Whren*, see Craig M. Glantz, Note, *"Could" This Be the End of Fourth Amendment Protections for Motorists?*, 87 J. CRIM. L. & CRIMINOLOGY 864 (1997).

[77] *Whren*, 116 S. Ct. at 1777.

[78] Both Whren and Brown were young African-American males driving in a "high drug area." *Id.* at 1772.

seconds.[79] The detectives decided to follow Whren and Brown.[80] Brown pulled out of the intersection, turned right without signaling, and sped down the street.[81] Although the police officers did not have probable cause to believe that either Whren or Brown had committed any crime other than Brown's failure to signal, the officers nevertheless stopped the vehicle.[82] At the next intersection, the detectives pulled alongside and identified themselves as police officers.[83] As one officer approached, he saw two bags of crack cocaine in Whren's lap.[84] The officers then arrested Whren and Brown.[85]

The Court maintained that because the traffic violation provided police officers with an objective, reasonable basis for the traffic stop, any subjective motive of the officers in effecting the stop was immaterial.[86] Since the officers had probable cause to stop the vehicle, the Court declined to apply a balancing test, and held the seizure to be constitutional.[87] The effect of *Whren* is that so long as a reasonable police officer could have a good-faith motive for a seizure and relies upon probable cause, the Fourth Amendment does not require an inquiry into the subjective intent of the officers.[88]

III. FACTS AND PROCEDURAL HISTORY

On June 8, 1994, at approximately 7:30 p.m., Maryland State Police Trooper David Hughes observed a white 1994 Nissan Maxima driving at an excessive speed on Interstate 95 in Balti-

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[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.* Plainclothes vice squad detectives in unmarked cars are authorized to issue traffic citations "'only in the case of a violation that is so grave as to pose an immediate threat to the safety of others.'" *Id.* at 1775 (quoting Metro. Police Dept.—Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992)).
[87] *Id.* at 1776.
[88] *Id.* Some have argued that the holding in *Whren* substantially undermines *Terry*. *See, e.g.*, Janet Koven Levit, Note, *Pretextual Traffic Stops:* United States v. Whren *and the Death of* Terry v. Ohio, 28 LOY. U. CHI. L.J. 145, 172-73 (1996) (asserting that *Whren* allows traffic stops on less than reasonable suspicion).

more County.[89] As he followed, Hughes noticed that the vehicle did not have license plates; there was only "a paper tag kind of hanging half off, half on that said Enterprise Rent-A-Car."[90] Hughes activated the lights and sirens on his patrol car, signaling the driver to pull over.[91] Instead of obeying Trooper Hughes, the driver continued on for another mile and a half before stopping.[92]

While pursuing the Maxima, Hughes observed that, in addition to the driver, there were two passengers in the vehicle.[93] For the two and a half miles that he followed the car, Hughes noticed that the passengers turned several times to look at him, ducked out of his line of sight, and then reappeared.[94] When the driver finally stopped, Hughes exited his patrol car and approached the Maxima.[95]

As Hughes neared the Maxima, McNichol, the driver, exited the Maxima and walked toward Hughes.[96] Hughes directed McNichol to move toward the rear of the Maxima and met McNichol about halfway between the two vehicles.[97] Hughes told McNichol he had been stopped for speeding and asked to see his driver's license and registration.[98] McNichol showed

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[89] Brief for Petitioner at 2, Maryland v. Wilson, 117 S. Ct. 882 (1997) (No. 95-1268). The speed limit was 55-miles-per-hour on that stretch of I-95. Hughes followed the car for one mile, pacing it, and determined that the vehicle was traveling at 64-miles-per-hour. He was alone in his patrol car at that time. *Wilson*, 117 S. Ct. at 883.

[90] Brief for Petitioner at 2, *Wilson* (No. 95-1268).

[91] *Wilson*, 117 S. Ct. at 883.

[92] *Id.*

[93] *Id.*

[94] *Id.* *See* State v. Wilson, 664 A.2d 1, 2 (Md. Ct. Spec. App. 1995). The petitioner's brief characterized the passengers as "constantly moving . . . [and] continuously duck[ing] below the seat level and then reappear[ing]." Brief for Petitioner at 2, *Wilson* (No. 95-1268). The respondent, however, supported by the trial court record, asserted that the passengers "turned and looked at the trooper four or five times, [and] their heads went up and down four or five times, and they looked 'furtively.'" Brief for Respondent at 1-2, *Wilson* (No. 95-1268).

[95] Brief for Petitioner at 2, *Maryland v. Wilson*, 117 S. Ct. 882 (1997) (No. 95-1268). Petitioner asserted that Hughes was hesitant to walk toward the Maxima, since the passengers continued moving even after the car stopped. *Id.* at 2-3. The respondent refuted this claim, and the Maryland Court of Special Appeals made no finding either that there was continued movement in the vehicle or that the Trooper was hesitant to approach the vehicle. *Wilson*, 664 A.2d at 2; Brief for Respondent at 2, *Wilson* (No. 95-1268).

[96] Brief for Petitioner at 3, *Wilson* (No. 95-1268).

[97] *Id.*

[98] *Id.*

Hughes a valid Connecticut driver's license and informed Hughes that he was traveling from Connecticut to South Carolina.[99] During this brief interview, Hughes noticed that McNichol was nervous and, at times, seemed to be trembling.[100]

Hughes asked to see the vehicle registration, and McNichol informed him that the papers were still in the car.[101] Hughes then instructed McNichol to return to the vehicle to retrieve the car's rental papers.[102] McNichol got back into the car and sat in the driver's seat.[103]

Hughes also observed that the passenger in the front seat, respondent Jerry Lee Wilson, appeared nervous and was sweating.[104] After McNichol had returned to the driver's seat, Hughes asked Wilson to step out of the vehicle.[105] As Wilson got out of the Maxima, crack cocaine fell to the ground.[106] Hughes drew his firearm and arrested Wilson.[107]

Wilson was indicted for possession of cocaine with the intent to distribute, as well as for other narcotics and conspiracy offenses.[108] Wilson filed a pretrial motion to suppress the cocaine evidence, arguing that Hughes violated his Fourth Amendment rights by ordering him out of the vehicle, and the trial court granted the motion.[109] The State of Maryland appealed that decision to the Maryland Court of Special Appeals.[110]

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[99] *Id.*

[100] Maryland v. Wilson, 117 S. Ct. 882, 883 (1997).

[101] State v. Wilson, 664 A.2d 1, 2 (Md. Ct. Spec. App. 1995).

[102] *Id.* at 2-3; Brief for Petitioner at 3, *Wilson* (No. 95-1268).

[103] *Wilson*, 664 A.2d at 2-3.

[104] *Wilson*, 664 A.2d at 2-3; Brief for Petitioner at 3, *Wilson* (No. 95-1268).

[105] *Wilson*, 664 A.2d at 2-3; Brief for Petitioner at 3, *Wilson* (No. 95-1268). The petitioner asserted that Hughes feared for his safety. Brief for Petitioner at 3, *Wilson* (No. 95-1268). The Court of Special Appeals held that the trial court's finding that Hughes was not afraid for his safety was not clearly erroneous, and, therefore, as a finding of fact, it could not be overturned. *Wilson*, 664 A.2d at 3-4. Surprisingly, Hughes's fear for his safety, or lack thereof, had no bearing on the *Wilson* majority's opinion, although the dissent makes much of it. *See Wilson*, 117 S. Ct. at 887 (Stevens, J., dissenting). The petitioner also asserted that Wilson originally refused Hughes' request that he exit the vehicle, but this was disputed by the respondent. Brief for Petitioner at 3, *Wilson* (No. 95-1268); Brief for the Respondent at 2, *Wilson* (No. 95-1268). The Maryland Court of Special Appeals did not find that Wilson resisted any request by Hughes. *Wilson*, 664 A.2d at 3.

[106] *Wilson*, 664 A.2d at 3; Brief for Petitioner at 3; *Wilson* (No. 95-1268).

[107] *Wilson*, 664 A.2d at 3.

[108] *Id.* at 2. The other offenses were not listed by the court.

[109] *Id.*

[110] *Id.*

The appellate court considered only the very narrow issue of a police officer's right, during a traffic stop, to order passengers to exit the vehicle.[111] The court held that the police officer's right to remove a passenger from a vehicle stopped for a traffic violation was not automatic; rather, it must be based on some "individualized or particularized suspicion" that the passenger either poses a danger to the officer or that the passenger has engaged in, is engaging in, or is about to engage in criminal activity.[112] Because the record did not indicate any such evidence, the Maryland Court of Special Appeals affirmed the ruling of the trial court suppressing the evidence seized in the traffic stop.[113]

The State appealed the ruling to the Court of Appeals of Maryland, Maryland's highest court, which denied certiorari.[114] The State then appealed to the United States Supreme Court, which granted the petition for certiorari[115] to determine if a police officer may automatically order a passenger to exit a vehicle during a traffic stop without violating the Fourth Amendment.[116]

IV. SUMMARY OF OPINIONS

A. THE MAJORITY OPINION

Writing for the Court,[117] Chief Justice Rehnquist reversed the decision of the Maryland Court of Special Appeals, holding that police officers, without probable cause or articulable suspicion of wrongdoing, may lawfully order passengers to exit a vehicle during a traffic stop without implicating the Fourth Amendment.[118]

Analogizing the case to the situation in *Pennsylvania v. Mimms*,[119] Chief Justice Rehnquist employed the *Mimms* balanc-

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[111] *Id.*

[112] *Id.* at 12-13.

[113] *Id.* at 15.

[114] State v. Wilson, 667 A.2d 342 (Md. 1995).

[115] Maryland v. Wilson, 116 S. Ct. 2521 (1996).

[116] Maryland v. Wilson, 117 S. Ct. 882, 884 (1997).

[117] Justices O'Connor, Scalia, Souter, Thomas, Ginsburg, and Breyer joined Chief Justice Rehnquist.

[118] *Wilson*, 117 S. Ct. at 884.

[119] 434 U.S. 106, 111 (1977) (holding that it is permissible under the Fourth Amendment for a police officer to order the driver out of an automobile, incident to

ing test.[120] In doing so, he noted that the State of Maryland incorrectly relied on dicta[121] for the proposition that the *Mimms* rule had already been extended to passengers as well as drivers.[122]

Examining the public interest side of the balance, Chief Justice Rehnquist deemed it to be in the state's interest to protect the lives of its law enforcement personnel.[123] He acknowledged the inherent dangers involved in traffic stops.[124] According to Chief Justice Rehnquist, the major distinction between interacting with a passenger and interacting with a driver is that the danger to an officer of standing in lanes of traffic on the driver's side of the vehicle generally does not exist when the officer interacts with a passenger.[125]

On the other hand, Chief Justice Rehnquist asserted that when a vehicle contains passengers, the possibility of risk to the officer increases.[126] To protect herself, the officer must focus her attention in more than one place: she must pay attention to the driver of the vehicle (the person to whom she will issue a citation), and to the passengers.[127] Therefore, authorizing the officer to control the locations of all the occupants of the vehicle ensures her safety.[128] Chief Justice Rehnquist concluded that, despite the different interactions an officer has with a driver or with a passenger, the state's interest in protecting the officer, as well as the potential risk, was the same.[129]

Chief Justice Rehnquist then addressed the personal liberty side of the balance, stating that the liberty interest of the pas-

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a lawful traffic stop, even without a particularized suspicion that the driver poses a danger to her). *See supra* notes 43-62 and accompanying text for the facts in *Mimms*.

[120] *Wilson*, 117 S. Ct. at 884.

[121] *Id.* The dicta relied upon by the State of Maryland came from *Michigan v. Long*, 463 U.S. 1032, 1047-48 (1983) ("[I]n [*Mimms*] we held that police may order persons out of an automobile during a stop for a traffic violation."), and *Rakas v. Illinois*, 439 U.S. 128, 155 n.4 (1978) ("[T]his Court determined in [*Mimms*] that passengers in automobiles have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made.").

[122] *Wilson*, 117 S. Ct. at 885.

[123] *Id.*

[124] *Id.* The Court cited FBI statistics showing that in 1994, 11 officers were killed and 5,762 officers were assaulted during traffic pursuits and stops. *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

senger is "in one sense stronger" than that of the driver.[130] Unlike the driver, the passenger has not violated any law.[131] The driver's traffic violation occasioned the traffic stop, placing the driver legitimately under official control.[132] The traffic violation itself, according to Chief Justice Rehnquist, gives the officer probable cause to stop the vehicle, and it renders the seizure of the driver reasonable under the Fourth Amendment.[133] The passenger, on the other hand, has committed no violation whatsoever, and a seizure of an innocent person, without probable cause or reasonable suspicion, would appear to be *per se* unreasonable under the Fourth Amendment.[134]

Despite the appearance of unreasonableness, Chief Justice Rehnquist discussed the two basic concepts justifying the automatic seizure of passengers as well as drivers.[135] First, the passenger is just as effectively seized as the driver, by virtue of the traffic stop.[136] Second, the passenger is as motivated as the driver to conceal a crime.[137] Therefore, the danger to police officers from a passenger can be as great as that from a driver.[138] Chief Justice Rehnquist asserted:

> It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.[139]

The police officer may not know this until it is too late.[140]

Chief Justice Rehnquist, citing *Michigan v. Summers*,[141] noted that public safety is increased if police officers remain in control

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[130] *Id.* at 886.

[131] *Id.*

[132] *Id.*

[133] *See* Pennsylvania v. Mimms, 434 U.S. 106 (1977) (holding that a police officer may order a driver to exit the vehicle during a lawful traffic stop).

[134] *Wilson*, 117 S. Ct. at 885.

[135] *Id.* at 886.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] 452 U.S. 692 (1981). The Court, citing *Summers*, noted that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Wilson*, 117 S. Ct. at 886 (citing *Summers*, 452 U.S. at 702-03).

of the encounter.[142] According to Chief Justice Rehnquist, even if a police officer has no reason to suspect that any of the occupants of a stopped vehicle pose a particular danger to her, allowing her to control the location of all occupants enhances public safety.[143]

Chief Justice Rehnquist concluded his analysis by considering the wisdom of establishing a bright-line rule in this context.[144] Noting that the reasons for establishing such a rule are different for passengers and drivers, he found that the state's interest in officer safety is as weighty in both contexts.[145] Accordingly, the Court extended the *Mimms* rule[146] to passengers, holding that police officers may, in the interest of safety, require passengers to exit a lawfully stopped vehicle.[147]

B. JUSTICE STEVENS' DISSENT

Justice Stevens dissented[148] on the ground that the Court could have reached the same conclusion without stretching the bounds of the Fourth Amendment.[149] According to Justice Stevens, *Terry v. Ohio*[150] allows a police officer to order passengers out of a vehicle during a traffic stop, without implicating the Fourth Amendment, if the officer has an articulable suspicion that the passengers pose a threat to her safety.[151] Extending the *Mimms* rule to passengers, on the other hand, impinges on constitutionally protected areas.[152] Furthermore, Justice Stevens noted, there is no empirical evidence to suggest that an exten-

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[142] *Wilson*, 117 S. Ct. at 886.

[143] *Id.*

[144] *Id.*

[145] *Id.* The Court addressed only the officer's right to order a passenger to exit a vehicle. Chief Justice Rehnquist did not express an opinion on the question of the police officer's right to detain a non-lawbreaking passenger at the location while completing the traffic stop.

[146] *See supra* note 62 and accompanying text for a discussion of the *Mimms* rule.

[147] *Wilson*, 117 S. Ct. at 886.

[148] Justice Kennedy joined Justice Stevens's dissent.

[149] *Id.* at 887 (Stevens, J., dissenting).

[150] 392 U.S. 1 (1968) (allowing police officers to seize suspects about whom they have articulable suspicions that do not rise to the level of probable cause). *See supra* notes 21-42 and accompanying text for a discussion of *Terry*.

[151] *Wilson*, 117 S. Ct. at 886 (Stevens, J., dissenting).

[152] *Id.* (Stevens, J., dissenting).

sion of the bright-line rule would accomplish its putative goal of providing additional protection to police officers.[153]

Justice Stevens pointed out several flaws in the majority's use of statistics to support its position that traffic stops are inherently dangerous.[154] He attacked this assertion three ways.[155] First, empirical evidence did not support the notion that assaults on police officers are fewer in jurisdictions that have already extended *Mimms* to passengers.[156] Second, there was no suggestion that assaults on police officers ever occur in situations where the police officers have no reason to suspect that they are in danger.[157] Finally, comparing the number of officers assaulted to the number of traffic stops annually, Justice Stevens calculated that "the Court's new rule would provide a potential benefit to Maryland officers in only roughly [twenty-five] stops a year."[158]

While Justice Stevens agreed that the state's interest in protecting its officers was great in the abstract, he believed that the majority underestimated the actual value of the liberty interest involved.[159] Although the intrusion on any individual passenger may be minimal, the rule adopted by the majority authorized the state to intrude incrementally on individual liberty numerous times a day.[160] According to Justice Stevens, such a rule would benefit police officers in only a few traffic stops out of tens of thousands.[161] At the same time, viewed in the aggregate, the "thousands upon thousands of petty indignities" occasioned by a rule allowing officers to order passengers out of a vehicle inevitably "ha[ve] an impact on freedom that [Justice Stevens]

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[153] *Id.* at 887 (Stevens, J., dissenting).

[154] *Id.* (Stevens, J., dissenting). The majority had used the statistics to assert that allowing officers to remove passengers from vehicles would protect officers. *Id.* at 885.

[155] *Id.* at 887 (Stevens, J., dissenting).

[156] *Id.* (Stevens, J., dissenting).

[157] *Id.* (Stevens, J., dissenting).

[158] *Id.* at 888 (Stevens, J., dissenting). Stevens noted that this is only an estimate, based on the fact that there are over a million motor vehicle cases in Maryland each year and an assumption that Maryland had a proportional share of the assaults on police officers. *Id.* at 888 nn.4-5 (Stevens, J., dissenting).

[159] *Id.* at 888 (Stevens, J., dissenting).

[160] *Id.* (Stevens, J., dissenting).

[161] *Id.* (Stevens, J., dissenting).

would characterize as substantial."[162] Justice Stevens therefore would not extend the *Mimms* rule to passengers.[163]

Justice Stevens also noted a major difference between *Wilson* and *Mimms*.[164] In *Mimms*, the Court recognized that the driver of the stopped vehicle was already reasonably seized by virtue of the traffic infraction itself.[165] The passenger in *Wilson*, on the other hand, had committed no violation justifying detention or restraint.[166] In fact, the majority's holding allowed police officers to detain innocent civilians about whom they have no articulable suspicion of wrongdoing.[167] According to Justice Stevens, the majority for the first time allowed suspicionless seizures not supported by the judicial approval that the Fourth Amendment required.[168]

Therefore, Justice Stevens maintained that the preferable course would be to continue to require police officers to make a lower, *Terry* level[169] showing of suspicion before allowing them to infringe upon constitutionally protected liberties.[170] Justice Stevens believed that a police officer must have "an articulable suspicion of possible danger" before she may order passengers out of a lawfully stopped vehicle.[171] In allowing police officers to "seize" people who have committed no offense and present no apparent danger to police officers, Justice Stevens believed that the Court disregarded precedent that required a reason for a seizure to be acceptable under the Fourth Amendment.[172]

C. JUSTICE KENNEDY'S DISSENT

Justice Kennedy dissented separately to emphasize his view that the Court's decision seriously encroached on constitution-

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[162] *Id.* (Stevens, J., dissenting).

[163] *Id.* (Stevens, J., dissenting).

[164] *Id.* at 886 (Stevens, J., dissenting).

[165] *Id.* at 889 (Stevens, J., dissenting) (citing Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977)).

[166] *Id.* (Stevens, J., dissenting).

[167] *Id.* (Stevens, J., dissenting).

[168] *Id.* at 889-90 (Stevens, J., dissenting).

[169] Terry v. Ohio, 392 U.S. 1, 27 (1968) (requiring police officers to base their actions upon articulable facts that do not necessarily meet a level of probable cause). *See supra* notes 21-42 and accompanying text for a discussion of *Terry*.

[170] *Wilson*, 117 S. Ct. at 887-89 (Stevens, J., dissenting).

[171] *Id.* at 887 (Stevens, J., dissenting).

[172] *Id.* at 890 (Stevens, J., dissenting).

ally protected areas.[173] According to Justice Kennedy, precedent supported the bright-line rule requiring that law enforcement officers have an objective reason for their actions, even if that objective reason is not the actual motivation for the seizure.[174] Justice Kennedy believed that the majority's decision allowed police officers to detain people who have done nothing wrong.[175] Justice Kennedy concluded that the Constitution would no longer shelter citizens from the arbitrary exercise of state power.[176] Indeed, after this decision, citizens would be dependent upon the largesse of the state for freedoms previously guaranteed by the Federal Constitution.[177]

V. ANALYSIS

The Supreme Court's holding in *Maryland v. Wilson* erodes traditional Fourth Amendment protections.[178] Allowing police officers to order innocent passengers out of a lawfully stopped vehicle, without requiring those officers to have any reason for seizing passengers, runs counter to prior case law interpreting the language of the Fourth Amendment.[179]

By incorrectly analogizing the case to the wrong precedent of *Mimms*, the *Wilson* Court reached the wrong result. Because the *Wilson* Court ruled that a police officer does not need a reason to order a passenger out of a legally stopped vehicle, the passenger cannot challenge the constitutionality of such an order. Consequently, government action in such situations is protected from judicial review. Courts have no power to prevent arbitrary police action in ordering passengers to exit lawfully stopped vehicles. Fortunately, such protection may still be afforded to passengers under state constitutions.

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[173] *Id.* (Kennedy, J., dissenting).

[174] *Id.* (Kennedy, J., dissenting). *Cf.* Whren v. United States, 116 S. Ct. 1769, 1774 (1996) (noting that as long as there is a rational, objective reason for a police officer's actions in stopping a vehicle, her subjective motives are irrelevant).

[175] *Wilson*, 117 S. Ct. at 890 (Kennedy, J., dissenting).

[176] *Id.* (Kennedy, J., dissenting).

[177] *Id.* at 891 (Kennedy, J., dissenting).

[178] *See supra* notes 21-42 and accompanying text.

[179] *See supra* notes 11-74 and accompanying text

A. THE MAJORITY INCORRECTLY APPLIED THE *MIMMS* TEST

The majority incorrectly accepted the proposition that *Pennsylvania v. Mimms*,[180] rather than *Terry v. Ohio*,[181] controlled the outcome in *Wilson*.[182] Because *Mimms* involves an application of *Terry*, the Court also should have considered the *Terry* holding in its analysis. In addition, because *Terry* dealt specifically with the legality of the initial seizure,[183] which was not at issue in *Mimms*,[184] but was an issue in *Wilson*,[185] the Court should have adhered to the *Terry* standard rather than the *Mimms* standard.[186]

In *Wilson*, the Court incorrectly applied the *Mimms* balancing test, failing to consider the legality of the seizure of the innocent, non-threatening passenger.[187] In *Mimms*, the issue was the incremental increase in the level of state control over a person already legally detained.[188] In contrast, *Wilson* involved the initial seizure of an innocent, non-threatening person.[189]

The Court should have begun its analysis by evaluating the legitimacy of the initial seizure of Wilson. The Court virtually ignored this issue, noting only that, "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle."[190] Logically, it is true that the passengers were no longer moving forward as a result of the police officer's legitimate traffic stop. Such a stop, however, does not rise to the level of a Fourth Amendment seizure until the state steps in to restrict the

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[180] 434 U.S. 106 (1977).

[181] 392 U.S. 1 (1968).

[182] *Wilson*, 117 S. Ct. at 884.

[183] *Terry*, 392 U.S. at 19-20.

[184] *Mimms*, 434 U.S. at 109 ("In this case, unlike *Terry v. Ohio*, there is no question about the propriety of the initial restrictions on respondent's freedom of movement.").

[185] *Wilson*, 117 S. Ct. at 884.

[186] In *Mimms*, the police had probable cause to believe that they could seize the driver of the vehicle, based on the traffic violation. *Mimms*, 434 U.S. at 111. By contrast, in *Terry* the police did not have probable cause to believe that the defendants were committing a crime; therefore the initial seizure was litigated. *Terry*, 392 U.S. at 27. Similarly, in *Wilson*, the state trooper had neither probable cause nor reasonable suspicion to believe that the passenger was committing a crime or was a danger to the officer. State v. Wilson, 664 A.2d 1, 3-4 (Md. 1995).

[187] *Wilson*, 117 S. Ct. at 886.

[188] *Mimms*, 434 U.S. at 109-10.

[189] *Wilson*, 117 S. Ct. at 886 (Stevens, J., dissenting).

[190] *Id.*

individual liberty of a person.[191] If the state actors were repairing the highway, for example, the passenger would be stopped just as effectively, yet that hardly constitutes a Fourth Amendment seizure.[192] A stop for highway repairs affects all travelers on the highway, not any one person individually. Such a dispersed effect is constitutional.[193] It is only when the state attempts to control an individual's liberty "by means of physical force or show of authority" that a Fourth Amendment seizure occurs.[194] In *Wilson*, the seizure occurred when the police officer ordered Wilson out of the vehicle.[195] At that point, the authority of the state actor overrode the will of the individual passenger.

Thus, the threshold question for the Court should have been whether the initial seizure of Wilson was legal, rather than whether the seizure was reasonable.[196] As *Terry* showed, the two questions are separable.[197] Applying *Terry* to the instant case, the first question the Court should have asked was whether the officer had the right to seize the defendant. If the Court had inquired into the legality of the initial seizure, rather than into the reasonableness of the seizure, the analysis would have begun in the same place, by examining the events in the light of circumstances. *Terry*, rather than *Mimms*, however, would have controlled the outcome. *Terry* requires the officer's actions to be supported by specific and articulable facts indicating to a reasonable police officer that a seizure is necessary to protect the

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[191] *Terry*, 392 U.S. at 16.

[192] *See Wilson*, 117 S. Ct. at 889 (Stevens, J., dissenting).

[193] Note that in such a case, when all persons traveling on the highway would be stopped, the Court has authorized the seizures. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (holding that a sobriety checkpoint did not violate the Fourth Amendment when all drivers were stopped for a drunk driving check, even absent an individualized suspicion that the drivers were intoxicated). Under *Wilson*, however, the police may select which motorists to subject to state control. Such arbitrary state action has, in other contexts, been found unconstitutional. *See supra* note 9 and accompanying text.

[194] *Terry*, 392 U.S. at 19 n.16. The *Terry* Court discussed the definition of a seizure and asserted that "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16.

[195] *Wilson*, 117 S. Ct. at 889 n.8 (Stevens, J., dissenting).

[196] *See id.* at 884-85.

[197] *Terry*, 392 U.S. at 15-16, 19-20.

officer.[198] *Mimms*, on the other hand, involved an incremental intrusion into the liberty of a citizen already legally seized.[199]

Applying *Terry* to the facts in *Wilson*, it is clear that the seizure of the passenger was not constitutionally authorized.[200] The totality of the circumstances—particularly the fact that the officer allowed the driver to return to the vehicle to get the registration materials—indicates that the officer did not believe there were weapons in the car.[201] The trial court, which heard the officer's testimony and was capable of judging the officer's demeanor, ruled that the officer's decision to order Wilson out of the vehicle was not based on articulable suspicion.[202] Consequently, the officer's order to Wilson to exit the vehicle was an unreasonable seizure, violating the Fourth Amendment.[203] The cocaine discovered due to the illegal seizure should have been suppressed.

B. THE FOURTH AMENDMENT PROTECTS PEOPLE BY SUBJECTING STATE ACTIONS TO JUDICIAL SCRUTINY

As the law stands after *Maryland v. Wilson*, police officers may stop a vehicle if they have probable cause to believe that a crime, including a minor traffic violation, has been committed.[204] An initial showing of probable cause or articulable suspicion is required to stop the vehicle and seize the driver, but no such showing is necessary to seize the passenger and exercise the authority of the state. In addition, police officers may also stop the car on a pretext—for example, if police officers suspect the occupants to be in possession of drugs or firearms. As long as the officers can point to an objective basis for the stop, such as a traffic violation, the Fourth Amendment is not implicated.[205]

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[198] *Id.* at 15-16.

[199] Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

[200] State v. Wilson, 664 A.2d 1, 3 (Md. 1995). The appellate court refused to overrule the trial court's finding that the arresting officer was not credible in testifying that he ordered Wilson out of the vehicle because he had concerns for his own safety. *Id.*

[201] *Id.* at 3-5, 15.

[202] *Id.* *See supra* notes 105 and 186.

[203] *Wilson*, 664 A.2d at 15.

[204] *Mimms*, 434 U.S. at 111.

[205] Whren v. United States, 116 S. Ct. 1769, 1773 (1996). "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 [*Wilson*], the Court puts tens of mil-

Once the car is stopped, the police officers need to make no showing of danger, or threat, or suspicion before seizing the passenger. In other words, after *Wilson*, becoming a passenger in an automobile entails giving up some Fourth Amendment protections.

The primary Fourth Amendment protection a passenger relinquishes is the ability to have the state action reviewed by an independent judiciary.[206] In a traffic stop, the police officer must have a reason to pull over the vehicle.[207] The officer, however, needs no reason to order the passenger to exit the vehicle. As a practical matter, police officers will continue to assert *Terry*-type articulable reasons for the order (officer safety being the one most used). The primary change effected by *Wilson* is that courts are no longer free to supervise officers.[208]

After *Wilson*, since officers need no longer articulate any reason for commanding passengers to exit the vehicle, their actions are insulated from judicial review. Therefore, any reason—or no reason at all—suffices to support an exit order. The courts cannot review a police officer's judgment, to tell her that ordering a specific passenger out of a vehicle was unreasonable. The officer does not need to provide a reason for the order and therefore need not testify on this point. This makes it much easier for officers to behave "constitutionally" for unconstitutional motives. Even if another clause of the Constitution provides an independent bar to the officers' actions,[209] the officers

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lions of passengers at risk of arbitrary control by the police." Maryland v. Wilson, 117 S. Ct. 882, 890 (1997) (Kennedy, J., dissenting).

[206] The protection of the Fourth Amendment is not so much in its prohibition on unreasonable searches and seizures, but in the power of the judiciary to curb arbitrary or unreasonable police action. The Court fashioned the exclusionary rule as a way to discourage illegal police activity. *See supra* note 14; *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 377-79 (1974); Andrew J. Pulliam, Note, *Developing a Meaningful Fourth Amendment Approach to Automobile Investigatory Stops*, 47 VAND. L. REV. 477, 478 (1994).

[207] *See, e.g.*, *Whren*, 116 S. Ct. at 1772-73.

[208] In *Wilson*, for example, the trial court did not believe that the officer had an articulable suspicion that Wilson afforded some danger to him. *Wilson*, 664 A.2d at 4. Since *Terry* required some articulable suspicion, lack of such suspicion made the search unconstitutional and the evidence was suppressed. *Id.* Following *Wilson*, however, the trial court now can not make a finding on the officer's actions; in the absence of some independent constitutional bar, the evidence will always be admissible.

[209] Specifically, the Equal Protection Clause of the Fourteenth Amendment bars officials from acting in a (racially) discriminatory fashion. *See supra* note 13 for the text of the Equal Protection Clause.

need only remain silent as to their motivation for the exit order and the court is powerless to stop them.

Subjecting police action to judicial review promotes the primary purpose of the Fourth Amendment: to protect people from arbitrary police action.[210] After *Whren*, police may fabricate a reason to effect a specific traffic stop.[211] After *Wilson*, they need articulate no reason whatsoever to seize a passenger.[212] Taking *Wilson* and *Whren* in conjunction, the police now have a weapon to implement law enforcement, but also a weapon to implement racial harassment.[213]

The Supreme Court has explicitly recognized that controlling arbitrary police action against racial minorities is a Fourth Amendment concern.[214] Since the Court's interpretation of the

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[210] *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967) (emphasizing the importance of judicial review of police activities).

[211] The officers in *Whren* were not authorized to make traffic stops. *Whren*, 116 S. Ct. at 1775-76. The Court allowed the officers to make the stop on the ground that they were police officers, and since other police officers on the police force could make the traffic stop, it was immaterial that these officers could not. *Id.* It was also immaterial that the officers pulled the defendants over, not because of the traffic violations, but because they suspected them of drug possession but had no probable cause on which to base a search or seizure. *Id.* at 1776. In other words, the officers were able to do what no court could have done: stopped, searched and seized the defendants for drug possession without a warrant and without probable cause that a drug violation had or would occur. *See supra* notes 75-88 and accompanying text for a discussion of *Whren*.

[212] Maryland v. Wilson, 117 S. Ct. 882, 886 (1997).

[213] From *Terry* to *Mimms* to *Wilson*, the Court has been aware of the dangers afforded to minorities by a stronger, less-regulated police force. *See infra* note 214. Applying the exclusionary rule as a deterrent to police officers was one way of protecting minorities. In *Wilson*, however, the exclusionary rule does not apply since, by judicial fiat, the police officer's actions in ordering a passenger out of a vehicle are always reasonable.

[214] *See* Terry v. Ohio, 392 U.S. 1, 14-15 (1968). In earlier years, the Court was concerned not only with the rights of the individual defendant appearing before it, but with the systemic implications of any new rule. The Court recognized that:

> The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial . . . . Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which trenches upon personal security without the objective evidentiary justification which the Constitution requires.

Id. (footnote omitted).

Justice Stevens, dissenting in *Mimms*, noted that "[s]ome citizens will be subjected to [the] minor indignity [of being ordered out of the vehicle] while others—perhaps those with more expensive cars, or different bumper stickers, or different-

Fourth Amendment required probable cause before *Terry* and articulable suspicion after *Terry*, police action was subjected to judicial review. Following the decisions in *Wilson* and *Whren*, however, police action is essentially unfettered in the area of passenger exit orders.

C. FOURTH AMENDMENT RIGHTS MAY STILL BE PROTECTED UNDER STATE CONSTITUTIONS

Any law enforcement official relying on *Wilson* to justify a suspicionless seizure of a passenger may find such reliance to be misplaced.[215] The protection to individuals afforded to passengers in vehicles before the *Wilson* decision may still exist, because most state constitutions contain specific prohibitions against unreasonable searches and seizures analogous to the

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colored skin—may escape it entirely." Pennsylvania v. Mimms, 434 U.S. 106, 122 (1977) (Stevens, J., dissenting) (footnote omitted).

On remand, the Pennsylvania Supreme Court emphasized that "[w]e cannot ignore the fact that Mimms and [passenger] Morrison were black nor can we ignore the fact that certain adherents of the Muslim faith known as 'Black Muslims' have been the subject of widespread unfavorable publicity . . . ." Commonwealth v. Mimms, 385 A.2d 334, 336 n.7 (Pa. 1978) (on remand from the Supreme Court, ordering a new trial for Mimms on the grounds that the prosecution improperly introduced evidence of the religious beliefs of Mimms and his passenger).

The Court also recognized that "[t]he Black Codes were a substitute for slavery; segregation was a substitute for the Black Codes; the discrimination in these sit-in cases is a relic of slavery." Bell v. Maryland, 378 U.S. 226, 247-48 (1964) (Douglas, J., concurring). *See also* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (voiding vagrancy statutes for vagueness in part because of the danger of arbitrary enforcement); Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual But Continual Erosion of* Terry v. Ohio, 34 HOW. L.J. 567 (1991) (summing up several studies detailing police encounters with minority citizens in a *Terry* context); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983). *Cf.* Robert Berkley Harper, *Has the Replacement of "Probable Cause" with "Reasonable Suspicion" Resulted in the Creation of the Best of All Possible Worlds?*, 22 AKRON L. REV. 13, 38 (1988) (suggesting that socio-economic status, rather than race, motivates more citizen-police encounters).

[215] Ronald Susswein noted that the New Jersey Supreme Court had decided the issue of the authority of police officers to order innocent passengers out of lawfully stopped vehicles two years before the Supreme Court decided *Wilson*, relying equally on the federal Constitution and on the New Jersey Constitution. *See* State v. Smith, 637 A.2d 158, 163-64 (N.J. 1994); Ronald Susswein, *The Practical Effect of the "New Federalism" on Police Conduct in New Jersey*, 7 SETON HALL CONST. L.J. 859, 869 (1997). Susswein believes that the New Jersey rule, requiring articulable suspicion before a police officer can order a passenger out of a car, survives the *Wilson* rule in New Jersey. *Id.* Therefore, he continues to instruct law enforcement personnel that they must abide by the New Jersey, rather than the federal, standard.

Fourth Amendment.[216] These prohibitions vary in language; some are copies of the Fourth Amendment, while others adhere merely to its spirit.[217] Nevertheless, the protections afforded to people under the Fourth Amendment to the Federal Constitution are usually also guaranteed to people independently by the states.

In addition, the Tenth Amendment indicates that some decisions would be best left to the states.[218] While the area of state autonomy is not mapped out in the Tenth Amendment, the Supreme Court has declined to decide some cases under the Constitution, declaring that the states are in a better position to make the necessary decision.[219] In addition, state constitutions may contain provisions that differ from the Federal Constitution, either in their wording or in their legislative history.[220] Those differences may allow citizens of the individual states to enjoy greater rights than those they enjoy as citizens of the United States. State courts in recent years, under the new judi-

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[216] *See, e.g.*, CAL. CONST. art I, § 13; ILL. CONST. art. I, § 6; MD. CONST. art. 26; MICH. CONST. art. I, § 11; N.Y. CONST. art. I, § 12; PA. CONST. art. I, § 8; TEX. CONST. art. I, § 9.

[217] *Compare* U.S. CONST. amend. IV ("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."), *with* CAL. CONST. art. I, § 13 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."), *and* MD. CONST. art. 26 ("That all warrants, without oath or affirmation, to search suspected places or to seize any person or property, are grevious [sic] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.").

[218] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[219] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) (declining to impose a school-financing system, holding that that is appropriately the province of the state). *See also* Robert F. Williams, *Two Visions of State Constitutional Rights Protections*, 7 SETON HALL CONST. L.J. 833, 836-37 (1997).

[220] *See supra* notes 216-17.

cial federalism, have been more willing to assert independent state bases for their constitutional decisions.[221]

Judicial federalism recognizes that the Federal Constitution provides a minimum threshold of rights. States may not grant to their citizens lesser rights than those granted by the Federal Constitution. The states may, however, grant their citizens greater rights than those granted by the Federal Constitution. They may do so by relying on the clause in the state constitution that purports to grant the state analogue of the federal right. In doing so, the states are not bound by the decisions of the Supreme Court interpreting the Federal Constitution.[222] In addition, resting the decision on an independent state ground shields the decision from review by the Supreme Court.[223] Therefore, despite the Supreme Court's holding that exempts passengers from Fourth Amendment protection, that protection may still exist under state constitutions. Although the Court has abridged certain rights formerly retained by the people, states may still secure those rights to citizens through their state constitutions.

VI. CONCLUSION

In *Maryland v. Wilson*, the Supreme Court held that police officers may, as a matter of course, lawfully order passengers to exit a vehicle during a traffic stop without implicating the Fourth Amendment.[224] After analogizing the case to *Pennsylvania v. Mimms*,[225] the Court applied the *Mimms* balancing test to determine the reasonableness of the officer's order to the passenger to exit the vehicle.[226] The Court held that the state's interest in officer safety outweighs a passenger's interest in

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[221] *See* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1016-17 (1997).

[222] Commonwealth v. Mimms, 385 A.2d 334, 337 (Pa. 1978) ("Disposition on state grounds . . . preserves a body of state law independent of decision of the United States Supreme Court.") (Roberts, J., concurring).

[223] Delaware v. Prouse, 440 U.S. 648 (1979) (holding that the Supreme Court had jurisdiction only because the Delaware Supreme Court decision rested as much on the Fourth Amendment as on the state constitution).

[224] Maryland v. Wilson, 117 S. Ct. 882, 884 (1997).

[225] 434 U.S. 106 (1977).

[226] *Wilson*, 117 S. Ct. at 884-85.

remaining free from arbitrary government intervention.[227] Consequently, the Court approved a bright-line rule allowing police officers to order passengers out of a lawfully stopped vehicle, without a showing that the passengers offer any danger to the officer.[228]

The *Wilson* Court used *Mimms* as the standard when it should have adhered to the standard articulated in *Terry v. Ohio*.[229] Under *Terry*, if an officer does not have probable cause, she must have specific articulable facts to justify the initial seizure of a person.[230] Adhering to the *Terry* standard would have led the Court to the conclusion that the order to Wilson to exit the vehicle was an illegal seizure. The decision as it stands is a departure from prior case law that required law enforcement personnel to articulate a reason before effecting a seizure.[231] Requiring police officers to state reasons for seizing an individual will ensure judicial scrutiny of police actions, and prevent the police from using the laws in a discriminatory, arbitrary manner. Finally, although *Wilson* establishes a bright-line rule for law enforcement, the Federal Constitution is only the lowest threshold of protection. The new judicial federalism may protect many citizens from unreasonable seizures under their state constitutions.

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[227] *Id.*
[228] *Id.*
[229] 392 U.S. 1 (1968).
[230] *Id.* at 30-31.
[231] *Id.*