

COMMENTS

“PEOPLE, NOT PLACES”: THE FICTION OF CONSENT, THE FORCE OF THE PUBLIC INTEREST, AND THE FALLACY OF OBJECTIVITY IN POLICE ENCOUNTERS WITH PASSENGERS DURING TRAFFIC STOPS

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INTRODUCTION

Of the various places to be judicially deprived of their private nature, the most devastated is undoubtedly the automobile. What may once have been viewed as a sanctuary more comforting in its limited confines and mobility than the airy expanse of a family home has become a place of public scrutiny, subject to nearly unchecked invasions of its physical interior and the persons who occupy it.

For the most part, drivers have acquiesced in the searching police inquiries that routinely accompany traffic stops. Maybe they believe that these intrusions are the consequence of their own misconduct. Maybe they realize that resistance to such practices was rendered futile long ago, when the omnipotent force of the public interest began to chip away at their Fourth Amendment rights. Regardless of the reason, however, their passengers must not fall victim to the same passive resignation. The “right to be let alone”¹ should not be arbi-

* J.D. Candidate, 2005, University of Pennsylvania Law School; B.S., 2001, University of Colorado. I would, first and foremost, like to thank the attorneys who argued *People v. Jackson* before the Colorado Supreme Court. They unknowingly planted the seed that became this Comment in the mind of a cub reporter anxiously awaiting her legal education. I would also like to thank my brothers, Luis and Justin, for listening to me flesh out the arguments presented here over and over again for months without once admitting boredom or disinterest, and my father, for never letting me win a debate of any kind. Your unconditional and unwavering support has been one of the few constants in my life and I love you. Finally, I would like to extend my gratitude to Professor David Rudovsky and the entire editorial board of the *University of Pennsylvania Journal of Constitutional Law* for their insightful suggestions and dedication.

¹ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (holding that speech is not property within the meaning of the Fourth Amendment and that the intercepting of telephone conversations implicated the Amendment only if it was accomplished through governmental trespass upon the suspect’s property), *overruled in part by* *Berger v. New York*, 388 U.S. 41 (1967) (holding that conversation is within the Fourth Amendment’s protection and that the use of electronic devices to capture it is a search within the meaning of the Amendment), *and in part by* *Katz v. United States*, 389 U.S. 347, 353 (1967) (“[T]he Fourth

trarily disregarded because of one's presence in a vehicle stopped for a traffic violation.

Because "the Fourth Amendment protects people, not places,"² the reasonableness requirement of that Amendment³ extends to seizures of passengers in traffic stops. Under *Terry v. Ohio*, a seizure must be reasonable both at its inception and throughout its duration, meaning that any interaction between police and passengers must be reasonably related to effectuating the purpose for the stop.⁴ Unfortunately, however, courts have yet to develop a coherent means of determining when these seizures are reasonable. Some have concluded that passengers are *not* actually seized during a traffic stop, and that, therefore, such encounters need not be reasonable.⁵ These courts view a passenger's detention as incidental to that of the driver,⁶ and thus, as a consensual encounter.⁷

Other courts have determined that, although these encounters *are* seizures,⁸ passenger questioning constitutes a reasonable police practice as a matter of law. Reasonableness balancing,⁹ these courts say, weighs in favor of the police, who need to be able to identify wit-

Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass . . .'" (citation omitted)).

² *Katz*, 389 U.S. at 351.

³ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

⁴ 392 U.S. 1, 20 (1968). In *Terry*, an officer approached a man he believed to have been "casing" a store for a robbery. After watching him pace back and forth up the street, occasionally conferring with an associate, the officer stopped him and searched his person for weapons, finding a revolver in his coat pocket. The Court determined that it was reasonable for an officer having specific reasons to suspect a person, although lacking probable cause, to initiate a limited seizure and, if his suspicions include a belief that the individual is armed and dangerous, a weapons frisk. The opinion gave birth to the modern day investigative detention, the requirements of which apply to traffic stops.

⁵ *E.g.*, *People v. Cartwright*, 85 Cal. Rptr. 2d 788, 793 (Cal. Ct. App. 1999) ("Passengers are not seized within the meaning of the Fourth Amendment simply because they occupy a seat in a vehicle which a police officer stops for a violation of the Vehicle Code."). *But see* *People v. Lamont*, 23 Cal. Rptr. 3d 26, 31 (Cal. Ct. App. 2004) ("[A]t the time of the initial traffic stop, the passenger is seized within the meaning of the Fourth Amendment.").

⁶ *E.g.*, *People v. Jackson*, 39 P.3d 1174, 1185 (Colo. 2002) ("The stop of the passenger is merely an unavoidable result of the driver's acquiescence in the police officer's command."); *State v. Hickman*, 763 A.2d 330, 337 (N.J. Super. Ct. App. Div. 2000) ("[T]he passengers are subject, as a practical matter, to the same temporary stop as the driver . . .").

⁷ *E.g.*, *Jackson*, 39 P.3d at 1188 (holding that a police request for a passenger's identification was a consensual encounter because a reasonable person would have felt free to decline the request).

⁸ *E.g.*, *State v. Griffith*, 2000 WI 72, ¶ 44, 613 N.W.2d 72, 81 ("[T]he officer's posing of . . . questions to the passenger did involve some incremental intrusion on the passenger's personal liberty.").

⁹ "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Terry*, 392 U.S. at 21 (citation omitted).

nesses,¹⁰ verify information provided by the driver,¹¹ or just have more information about the individuals they are dealing with.¹² The invasion of personal liberty these needs demand is thought to be minimal.¹³

Finally, a minority of courts view the questioning of a passenger as an independent extension of that passenger's seizure, requiring an independent justification.¹⁴ Where the requisite reasonable suspicion is lacking, the suppression remedy is available to repair the damage.¹⁵

This Comment explores the reasonableness of encounters between police and passengers during traffic stops. Part I will discuss Fourth Amendment doctrine as it is currently applied to the routine traffic stop, with an emphasis on the requirements set forth by the Supreme Court in *Terry v. Ohio*.¹⁶ Part II will examine each of the most common jurisprudential approaches to determining whether the questioning of passengers during traffic stops is reasonable. This Part will evaluate each approach in turn, reviewing the relevant decisions to illustrate the common analytical errors that render each ineffectual. Part III will propose as an alternative a presumption of unreasonableness, to be countered only by either a clear showing of a reasonable relation to an important public interest or independent reasonable suspicion based on the totality of the circumstances of the particular incident.

¹⁰ *E.g.*, *State v. Jones*, 5 P.3d 1012, 1018 (Kan. Ct. App. 2000) ("We hold the securing of names of witnesses is part of the scope of a traffic stop . . ."), *aff'd on other grounds*, 17 P.3d 359 (Kan. 2001); *Griffith*, 2000 WI 72, ¶ 48, 613 N.W.2d at 81 ("[T]here is a general public interest in attempting to obtain identifying information from witnesses to police-citizen encounters.").

¹¹ *E.g.*, *United States v. Brown*, 345 F.3d 574, 578 (8th Cir. 2003) ("The officer may also ask the passenger similar questions to verify the information the driver provided."); *United States v. Mendoza-Carrillo*, 2000 DSD 34, 107 F. Supp. 2d 1098 (same).

¹² *E.g.*, *State v. Landry*, 588 So. 2d 345, 348 (La. 1991) ("[T]he officers had a further security interest in determining whether the men with whom they were dealing were dangerous characters.").

¹³ *E.g.*, *id.* ("[T]he document obtained by the simple request for identification was one which is commonly used for identification purposes and one in which a person has little expectation of privacy."). Despite this holding, it seems obvious that an individual may have more than a little expectation of privacy in an identification card. This is because it is not the card itself, but the information it contains—namely, the identity—which the individual may wish to keep private.

¹⁴ *E.g.*, *United States v. Givan*, 320 F.3d 452 (3d Cir. 2003) (holding that police questioning of the occupants of a vehicle stopped for speeding about their travel plans was reasonable after police developed a reasonable suspicion that they were involved in drug activity).

¹⁵ "[S]tatements given during a period of illegal detention are inadmissible even though voluntarily given if they are the product of the illegal detention and not the result of an independent act of free will." *Florida v. Royer*, 460 U.S. 491, 501 (1983) (holding that police exceeded the limits of an investigative detention when they asked the defendant to accompany them to a small police room after stopping him in an airport, retaining his ticket and identification, and retrieving his luggage without consent).

¹⁶ 392 U.S. 1 (1968); *see supra* note 4.

I. THE FOURTH AMENDMENT AND THE TRAFFIC STOP

Of the countless encounters between citizens and the police, perhaps the most common is the dreaded traffic stop. Everyone knows the sinking feeling in the pit of the stomach that accompanies flashing lights in the rearview mirror. Perhaps the driver was speeding, rolled through a stop sign, failed to signal, or neglected to replace a broken taillight. Regardless of the reason, and although inevitably unpleasant, these mild brushes with the law are often uneventful. An officer approaches the driver, asks to inspect the necessary documents, issues a citation or a warning, and then departs, leaving the offending motorist grumpy, but perhaps a bit more cautious.

Such an encounter constitutes a "seizure,"¹⁷ and must therefore be reasonable to comply with the Fourth Amendment.¹⁸ Specifically, the law classifies the routine traffic stop as an "investigative detention," or "Terry stop."¹⁹ Police need only have a reasonable suspicion that some illegality has occurred or is occurring in order to stop a vehicle to investigate.²⁰ Importantly, however, police must be able to clearly articulate the reasons for their suspicions,²¹ and the subsequent investigation must be limited to whatever questions or other conduct is necessary to determine if a violation has occurred.²²

Sometimes the minor traffic stop gets more complicated. If police suspicions are aroused by something they see or hear during the stop, something unrelated to the initial traffic violation, they may want to investigate further. Maybe the driver appears to be intoxicated, the

¹⁷ "[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (holding that a discretionary stop of an automobile to check license and registration requires reasonable suspicion).

¹⁸ See *supra* note 3.

¹⁹ *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) ("[T]he usual traffic stop is more analogous to a so-called 'Terry stop,' than to a formal arrest." (citations omitted)); *accord* *United States v. Williams*, 271 F.3d 1262, 1266 (10th Cir. 2001) (same); *United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir. 2001) (same); *State v. Mitchell*, 960 P.2d 200, 202 (Kan. 1998) (same); *Damato v. State*, 64 P.3d 700, 704 (Wyo. 2003) (same). The idiom is in reference to *Terry v. Ohio*, 392 U.S. 1 (1968). See *supra* note 4.

²⁰ See *Berkemer*, 468 U.S. at 439 ("Under the Fourth Amendment, . . . a policeman who lacks probable cause but whose 'observations lead him reasonably to suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to 'investigate the circumstances that provoke suspicion.'" (citation omitted)). Typically, police will have probable cause to make the stop based on their observation of a traffic violation, but such cause is not required.

²¹ *Terry*, 392 U.S. at 21 ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

²² *Berkemer*, 468 U.S. at 439 ("[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" (citations omitted)).

interior of the car smells like marijuana, or a weapon is in plain view on the back seat. In such cases, police may decide to question the driver,²³ order him to exit the car,²⁴ frisk him for weapons,²⁵ or conduct a search of the passenger compartment of the vehicle.²⁶

Although certainly more intrusive both in scope and duration, these encounters are viewed as extensions of the initial investigative detention.²⁷ Thus, their reasonableness is determined by the same standards as the initial stop. The extension must be justified by an independent reasonable suspicion of some *additional* illegality,²⁸ and the subsequent investigation must be limited in scope to that which is reasonably related to determining whether that suspicion is correct.²⁹

Despite the clarity of these well-established principles, both the orderly procedure of the traffic stop itself and the law that attempts to govern it fall into disarray when passengers are present. And when passengers are required to shift roles from innocent bystanders to witnesses, or even suspects, disarray becomes disaster. It would seem that police questioning of passengers would pose no special problem for courts. The expansion of the passenger's seizure is reasonable if it is reasonably related to the purpose for the traffic stop or is based upon an independent reasonable suspicion. Inexplicably, however,

²³ See, e.g., *United States v. Givan*, 320 F.3d 452 (3d Cir. 2003) (holding that police questioning of the occupants of a vehicle stopped for speeding about their travel plans was reasonable after police developed a suspicion that they were involved in drug activity).

²⁴ Under *Pennsylvania v. Mimms*, police may order the driver of a vehicle stopped for a routine traffic violation to exit the automobile as a matter of course. 434 U.S. 106, 111 (1977). The Supreme Court in that case determined that the public interest in officer safety outweighs the "de minimis" intrusion on driver privacy such that the practice is reasonable under the Fourth Amendment as a matter of law. *Id.* In *Maryland v. Wilson*, the Court held that *Mimms* applies to passengers as well. 519 U.S. 408 (1997).

²⁵ The *Terry* Court explained the need for police officers to search for weapons:

[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.

Terry, 392 U.S. at 27.

²⁶ *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) ("[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect is dangerous and the suspect may gain immediate control of weapons.").

²⁷ See *Givan*, 320 F.3d at 458 ("After a traffic stop that was justified at its inception, an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of an inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation.").

²⁸ *Id.*

²⁹ "[P]olice [should] diligently pursue[] a means of investigation that [is] likely to confirm or dispel their suspicions quickly, during which time it [is] necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (holding that a twenty-minute detention was reasonable where drug enforcement agents were diligent in their investigation).

courts have taken widely divergent routes in their efforts to determine reasonableness in this context.

II. COMMON APPROACHES TO DETERMINING WHETHER ENCOUNTERS BETWEEN POLICE AND PASSENGERS ARE CONSTITUTIONAL

A. *Consensual Encounter*

The Fourth Amendment has no bearing on consensual encounters between police and citizens.³⁰ A cop can approach anyone on the street and ask him to list every single illegal thing he has ever done in his life. If the unlucky target is foolish enough to answer, there is nothing the Fourth Amendment can do to help him in court. Its protection is limited to "searches and seizures."³¹ Thus, unless and until an encounter loses its consensual nature, it will not trigger Fourth Amendment scrutiny.³² Accordingly, the first question a court must answer is whether and at what point a seizure of a passenger actually occurred.

Although the definition of a seizure has varying formulations, its existence generally depends exclusively on the underlying police conduct. In *Terry v. Ohio*, the Supreme Court stated that "[o]nly when the officer, by means of physical force *or* show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."³³

In *United States v. Mendenhall*,³⁴ the Court clarified the second half of this definition, determining that a seizure is accomplished by a show of authority "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."³⁵ The Court listed a variety of indicators, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the

³⁰ *Florida v. Royer*, 460 U.S. 491, 498 (1983) ("If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.")

³¹ U.S. CONST. amend. IV.

³² *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (holding that consensual searches of bus passengers' luggage are not per se unconstitutional).

³³ 392 U.S. 1, 19 n.16 (1968) (emphasis added); *see supra* note 4.

³⁴ 446 U.S. 544 (1980). In *Mendenhall*, police suspected that a woman at an airport was carrying narcotics. After approaching her and asking to inspect her ticket and identification, they noticed a discrepancy, questioned her briefly, and asked her to accompany them to an office. There, they obtained consent to search her handbag and her person and discovered heroin. The Court determined that she had not been seized within the meaning of the Fourth Amendment, specifically noting that "stopping or diverting an automobile in transit, with the attendant opportunity for a visual inspection of areas of the passenger compartment not otherwise observable, is materially more intrusive than a question put to a passing pedestrian" *Id.* at 556–57.

³⁵ *Id.* at 554.

citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."³⁶

Because both cases involved encounters that occurred in the open, the Court's conception of the seizure was not broad enough to encompass less obvious seizures—those involving more mental, rather than physical, compulsion. This problem was solved in *Florida v. Bostick*,³⁷ where the Court offered yet another formulation of the seizure standard, one specifically intended to cover seizures taking place in inherently confined locations.

In *Bostick*, police boarded a bus parked at a rest stop. In accordance with a police program designed to uncover drug trafficking, they eyed each passenger as they moved down the aisle, searching for certain revealing characteristics. When they reached the rear, they noticed the defendant, asked to see his ticket and identification, and then requested consent to search his luggage. When he consented, police discovered narcotics.

The defendant argued that a reasonable passenger would not have felt free to leave the bus.³⁸ He claimed that he had been seized under *Mendenhall*, and that his consent to the search was therefore involuntary.³⁹ But the Court disagreed, reasoning that his inability to leave was a product of his decision to take the bus in the first place.⁴⁰ The appropriate test, the Court held, was whether the police conduct would have communicated to a reasonable person that the person was not "free to decline the officers' requests or otherwise terminate the encounter" based on the totality of the circumstances.⁴¹

Although the facts of *Bostick* are clearly distinguishable, the case has been hugely influential to courts evaluating encounters taking place during traffic stops. In addition to utilizing the *Bostick* inquiry for whether a Fourth Amendment seizure occurred, courts regularly cite the opinion for the rule that "mere police questioning does not constitute a seizure."⁴²

For example, in *People v. Jackson*,⁴³ police stopped a car in the middle of the night because its headlights were not on. After approach-

³⁶ *Id.*

³⁷ 501 U.S. 429 (1991).

³⁸ *Id.* at 435.

³⁹ *Id.*

⁴⁰ *Id.* at 436 ("Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.").

⁴¹ *Id.* See generally Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153 (2003) (arguing for the use of empirical evidence in consent determinations; concluding that the bus passengers in *Bostick* would have felt compelled to comply with police even if they would have preferred to refuse).

⁴² *Bostick*, 501 U.S. at 434.

⁴³ 39 P.3d 1174 (Colo. 2002).

ing the vehicle, the officer requested the necessary documents from the driver and then asked for identification from the passenger. When a computer check revealed outstanding warrants for the passenger's arrest, he was taken to the police station, where a search of his person revealed crack cocaine.

After citing *Bostick* for the appropriate inquiry,⁴⁴ the Colorado Supreme Court determined that "[t]he stop of the passenger is merely an unavoidable result of the driver's acquiescence in the police officer's command."⁴⁵ The request for identification, therefore, was not a seizure but a consensual encounter.⁴⁶ The court reasoned that the officer's tone of voice and non-threatening manner, among other things, would have communicated to a reasonable person that he was free to decline the request or otherwise terminate the encounter.⁴⁷

The Supreme Court of Wisconsin came to a similar conclusion in *State v. Griffith*.⁴⁸ In that case, police stopped a car on suspicion of driving without a license and immediately questioned the driver and both passengers as to their identities. The interrogation resulted in the arrest of one passenger for providing false information. After noting that "the passenger was already seized incidental to the lawful stop of the [car],"⁴⁹ the court cited *Bostick*⁵⁰ before holding that the questioning was consensual because the passengers could decline to answer.⁵¹

These cases, and many others like them,⁵² construe the detention of passengers in a traffic stop as merely incidental to that of the driver. Because police suspicion is not directed at them, any subsequent encounter police initiate with passengers is looked upon as consensual when it involves mere questioning, which automatically fails the *Bostick* test.⁵³ These courts regard such questioning as rele-

⁴⁴ *Id.* at 1182.

⁴⁵ *Id.* at 1185.

⁴⁶ *Id.* at 1186.

⁴⁷ *Id.* Interestingly, the court noted that its holding required it to "leave[] aside the inherent social pressure citizens feel to cooperate with the police." *Id.*

⁴⁸ 2000 WI 72, 613 N.W.2d 72.

⁴⁹ *Id.* ¶ 44, 613 N.W.2d at 81.

⁵⁰ *Id.* ¶ 53, 613 N.W.2d at 82.

⁵¹ *Id.* ¶ 84, 613 N.W.2d at 65.

⁵² *E.g.*, *People v. Grant*, 266 Cal. Rptr. 587, 592 (Cal. Ct. App. 1990) (holding that no separate detention of a passenger occurred when police stopped a car for speeding, and that a request for identification was a consensual encounter); *People v. O'Neal*, 32 P.3d 533, 538 (Colo. Ct. App. 2000) (holding that a police request for a passenger's identification was "part of a consensual interview").

⁵³ *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (noting that "mere police questioning does not constitute a seizure").

vant only for its ability to extend the duration of the stop, which bears exclusively on the reasonableness of the *driver's* seizure.⁵⁴

This line of reasoning is simply erroneous. It fails to recognize that passengers are subjected to a seizure as soon as the car is pulled over.⁵⁵ Whether that seizure may be described as incidental is irrelevant. Passengers are forced to yield to police authority when the driver does. As the California Court of Appeal explained in reversing its previous practice of treating passenger involvement as consensual, "[t]he freedom of action of the passenger, as well as the driver, is significantly curtailed by an officer's act of making the driver stop the car."⁵⁶ Any subsequent questioning, therefore, should be examined not independently, but for its bearing on the reasonableness of that *passenger's* seizure.

A comparison between *Bostick* and an ordinary traffic stop is illustrative. In *Bostick*, police boarded the bus without any suspicion of its occupants whatsoever for the purpose of conducting a random drug sweep.⁵⁷ They had no particular passenger in mind and no evidence of wrongdoing.⁵⁸ Accordingly, unless the passengers harbored guilty consciences, most of them probably felt little other than mild curiosity as to what or who the cops were looking for. The bus did not be-

⁵⁴ See *United States v. Shabazz*, 993 F.2d 431, 436 (5th Cir. 1993) (holding that consensual questioning of a passenger about matters unrelated to the initial justification for the stop is unreasonable only where it extends the duration of the detention); *State v. Hickman*, 763 A.2d 330, 338 (N.J. Super. Ct. App. Div. 2000) (holding that police may question passengers about any unrelated matters so long as it does not extend the duration of the stop).

⁵⁵ "[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth Amendment]." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (holding that a discretionary stop of an automobile to check license and registration requires reasonable suspicion) (emphasis added); see *People v. Lamont*, 23 Cal. Rptr. 3d 26, 31 (Cal. Ct. App. 2004) ("[A]t the time of the initial traffic stop, the passenger is seized within the meaning of the Fourth Amendment."). *Contra* *People v. Cartwright*, 85 Cal. Rptr. 2d 788, 793 (Cal. Ct. App. 1999) (holding that passengers are not subjected to any seizure when the cars in which they are riding are stopped by police, reasoning that only the driver has submitted to the authority of the police); *State v. Mennegar*, 787 P.2d 1347 (Wash. 1990) (en banc) (holding that there had been no seizure of a passenger prior to the time police discovered the existence of an outstanding warrant by running a computer check on his identification).

⁵⁶ *Lamont*, 23 Cal. Rptr. 3d at 31. In *Lamont*, the California Court of Appeal determined that "a traffic stop constitutes at least a momentary seizure of everyone in the car," effectively overruling its 1999 decision to the contrary in *Cartwright*, 85 Cal. Rptr. 2d at 793. The court reasoned:

The freedom of action of the passenger, as well as the driver, is significantly curtailed by an officer's act of making the driver stop the car. Whether a passenger remains detained thereafter depends on whether, under the circumstances, a reasonable person would feel free to leave. Presumably, if the officer is investigating the driver, the passenger is free to walk away. The same cannot be said if the officer immediately approaches and questions the passenger.

Lamont, 23 Cal. Rptr. 3d at 31.

⁵⁷ *Bostick*, 501 U.S. at 431.

⁵⁸ *Id.*

long to them, they probably did not know any of the other passengers, and they certainly had no reason to think they were being targeted. Therefore, when police took an interest in the defendant, he had not yet been seized. The defendant, like the other passengers, was merely sitting on the bus waiting to continue his journey. The encounter with police did not begin until he was questioned.

The seizure in a traffic stop, on the other hand, begins at the moment the driver submits to police authority by pulling over, *not* whenever the officer takes an interest in the passengers. As soon as the overhead lights begin to flash and the sirens begin to wail, the driver knows the police have reason to suspect him of wrongdoing. The passengers are aware of that suspicion, and of their proximity to it. In this situation, the police are not stopping a person. They are stopping an automobile that may contain any number of people. Each of the occupants knows that his conduct, composure, and appearance will be carefully scrutinized.

One can think of the occupants of the bus in *Bostick* as patrons of a restaurant, similarly confined to a relatively small physical location and yet entirely independent of one another as to motivations and intentions. Passengers in an automobile can be thought of as occupants of one table in that restaurant, even more closely confined and sharing motivations and intentions as to their presence in the restaurant.

In this sense, passengers are passive participants in any detention of the driver. It is this participation that makes it a seizure. Their mere presence has the potential to affect the outcome of the detention. Such involvement negates the possibility that passengers would feel free to simply get out of the car and walk away. Not only would that course of action appear highly suspicious, it would, in all likelihood, be prevented by the police.⁵⁹ Instead, passengers must remain where they are throughout the duration of the detention. And because the duration is determined by the officer, passengers have no power to terminate the encounter.⁶⁰

⁵⁹ The Supreme Court has upheld a variety of police practices on the ground that their minimal intrusion on privacy rights is outweighed by the public interest in officer safety. See *Maryland v. Wilson*, 519 U.S. 408 (1997) (extending the *Mimms* rule to passengers); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (holding that police may routinely order a driver from his vehicle as a means of ensuring their safety). Accordingly, it can be assumed that requiring passengers to stay within sight of police during a traffic stop would similarly be deemed a reasonable means of ensuring their safety. Although the Court expressly declined to decide this question in *Wilson*, 519 U.S. at 415 n.3, it made the broad pronouncement in *Mimms* that “[w]hat is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer’s safety,” 434 U.S. at 111.

⁶⁰ The Court of Appeals of New Mexico recently explained it well:

A passenger in a vehicle stopped because of a traffic-related violation is situated in a vehicle that is not free to be driven away and is not free to drive the vehicle away. . . .

As a result, it defies logic to suggest that questioning *during* such a seizure is a consensual encounter. It is much like arguing that a kidnapping victim can consent to a subsequent sexual assault. The entire theory of the consensual encounter is that the subject has not been seized, and therefore, his freedom of choice is unimpaired by perceived police authority.⁶¹ After being detained by police with flashing overhead lights and sirens, a passenger confined to the scene cannot realistically be thought to consider himself free to decline to answer when questioned by a standing, uniformed, armed police officer.⁶² Maintaining that this encounter is the product of some implied consent on the part of the passenger is a fiction of judicial imagination.⁶³

If mere questioning cannot itself constitute a seizure of a passenger, as the Supreme Court held in *Bostick*,⁶⁴ then it cannot possibly be sufficient to transform the initial seizure into a consensual encounter. Questioning does not signal the end of one encounter and the beginning of another. Rather, questioning is an aspect of the continuing seizure of the passenger, bearing on its reasonableness.

By relying on the illusion that passengers can simply ignore the presence of the police, courts approve the sort of fishing expeditions the Fourth Amendment was designed to prevent. If questioning is consensual, there is no limit to the range of questions police may ask

In reality, few passengers in this circumstance would, in our view, feel free to ignore an officer's request for identification, or feel free to get out of the vehicle and leave the area after either refusing to give the information or even after providing it. Nor, in our view, would an officer likely tolerate a passenger's refusal to give the information followed by the passenger leaving the area. . . .

We doubt that passengers generally . . . would want to risk the consequences they would fear from their refusal to provide identifying information, or from providing the information and then leaving the area.

State v. Affsprung, 87 P.3d 1088, 1093–94 (N.M. Ct. App. 2004) (citations omitted).

⁶¹ An investigative detention, on the other hand, does impair that freedom. Although those questioned technically retain the right to refuse to answer, the coercive nature of the encounter is what makes it a seizure, subject to the reasonableness requirement of the Fourth Amendment.

⁶² "There is simply all the difference in the world in the nature of the relationship between a police officer detaining someone for questioning and a police officer striking up a conversation on the bus." *United States v. Childs*, 277 F.3d 947, 960 (7th Cir. 2002) (Cudahy, J., concurring) (holding that police may question passengers about matters unrelated to the purpose for the stop so long as they do not significantly prolong the detention), *cert. denied*, 537 U.S. 829 (2002).

⁶³ Again, the Court of Appeals of New Mexico is enlightening:

We think it strains common sense to say a passenger under the[se] circumstances . . . can feel free to ignore such direct police privacy intrusion. We think it more fiction than fact to call this encounter consensual. We know of no legal or policy purpose or effect that requires or invites an encounter such as this to be called consensual. That the passenger voluntarily provides information at the officer's request does not turn the encounter into a consensual one.

Affsprung, 87 P.3d at 1094.

⁶⁴ 501 U.S. 429, 434 (1991).

passengers, regardless of the impact their answers may have on everyone present. In this way, police can interrogate passengers with impunity, develop reasonable suspicion, and then interrogate the driver about matters unrelated to the traffic stop, which would otherwise violate *Terry*.⁶⁵ Under this approach, the fewer reasons police have to suspect wrongdoing of a person in a traffic stop, the more they may take advantage of an inherently coercive environment to blindly dig for evidence of unrelated crimes they have no reason to believe have even occurred. This cannot be what the Fourth Amendment was intended to allow.

B. Reasonable as a Matter of Law

Courts recognizing that passengers truly *are* seized by police during a traffic stop must determine whether their seizure was reasonable. In *Terry*, the Court framed the inquiry as a dual one: “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”⁶⁶

In the absence of individualized suspicion, courts must balance the law enforcement interests in the particular practice against the interests of the individuals affected by it to determine if the first prong was met.⁶⁷ If the balance justifies the intrusion, *Terry* still requires that it be limited in both duration and scope.⁶⁸ Specifically,

⁶⁵ An investigative detention must be “reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry v. Ohio*, 392 U.S. 1, 20 (1968); see *supra* note 4.

⁶⁶ *Id.*

⁶⁷ *Id.* at 21 (“[T]here is ‘no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.’” (citations omitted)).

⁶⁸ Disagreement exists among the federal circuit courts as to whether the second prong of the *Terry* inquiry pertains solely to duration or contains a substantive limitation as well. Compare, e.g., *United States v. Shabazz*, 93 F.2d 431, 437 (5th Cir. 1993) (holding that passenger questioning unrelated to the purpose for the stop was reasonable because it did not extend the duration of the stop), with *United States v. Holt*, 264 F.3d 1215, 1230 (10th Cir. 2001) (en banc) (holding that the reasonableness of a traffic stop must be judged by examining its duration and the manner in which it is carried out). Although this conflict persists, language from the Supreme Court’s opinion in *Florida v. Royer*, 460 U.S. 491 (1983), tends to support the view that *Terry* stops be limited in scope as well as duration. Specifically, the Court stated that “the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.” *Id.* at 500; see also Amy L. Vazquez, Comment, “Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car?” What Questions Can a Police Officer Ask During a Traffic Stop?, 76 TUL. L. REV. 211, 228 (2001) (arguing that suspicion should be required for any unrelated questioning during a traffic stop).

"an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."⁶⁹

The Court has had numerous occasions to perform reasonableness balancing when examining the constitutionality of police roadblocks. In *United States v. Martinez-Fuerte*, for example, the Court approved suspicionless stops of automobiles near the Mexican border to check drivers' licenses and registrations.⁷⁰ The Court held that the public interest in border control outweighed the minimal intrusion on Fourth Amendment liberty.⁷¹ In *Indianapolis v. Edmond*, however, the Court determined that a generalized interest in crime control was insufficient to outweigh Fourth Amendment liberty.⁷² Thus, stopping cars to check for drug activity requires independent reasonable suspicion.⁷³

In the routine traffic stop context, the initial seizure of passengers is reasonable because it is unavoidable. The public interest in stopping the driver far outweighs the minimal intrusion on passengers' liberty. Their inconvenience is justified by the public interest in highway safety.⁷⁴ Thus, the first prong of the *Terry* inquiry can be presumed to be met. Subsequent questioning of passengers, therefore, is an aspect of the second prong; it must be reasonably related to furthering the purpose of the stop.

Many courts appear not to have grasped this distinction. They begin their analyses by asking whether some public interest justifies police questioning of passengers in general, as though such questioning constitutes the seizure's inception. For example, in *State v. Grifith*,⁷⁵ police approached a car that had stopped in an apartment building parking lot on suspicion that the driver did not have a valid

⁶⁹ *Royer*, 460 U.S. at 500 (holding that police exceeded the bounds of an investigative detention when they asked the defendant to accompany them to a small police room after stopping him in an airport, retaining his ticket and identification, and retrieving his luggage without consent).

⁷⁰ 428 U.S. 543 (1976).

⁷¹ *Id.* at 557 ("[T]he need to make routine checkpoint stops is great, [and] the consequent intrusion on Fourth Amendment interests is quite limited.").

⁷² 531 U.S. 32, 44 (2000) ("We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.").

⁷³ *Id.* ("We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes.").

⁷⁴ Of course, the stop of the car must be based on a reasonable suspicion that a driver has committed a traffic violation. In *Terry*, the Court determined that such suspicion, along with the corresponding public interest in preventing crime, outweighs individual Fourth Amendment rights. 392 U.S. 1 (1968). The Court applied this holding to traffic stops in *United States v. Brignoni-Ponce*, where it held that police having a reasonable suspicion that a vehicle contains illegal aliens may stop the car and briefly investigate. 422 U.S. 873, 881 (1975). As a result of these holdings, reasonable suspicion is a per se justification for an investigative detention.

⁷⁵ 2000 WI 72, 613 N.W.2d 72.

license. The officers immediately questioned the driver and both passengers as to their identities, resulting in the arrest of one passenger for providing false information.

After noting that “the passenger was already seized incidental to the lawful stop of the [car],”⁷⁶ the Supreme Court of Wisconsin concluded that “the public interests are substantial and the interference with private liberty interests is *de minimis*.”⁷⁷ Therefore, “the incremental intrusion that resulted from the questioning did not transform the lawful, reasonable seizure into an unlawful, unreasonable one.”⁷⁸

According to the court, such questioning served police interests in completing the investigation of the traffic violation,⁷⁹ determining the fate of the automobile,⁸⁰ and identifying witnesses to the encounter.⁸¹ As will be explored in greater detail below, the court failed to consider whether these interests were reasonable under the circumstances and whether police conduct was calculated to further them. In fact, the court never even inquired as to whether the police actually had these interests to begin with.

Clearly, there are occasions when these interests constitute important police objectives. Sometimes police need to speak to passengers to determine whether a violation has occurred, to verify information, or to ensure their own safety. But, as discussed above, the reasonableness of passenger questioning is an aspect of the second prong of the *Terry* inquiry, not the first. Courts may not simply conclude that asserted police interests generally outweigh passenger liberty and call it a day. Rather, when passenger questioning is alleged to have fur-

⁷⁶ *Id.* ¶ 44, 613 N.W.2d at 81.

⁷⁷ *Id.* ¶ 63, 613 N.W.2d at 84.

⁷⁸ *Id.* ¶ 63 n.13, 613 N.W.2d at 84 n.13.

⁷⁹ *Id.* ¶ 46, 613 N.W.2d at 81. The court reasoned that, although the driver of the vehicle had admitted to having lost his driver’s license, his response was “ambiguous,” such that police “*may have wished to obtain information from the rear passenger to complete the investigation . . .*” *Id.* (emphasis added).

⁸⁰ *Id.* The court stated only that “it seems reasonable under the circumstances that [police] would seek some additional information, such as whether anyone in the car was licensed to drive.” *Id.*

⁸¹ *Id.*; accord *State v. Jones*, 5 P.3d 1012, 1018 (Kan. Ct. App. 2000) (“We hold the securing of names of witnesses is part of the scope of a traffic stop . . .”), *aff’d on other grounds*, 17 P.3d 359 (Kan. 2001). Other courts have relied on police interests in verifying the information provided by the driver, *see, e.g.*, *United States v. Brown*, 345 F.3d 574, 578 (8th Cir. 2003) (“Once the officer makes the traffic stop, the officer may lawfully . . . ask the driver about his destination and purpose The officer may also ask the passenger similar questions to verify the information the driver provided.”); *United States v. Mendoza-Carrillo*, 2000 DSD 34, ¶ 15, 107 F. Supp. 2d 1098, 1102 (same), and in determining whether individuals in the vehicle are dangerous, *see, e.g.*, *State v. Landry*, 588 So. 2d 345, 348 (La. 1991) (“When the officers ordered defendant and the driver from the car in order to establish a face-to-face situation, the officers had a further security interest in determining whether the men with whom they were dealing were dangerous characters.”).

thered one of the above interests, the inquiry as to whether it complied with the second prong is twofold: first, whether the interest itself was reasonably related to the purpose for the stop, and second, whether the questioning that occurred was reasonably related to furthering that interest.⁸²

As for the first part, the interests discussed above cannot reasonably be said to exist in every single traffic stop. Unlike the broad interests served by border checks and random bus sweeps, these interests do not exist independent of the facts and circumstances of a particular encounter. If a warning is to be given, identifying witnesses is unnecessary. If the stop was premised on probable cause, for example police observation of a traffic violation, there is no investigation to be made. And if a car is occupied by a young mother and her children, there simply is no reason for police to feel threatened. Thus, the facts of the particular case *must* support the conclusion that the interest was related to the purpose for the particular stop, that it was one any reasonable officer would have had in that situation.⁸³

If found so related, courts must then examine the actual questioning that occurred. Reality must be respected. Questions about drugs and weapons are not reasonably related to identifying witnesses, to determining the fate of automobiles, or to completing the investigation of a traffic violation. Identification is simply unnecessary when police question a passenger to verify information provided by a driver.

In *State v. Affsprung*,⁸⁴ the Court of Appeals of New Mexico performed precisely the correct analysis. There, police stopped a vehicle for a faulty license plate light. Although the officer admittedly had no suspicion that either the passenger or the driver were engaged in criminal activity or were dangerous in any way, the officer requested identification from them both and then ran a warrants check on

⁸² *Terry* itself supports this interpretation of the second prong. After discussing the applicable standards in that case, the Court specifically examined "the conduct of [the officer] . . . to determine whether his search and seizure of petitioner were reasonable, both at their inception and as conducted." 392 U.S. 1, 27-28 (1968). After acknowledging the legitimacy of officer safety as a public concern, the Court concluded that "on the facts and circumstances [he] detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." *Id.* at 28. Thus, the details of the particular encounter had to substantiate the state's claimed public interest. Then, the Court was careful to compare the officer's conduct to its justification, concluding that he had "confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons." *Id.* at 30.

⁸³ See *id.* at 21-22 ("[I]n making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief that the action taken was appropriate?').

⁸⁴ 87 P.3d 1088 (N.M. Ct. App. 2004).

them. After learning that the passenger was wanted on an outstanding warrant, the officer performed a search incident to arrest and discovered drug paraphernalia. According to the officer, it was his standard practice to perform such checks on all occupants of stopped vehicles as a means of ensuring his own safety.

Although "sensitive to the generalized concern an officer may have regarding potential harm to them from the friction that can flow from a traffic stop,"⁸⁵ the court was adamant in its disbelief that "this generalized concern, without more, is sufficient to override reasonable Fourth Amendment privacy considerations of passengers in relation to routine traffic misdemeanor stops."⁸⁶ According to the court, "[w]ith no suspicion, much less reasonable suspicion, regarding criminal activity on the part of Defendant, and no particularized concern about his safety, the officer had no legitimate basis on which to obtain the identifying information for the purpose of checking it out through a wants and warrants check."⁸⁷

Unfortunately, many courts have failed to understand the *Terry* inquiry in this context. Instead, they employ categorical, public interest justifications in such a way that inquiry into the particular event becomes unnecessary. Essentially, these courts conclude that police questioning of any passenger is presumptively reasonable as long as it is *alleged* to have been related to one of the above police interests. This allegation is not required to be supported by the facts and circumstances; if police say they had a reason for doing it, it was reasonable. The second half of the *Terry* inquiry essentially drops out with respect to passengers, leaving the reasonableness of their seizure to depend only upon whether police had the requisite suspicion to stop the driver.

The problem is illustrated well by the following decisions. In *United States v. Carrasco*,⁸⁸ police stopped a car for speeding and discovered that the driver's license was suspended. When the driver requested that her passenger be permitted to drive the car home, police questioned the passenger about his identity, address, travel plans, and whether he was carrying weapons. The interrogation culminated in a pat-down that revealed drugs. The District Court for the District of New Mexico concluded, without explanation, that "questions reasonably related to the purpose of a traffic stop are permissible and do not constitute an illegal detention."⁸⁹ Apparently, asking whether the

⁸⁵ *Id.* at 1094.

⁸⁶ *Id.* at 1094-95.

⁸⁷ *Id.* at 1094.

⁸⁸ 236 F. Supp. 2d 1283 (D.N.M. 2002).

⁸⁹ *Id.* at 1287.

passenger had weapons was relevant to whether he would be able to drive the car home.

In *United States v. Rivera*,⁹⁰ police stopped a car for tailgating and questioned both the driver and the passenger about their identities, travel plans, and ownership of the vehicle. Without elaborating, the Court of Appeals for the Tenth Circuit stated only that the officer "could legitimately ask [such] questions . . . regardless of [his] underlying motivation."⁹¹ In so holding, the court assumed that the challenged conduct was meant to serve some legitimate, but unstated, police interest, even when the officer himself had not so alleged.

Similarly, in *State v. Griffith*,⁹² the case discussed at the beginning of this section, the Supreme Court of Wisconsin determined that a variety of public interests justified police questioning of a passenger without once evaluating whether such interests were objectively reasonable under the circumstances of the stop or how the actual questioning furthered those interests.⁹³ Instead, the court found only that such interests exist during traffic stops generally.⁹⁴ The obvious implication was that they existed during the relevant encounter, rendering it reasonable, but the court failed to account for this finding. In this way, the court justified police conduct itself, instead of requiring the state to do so, in accordance with its burden of proof.⁹⁵

If the objective reasonableness of such interests in a particular case and the relationship of the questions asked to those interests are irrelevant, then the questioning of passengers would seem to be presumptively reasonable in *all* cases. After all, a court could conclude that an officer questioned a passenger for any one of the interests given above, regardless of the facts and circumstances of the particular stop. The Fourth Amendment does not grant this blanket authority to question passengers. "A central concern in balancing these competing considerations . . . has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field."⁹⁶ The only way to obtain such assurance is to strictly adhere to the commands of *Terry*.

⁹⁰ 867 F.2d 1261 (10th Cir. 1989).

⁹¹ *Id.* at 1263.

⁹² 2000 WI 72, 613 N.W.2d 72.

⁹³ See *supra* notes 48–51 and accompanying text.

⁹⁴ For example, the court stated that "there is a general public interest in attempting to obtain identifying information from witnesses to police-citizen encounters." *Griffith*, 2000 WI 72, ¶ 48, 613 N.W.2d at 81.

⁹⁵ "It is the State's burden to demonstrate that the seizure it seeks to justify . . . was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, 460 U.S. 491, 500 (1983).

⁹⁶ *Brown v. Texas*, 443 U.S. 47, 51 (1979) (holding that police did not have the requisite reasonable suspicion to detain the defendant on the street for questioning).

In *Griffith*,⁹⁷ therefore, the court should have determined how identifying the passenger was relevant to determining whether the driver was licensed. As a dissenting judge noted, “[t]here is no testimony whatsoever in the record supporting the majority’s theory that the questions directed at [the passenger] were asked to further the investigation. In the absence of testimony to support its theory, the majority nevertheless imputes such motivation to the officers.”⁹⁸

The same criticism may be levied against the other justifications given by the court for the questioning of the passenger in that case. For example, the court found only that “[t]here is a public interest in determining whether a car must be towed at public expense or may be driven away by a private party.”⁹⁹ Instead, the court should have determined first, whether it was objectively reasonable to require the car to be moved at all, and second, how identifying the passenger was reasonably related to the fate of the vehicle. Because “there [was] nothing to suggest that the car needed to be removed from its location,”¹⁰⁰ and “the officers never expressed an intent to inquire whether [the passenger] had a valid license so that he could drive the [car] out of the driveway,”¹⁰¹ this inquiry would have made very plain that the justifiability of the questioning was questionable. In truth, it was vital to determining the reasonableness of the passenger’s seizure.

That court also found that “there is a general public interest in attempting to obtain identifying information from witnesses to police-citizen encounters.”¹⁰² Instead, the court should have determined first, whether it was objectively reasonable to believe such information was necessary *in that particular case*, and if so, whether identifying the passenger immediately—prior to the police determination of whether the suspected violation had even occurred—was reasonably related to that interest. Again, the court did not do so.¹⁰³

Other police interests said to justify the questioning of passengers should be handled similarly. If verification of information provided by a driver is cited as the justification, the court should determine why such verification was necessary in a particular case and whether

⁹⁷ 2000 WI 72, 613 N.W.2d 72.

⁹⁸ *Id.* ¶ 91, 613 N.W.2d at 88 (Bradley, J., dissenting).

⁹⁹ *Id.* ¶ 47, 613 N.W.2d at 81.

¹⁰⁰ *Id.* ¶ 93, 613 N.W.2d at 88 (Bradley, J., dissenting).

¹⁰¹ *Id.*

¹⁰² *Id.* ¶ 48, 613 N.W.2d at 81.

¹⁰³ Accordingly, as the dissent concluded, “the actual record is devoid of any reference to legitimate law enforcement objectives or public interest concerns to justify the intrusion upon [the passenger’s] right to privacy.” *Id.* ¶ 90, 613 N.W.2d at 88 (Bradley, J., dissenting). Therefore, “[w]eighing the unexpressed public interest against [the passenger’s] interest in personal security tips the scale in favor of [his] right to be free from arbitrary interference by law enforcement under these particular facts.” *Id.* ¶ 98, 613 N.W.2d at 89.

the questions posed were reasonably calculated to accomplish such verification. Ideally, police would be required to show reasonable suspicion that the driver was providing false information before verification would be deemed to outweigh individual Fourth Amendment rights.

If officer safety is cited, the court should determine whether a concern for the officer's safety was objectively reasonable under the circumstances and how identifying or questioning passengers promoted that interest. This is particularly true because the Supreme Court has granted police the option of removing passengers from vehicles,¹⁰⁴ and even frisking them, when a safety concern arises.¹⁰⁵ Again, ideally, police would be required to show a reasonable suspicion that passengers posed a threat before the public interest in officer safety would be deemed to outweigh passengers' individual Fourth Amendment rights.

Whatever the particular interest provided as the justification, none is sufficient to warrant an intrusion on the privacy and liberty of innocent passengers unless police conduct is shown to be objectively reasonable in a particular case. This requires courts to evaluate the encounter to determine what objectives would have been reasonable to police at the time and what conduct would have been reasonably related to furthering those objectives. Otherwise, such questioning takes advantage of the unavoidable presence of the passengers, "whose only transgression is their presence in vehicles stopped for traffic violations."¹⁰⁶

As with any driver, unjustifiable questioning of a passenger makes a justifiable detention unreasonable. The failure to complete the *Terry* inquiry after conducting reasonableness balancing results in a disparity between the treatment accorded to drivers and that accorded to passengers. Such passengers become second-class citizens, whose constitutional right to be free from intrusive police inquiry is nullified by the presumed existence of some broad police interest, rather than being protected by the individualized justifications required in the searches and seizures of drivers.¹⁰⁷

¹⁰⁴ See *Maryland v. Wilson*, 519 U.S. 408 (1997) (holding that the public interest in officer safety permits police to order passengers from vehicles lawfully stopped for traffic violations as a matter of course). See generally Skyler J. Greco, Note, *Just Along for the Ride: The Tribulations of Maryland v. Wilson*, 34 TULSA L.J. 625, 626 (1999) (arguing that *Wilson* represents an "erosion" of Fourth Amendment liberties).

¹⁰⁵ See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (holding that police had reasonable suspicion to frisk a driver who was ordered to exit his vehicle after the officer noticed a bulge in his jacket); see *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (declaring a frisk where an officer was understandably concerned about the safety of himself and others "reasonable").

¹⁰⁶ *Griffith*, 2000 WI 72, ¶ 100, 613 N.W.2d at 89 (Bradley, J., dissenting).

¹⁰⁷ As one commentator has argued, "[p]assengers no longer have a diminished expectation of privacy when they travel in an automobile, but rather no expectation of privacy at all."

If police are assured of a justification for their action, one that does not require consideration of the particular questioning that occurred, they may become more inclined to expand the scope of questioning beyond that which would be reasonable to accomplish the presumed purposes. This in turn may lead to the divulging of information that might compromise not just the questioned passenger's privacy rights, but those of other occupants as well. These courts sanction a form of inquisitorial justice that demeans the protections granted by the Constitution, "open[ing] a door to the type of indiscriminate, oppressive, fearsome authoritarian practices and tactics of those in power that the Fourth Amendment was designed to prohibit."¹⁰⁸

C. Individualized Suspicion

As with the driver, if police develop a reasonable suspicion that a passenger has committed or is committing a crime during a traffic stop, they may expand the stop to investigate further.¹⁰⁹ As with any other seizure, investigative detentions based on reasonable suspicion must meet the requirements of *Terry*. Accordingly, the additional intrusion into the rights of a seized passenger must be "justified at its inception"¹¹⁰ and must be "reasonably related in scope to the circumstances which justified the interference in the first place."¹¹¹

Much has been written by the Supreme Court in reference to the meaning of these requirements. As for the first prong, courts must determine whether objective reasonable suspicion existed in a particular case based on the "totality of the circumstances."¹¹² Importantly, an "inchoate and unparticularized suspicion or 'hunch'" is in-

Ronald L. Hanna, Casenote, *Scope of Automobile Search Extends to Passengers' Belongings—Erosion Control or Controlled Erosion?: Wyoming v. Houghton*, 526 U.S. 295 (1999), 25 S. ILL. U. L.J. 419, 438 (2001) (arguing that Supreme Court jurisprudence regarding automobile searches has gradually broadened police power at the expense of Fourth Amendment privacy rights).

¹⁰⁸ *State v. Auffsprung*, 87 P.3d 1088, 1095 (N.M. Ct. App. 2004).

¹⁰⁹ It is important to recognize the distinction between questioning said to be related to the purpose for the original traffic stop and that based on independent reasonable suspicion arising during the stop. The former is an aspect of the continuing seizure, justified at its inception by police suspicion of a traffic violation. The latter is an aspect of the expanded seizure, justified at the point of expansion by some additional reasonable suspicion, unrelated to the purpose for the stop. See *supra* note 71 and accompanying text.

¹¹⁰ *Terry*, 392 U.S. at 20.

¹¹¹ *Id.*

¹¹² When making reasonable suspicion determinations, courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)) (holding that a border patrol agent had reasonable suspicion to detain a minivan traveling on a remote unpaved road near the border).

sufficient.¹¹³ Police must "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion."¹¹⁴

As for the second prong, "[t]he scope of the detention must be carefully tailored to its underlying justification."¹¹⁵ In other words, the seizure must be "temporary and last no longer than is necessary to effectuate the purpose of the stop."¹¹⁶ Additionally, "the investigative method employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."¹¹⁷

Because courts have been unable to resist the temptation to find other means of holding the questioning of passengers to be reasonable, cases in which independent reasonable suspicion was required are few. Collectively, however, they indicate that the reasonable suspicion standard provides little more protection to passengers than either of the alternative approaches discussed above. The fault lies not in the standard itself, but rather in the judiciary's almost unwavering deference to police determinations of whether it has been satisfied.¹¹⁸

Because of their presumed experience and their presence at the scene, police are deemed to possess a far greater ability to assess the implications of particular facts and circumstances than a court relying on testimony weeks or months after the stop. This deference has resulted in numerous decisions finding reasonable suspicion to exist on facts and circumstances that were objectively innocent, even in their totality, and clearly inferior to the activity contemplated by the Supreme Court in *Terry*.¹¹⁹

In *United States v. Givan*,¹²⁰ for example, the Court of Appeals for the Third Circuit determined that reasonable suspicion of drug activity existed to support the questioning of passengers about their travel plans where police knew only that a visibly "nervous and fidgety"¹²¹

¹¹³ *Terry*, 392 U.S. at 27.

¹¹⁴ *Id.* at 21.

¹¹⁵ *Florida v. Royer*, 460 U.S. 491, 500 (1983).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (holding that courts "should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court[s] should not indulge in unrealistic second-guessing"); see also *United States v. Arvizu*, 534 U.S. 266, 273 (2002) ("[The reasonable suspicion standard] allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981))); *United States v. McRae*, 81 F.3d 1528, 1534 (10th Cir. 1996) ("We defer to the ability of a trained law enforcement officer to distinguish between innocent and suspicious actions." (citations omitted)).

¹¹⁹ See *supra* note 4.

¹²⁰ 320 F.3d 452 (3d Cir. 2003).

¹²¹ *Id.* at 459.

driver was speeding westbound in Pennsylvania in a rental car obtained in Michigan less than twenty-four hours prior to the stop. The court stated that reasonable suspicion "only requires that police articulate some *minimal*, objective justification"¹²² and should be determined "in light of the officer's experience."¹²³

In *United States v. Galindo-Gonzales*,¹²⁴ the Court of Appeals for the Tenth Circuit determined that questioning passengers about their identities was reasonably related to determining ownership of a vehicle when its driver was unable to produce proper registration.¹²⁵ When a subsequent computer check revealed that the vehicle was in fact registered to the driver, the court held that continued questioning of the passengers was reasonable where the initial questioning gave rise to a reasonable suspicion that the passengers were illegal immigrants.¹²⁶ The court thought this suspicion reasonable, even though it was based exclusively on the facts that the passengers spoke only Spanish and carried no identification, and that the driver refused to disclose their identities.¹²⁷

It must be noted that there are cases rejecting police contentions that reasonable suspicion existed. However, the facts and circumstances of those cases clearly precluded an alternative result. For example, in *State v. Larson*,¹²⁸ police approached a car illegally parked beside a public park at 3 a.m. When the police got closer to the vehicle, it began to pull away and the police turned on their overhead lights and stopped it. After being asked for identification, one passenger opened her purse, into which an officer shone his flashlight. The light revealed marijuana and the passenger was arrested. The Supreme Court of Washington held that the justification for the stop—a parking violation—did not "reasonably provide an officer with grounds to require identification of individuals in the car other than the driver, unless other circumstances give the police independent cause to question passengers."¹²⁹ Such cause, the court determined, did not exist here.¹³⁰

¹²² *Id.* at 458 (emphasis added).

¹²³ *Id.*

¹²⁴ 142 F.3d 1217 (10th Cir. 1998).

¹²⁵ *Id.* at 1223.

¹²⁶ *Id.* at 1225.

¹²⁷ *Id.*

¹²⁸ 611 P.2d 771 (Wash. 1980) (en banc).

¹²⁹ *Id.* at 774. "To hold otherwise," the court continued, "would restrict the Fourth Amendment rights of passengers beyond the perimeters of existing case law." *Id.*

¹³⁰ *Id.* ("When considered in totality . . . the circumstances known to the officers at the time . . . did not give rise to a reasonable and articulable suspicion that the occupants were engaged or had engaged in criminal conduct, but at best amounted to nothing more substantial than an inarticulate hunch." (citation omitted)).

Similarly, in *State v. Damm*,¹³¹ police stopped a car for a broken tail-light and immediately demanded identification from every occupant of the vehicle. A computer check revealed an outstanding warrant on one of the passengers, resulting in his arrest and the discovery of drugs in the vehicle. The Supreme Court of Kansas held that the officer had no reasonable suspicion to require identification from the passengers, which impermissibly prolonged the detention of the driver.¹³² The court reasoned that:

Otherwise, the driver of a carload of people on the way to work, the driver of a vanload of people on the way to a ball game, or the driver of an intercity bus loaded with passengers, when stopped for a defective tail-light, could be detained for an inordinate amount of time while the officer runs record checks on every passenger aboard.¹³³

Because these decisions were based on egregious police conduct, they do nothing to alter the conclusion that genuine disputes as to what may be reasonably inferred as suspicious from a particular situation are resolved in favor of the police. If facts or circumstances were thought suspicious by the particular officer at the time of the stop, the court will find reasonable suspicion to have existed if he can point to anything on which to base his conclusion, regardless of whether it was objectively reasonable or not.

This tiebreaker method of answering an important legal question fails to uphold the strict requirements of *Terry*. The Supreme Court was crystal clear that "the Fourth Amendment becomes meaningful only when . . . the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances."¹³⁴ This statement, along with the Court's "demand for specificity in the information upon which police action is predicated,"¹³⁵ requires courts to conduct independent evaluations of the facts and circumstances to determine whether reasonable suspicion truly existed.¹³⁶

¹³¹ 787 P.2d 1185 (Kan. 1990).

¹³² *Id.* at 1188. With respect to the rights of the passengers, the court noted that "each individual is clothed with constitutional protection against an unreasonable seizure, which may not be denied by the individual's mere propinquity to others independently suspected of criminal activity." *Id.* at 1189 (citation omitted).

¹³³ *Id.* at 1188; *see also* *United States v. Mendoza-Carrillo*, 2000 DSD 34, 107 F. Supp. 2d 1098 (holding that a failure to make eye contact, an ambiguous remark, and the driver's inability to remember his passenger's last name did not constitute reasonable suspicion to question the passenger after the officer had finished writing a warning for a defective taillight).

¹³⁴ *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

¹³⁵ *Id.* at 21 n.18.

¹³⁶ The Court stressed the importance of neutrality and independence in determining Fourth Amendment protections in *Johnson v. United States* when it noted:

By instead granting deference to law enforcement officers, courts have entirely removed all objectivity from the review. Noble intentions notwithstanding, those with such profound interests in a particular result are simply not fit to make objective determinations respecting a constitutional right. The practice is analogous to trusting the Pope to uphold the Free Exercise Clause of the Constitution.¹³⁷

Furthermore, because reasonable suspicion is a matter of law, police officers are not in a position to make such determinations—most, particularly those who patrol the streets, are paid for their muscle, their bravery, and their enthusiasm for nabbing the bad guy. Street cops are not required to understand the intricacies of Fourth Amendment doctrine. Viewed in this light, the abdication of judicial authority through deference to police appears even more absurd.

The right to be free from governmental intrusion must not fall so easily to the biased discretion of overzealous police officers and their paranoid determinations of what constitutes reasonable suspicion. As the Court has recognized, “[t]he needs of law enforcement stand in constant tension with the Constitution’s protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.”¹³⁸

III. A PROPOSAL FOR A PRESUMPTION OF UNREASONABLENESS

The combined result of these principles is that a passenger’s rights will be successfully vindicated only where police are unable to articulate any conceivable reason for their action. The myriad of options held to be sufficient by the judiciary makes this unlikely. Police can testify to their own benevolent respect for the passenger’s supposed freedom of choice by demonstrating how pleasant, gentle, and otherwise not coercive their behavior was. In a credibility contest, the word of a public servant is likely to prevail against that of a presumed

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 in 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.

333 U.S. 10, 13–14 (1948). This case concerned the warrantless search of a hotel room, but the statement is nonetheless germane. Because it would be illogical to expect police to obtain a warrant prior to making a traffic stop, the subsequent review of its basis by an objective judiciary is even more essential.

¹³⁷ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

¹³⁸ *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973) (holding that a warrantless search of an automobile without probable cause or consent at a location twenty-five miles from the border was not the functional equivalent of a border search and, therefore, was unreasonable).

criminal. Police can also invoke any of the various public interest buzz words, including the omnipotent "police safety," which inevitably prevails against what is perceived to be an inconvenience.¹³⁹ Finally, police can describe how their infallible nose for criminals was once again accurate. Deference to police determinations makes the basis for the suspicion almost irrelevant because, as courts like to point out, the untrained layperson would not pick up the scent.

Burdened by these so-called justifications, Fourth Amendment reasonableness has withered to Fourth Amendment routine. Yet no matter how routine such practices may have become, these practices' harm to the people's right to be let alone is undeniable. There is no such thing as a consensual encounter during a traffic stop. Vague public interests cannot be called upon to justify constitutional violations without support from the facts and circumstances. And police are paid to be suspicious, not reasonable, which negates any contention that their judgment is objective. In short, reform of the current jurisprudential nightmare is required.

If the Fourth Amendment truly does protect people,¹⁴⁰ it ought to protect them uniformly, without reference to their company. Each of the above three methods of analysis ignores the fact that there would be no case against the passenger were it not for the unlawful conduct of the driver. There is simply nothing reasonable about a doctrine that proceeds from the assumption that dumb luck must favor the government, rather than the citizenry. Nothing in the Constitution supports this imbalance. If anything, the Fourth Amendment makes clear that it is the rights of the people, not the self-endowed prerogatives of the state, which are to be accorded preference.¹⁴¹

Accordingly, courts need a new standard, a new method of determining whether police questioning of passengers in traffic stops is reasonable. If the injustices that result from current standards are to be relieved at all, such questioning must be presumed unreasonable from the start. The prosecution could rebut this presumption either by showing that the specifics of a passenger's involvement in the traffic stop bore a reasonable relation to an important public interest

¹³⁹ *E.g.*, *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (holding that police may routinely order drivers from their vehicles because the public interest in officer safety outweighs a mere inconvenience); *United States v. Enslin*, 327 F.3d 788, 797 (9th Cir. 2003) (holding that a police order that a defendant show his hands was a reasonable seizure because the public interest in officer safety outweighs a mere inconvenience), *cert. denied*, 540 U.S. 917 (2003); *United States v. Stanfield*, 109 F.3d 976, 982 (4th Cir. 1997) (holding that police may routinely open vehicle doors when window tint obscures their vision because individual liberty interests are "comparatively minor" in relation to the public interest in officer safety).

¹⁴⁰ *Katz v. United States*, 389 U.S. 347, 351 (1967) ("For the Fourth Amendment protects people, not places.")

¹⁴¹ 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 . . .").

arising out of the particular incident, or by demonstrating the existence of independent, objectively reasonable suspicion of the passenger. The court must decide for itself whether either showing has been made based upon the totality of the circumstances of the stop in question.

The presumption of unreasonableness remedies many of the current problems. First of all, it comports with reality by precluding any erroneous suggestion that police questioning of passengers is consensual, and therefore, not subject to Fourth Amendment scrutiny. It recognizes such questioning for what it is—an aspect of the passenger's initial seizure bearing on its reasonableness.

Secondly, the presumption places the interests at stake in their proper order of priority. Constitutional protections must come before grandiose conceptions of the public interest, even if that interest is the apprehension of criminals. The document itself makes this clear, declaring itself and laws made pursuant to its authority to be "the supreme Law of the Land."¹⁴²

Under the prevailing analysis, once one of the tenuous justifications is even mentioned by the state, the burden of reasonableness is for all intents and purposes shifted to the defendant to refute it. The task is not easy, particularly when courts defer to police determinations and even take it upon themselves to argue on the state's behalf. In this way, courts imply that the public good should and will prevail over any individual right to be let alone by the government. The effect is to stamp the involvement of passengers with a presumption of reasonableness.

The opposite presumption would require the state to defend itself from the beginning, as is its burden, by recognizing that such conduct is not the norm and should not be sanctioned absent special justification. As with alleged violations of the Due Process¹⁴³ and Equal Protection¹⁴⁴ Clauses, the presumption of unreasonableness would approximate an enhanced level of scrutiny, appropriate in this context because police questioning of passengers burdens their constitutional "right to be let alone."¹⁴⁵ The presumption would require courts to restrict the current bounds of reasonableness. When reasonable suspicion is alleged as a justification, courts should be wary of

¹⁴² U.S. CONST. art. VI, cl. 2.

¹⁴³ U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.")

¹⁴⁴ U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

¹⁴⁵ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (holding that speech is not property within the meaning of the Fourth Amendment and that the intercepting of telephone conversations implicated the Amendment only if it was accomplished through governmental trespass upon the suspect's property).

deferring judgment to the police, which inevitably results in some sacrifice of Fourth Amendment rights to the imagined necessity of crime control. When the public good is alleged, courts should carefully determine whether the state interest truly existed and whether it was really furthered by passenger questioning, being mindful of the fact that a constitutional right is at stake. In this way, the questioning of passengers would be placed alongside warrantless searches on the hierarchy of Fourth Amendment police practices—simply stated, unlawful until proven otherwise.¹⁴⁶

Finally, the presumption would create uniformity in an area of the law characterized by a vast uncertainty of outcome. Every such encounter would be judged by the same standard, whether its propriety were being challenged by the defendant or not. If police are unable to show either the requisite reasonable suspicion or that their action was reasonably related to a sufficiently important state interest, the presumption would prevail and the questioning would make the seizure unreasonable.

Apart from these doctrinal improvements, the presumption would serve an even more important purpose. It would help to secure the rights of the people against routine abuses. Because police making any given traffic stop are never certain of what might occur, they would proceed with caution, knowing that any decision to involve a passenger will require some meaningful justification if it leads to prosecution. This would help to discourage unnecessary passenger involvement, and consequently, flimsy arguments that police conduct served an obscure public interest or that reasonable suspicion was a matter of instinct.

Furthermore, over time police would learn the level of justification that would be required by courts and would modify their actions accordingly. The important public interests and the types of events in which they legitimately arise would come to be distinguished from those that do not warrant an invasion of privacy rights. Facts inducing inarticulable suspicions would come to be set apart from those that objectively give rise to a belief that criminal activity is afoot. Law enforcement would thus gain a clear understanding of when they would be warranted in conducting such questioning, and when they would have to walk away, reducing the incidence of violations that do not result in prosecution, as well as those that do.

¹⁴⁶ "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *United States v. Katz*, 389 U.S. 347, 357 (1967) (holding that the warrantless recording of a conversation from outside a public telephone booth was an unreasonable search); *accord* *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (holding that a warrantless entry into the home absent exigent circumstances is presumptively unreasonable).

CONCLUSION

The theory that the Fourth Amendment protects property rights suffered its first major blow when Justice Brandeis wrote his dissenting opinion in *Olmstead v. United States*. Arguing that government wire taps on telephone lines constituted a search within the meaning of the Amendment, Brandeis was adamant in his view that the Framers of the Constitution meant to protect, "as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."¹⁴⁷ As a result, Brandeis concluded, "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."¹⁴⁸ Decades later, in *Katz v. United States*, Justice Stewart proclaimed the necessary conclusion that "the Fourth Amendment protects people, not places,"¹⁴⁹ in an opinion that found the government's surreptitious, warrantless recording of conversations from outside a public telephone booth unconstitutional.

Despite these broad pronouncements, Fourth Amendment privacy rights have largely been subordinated to the justifications proffered for any given governmental intrusion,¹⁵⁰ even though such interests are found nowhere in the Constitution. Additionally, although individuals clearly harbor expectations of privacy in the contents of their minds,¹⁵¹ the reasonableness of seizures of intangible information has been left to inferior notions of public interest, suspicion, and implied consent, rather than the probable cause required for most searches.

These developments have enormous implications for individuals who are seized by prying police officers simply because of their presence in an automobile. Not realizing that they would be within their

¹⁴⁷ 277 U.S. at 478 (Brandeis, J., dissenting).

¹⁴⁸ *Id.*

¹⁴⁹ 389 U.S. at 351.

¹⁵⁰ For example, the presence of exigent circumstances exempts some searches from the warrant requirement. Such circumstances include the imminent destruction of evidence, a threat to the safety of police or others, and the hot pursuit of a suspected criminal. Where found, exigent circumstances allow police to dispense with a warrant regardless of the place invaded, including the home. *See, e.g.,* *Warden v. Hayden*, 387 U.S. 294 (1967) (holding that the warrantless search of a house for a suspected robber and weapons was reasonable where the crime had just occurred and police had reason to believe he had entered the house).

¹⁵¹ As Justice Brandeis eloquently opined:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting).

rights to remain absolutely silent, passengers feel compelled to answer questions, implicating themselves or others in an encounter later deemed reasonable by some distant judge.

Such questioning and the demanding of identification is as much an invasion of privacy as the emptying of a passenger's pockets. And yet, courts considering the issue have upheld such conduct as constitutional with very few exceptions, determining that crime control, police safety, and even administrative convenience justify the intrusion. As demonstrated above, their analyses vary greatly, but they are uniform in their creation of what amounts to a secondary class of citizens, whose right to be let alone by the government is reduced to a fiction. Its protection has been subsumed by a fallacious formulation of consent, deemed inconsequential by a socialist notion of public welfare, and ultimately, left to flounder in the hands of the very government it was intended to limit.

Again, Justice Brandeis's dissent in *Olmstead* is instructive. "Clauses guaranteeing to the individual protection against specific abuses of power, must have a . . . capacity of adaptation to a changing world."¹⁵² Thus, although the exploitation of passengers by police during traffic stops was probably neither anticipated nor intended by the Supreme Court when it began to adopt a liberal construction of the Fourth Amendment, it can and should be rectified through reform.

Ultimately, that reform must include a presumption of unreasonableness, the only meaningful way to ensure that the right to be let alone regains substance with respect to passengers in vehicles stopped for traffic violations. Otherwise, "[r]ights declared in words might be lost in reality."¹⁵³

¹⁵² *Id.* at 472.

¹⁵³ *Id.* at 473 (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).