

THE HITCHHIKER'S GUIDE TO THE FOURTH AMENDMENT:
THE PLIGHT OF UNREASONABLY SEIZED PASSENGERS
UNDER THE HEIGHTENED FACTUAL NEXUS APPROACH
TO EXCLUSION

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INTRODUCTION

The benefits of carpooling are well documented and widely known. Being a passenger, however, does not come without its perils, at least in terms of diminished Fourth Amendment protection.¹ Over thirty years ago, the Supreme Court, in *Rakas v. Illinois*, established its current approach to Fourth Amendment standing in the context of suppressing the fruit of an unlawful search, holding that a defendant may seek suppression only if he has a “legitimate expectation of privacy in the particular areas” searched.² Addressing the admissibility of evidence

1. The Fourth Amendment to the United States Constitution states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

2. 439 U.S. 128, 148 (1978). By equating the test for standing with the definition of a Fourth Amendment search, derived from Justice Harlan’s concurring opinion in *Katz v. United States*, 389 U.S. 347 (1967), the Court disapproved of a conception of standing as a separate threshold inquiry. *Rakas*, 439 U.S. at 139 (“But we think the better analysis forthrightly focuses on the extent of a particular defendant’s rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.”). In *Katz*, Justice Harlan formulated a two-pronged definition of a search: “first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The Court formally adopted this definition in *Smith*

found during the search of a vehicle,³ the Court held that the petitioners, both of whom were “passengers occupying a car which they neither owned nor leased,”⁴ were unable to demonstrate a legitimate expectation of privacy in the vehicle.⁵ Therefore, the petitioners did not have standing to contest the legality of the search.

Rakas created a harsh reality for automobile passengers: as “mere passengers,” they are unable to suppress the evidence uncovered in an even egregiously unlawful search of the car in which they are riding, as they are not deemed to have suffered a personal Fourth Amendment violation. Justice White, in dissent, accused the Court of holding “that the Fourth Amendment protects property, not people,” and admonished that “[i]nsofar as passengers are concerned, the Court’s opinion today declares an ‘open season’ on automobiles.”⁶ Justice White continued:

[T]he ruling today undercuts the force of the exclusionary rule in the one area in which its use is most certainly justified—the deterrence of bad-faith violations of the Fourth Amendment. This decision invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant After this decision, police will have little to lose by unreasonably searching vehicles occupied by more than one person.⁷

In 2007, the Court offered automobile passengers a glimmer of hope, holding, in *Brendlin v. California*, that passengers, as well as drivers, are seized when officers effectuate a traffic stop.⁸ *Brendlin* was a passenger in a vehicle stopped without legal justification.⁹ Further investigation revealed that *Brendlin* had violated his parole and, as a result, was subject to an outstanding arrest warrant.¹⁰ Subsequent searches of *Brendlin*’s person and the car revealed evidence of methamphetamine

v. *Maryland*, 442 U.S. 735, 740 (1979). For a critique of the Court’s standing doctrine, in particular the merger of the standing inquiry into the substantive merits, see Nadia B. Soree, *The Demise of Fourth Amendment Standing: From Standing Room to Center Orchestra*, 8 NEV. L.J. 570 (2008). For ease of reference, I continue to use the term “standing” to refer to a defendant’s ability to challenge the admission of evidence derived from a Fourth Amendment violation.

3. Police, in searching the glove compartment and under the front passenger seat, discovered evidence related to an armed robbery. *Rakas*, 439 U.S. at 130.

4. *Id.* at 140.

5. *Id.* at 148. (“[Petitioners] made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers.”).

6. *Id.* at 156–57 (White, J., dissenting). Justice White felt the Court, while acknowledging the primary interest protected by the Fourth Amendment is privacy, nevertheless tied that Amendment’s protective reach to property interests, in that only those who own or lease the vehicle seem able to claim a legitimate expectation of privacy therein. *Id.*

7. *Id.* at 168–69 (citations omitted).

8. 551 U.S. 249, 251 (2007).

9. *Id.* at 252. The State conceded the illegality of the stop. *Id.* at 256.

10. *Id.* at 252.

possession and manufacture.¹¹ Appealing his conviction, Brendlin did not claim the evidence was fruit of an unlawful *search*—after all, *Rakas* precluded such an attack—but instead successfully argued that the evidence obtained from his person and the car were fruit of an unlawful *seizure*.¹²

The concerns voiced by Justice White in his *Rakas* dissent carried the day in *Brendlin*: “Holding that the passenger in a private car is not (without more) seized in a traffic stop would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal.”¹³ For passengers, however, this may be a victory more in principle than in fact. Police often have the requisite probable cause or reasonable suspicion to pull over a vehicle for the driver’s failure to adhere to any one of a myriad of traffic rules, making a seizure lawful and rendering *Brendlin* inapplicable. Further, the Court, in *Whren v. United States*, held that as long as a seizure is justified by probable cause, that seizure is reasonable under the Fourth Amendment regardless of the subjective motivation of the officer.¹⁴ Thus, if the seizure is objectively justified, it is irrelevant for Fourth Amendment purposes whether the traffic stop is a pretext for an unrelated investigation, even if the stop is racially motivated, effectively permitting police to “single out almost whomever they wish for a stop.”¹⁵

Despite the ease with which officers can articulate a traffic-related justification for stopping a vehicle, stops that are unlawful at their inception or, alternatively, stops that, although initially lawful, exceed the scope of their justification, still occur. It is in this latter situation that *Brendlin*, at least in three circuits, does not

11. *Id.* at 252–53.

12. *Id.* at 253. The State argued that Brendlin was not seized until the time of his arrest because the police pulled over the car to investigate the driver, and therefore did not “direct a show of authority toward Brendlin.” *Id.* at 259–60. The Court focused on the passenger’s reasonable understanding that he (similarly to the driver) was “not free to ignore the police presence and go about his business.” *Id.* at 261. Although the Court vacated Brendlin’s conviction, holding that he was seized at the time the car came to rest at the side of the road, the Court invited the state court to consider whether the exclusion of evidence might nevertheless not be required on some other basis. *Id.* at 263.

13. *Id.* at 263.

14. 517 U.S. 806, 813, 819 (1996).

15. *Id.* at 818. In *Whren*, officers patrolling a “‘high drug area’” in an unmarked car passed a truck with temporary plates stopped at a stop sign. *Id.* at 808. The officers became suspicious when the car, with its “youthful occupants,” lingered at the intersection and the driver glanced down at the front passenger’s lap. *Id.* The officers followed the truck and observed the vehicle turn without signaling and “spe[ed] off at an ‘unreasonable’ speed.” *Id.* Upon pulling over the vehicle, one of the officers saw crack cocaine in Whren’s hands. *Id.* at 809. The search of the car revealed additional evidence of illegal drugs. *Id.* Petitioners argued that the officers’ decision to stop the car was motivated by the desire to investigate drug activity, for which there was no probable cause or reasonable suspicion, and that the asserted purpose for stopping the car—to administer a warning for traffic violations—was pretextual. *Id.* In addition, the petitioners, who were black, raised the very real possibility that the officers’ decisions to stop motorists may have been based on racial animus. *Id.* at 810. The Court recognized this danger, but did not see the Fourth Amendment as the proper provision to regulate intentional discrimination: “But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Id.* at 813.

deliver the protection it seemed to promise. The Sixth, Ninth, and Tenth Circuits apply a “heightened ‘factual nexus’”¹⁶ approach to determine whether a passenger may suppress evidence found in a car following a lawful stop that was unlawfully extended. Under this test, a passenger-defendant must show that the search and discovery of evidence was a result of *his and only his* unlawful seizure. This is theoretically distinct from the standing inquiry, which requires a defendant to demonstrate a personal constitutional violation in order to seek suppression based on that violation. When driver and passengers have been unlawfully detained, the passenger has himself suffered a violation through the unlawful seizure of his person, and thus has standing to suppress. He must, however, establish a sufficient causal connection between that violation and the discovery of evidence in order to succeed in his motion. Under the heightened factual nexus approach, no matter how egregious the violation, the passenger must survive an exceedingly stringent but-for causal test to benefit from the exclusionary rule.

Part I of this Article discusses the relevant case law in the circuits that have either adopted or rejected the heightened factual nexus approach. The courts adopting this approach see the initial, lawful stop as separate from the continued unlawful detention of the driver and passengers, and further separate the passenger’s detention from the entire course of police conduct in stopping and then searching the vehicle. Once the passenger’s detention is analytically separate, this approach posits that because the driver was also (unlawfully) detained, the evidence in the car would have been discovered even had the passenger been permitted to leave the scene.

Part II examines the arguments against the heightened factual nexus approach by analyzing the judicial opinions that reject it. Part II also demonstrates this approach’s inconsistency with *Brendlin* and other Supreme Court decisions defining Fourth Amendment seizures, and posits that the heightened factual nexus approach creates a no-win situation for passenger-defendants: the very fact of their unlawful detention, which is necessary for standing to seek suppression, seems to preclude their success in doing so. Finally, Part II argues that officers’ subjective motivations in prolonging a traffic stop beyond its lawful scope, or in effectuating the stop in the first place if it exceeds its lawful limits, should be scrutinized when making these exclusionary rule determinations, *Whren* notwithstanding.

Part III examines data on traffic stops and motions to suppress arising from such stops to illustrate the danger to Fourth Amendment rights engendered by the heightened factual nexus approach. The Article concludes by urging further study of the correlation between traffic stops and the number of occupants in those vehicles and by urging courts to reject the heightened factual nexus approach, which renders passengers vulnerable to unreasonable seizures with virtually no constraint upon law enforcement.

16. *United States v. DeLuca*, 269 F.3d 1128, 1148 (10th Cir. 2001).

I. PASSENGERS AT THE CROSSROADS OF THE FOURTH AMENDMENT AND THE EXCLUSIONARY RULE: A SURVEY OF THE RELEVANT CASE LAW

A. *Origins of the Heightened Factual Nexus Approach*

The heightened factual nexus approach adopted by the Sixth, Ninth, and Tenth Circuits has its origins in factual scenarios quite different from the traffic stops to which it is now applied. The inquiry into a “factual nexus” between a particular Fourth Amendment violation and the evidence stemming from that violation is derived from two Supreme Court cases involving wiretaps,¹⁷ and comports with the requirement that, for evidence to be excluded, the constitutional violation must be, at a minimum, a “but-for” cause of the evidence’s discovery, although establishing this causal relationship does not guarantee exclusion.¹⁸

Announcing the attenuation doctrine in *Wong Sun v. United States*, Justice Brennan stated:

We need not hold that all evidence is ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is ‘whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’¹⁹

In addition to attenuation analysis, other doctrines limit the availability of the exclusionary remedy, including the independent source²⁰ and inevitable discovery²¹ doctrines. Of course, a strict “personal right” approach to standing, as exemplified by *Rakas*,²² also limits exclusion by restricting the number of defendants who can seek suppression in the first place. As the next Sections will demonstrate, the circuits adopting the heightened factual nexus approach draw from each of these doctrines.

Before turning to automobile passengers and traffic stops, however, an examina-

17. The two cases are *United States v. Nardone*, 308 U.S. 338 (1939) and *United States v. Alderman*, 394 U.S. 165 (1969). See *United States v. Mosley*, 454 F.3d 249, 254 (3d Cir. 2006).

18. See *Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (“Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression.”).

19. 371 U.S. 471, 487–88 (1963) (quoting JOHN MACARTHUR MAGUIRE, *EVIDENCE OF GUILT* 221 (1959)).

20. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (“[T]his does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . .”).

21. See *Nix v. Williams*, 467 U.S. 431, 444 (1984) (holding that it is unnecessary to suppress “evidence that would inevitably have been discovered” even when that evidence is actually derived from a constitutional violation).

22. See *Rakas v. Illinois*, 439 U.S. 128 (1978); see also *supra* note 6 and accompanying text; *Wong Sun*, 371 U.S. at 492 (“The seizure of this heroin invaded no right of privacy of person or premises which would entitle *Wong Sun* to object to its use at his trial.”).

tion of the factual nexus analysis in its first context—involving complex factual scenarios, large-scale investigations, and extensive electronic surveillance—helps demonstrate a certain incongruence in using such a rigorous analysis in the comparatively straightforward context of a traffic stop. In *Nardone v. United States*, the Supreme Court addressed whether the government could introduce information derivatively obtained from illegally intercepted telephone conversations.²³ The Court held that “[t]o forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed ‘inconsistent with ethical standards and destructive of personal liberty.’”²⁴ However, the government could use information gained independently of the violation, or evidence with a sufficiently attenuated causal relationship to the violation.²⁵ The Court noted its faith that experienced trial judges would exercise discretion to ensure that defendants’ claims of taint were “solid[] and not . . . merely a means of eliciting what is in the government’s possession before its submission to the jury.”²⁶ The Court thus set the stage for a careful analysis by trial judges to determine precisely what evidence, in an entire prosecution, truly stems from an alleged violation.

Just over thirty years later, the Court, in *United States v. Alderman*, again considered the relationship between an alleged constitutional violation and the evidence offered at trial.²⁷ The Court remanded to the district court to determine whether any petitioner was subjected to unconstitutional electronic surveillance, and, if so, to determine the “relevance to his conviction of any conversations which may have been overheard through that surveillance.”²⁸ Setting out the parties’ respective burdens, the Court stated that, although the government bears “the ultimate burden of persuasion to show that its evidence is untainted,”²⁹ a defendant must first produce specific evidence demonstrating not only that the evidence is

23. 308 U.S. 338, 339 (1939). The government violated the Communications Act of 1934 by wiretapping conversations. *Id.* While the illegally intercepted conversations were excluded, the trial judge had not permitted the defendants to question the prosecution regarding the derivative use of those conversations. *Id.* The court of appeals ruled that the Communications Act only prohibited introduction of the intercepted conversation itself, but permitted the use at trial of the information contained in that conversation. *Id.*

24. *Id.* at 340. The Court also quoted *Silverthorne Lumber Co.*: “‘The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.’” *Id.* at 340–41 (quoting *Silverthorne Lumber Co.*, 251 U.S. at 392).

25. *Id.* at 341.

26. *Id.* at 342.

27. 394 U.S. 165 (1969). *Alderman* arose from a complex set of facts involving many defendants, various convictions, and issues of national security.

28. *Id.* at 186. The Court urged the district court to conduct an adversarial hearing to make this determination in light of the complexity of the issues and the concern that a judge unfamiliar with the facts would require guidance from the parties “to provide the scrutiny which the Fourth Amendment exclusionary rule demands.” *Id.* at 181–84.

29. *Id.* at 183.

tainted, but also that “a substantial portion of the case against him was a fruit of the poisonous tree.”³⁰

It is not surprising that a defendant, to suppress evidence, should have to show that the challenged evidence came to light through an alleged constitutional violation.³¹ It is also not surprising that, in complex cases involving extensive, multi-layered investigations, a court must carefully examine the causal relationship between a given violation and the entire body of evidence. These complex investigations and prosecutions, however, bear little resemblance to the scenario that is the subject of this Article: police stop an automobile, detain the driver and passengers, and discover evidence in an ensuing vehicle search. In the event that the detention is unlawful, a motion to suppress should result in nothing more than “an utterly straightforward and unremarkable application of the fruit of the poisonous tree doctrine.”³²

The Court has limited the exclusionary rule beyond simply requiring a causal connection, however, by permitting the use of evidence actually derived from a violation as long as the causal connection has become so attenuated (often due to some intervening circumstance), that the taint has dissipated.³³ Going further still, the Court, in *Nix v. Williams*, adopted “the ultimate or inevitable discovery exception to the exclusionary rule.”³⁴ Pursuant to this exception, if the prosecution can adequately demonstrate “that the information ultimately or inevitably would have been discovered by lawful means . . . the evidence should be received.”³⁵ The Iowa Supreme Court, whose judgment was being reviewed, termed this the “‘hypothetical independent source’ exception to the exclusionary rule.”³⁶

30. *Id.* It is only after the defendant makes this initial showing that the burden would shift to the government to disprove the taint. *Id.*; see also *United States v. Ivanov*, 342 F. Supp. 928, 937 (D.N.J. 1972).

31. See *United States v. Kandik*, 633 F.2d 1334, 1335 (9th Cir. 1980) (“The Government must prove that particular evidence or testimony is not fruit of the poisonous tree, but a defendant has the initial burden of establishing a factual nexus between the illegality and the challenged evidence.”).

32. *United States v. Mosley*, 454 F.3d 249, 260 (3d Cir. 2006).

33. See *Wong Sun v. United States*, 371 U.S. 471, 490 (1963) (holding that, although the defendant was unlawfully arrested, because he voluntarily returned to the agent’s office and provided statements several days after his arraignment and release, “the connection between the arrest and the statements had become so attenuated as to dissipate the taint”) (internal quotation marks omitted) (internal citation omitted).

34. 467 U.S. 431, 444 (1984). In *Nix v. Williams*, police violated the defendant’s Sixth Amendment right to counsel by eliciting a statement regarding the location of the body of a girl whom he had murdered, resulting in the reversal of his conviction. *Id.* at 437. At his retrial, although the defendant’s statements were excluded, the prosecution offered evidence with respect to the body itself. *Id.* The State provided sufficient evidence that an ongoing search for the victim would have led to the body’s discovery had the search not been called off because of the defendant’s cooperation. *Id.* at 437–38.

35. *Id.* at 444. The Court explained that, like the independent source exception, the inevitable discovery exception is justified because, when balancing the interest in deterring unconstitutional police conduct with the interest in providing juries with relevant evidence of crime, the exclusionary rule should be used to put the police “in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.” *Id.* at 443. The Court also reasoned that if the evidence inevitably would have been obtained lawfully, there is little deterrent effect in excluding it. *Id.* at 444.

36. *Id.* at 438 (quoting *State v. Williams*, 285 N.W.2d 248, 260 (Iowa 1979)).

In dissent, Justice Brennan noted the speculative, counterfactual nature of this exception:

In its zealous efforts to emasculate the exclusionary rule, however, the Court loses sight of the crucial difference between the “inevitable discovery” doctrine and the “independent source” exception from which it is derived. When properly applied, the “independent source” exception allows the prosecution to use evidence only if it was, in fact, obtained by fully lawful means. It therefore does no violence to the constitutional protections that the exclusionary rule is meant to enforce. The “inevitable discovery” exception is likewise compatible with the Constitution, though it differs in one key respect from its next of kin: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule.³⁷

The dissent urged that the prosecution should bear “a heightened burden of proof,” showing by “clear and convincing evidence” that the challenged evidence would have been discovered lawfully.³⁸

Ironically, under the heightened nexus approach, courts contrive hypothetical (and highly unrealistic) facts to impose the heightened burden not on the prosecution, but on defendant passengers to *disprove* that the evidence inevitably would have come to light (through the seizure of the driver), irrespective of their own rights having been violated.³⁹ With this background, the Article turns to the existing case law addressing this heightened standard.

B. Circuits Adopting the Heightened Factual Nexus Approach

1. The Sixth Circuit

The Sixth Circuit applied the heightened factual nexus approach in *United States v. Carter*, involving the traffic stop of a van with temporary out-of-state tags.⁴⁰ The driver produced a valid license and documents showing that the van was recently purchased.⁴¹ A radio check provided no reason for suspicion.⁴² In the meantime, defendant-passenger Carter exited the van and “according to the officer, [] kept trying to walk away from the vehicle” until the officer directed him to wait for questioning.⁴³

37. *Id.* at 459 (Brennan, J., dissenting).

38. *Id.*

39. *See infra* Part I.B.

40. 14 F.3d 1150, 1151–52 (6th Cir. 1994).

41. *Id.* at 1151.

42. *Id.*

43. *Id.*

Not entirely satisfied with the inconsistent accounts provided by the driver and passenger regarding their previous whereabouts, the officer informed the driver that he was free to leave, but before the driver was able to reenter the van, the officer asked to search it.⁴⁴ The driver withheld consent.⁴⁵ Faced with this refusal, the officer stated “that he would have to call a superior, . . . then took [the driver] by the arm and confined him, over protest, in the back of the patrol car.”⁴⁶ The supervisor arrived shortly thereafter and again requested consent to search.⁴⁷ Although the supervisor testified that the driver orally consented, the magistrate judge conducting the suppression hearing “found as a fact that [the driver] never consented in any way to the search of his vehicle.”⁴⁸ Upon nonetheless opening the van’s back door, the officers found 437 pounds of marijuana.⁴⁹

The driver successfully moved to suppress this evidence, and the indictment against him was eventually dismissed.⁵⁰ Although the magistrate noted that “the result of suppressing the search for the driver and not the passenger is an unfortunate one, given that the progress of both driver and passenger [was] impeded by illegal actions of the police,” the magistrate found that Carter had failed to establish standing because he did not demonstrate a possessory interest in the vehicle or the contraband.⁵¹ In his ruling, the magistrate clearly seemed to focus on Carter’s ability to challenge the search of the van, rather than on his ability to challenge the seizure of his person, even while recognizing that the seizure of the driver could provide a proper basis for excluding the fruit of the search against the driver.⁵²

The Sixth Circuit addressed whether the evidence offered against Carter was fruit of the unlawful seizure of his person.⁵³ The circuit court recognized that Carter, no less than the driver, was seized as a result of the traffic stop, and therefore had standing to dispute the legality of that seizure.⁵⁴ The court reasoned:

44. *Id.* at 1152.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1152–53. As the owner and driver of the van, he had “standing” to challenge the legality of the search itself; and the magistrate judge also suggested that even if the driver had consented to the search that consent would have been fruit of his illegal arrest. *Id.* at 1153.

51. *Id.* at 1153. The district court accepted the magistrate’s judge recommendation, denying the motion to suppress. *Id.*

52. *See supra* note 50. Carter also seemed not to press the connection between the seizure and the evidence, instead framing his argument for suppression on an assertion that because he “placed personal belongings for use in connection with a trip in the vehicle” he had a reasonable expectation of privacy in the vehicle. *Carter*, 14 F.3d at 1152.

53. *Id.* at 1153.

54. *Id.* at 1154.

[W]e shall assume, for purposes of analysis, not only that the subsequent arrest of the driver was unconstitutional, but also that the detention of Mr. Carter, if not illegal from the outset, became illegal when the driver was arrested. It does not follow from any of this, however, that the discovery and seizure of the marijuana represented “fruit” of Mr. Carter’s unlawful detention. Suppose that at the time of the driver’s arrest the police had summoned a taxi cab for Mr. Carter and told him he was free to leave. The marijuana would still have been discovered, because it was located in a van owned and controlled by Mr. Locklear (who was not going anywhere until his vehicle had been searched) and not in a vehicle controlled by Mr. Carter.⁵⁵

To support its conclusion, the Sixth Circuit invoked a counterfactual hypothetical to disprove a causal connection between Carter’s seizure and the discovery of the marijuana. Since the car would have remained with its owner (also unlawfully detained), the only way for the defendant to establish a causal connection under these facts, would be to demonstrate that not only would he have been permitted to leave, but he would have been permitted to do so in the vehicle. Of course, not only did the officers not “summon a taxi cab” for Carter, they detained him when he tried to leave the scene.⁵⁶ Indeed, the officers were not letting *anyone* leave until the van was searched.

The court contrasted this case with *United States v. Durant*, where a passenger of a stopped vehicle was frisked, and evidence found underneath her blouse prompted the subsequent search of the vehicle, which provided the requisite causal connection between the passenger’s detention and the discovery of the evidence in the car.⁵⁷ The court, however, in its haste to speculate, failed to see a key similarity between these two cases. In *Carter*, the officers initially stopped the van when they observed its temporary tags. Though the initial checks indicated nothing of interest, the officers’ suspicions were nonetheless aroused, in significant part, by the inconsistent accounts given by *both* driver and passenger regarding their prior whereabouts.⁵⁸ Thus, as long as we are engaging in hypothetical speculation, it very well may have been Carter’s statements, made while unlawfully detained, that prompted, or at least contributed significantly, to the officers’ decision to search the van,⁵⁹ just as the evidence found under the blouse of the passenger in *Durant* led to the search of the vehicle in that case.

55. *Id.* The Sixth Circuit, by not acknowledging that the initial traffic stop may have been unlawful (rather than merely the continued detention), also left open the possibility that had it made such a finding with respect to the initial stop, Carter still would not have prevailed. *Id.*

56. See *supra* text accompanying note 43.

57. *Carter*, 14 F.3d at 1154 (citing *United States v. Durant*, 730 F.2d 1180 (8th Cir. 1984)).

58. See *supra* text accompanying note 44.

59. This is not to say that had the police, as the Court suggested, permitted Carter to leave before speaking with him, they would not have searched the van. The driver, who appeared nervous, was also a bit vague in his responses. *Carter*, 14 F.3d at 1151. Nonetheless, it certainly must have added to the officer’s suspicion that Carter stated that they were returning from visiting a cousin and could not remember exactly where they had been. *Id.*

Years later, the District Court for the Northern District of Ohio applied the Sixth Circuit's holding to a set of facts amply demonstrating the danger posed by the heightened factual nexus approach. In *United States v. Davis*, a police officer observed a car partially enter the adjacent lane "on three occasions over a quarter mile."⁶⁰ Upon submitting the vehicle's temporary tag number, the officer received a "criminal gang warning" for the driver.⁶¹ The officer stopped the vehicle, which also contained the driver's young son and Davis, the defendant.⁶² The officer felt that both adult occupants seemed nervous, and a subsequent check on Davis's identification indicated a prior conviction for a drug-related offense.⁶³ At this time, the officer called for a drug-sniffing dog.⁶⁴

According to both Davis and the driver, the officer told the driver that the license, registration, and insurance were fine, that a canine had been requested, "and [that] if the canine unit doesn't indicate or show indication, we'll let you go with a warning."⁶⁵ The dog and his handler arrived sixteen minutes after the initiation of the stop,⁶⁶ and the dog eventually alerted.⁶⁷ At this point, the officers searched the vehicle, which "did not reveal any illegal drugs of evidentiary significance" but did reveal "a handgun in the vehicle's glove compartment."⁶⁸ After this discovery, the officers patted down both the driver and Davis, placed them in separate police cars, and questioned Davis without administering *Miranda* warnings.⁶⁹ Eventually, Davis admitted the gun was his, upon which he was formally arrested.⁷⁰

The district court found that the initial stop was based on probable cause that the driver had committed a moving violation.⁷¹ However, the district court also found

60. *United States v. Davis*, No. 6:06CR00386, 2007 WL 490088, at *1 (N.D. Ohio, Feb. 8, 2007). The facts are set out in the opinion. *See id.* at *1–*10.

61. *Id.* at *1.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at *4. Davis testified consistently with the driver as to what the officer told them. In other words, both the driver and passenger felt they were not free to leave until such time as the dog sniff was conducted, despite the fact that, with respect to the reason for the stop, the officer had decided to issue a warning.

66. *Id.* at *1. Yet another officer also arrived on the scene in order to observe the execution of the dog sniff. *Id.* at *1 n.5.

67. *Id.* at *2 n.6. There was a discrepancy between the accounts of the officers and the driver and Davis with respect to how many times the dog circled the car before alerting. *See id.* at *2.

68. *Id.* at *2. One officer testified he found "little flakes" of marijuana, "that he may have needed tweezers to retrieve it," but nonetheless "believe[d] it had a slight odor of marijuana." *Id.*

69. *Id.* In *Miranda v. Arizona*, the Supreme Court held that, as an essential precondition of the admissibility of statements taken from suspects subject to custodial interrogation, police must deliver certain warnings informing suspects of their rights, and obtain a valid waiver. 384 U.S. 436, 476 (1966). *See infra* notes 250–52 and accompanying text.

70. *Davis*, 2007 WL 490088, at *2.

71. *Id.* at *4. The court credited the officer's testimony, but also noted that the "alleged violation is a highly technical one, not presenting any real safety concerns." *Id.* at *3. The driver had indicated his belief that the true motivation for the stop was the fact that he was "a black male with prior gang involvement" and that, in fact, local

that “[n]o circumstances justified extending the duration of a simple warning stop to include an additional traffic or safety-related investigation,”⁷² thus rendering the prolonged detention an unlawful seizure of both occupants of the vehicle.⁷³ The court relied heavily on the Sixth Circuit’s decision in *Carter* to conclude that, while Davis had standing to challenge his detention, he had not established the requisite factual nexus to suppress the handgun.⁷⁴ A survey of other circuits’ approaches also led the district court to articulate its understanding of a general rule:

The rationale among the circuit courts of appeal appears to be that, if the car was illegally stopped initially, then a passenger generally may assert a Fourth Amendment challenge because, but for that initial illegal detention (of which he was a part), no evidence would have been discovered. If, however, the initial stop was legal but *evolved* into unlawful detention, then the required factual nexus does not necessarily exist, because the evidence discovered in the car would have been discovered even without the passenger’s personal detention (by virtue of the unlawful detention of the driver—whose right to be free from that detention the passenger cannot assert). In sum, “[i]n order to . . . demonstrate the required factual nexus, [a Defendant] must show that the [evidence] would never have been found but for *his*, and only his, unlawful detention.”⁷⁵

The district court adopted the counterfactual hypothetical reasoning of *Carter* (taxicab and all), finding the facts at issue to be, for purposes of analysis, virtually identical.⁷⁶ But, as in *Carter*, the district court in *Davis* failed to carefully analyze the causal relationships between the passenger and the decision to unlawfully prolong the stop, and between the passenger and the evidence. While the officer may have been motivated to make the initial stop because of the warning he received regarding the driver’s previous gang involvement,⁷⁷ it is entirely plausible to believe that he was motivated to detain the vehicle for the dog sniff because of Davis’s prior drug-related conviction. One can wonder whether the car would have been searched at all had Davis not been its passenger. In addition, hypothetically speaking, the handgun would not have been found if Davis had

officers often stopped him despite his extreme caution when driving. *Id.* The court observed that the driver’s testimony “raise[d] concerns about the general practices” of the police in that locality. *Id.* at *4.

72. *Id.* at *5.

73. *Id.* at *4–*5.

74. *Id.* at *10.

75. *Id.* at *9 (emphasis in original) (quoting *United States v. Deluca*, 269 F.3d 1128, 1133 (10th Cir. 2001)).

76. *Id.* at *10 (“Here, similarly, the handgun in the glove compartment would have been discovered by virtue of the detention of [the driver], even if the Defendant was not detained.”).

77. Whether or not this is the case, the initial stop is lawful under *Whren v. United States*, 517 U.S. 806 (1996), regardless of the officer’s motivation, because the officer (as the district court found) observed the traffic violation. *Id.* at *4 (“Thus, while the circumstances indicate that [the officer] may also have had an ulterior motive for stopping [the vehicle], the Court finds that he had probable cause to do so.”) (citing *Whren*, 517 U.S. at 813).

been permitted to depart and, before doing so, had also been given permission to remove his property from the glove compartment (putting aside, for purposes of argument, the nature of that property). Clearly, the discovery of *his* handgun arose from *his*, and only *his*, presence in the car to begin with.

The facts and outcome of *Davis* provide cause for concern. The facts suggest that the minor traffic violation could have been a pretext for stopping the car. Once stopped, the officer detained the driver and passenger to investigate a potential drug offense for which he had no reasonable suspicion or probable cause. A questionable alert from the drug-sniffing dog led to the search of the vehicle and the discovery of the handgun (but no illegal drugs), which in turn led to the further detention of *Davis* in the police car, where he was questioned without benefit of *Miranda* warnings.⁷⁸ It is no wonder that the district court noted that such conduct “raises concerns about the general practices” of the police.⁷⁹

2. *The Tenth Circuit*

The Tenth Circuit adopted the heightened factual nexus approach in two primary cases. *United States v. Nava-Ramirez* involved a defendant who, although the driver of the vehicle, was in the company of the owner (seated in the passenger seat).⁸⁰ Thus, for purposes of argument, because the owner was present in, and had authority over the use of, the car, the defendant did not have ultimate control of the vehicle after it was lawfully stopped for having a crack in its windshield.⁸¹ Upon speaking with the vehicle’s occupants, the officer identified the odor of methamphetamine, observed various items in the car, including Visine and some wine coolers, and noted that the occupants appeared nervous.⁸²

The officer asked for and received permission to take “‘a quick look’ inside the car,” but before doing so patted down the occupants and discovered two pipes in the car owner’s pockets.⁸³ The passenger compartment contained nothing of interest, but a subsequent search of the trunk revealed methamphetamine and drug paraphernalia, leading to *Nava-Ramirez*’s indictment.⁸⁴ The Tenth Circuit found that, even if his detention was unlawful, *Nava-Ramirez*

78. The district court did not rule on whether the statements would likely have been suppressed under *Miranda*, but suppressed the statements as fruit of “the Defendant’s, and only the Defendant’s, detention.” *Davis*, 2007 WL 490088, at *10.

79. *Id.* at *4.

80. *United States v. Nava-Ramirez*, 210 F.3d 1128, 1130 (10th Cir. 2000).

81. *Id.*; see *infra* text accompanying note 87.

82. *Nava-Ramirez*, 210 F.3d at 1130. The officer also noted that the owner-passenger’s eyes “appeared bloodshot and glassy.” *Id.*

83. *Id.*

84. *Id.* The owner of the car successfully appealed the denial of his motion to suppress the contents of the trunk, as the Sixth Circuit found that the search of the trunk was not based on probable cause. *United States v. Wald*, 208 F.3d 902, 908 (10th Cir. 2000) *superseded by* *United States v. Wald*, 216 F.3d 1222 (2000).

failed to satisfy his burden of proving a factual nexus between his detention and the evidence ultimately discovered in the trunk. At a minimum, a defendant must adduce evidence at the suppression hearing showing the evidence sought to be suppressed would not have come to light but for the government's unconstitutional conduct.⁸⁵

The court then applied the counterfactual hypothetical that should, by now, be somewhat familiar: Nava-Ramirez failed to meet this burden because he offered no evidence that, at some time before the search of the trunk, he would have asked for and received permission, not only to leave the scene, but to leave in his companion's car.⁸⁶ As the court stated, "[i]n the absence of some supportive proof, this court cannot simply speculate that [the owner] would have given Nava-Ramirez permission to take his car."⁸⁷

The next year, the Tenth Circuit decided *United States v. DeLuca*, in which the defendant was a passenger in a car that was initially stopped pursuant to a lawful license and registration checkpoint.⁸⁸ Although the driver provided a valid license and the owner, seated in the rear, produced the vehicle registration, the officer believed that all the occupants appeared nervous.⁸⁹ After some brief questioning, the officer, without returning the driver's license or the vehicle registration, asked the driver to move the vehicle to the shoulder.⁹⁰ The officer subsequently asked the driver for consent to search the trunk, as well as consent to conduct a dog sniff.⁹¹ The ensuing search revealed a package of methamphetamine.⁹²

Though the district court granted DeLuca's motion to suppress,⁹³ the Tenth Circuit determined that DeLuca did *not* satisfy the "but for" test articulated by *Nava-Ramirez*.⁹⁴ Specifically, the court found,

Mr. DeLuca has failed to show that had he requested to leave the scene of the traffic stop, he would have been able to do so in [the owner's] car. Therefore . . . we must assume that regardless of Mr. DeLuca's presence, the car and its owner would have continued to be detained and the officer would still have found the methamphetamine.⁹⁵

85. *Nava-Ramirez*, 210 F.3d at 1131.

86. *Id.*

87. *Id.*

88. 269 F.3d 1128, 1130 (10th Cir. 2001).

89. *Id.*

90. *Id.*

91. *Id.* at 1130–31.

92. *Id.* at 1131.

93. *Id.* The district court understood *Nava-Ramirez* as requiring "'only a 'but for' factual nexus between the illegal detention of the car and its occupants . . . and the evidence subsequently discovered' and 'found that nexus clearly-established here.'" *Id.* at 1133.

94. *Id.*

95. *Id.*

The court continued that, in order for DeLuca to meet his burden to demonstrate the requisite factual nexus, he would have to “show that the methamphetamine would never have been found but for *his*, and only his, unlawful detention.”⁹⁶

DeLuca did actually try to establish this nexus by arguing that the officer, in his statement of probable cause supporting the prolonged detention, asserted that “all [of] the occupants ‘appeared to be nervous.’”⁹⁷ According to DeLuca, then, the factual nexus requirement was met because “‘but for’ his apparent nervousness, the officer would not have continued to detain the vehicle and the methamphetamine would not have been discovered.”⁹⁸ The *DeLuca* majority, not finding this argument persuasive, reversed the lower court, although not without dissent.⁹⁹

3. *The Ninth Circuit*

The Ninth Circuit formally adopted the heightened factual nexus approach in *United States v. Pulliam*.¹⁰⁰ In *Pulliam*, two officers were patrolling in an area known for gang-related activity¹⁰¹ and observed two men in the courtyard of a building: Richards, whom they recognized as a gang member and parolee, and Pulliam, who was unknown to them.¹⁰² The officers felt that the two men in the courtyard looked startled upon seeing them.¹⁰³ Richards approached the officers’ car to speak with them, a move the officers believed was meant to distract them from Pulliam, who the officers suspected was wanted or armed.¹⁰⁴

After conversing with Richards, the officers drove away, but continued their observation of the men, assuming that they would shortly depart in Richards’s car and having decided that “they were ‘going to follow them’ and ‘find a reason to stop them.’”¹⁰⁵ A few minutes after seeing the car, driven by Richards, pass by, the “reason to stop” materialized when the officers observed that one of the rear brake lights was not working.¹⁰⁶ As stated by the circuit court, “they also assert[ed] that

96. *Id.* Even if this initial burden is met by the defendant, the government could argue that the evidence should nonetheless be admitted because it would have been inevitably discovered, it came to light through independent means, or because it was sufficiently attenuated. *Id.* at 1132.

97. *Id.* at 1134.

98. *Id.*

99. Judge Seymour dissented from the majority opinion, authoring a thorough, well-reasoned opinion that this Article will explore in Part II. *See id.* at 1135. (Seymour, J., dissenting).

100. 405 F.3d 782 (9th Cir. 2005).

101. *Id.* at 784. The facts surrounding the traffic stop and subsequent detention of the defendant are set out in *Pulliam*. *Id.* at 784–85.

102. *Id.* at 784.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* At the suppression hearing, Richards’s sister, the owner of the car, testified, “suggesting that the brake light was working and that the officers might themselves have broken it to manufacture a reason for stopping the car.” *Id.* at 785.

the car rolled through a stop sign.”¹⁰⁷ The officers then stopped the car, approached with their weapons drawn and aimed low, and ordered the men to exit the car and “walk to the curb, where they were handcuffed and patted down.”¹⁰⁸ One officer went directly to the car, finding a gun under the passenger seat, although Richards and Pulliam were not interrogated and nothing was found as a result of the pat down.¹⁰⁹ Pulliam admitted ownership of the gun.¹¹⁰

The district court granted Pulliam’s suppression motion, finding that although the initial stop was lawful, the officers had no justification for any further investigative action.¹¹¹ The circuit court recognized that Pulliam had “standing to contest the legality of his own detention,” but nonetheless held that he “failed to demonstrate that the gun is in some sense the product of his detention.”¹¹² The court noted that the officers had not interrogated Pulliam prior to the search, and the pat down was unfruitful, leading the court to conclude:

Even if [the officers] had immediately released [Pulliam] rather than detaining him, the search of the car still would have occurred, and the gun would have been found. The discovery and seizure of the gun was simply in no sense the product of any violation of Pulliam’s [F]ourth [A]mendment rights.¹¹³

The circuit court cited *DeLuca* for the proposition that in order to meet his burden, Pulliam needed to demonstrate that he would have been permitted, on request, to leave the scene in the vehicle,¹¹⁴ or, in the alternative, that something occurring during his detention, for example, the discovery of evidence on his person or some actions or words on his part, prompted the search.¹¹⁵

The circuit court was not persuaded by Pulliam’s argument that had he “not been in the car, the car would not have been stopped, and the gun would not have been found.”¹¹⁶ The court also rejected a conception of a traffic stop and the ensuing detentions and search as “a clear, swift, and unbroken chain . . . a single official decision,” although it may have concluded otherwise had the initial stop been

107. *Id.* at 784. This particular choice of words, by this author’s interpretation, highlights how easily officers can claim any number of moving violations, with little but their assertions to prove that such violations actually occurred.

108. *Id.* The officers stated that Richards did not immediately pull over in response to the siren and lights, although Richards disputed that point. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 785. The government conceded that that the detention of Pulliam and the search of the car were unjustified, and also did not contest the district court’s ruling to exclude Pulliam’s statements. *Id.*

112. *Id.* at 787.

113. *Id.*

114. *Id.* (citing *United States v. DeLuca*, 269 F.3d 1128, 1133 (10th Cir. 2001)).

115. *Id.*

116. *Id.* The circuit court reasoned that the car was stopped because of the broken brake light, regardless of the officers’ actual purpose at the outset, and understood Pulliam to be arguing for suppression “because he was the ‘target’ of the search,” a theory rejected by the Supreme Court in *Rakas v. Illinois*, in its holding with respect to standing to challenge searches. *Id.* at 788 (citing *Rakas v. Illinois*, 439 U.S. 128, 132–33 (1978)).

unlawful.¹¹⁷ As in the Tenth Circuit, the Ninth Circuit's decision in *Pulliam* was not unanimous.¹¹⁸

4. *The Eighth Circuit*

While the Eighth Circuit did not directly adopt the heightened factual nexus approach, that court nonetheless indicated its willingness to overlook police illegality in deciding whether to apply the exclusionary rule to passengers, and in one case, cited favorably to *DeLuca*.¹¹⁹ In *United States v. Kreisel*, the defendant was a passenger in a truck driven by his brother.¹²⁰ Two officers decided to stop the truck, believing that the truck was being used for commercial purposes, and as such, would be subject to additional documentation, which they did not see displayed.¹²¹ During the stop, which proved the officers' belief to be incorrect, the driver consented to the search of the truck, which revealed the methamphetamine-related evidence the defendant sought to suppress.¹²²

The court held that even if the stop was unlawful, the driver's consent was "an act of free will that validated the search."¹²³ Rather than applying a heightened factual nexus approach to determine *whether* the stop was a but-for cause of the search, the court found that the consent attenuated the causal relationship between the potential illegality and the search so as to purge any taint.¹²⁴ In its analysis, the circuit court considered one of the factors supplied by the Supreme Court's decision in *Brown v. Illinois*¹²⁵ for determining whether evidence is sufficiently attenuated from a Fourth Amendment violation, "particularly, the purpose and flagrancy of the official misconduct."¹²⁶ The court here found no intentional police misconduct, and no indication that the stop was "part of a preconceived plan to extract a consent to search [the truck] from the driver."¹²⁷

The following year, the Eighth Circuit again considered the admissibility of evidence found pursuant to a consent search of a vehicle; however, this time the initial stop of the vehicle and the detention of its occupants were assumed to be unlawful.¹²⁸ In *United States v. Green*, Green was a passenger in a car stopped by

117. *Id.* ("But when, as here, the initial stop is lawful, the situation is different."). The court was unwilling to "amalgamate the separate police actions . . . merely because they occurred in close proximity." *Id.* at 789.

118. Judge Wardlaw authored a dissent, citing to Judge Seymour's dissenting opinion in *DeLuca*, which this Article will address in Part II. *See id.* at 792, 794–95 (Wardlaw, J., dissenting) (citing *DeLuca*, 269 F.3d at 1145–48 (Seymour, J., dissenting)).

119. *See United States v. Green*, 275 F.3d 694, 699, 700 (8th Cir. 2001) (citing *DeLuca*, 269 F.3d at 1133).

120. 210 F.3d 868, 868 (8th Cir. 2000). The case provides a brief set of facts. *Id.*

121. *Id.*

122. *Id.* at 868–69.

123. *Id.* at 869.

124. *Id.*

125. 422 U.S. 590, 604 (1975); *see infra* text accompanying notes 185–86.

126. *Kreisel*, 210 F.3d at 869–70 (quoting *Brown*, 422 U.S. at 604).

127. *Id.* at 870.

128. *United States v. Green*, 275 F.3d 694, 700 (8th Cir. 2001).

officers at a “drug interdiction checkpoint.”¹²⁹ The actual checkpoint was strategically placed at the top of a freeway exit to stop motorists who, through posted signs, were led to believe that the actual checkpoint was beyond the exit.¹³⁰ The driver admitted to transporting a package containing narcotics, consented to a search of the car, and implicated Green.¹³¹

Citing to *Kreisel*, the court again found that the driver’s consent provided a basis for the search independent of the illegality of the stop, and that the consent was “sufficiently an act of free will to purge the original taint.”¹³² The circuit court also cited to *DeLuca* for its “finding that defendant’s unlawful detention did not result in suppression of drugs.”¹³³ This time, however, the circuit court did not mention what had been a relevant consideration in *Kreisel*—a lack of flagrant police misconduct.

C. Circuits (Perhaps) Disapproving of the Heightened Factual Nexus Approach

1. The Fifth Circuit

The Fifth Circuit has implicitly, although not expressly, rejected the heightened factual nexus approach described above. In *United States v. Jones*, two officers conducted a traffic stop for a speeding violation.¹³⁴ One officer informed the driver that he would issue a warning citation.¹³⁵ Before doing so, however, the officer began to question the driver, whom he had directed to step outside the vehicle.¹³⁶ The driver indicated that he and Jones, his passenger, were traveling in connection with “promotional work for a record company.”¹³⁷ Jones was similarly questioned, and voluntarily opened the trunk of the car to remove a promotional CD.¹³⁸ The officers ordered criminal background checks, and over a quarter of an hour after the initial stop, the police “dispatcher reported that neither [the driver] nor Jones had a criminal history and that both drivers’ licenses were current.”¹³⁹ Neverthe-

129. *Id.* at 697. The Supreme Court, in *Indianapolis v. Edmond*, 531 U.S. 32 (2000), had held that suspicionless stops at vehicle checkpoints conducted with the primary purpose of furthering “the general interest in crime control” violate the Fourth Amendment. *Edmond*, 531 U.S. at 44 (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979)). The court of appeals assumed such a primary purpose motivating the checkpoint at issue here, as it was ostensibly being operated for purposes of discovering narcotics. *Green*, 275 F.3d at 700.

130. *Green*, 275 F.3d at 697.

131. *Id.*

132. *Id.* at 700 (quoting *Kreisel*, 210 F.3d at 869).

133. *Id.* (citing *United States v. Deluca*, 269 F.3d 1128, 1133 (10th Cir. 2001)).

134. 234 F.3d 234, 237 (5th Cir. 2000). The relevant facts are set out in the opinion. *Id.* at 237–39.

135. *Id.* at 237–39.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 238.

less, the officers continued to question both men and asked for consent to search the car.¹⁴⁰ The search revealed narcotics.¹⁴¹

The circuit court found that the continued detention of both the driver and Jones, beyond the time needed for the computer checks and to administer the citation, violated the Fourth Amendment.¹⁴² In addition, the court found that the driver's consent, even if voluntary, was not "an independent act of free will [] that . . . broke the causal chain between the consent and the illegal detention."¹⁴³ What is most important, for present purposes, however, is that the court did not distinguish between the driver and Jones, the passenger, for purposes of suppression. Both convictions were overturned.¹⁴⁴ Thus one can read *Jones* as an implicit rejection of the heightened factual nexus approach adopted by the Sixth, Ninth, and Tenth (and possibly Eighth) Circuits.

2. *The Third Circuit*

Although not having yet had occasion to consider the application of the heightened factual nexus test where the initial stop is lawful, the Third Circuit, in *United States v. Mosley*, expressed some reservations about the Tenth Circuit's approach in *DeLuca*.¹⁴⁵ At issue in *Mosley* was the suppression of guns found in a search of a vehicle after an unlawful stop.¹⁴⁶ The circuit court held that Mosley, a passenger, was entitled to suppress the fruit of the illegal traffic stop, as the driver would have been, because the "Fourth Amendment violation . . . was the traffic stop itself, and not just Mosley's removal from the car."¹⁴⁷

For purposes of suppression, the Third Circuit elected to understand "an illegal traffic stop of a car occupied by a driver and a passenger [as] a single constitutional violation, with two victims, each of whom can seek to suppress all fruits of that violation."¹⁴⁸ Based on that understanding, the court agreed with the majority of other circuits finding that passengers' motions to suppress under similar circumstances presented "no conceptual difficulties"¹⁴⁹ or "'fruits' problem of any

140. *Id.*

141. *Id.* at 238–39.

142. *Id.* at 241. The court further found that there was no reasonable suspicion to prolong the detentions. *Id.* at 242.

143. *Id.* at 243.

144. *Id.* at 244.

145. 454 F.3d 249, 255 n.11 (3d Cir. 2006).

146. *Id.* at 252. Police stopped a "green Suzuki SUV" in which Mosley was a passenger, after receiving a call "advising officers to be on the lookout for a black man with dreadlocks driving a green SUV." *Id.* at 251. With nothing more, the anonymous tip did not provide reasonable suspicion to justify the temporary stop. *Id.* (citing *Florida v. J.L.*, 529 U.S. 266 (2000)).

147. *Id.* at 251, 253. The circuit court reiterated that "a Fourth Amendment seizure of every occupant of a vehicle occurs the moment that vehicle is pulled over by the police. The legality of the seizure depends upon the legality of the traffic stop." *Id.* at 253 n.6.

148. *Id.* at 257–58.

149. *Id.* at 257.

magnitude,”¹⁵⁰ and, in each such case, called for “an utterly straightforward and unremarkable application of the fruit of the poisonous tree doctrine.”¹⁵¹

Turning to *DeLuca*, the court noted that the *DeLuca* Court’s use of a “counterfactual—‘What if?’—approach” to the passenger’s suppression motion was “a novel idea.”¹⁵² The court noted that *DeLuca* presented a different factual situation that may have prompted that court’s exacting fruits analysis: *DeLuca* involved an initially legal traffic stop that became unlawful when police detained the occupants (and the vehicle) longer than justified by the legitimate purposes of the stop.¹⁵³ Nonetheless, the Third Circuit indicated some level of disapproval of the Tenth Circuit’s approach:

Even on its limited facts, *DeLuca* was not uncontroversial. Former Chief Judge Seymour issued a blistering dissent, calling the majority’s reasoning “ludicrous,” and Professor LaFave concurred in that assessment. The most serious criticism is that the counterfactual methodology “forces the defendant to disprove inevitable discovery and does an end run around the government’s burden of proof on inevitable discovery.”¹⁵⁴

While the Third Circuit limited its holding to the facts before it, “express[ing] no opinion on the viability in [the Third] Circuit of the *DeLuca* test on *DeLuca* facts,”¹⁵⁵ the court continued: “[W]e recognize that the rationale for our holding might be thought to undermine the *DeLuca* rationale even on *DeLuca* facts.”¹⁵⁶

Recently, the District Court for the Middle District of Pennsylvania had the opportunity to consider the “*DeLuca* test on *DeLuca* facts.”¹⁵⁷ In *United States v. Fraguela-Casanova*, an officer lawfully stopped a tractor-trailer for making an “improper lane change” without signaling.¹⁵⁸ Upon conversing with the driver and Fraguela, a passenger in the truck, the officer developed reasonable suspicion warranting further investigation, which included “an exhaustive, state-by-state

150. *Id.* (citing 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(d) (4th ed. 2004)).

151. *Id.* at 260. (discussing *United States v. Chanthasouvat*, 342 F.3d 1271 (11th Cir. 2003) and *United States v. Twilley*, 222 F.3d 1092 (9th Cir. 2000)).

152. *Id.* at 255 (“[T]he majority view in the circuits was and remains that in a traffic stop, there will always be a sufficient ‘nexus’ between the stop and the search, unless there are significant intervening events that sever or attenuate the causal chain.”).

153. *Id.* Thus, because the initial stop was lawful, the *DeLuca* court separated the continued detention of the occupants from the initial (legal) stop. *Id.*

154. *Id.* at 255 n.10 (quoting *United States v. DeLuca*, 269 F.3d 1128, 1145 n.1 (10th Cir. 2001) (Seymour, J., dissenting)).

155. *Id.* at 255.

156. *Id.* at 255 n.11. The Third Circuit, in *Mosley*, conducted a thorough survey of other circuits’ decisions, finding that the “prevailing rule . . . is that an illegal traffic stop entails a suppression remedy for all occupants of the car.” *Id.* at 266. In addition, the *Mosley* court found Fourth Amendment interests best served by not differentiating between passengers and drivers. *Id.* at 268. The Third Circuit’s decision will be more thoroughly explored in Part II.

157. See *United States v. Fraguela-Casanova*, 858 F. Supp. 2d 432 (M.D. Penn. 2012).

158. *Id.* at 436.

search of [the driver's] and Fraguera's criminal histories."¹⁵⁹ A full ninety-four minutes later, the driver permitted the search of the truck,¹⁶⁰ revealing "approximately 22,500 cartons of untaxed cigarettes" for which both occupants were arrested.¹⁶¹ The court found that the excessively long detention constituted "a *de facto* arrest without probable cause."¹⁶² Thus, the court was called upon to determine the exclusion of evidence with respect to a passenger in the paradigmatic circumstances which trigger the heightened factual nexus test: an initially lawful stop that is unlawfully prolonged.

The district court expressly rejected the application of the heightened factual nexus test to these facts, deeming the entire incident as "a *single* decision to detain [the driver], Fraguera, and the tractor-trailer" rather than as "three discrete, independent, detentions."¹⁶³ The district court relied on the dissenting opinions in *Pulliam* and *DeLuca*, as well as the dicta and reasoning in *Mosley*, to support its holding, noting the commonsense reality that the freedom of drivers and passengers alike is curtailed during a vehicle detention.¹⁶⁴ The court also highlighted the role of the exclusionary rule as a tool of "judicial supervision of [] law enforcement activities."¹⁶⁵ The Article now turns to an examination of the various arguments underlying the opinions supporting the rejection of the heightened factual nexus approach.

II. PASSENGERS WITH STANDING: ARGUMENTS FOR REJECTING THE HEIGHTENED FACTUAL NEXUS APPROACH

A. *Voices in Dissent: A Closer Look*

The dissenting opinions in *Pulliam* and *DeLuca*, and the majority opinion in *Mosley*, articulate three common arguments.¹⁶⁶ First, these opinions note that the courts adopting the heightened factual nexus test seem to confuse passengers' rights under the *Rakas* "standing" test¹⁶⁷ with the right of passengers to contest the legality of their seizures.¹⁶⁸ Although the evidence eventually comes to light

159. *Id.* at 440–41, 445.

160. *Id.* at 438.

161. *Id.*

162. *Id.* at 443.

163. *Id.* at 451. The district court noted that both driver and passenger raised the officer's suspicions and prompted him to detain both of them to investigate further. *Id.*

164. *Id.* at 450–51.

165. *Id.* at 451.

166. Each opinion supports its conclusions with more than three arguments, but this Section focuses on three common arguments and states them broadly.

167. See *supra* notes 2–6 and accompanying text.

168. See *United States v. Mosley*, 454 F.3d 249, 264–65 (3d Cir. 2006) (identifying the Court's standing doctrine in *Rakas* as a "source of confusion"); *United States v. Pulliam*, 405 F.3d 782, 794 (9th Cir. 2005) (Wardlaw, J., dissenting) ("Perhaps the majority's error lies in confusing standing analysis with 'fruit of the poisonous tree' analysis."); *United States v. DeLuca*, 269 F.3d 1128, 1145 n.2 (10th Cir. 2001) (Seymour, J.,

during a search of the vehicle in question, it is not the search, but the illegal *detention* of the passenger that is at issue when determining whether the discovered evidence can be considered “fruit” of that illegality. Thus, as long as the defendant passenger can show that he was the victim of an unreasonable seizure, the standing requirement is met, regardless of any sort of possessory or privacy interest in the vehicle (or lack of either), and needs no further analysis.

What remains, then, is simply a question of the proper scope of the exclusionary remedy, leading to the second common thread of argument in these opinions: these judges conceived of the stop and detention of *all* the occupants of the vehicle as “a single act, which affects equally all occupants of a vehicle,”¹⁶⁹ and classified the entire action as the “‘primary illegality’ . . . stemm[ing] from the officers’ single decision to detain and search the car, [passenger], and the driver,” which resulted in “a single, integrated instance of unconstitutional police conduct.”¹⁷⁰ This single transaction adversely affects the freedom of movement of driver and passenger equally, both of whom have identical interests in freedom from unreasonable seizures.¹⁷¹

Third, these opinions were critical of “courts artificially . . . bifurcat[ing] police actions on a post hoc basis in an attempt to evade the exclusionary rule.”¹⁷² When the complete transaction involving the officer and the occupants of the vehicle is viewed as one illegal event, the causal connection between the illegality and the evidence is “crystal clear,”¹⁷³ “apparent,”¹⁷⁴ and “self-evidently sufficient to support suppression.”¹⁷⁵ Judge Seymour, dissenting in *DeLuca*, went even further, stating that “[t]o impose a heightened factual nexus test . . . on a vehicular stop

dissenting) (noting that “[t]he fruits analysis should not change simply because of the different standing required, so long as the evidence is being viewed as fruit of the detention, not the search”).

169. See *Mosley*, 454 F.3d at 267 (“A police officer who pulls over a vehicle does not, in the act of pulling over the vehicle, interact separately with each occupant; rather, the officer undertakes one action—turning on the siren and lights—which instantly affects everyone in the targeted vehicle, signaling to them that their freedom of movement has been restricted.”); *Pulliam*, 405 F.3d at 793 (Wardlaw, J., dissenting) (“None of our vehicular stop cases analyzes the stop of the vehicle and the unlawful detention of its occupants as discrete, independent actions . . . They have instead uniformly considered the illegal detention of the vehicle and its occupants together in their fruits analysis.”); *DeLuca*, 269 F.3d at 1145 (Seymour, J., dissenting) (“In our precedent, we have not distinguished between driver, owner, and passenger in our analysis of whether the evidence is fruit of the illegality.”).

170. *Pulliam*, 405 F.3d at 794 (Wardlaw, J., dissenting) (noting agreement with the Fifth Circuit and citing to WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(d) (4th ed. 2004)); see also *DeLuca*, 269 F.3d at 1145 (Seymour, J., dissenting) (“We have focused on the stop of the vehicle and the unlawful detention or arrest of its occupants as constituting part of the same factual occurrence . . .”).

171. *Pulliam*, 405 F.3d at 792 (Wardlaw, J., dissenting); *DeLuca*, 269 F.3d at 1145 (Seymour, J., dissenting).

172. *Pulliam*, 405 F.3d at 795 (Wardlaw, J., dissenting) (citing *United States v. Martell*, 654 F.2d 1356, 1370 (9th Cir. 1981)).

173. *DeLuca*, 269 F.3d at 1144 (Seymour, J., dissenting).

174. *Pulliam*, 405 F.3d at 793 (Wardlaw, J., dissenting).

175. *United States v. Mosley*, 454 F.3d 249, 266 (3d Cir. 2006) (expressing the dominant approach taken by other circuit courts). *Mosley*, it should be remembered, involved the situation where the initial stop of the car was unlawful. The opinion concedes that a plausible argument can be made for the analytic separation approach, but

case is ludicrous.”¹⁷⁶ The evidence simply would not have been discovered without the constitutional violation (the stop and unlawful detention of the vehicle and all its occupants), taking into account “the proximity in time and in location of the events, and the unbroken links between them.”¹⁷⁷

Once a but-for relationship is established, the government bears the burden of establishing that the taint of illegality has been purged, by “demonstrating the evidence would have been inevitably discovered, was discovered through independent means, or was so attenuated from the illegality as to dissipate the taint of the unlawful conduct.”¹⁷⁸ The Eighth Circuit, as discussed above, found the driver’s consent to be an independent source for the discovery of evidence, despite the initially unlawful stop.¹⁷⁹ On the other hand, the use of the counterfactual hypothetical by the courts adopting the heightened factual nexus approach seems to be rooted more in the inevitable discovery exception to the exclusionary rule.

However, reliance on the counterfactual hypothetical turns that exception on its head. In *Nix v. Williams*, the Supreme Court announced the inevitable discovery doctrine, holding that “if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered *by lawful means* . . . then the deterrence rationale has so little basis that the evidence should be received.”¹⁸⁰ The counterfactual hypothetical approach posits that unless the passenger defendant can somehow show that he would have been able to depart the scene with the car and thus, the evidence eventually found in the car, the evidence inevitably would have been found due to the *illegal* detention of the driver or owner of the vehicle.¹⁸¹ Referring to the role of the exclusionary rule as a deterrent to unlawful police conduct, Judge Seymour would have held that when the evidence comes to light only through *unlawful* means, such evidence should be excluded.¹⁸²

Turning to attenuation, the Supreme Court, in *Wong Sun v. United States*, held that exclusion is not necessary where, even “granting establishment of the primary illegality, the evidence . . . has been come at by . . . means sufficiently distinguishable to be purged of the primary taint.”¹⁸³ The Court provided additional guidance in *Brown v. Illinois*, deciding whether a properly Mirandized

ultimately rejects that approach in favor of the view that the stop is “a single act, which affects equally all occupants of a vehicle.” *Id.* at 267.

176. *DeLuca*, 269 F.3d at 1144 (Seymour, J., dissenting).

177. *Id.*

178. *Id.* at 1137 (quoting *United States v. Nava-Ramirez*, 210 F.3d 1128, 1131 (10th Cir. 2000)).

179. See *supra* notes 129–33 and accompanying text.

180. 467 U.S. 431, 444 (1984) (emphasis added).

181. For a discussion of the use of the counterfactual hypothetical approach to demonstrate a lack of causal connection between the passenger’s unlawful seizure and the discovery of evidence see *supra* Part I.B.

182. *DeLuca*, 269 F.3d at 1147 (Seymour, J., dissenting).

183. 371 U.S. 471, 488 (1963) (quoting JOHN MACARTHUR MAGUIRE, *EVIDENCE OF GUILT* 221 (1959)).

confession was sufficiently an act of free will to attenuate its causal connection with the defendant's preceding illegal arrest.¹⁸⁴ The Court prescribed consideration of various factors in addition to *Miranda* warnings, such as "[t]he temporal proximity of the [violation] and the [evidence], the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct."¹⁸⁵

Judge Seymour agreed with the district court's finding that the police conduct at issue in *DeLuca* amounted to a "flagrant misuse of . . . checkpoints,"¹⁸⁶ and was "flagrantly illegal."¹⁸⁷ Judge Wardlaw, in his *Pulliam* dissent, accused the majority's ruling of "invit[ing] police officers to engage in patently unreasonable detentions, searches, and seizures every time an automobile contains more than one occupant."¹⁸⁸ Judge Fisher, writing for the majority in *Mosley*, turned to another Supreme Court decision to support a view of attenuation that requires an examination of the real-world consequences associated with limiting the exclusionary rule:

The Supreme Court stressed in *Hudson* that in determining whether a particular Fourth Amendment violation is causally related to a particular challenged piece of evidence in such a way as to trigger the exclusionary rule, we must look not only to the logical relationship between the violation and the discovery of the evidence, but also to the nature of the personal and social interests the Constitution protects, the prevalence of the illegal police practice at issue, the deterrent value of the suppression remedy, and the likely practical effects of a particular rule.¹⁸⁹

Noting the prevalence of racial profiling, the widespread dependence on anonymous informants' tips, and the pervasive "use of traffic stops as investigatory tools," Judge Fisher concluded "the purposes of the Fourth Amendment are best served by extending the bubble of proximate causation to vehicle passengers."¹⁹⁰

184. 422 U.S. 590, 600 (1975).

185. *Id.* at 603–04 (internal citations omitted).

186. *DeLuca*, 269 F.3d at 1140 (Seymour, J., dissenting).

187. *Id.* at 1148 (Seymour, J., dissenting).

188. *United States v. Pulliam*, 405 F.3d 782, 796 (9th Cir. 2005) (Wardlaw, J., dissenting).

189. *United States v. Mosley*, 454 F.3d 249, 268 (3d Cir. 2006) (citing *Hudson v. Michigan*, 547 U.S. 586 (2006)). In *Hudson*, the Court, in holding the exclusionary rule inapplicable to "knock-and-announce" violations, considered the interests protected by the knock-and-announce rule, finding them to be unrelated to the discovery of evidence. 547 U.S. at 594 ("Since the interests that *were* violated in this case have nothing to do with the seizure of evidence, the exclusionary rule is inapplicable."). The Court also took into account the "increasing professionalism of police forces" as an indication that exclusion was no longer necessary to deter these types of violations. *Id.* at 598.

190. *Mosley*, 454 F.3d at 268. Judge Fisher distinguished the unlawful traffic stop from the knock-and-announce rule, stating that the constitutional violations occurring during the unlawful traffic stop go directly to "the heart of the validity of the underlying police activity itself, not merely the method of its execution." *Id.* at 268 n.24. *But see* Note, *The Anomaly of Passenger "Standing" To Suppress All Evidence Derived from Illegal Vehicle Seizures Under the Exclusionary Rule: Why the Conventional Wisdom of the Lower Courts Is Wrong*,

Any discussion of the scope of the exclusionary rule will necessarily be policy-laden, as courts attempt to find the proper balance between effective law enforcement and the protection of constitutional rights, with exclusion serving to promote deterrence of future violations. Denial of the ability to exclude evidence derived from a passenger's unlawful detention under the heightened factual nexus test "comes dangerously close to creating a right without a remedy."¹⁹¹ Further, the exceptions to the exclusionary rule, in particular the independent source and inevitable discovery exceptions, have as their core justification the notion that while the government should not reap an evidentiary benefit from violating a constitutional right, neither should it be placed in a worse position than had the violation never occurred.¹⁹²

The use of the heightened factual nexus test to deny passengers the benefit of exclusion ensures that "police officers will have little to lose, but much to gain, by legally stopping but illegally detaining vehicles occupied by more than one person."¹⁹³ By forcing passengers to prove something highly implausible—that "they tried to leave with the vehicle prior to the illegal search"¹⁹⁴—the government will almost always be able to establish inevitable discovery. Under this counterfactual approach, the police would have discovered the evidence located in the car because, even if the passenger had been allowed to leave on foot, the driver (still being unlawfully detained), and thus the driver's car, would have remained on the scene to be searched. The following Section more fully explores the use of the counterfactual hypothetical as well as the analytical separation of the one overarching constitutional violation into discreet violations involving (separately) the driver, the car, and the passenger, demonstrating its incompatibility with the Supreme Court's definition of a seizure, and in particular, that definition's application to automobile passengers.

B. The Heightened Factual Nexus Approach: An Impossible Bind for the Reasonable, but Unreasonably Seized, Passenger

1. Defining the Fourth Amendment Seizure: From Pedestrian to Passenger

The Supreme Court, in the landmark decision of *Terry v. Ohio*, held that a police constraint short of a formal arrest could still trigger one's Fourth Amendment protection against being unlawfully seized.¹⁹⁵ Specifically, the *Terry* Court defined

82 Miss. L.J. 183, 199–200 (2013) (rejecting the "'Bubble Theory' of causation" as contrary to established Fourth Amendment standing doctrine).

191. *DeLuca*, 269 F.3d at 1148 (Seymour, J., dissenting).

192. *Nix v. Williams*, 467 U.S. 431, 443–44 (1984).

193. *Pulliam*, 405 F.3d at 796 (Wardlaw, J., dissenting).

194. *DeLuca*, 269 F.3d at 1148 (Seymour, J., dissenting).

195. 392 U.S. 1, 16 (1968) ("It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology."); see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) ("The Fourth Amendment

a Fourth Amendment seizure as occurring “whenever a police officer accosts an individual and restrains his freedom to walk away.”¹⁹⁶ The Court elaborated that not all contact between officer and citizen rises to the level of a Fourth Amendment seizure, but that “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.”¹⁹⁷

Many years later, the Court applied *Terry*’s definition to facts involving Drug Enforcement Agency (“DEA”) agents who approached a woman at an airport concourse and, after having identified themselves, requested to inspect her identification and ticket.¹⁹⁸ A fractured Court found this encounter to be reasonable under the Fourth Amendment, although there was disagreement as to whether a seizure had occurred.¹⁹⁹ Consequently, only two Justices officially endorsed the part of Justice Stewart’s opinion providing the definition of a seizure that would later be referred to as “the *Mendenhall* test.”²⁰⁰ This definition added a layer to the *Terry* formulation: “a person has been ‘seized’ . . . 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.”²⁰¹ In *I.N.S. v. Delgado*, the Court quoted *Mendenhall*’s language, which has become an essential part of the definition of the Fourth Amendment seizure.²⁰²

The Court, in *California v. Hodari D.*, added one other requirement to the *Terry-Mendenhall* definition: when the seizure is predicated upon a “show of authority,” the individual is not in fact seized until and unless he submits to such

applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.”).

196. *Terry*, 392 U.S. at 16. In *Terry*, an experienced officer, after having witnessed conduct that, led him to believe that three individuals were planning an armed robbery, approached and stopped the individuals. *Id.* at 6. Upon frisking one of the individuals, the officer found a concealed weapon. *Id.* at 7. The Court held that an investigative detention, based on the officer’s reasonable conclusion, pursuant to his observation, that “criminal activity may be afoot and that the persons . . . may be armed and presently dangerous,” is reasonable under the Fourth Amendment, as is “a carefully limited search of the outer clothing . . . in an attempt to discover weapons.” *Id.* at 30.

197. *Id.* at 19 n.16.

198. *United States v. Mendenhall*, 446 U.S. 544, 547–48 (1980). After the initial encounter on the concourse, the woman was brought to a DEA office within one flight of stairs and fifty feet from where she was initially approached, where she consented to a strip search that revealed that she was carrying heroin. *Id.* at 548–49. A majority of the Court found that the movement to the DEA office as well as the ensuing search were consensual. *Id.* at 559–60.

199. Two Justices (Justices Stewart and Rehnquist) felt that the concourse encounter did not amount to a seizure. *Id.* at 555. Three Justices (Chief Justice Burger and Justices Blackmun and Powell) assumed that the encounter was a seizure, but nonetheless lawful because it was based on reasonable suspicion. *Id.* at 565.

200. *See California v. Hodari D.*, 499 U.S. 621, 627 (1991) (referring to “the so-called *Mendenhall* test, formulated by Justice Stewart’s opinion in *United States v. Mendenhall*”).

201. *Mendenhall*, 446 U.S. at 554 (“As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy as would under the Constitution require some particularized and objective justification.”).

202. *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984).

authority, or is subdued by physical force.²⁰³ In other words no seizure has occurred until the individual is under the officer's control. Turning to passengers (albeit traveling by bus, rather than by automobile), the Court clarified that *Mendenhall's* language indicating an individual's freedom to leave or "walk away," was inapplicable where the approached individual may reasonably feel unable to leave, not because of the police interest, but as "the natural result of his decision to take the bus" and the fear of being stranded.²⁰⁴ Eschewing any per se rule with respect to bus dragnets, the Court phrased the test of whether police have conducted a Fourth Amendment seizure as follows:

[A] court must consider all the circumstances surrounding the encounter to determine 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. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus.²⁰⁵

As we shall see, that rule also applies to encounters in private automobiles.

The Court in *United States v. Brignoni-Ponce* considered the applicability of the Fourth Amendment to roving-patrol stops of vehicles traveling near the Nation's border.²⁰⁶ The Court held that the Fourth Amendment prohibits even brief detentions²⁰⁷ unless supported by at least reasonable suspicion.²⁰⁸ In *Delaware v. Prouse*, the Court reiterated that "stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth and Fourteenth] Amendments"²⁰⁹ in the context of a random stop to check the driver's license and the vehicle registration.²¹⁰ The Court also emphasized the requirement that officers have at least some "articulable basis amounting to reasonable suspicion" for stopping a particular driver, admonishing that "[t]his kind of standardless and unconstrained discretion is the evil" the Court had, in earlier cases, sought to curtail.²¹¹ Interestingly, Prouse may actually have been a passenger in, rather than

203. *Hodari D.*, 499 U.S. at 626. (holding that the cocaine that defendant abandoned as he fled from an officer, but *before* he was tackled and thus, seized, was not fruit of that seizure).

204. *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

205. *Id.* at 439-40.

206. *United States v. Brignoni-Ponce*, 422 U.S. 873, 876 (1975).

207. *Id.* at 878. The government had asserted that such roving-patrol stops generally did not extend beyond a minute in duration. *Id.* at 880.

208. *Id.* at 882. The Court further held that although "Mexican appearance [is] a relevant factor . . . standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens." *Id.* at 887.

209. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

210. *Id.* at 650.

211. *Id.* at 661. The Court was not here deciding the legality of roadblocks conducted for purposes of checking licenses and registrations conducted pursuant to standardized procedures. *Id.* at 651.

the driver of, the vehicle.²¹² More remarkable still, is that less than one year after the Court decided *Rakas*,²¹³ the Court here stated: “An individual operating *or traveling* in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation.”²¹⁴

It was not until 2007 that the Court formally announced that the defendant, a passenger in a stopped vehicle, “was seized from the moment [the] car came to a halt on the side of the road” and thus, entitled to seek suppression of the fruit of that seizure.²¹⁵ Applying the *Mendenhall-Hodari D.* definition of a seizure, the *Brendlin* Court reasoned that “any reasonable passenger would have understood . . . that no one in the car was free to depart without police permission”²¹⁶ and, further, that by staying inside the vehicle, the passenger had, in fact, submitted to the officer’s “show of authority.”²¹⁷ The Article next turns to demonstrating how the heightened factual nexus approach is inconsistent with the reasoning underlying the holding of *Brendlin*, and in fact, places the passenger defendant in an impermissible and impossible bind.

2. *The Heightened Factual Nexus Test: A Veritable Kobayashi Maru Scenario for Passengers*

For fans of the *Star Trek* film series, the *Kobayashi Maru* Scenario is synonymous with a no-win situation.²¹⁸ This is precisely what passengers face under a heightened factual nexus approach when they seek to suppress evidence stemming from an unconstitutional seizure of their persons. To establish the requisite factual (but-for) nexus between his seizure and the discovery of evidence, the defendant must demonstrate that had he requested permission to depart the scene of the stop, he would have been permitted to do so *in the car containing the discovered evidence*.²¹⁹ Herein lies the rub—in order to seek suppression, the defendant must prove that he was seized as a matter of standing; for him to prevail under this test,

212. The officer who arrested Prouse testified that by his recollection, Prouse was seated in the back seat of the car, and was one of four occupants. *Id.* at 650 n.1.

213. 439 U.S. 128 (1978); *see supra* notes 2–5 and accompanying text.

214. *Prouse*, 440 U.S. at 662 (emphasis added).

215. *Brendlin v. California*, 551 U.S. 249, 263 (2007).

216. *Id.* at 257.

217. *Id.* at 262.

218. The *Kobayashi Maru* Scenario was a test administered to officer-track cadets studying at the Starfleet Academy during the twenty-third century. *Kobayashi Maru Scenario*, WIKIA, http://www.en.memory-alpha.org/wiki/Kobayashi_Maru_scenario (last visited Feb. 28 2014). The test consisted of a simulation of the U.S.S. Enterprise bridge during which the cadet being tested receives a distress call from a disabled freight ship, the *Kobayashi Maru*, located in the “neutral zone.” *Id.* Entry into the neutral zone (a treaty violation) to rescue the *Kobayashi Maru* would mean a sure fight with the enemy Klingons. *Id.* Thus, the test, meant to provide insight into the cadet’s character, is a no-win situation, as the cadet cannot save the disabled ship, avoid fighting the Klingons, and safely withdraw from the neutral zone without jeopardizing the Enterprise and her crew. *Id.* For a full description of the test and how the young James T. Kirk beat the test, see *id.*

219. *See, e.g., United States v. DeLuca*, 269 F.3d 1128, 1133 (10th Cir. 2001); *see also supra* note 95 and accompanying text.

however, he must show, in effect, that he was not.²²⁰ It is therefore instructive to examine closely the language used by the Court in *Brendlin* to fully appreciate what the passenger must prove to meet the threshold standing requirement.

Who, then, is the reasonable passenger in a traffic stop? A reasonable passenger “underst[ands] the police officers to be exercising control to the point that no one in the car [is] free to depart without police permission.”²²¹ The reasonable passenger

[W]ould not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing . . . [and] even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave the scene would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place.²²²

The reasonable passenger “expects[s] that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety.”²²³

Additionally, if the passenger submits to police authority by remaining in the car, how much more emphatic is his compliance if he exits the car on the officer’s command?²²⁴ The Court endorsed an officer’s lawful ability to order passengers out of a stopped vehicle, reasoning 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.”²²⁵ The Court reiterated this point in *Brendlin*: “What we have said . . . reflects a societal expectation of ‘unquestioned [police] command’ at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without *advance* permission.”²²⁶

Thus, to prove he was seized, a reasonable passenger must have felt the police were exercising “unquestioned” control over his movement, and yet to actually

220. Recall that under *Rakas v. Illinois*, a passenger has no standing to challenge the search of the vehicle he occupied. 439 U.S. 128, 133 (1978); see *supra* note 5 and accompanying text. He is, however, permitted to challenge the legality of the seizure of his person. *Brendlin v. California*, 551 U.S. 249, 251 (2007). As discussed above, once the passenger establishes that he has been seized, he has standing to seek suppression of evidence stemming from that seizure. See *supra* notes 8–12 and accompanying text.

221. *Brendlin*, 551 U.S. at 257.

222. *Id.*

223. *Id.* at 258.

224. In *Maryland v. Wilson*, the Court held that “an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.” 519 U.S. 408, 415 (1997). Previously, the Court had reached a similar conclusion with respect to the driver of a stopped vehicle. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977) (holding that once a vehicle has been lawfully stopped, a police officer may order passengers to exit the vehicle without violating the Fourth Amendment’s ban on unreasonable searches and seizures).

225. *Wilson*, 519 U.S. at 414 (emphasis added) (quoting *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981) (authorizing police to detain occupants of a house undergoing a warranted search for narcotics)) (internal quotation marks omitted).

226. *Brendlin*, 551 U.S. at 258 (emphasis added) (citations omitted) (internal quotation marks omitted).

suppress, that same passenger must show that he would have asked a most daring question and would have received an equally unexpected answer. But if the passenger can demonstrate that he would have asked, and been granted, permission to depart in his companion's stopped vehicle (even while his companion remained detained), that would seem to disprove the fact that he was seized at all (since the reasonable person would not feel free to terminate the encounter in any way). Having established standing, the passenger gets to play the game, but by his very eligibility, a losing result is a foregone conclusion—he can never win.²²⁷

Interestingly, the Court had previously recognized and sought to remedy a somewhat analogous no-win situation for defendants, also in the context of standing to suppress. Before *Rakas* so dramatically changed a defendant's ability to contest a search,²²⁸ a defendant was entitled to seek suppression if he was "legitimately on premises where a search occurs"²²⁹ or if he could "claim either to have owned or possessed the seized property."²³⁰ This latter basis for standing naturally presented a bit of a conundrum for the defendant accused of a possessory offense: in order to establish standing, he would have to "allege facts[,] the proof of which would tend, if indeed not be sufficient, to convict him."²³¹

To alleviate this dilemma, the *Jones* Court established the doctrine of automatic standing, holding that the very possession of which the defendant is accused automatically confers on him standing to seek suppression of the contraband derived from an allegedly unlawful search.²³² In addition, the *Jones* Court sought, as a matter of fairness, to prevent the government from gaining an advantage by asserting contradictory positions:

227. The *Pulliam* Court also recognized an alternative scenario that would have satisfied the strict heightened factual nexus test: if the passenger made a showing that something he did or said during his detention prompted the ensuing search of the vehicle. *United States v. Pulliam*, 405 F.3d 782, 787 (9th Cir. 2005). Logically, a heightened nexus approach, taken to its extreme, might require a passenger to *disprove* that the officers would have sought to search the vehicle, regardless of whether the passenger said or did something that aroused suspicion.

228. See *supra* note 2 and accompanying text.

229. *Jones v. United States*, 362 U.S. 257, 267 (1960). This part of *Jones*'s holding was overruled by *Rakas v. Illinois*, 439 U.S. 128, 147–48 (1978).

230. *Jones*, 362 U.S. at 261. *Rakas v. Illinois* seemed to recognize that a possessory interest in the seized item would be sufficient to confer standing. 439 U.S. at 148 ("[Petitioners] asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized."). However, the Court stated clearly, in *Rawlings v. Kentucky*, that after *Rakas*, a defendant can only successfully challenge an unlawful search with a "legitimate expectation of privacy" in the place searched. 448 U.S. 98, 106 (1980).

231. *Jones*, 362 U.S. at 262. At the time *Jones* was decided, the defendant's testimony at a suppression hearing could be introduced against him at the subsequent trial. *Id.*

232. *Id.* at 264–65. The *Jones* automatic standing rule was overruled by the Court in *United States v. Salvucci*, 448 U.S. 83, 85 (1980). The Court stated two reasons for its decision: (1) the Court had, since *Jones*, held that a defendant's testimony given during a suppression hearing was inadmissible at trial as evidence of guilt, thereby eliminating the dilemma discussed in *Jones*; and (2) the Court's standing doctrine no longer recognized the possessory interest in the seized item as a basis for standing to contest the search that led to its discovery. *Id.* at 88–91.

Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government.²³³

While the analogy may not be perfect, the Court's words in *Jones* resonate in the heightened factual nexus context as well. To suppress the evidence as fruit of a clearly unlawful seizure, the defendant passenger must prove he was seized, and yet prove a hypothetical scenario completely contradictory to that seizure. The disconcerting result is that the government is able to use its illegal conduct simultaneously as both sword and shield. By unlawfully seizing *all* the occupants of the car, the police are able to discover evidence that without that illegality would have remained hidden (the sword). However, because the police unlawfully seized *all* the occupants of the car, under this test, the passenger cannot show that his detention alone was the source of the evidence—after all, it would have been (unlawfully) discovered even if he had been free to leave (the shield). Thus, the government gains an evidentiary benefit from its violation of the Constitution, and the passenger victim of the violation bears the virtually insurmountable burden of satisfying a test that “comes dangerously close to creating a right without a remedy, something which is strongly disfavored in American jurisprudence.”²³⁴

C. Passengers Suffering from Separation Anxiety: One Detention or Two?

1. Prolonging One Detention Does Not Make Two

The Article has already noted one of the critiques of the heightened factual nexus approach offered by the dissenting Judges in the Ninth and Tenth Circuits, as well as in the majority opinion in the Third Circuit²³⁵—namely that courts applying this test “‘artificially [] bifurcate’” the police conduct into separate stages with separate victims as a way to avoid the exclusionary remedy.²³⁶ This Section, however, focuses on a particular aspect of analytic separation—between an initially lawful stop and its unlawful prolongation. The clearest expression of the significance of the legality of the initial stop can be found in *United States v. Pulliam*:

233. *Jones*, 362 U.S. at 263–64.

234. *United States v. DeLuca*, 269 F.3d 1128, 1148 (10th Cir. 2001) (Seymour, J., dissenting).

235. *See supra* Section II.A.

236. *See United States v. Pulliam*, 405 F.3d 782, 795 (9th Cir. 2005) (Wardlaw, J., dissenting) (quoting *United States v. Martell*, 654 F.2d 1356, 1370 (9th Cir. 1981)).

Since officials cannot physically stop a car without seizing its passengers, a passenger who objects to the legality of a stop effectively is challenging the official action that caused a violation of his own rights. Thus, the standing principle is satisfied. Further, the causation principle is satisfied because evidence found in a vehicle search following an illegal stop ordinarily . . . will be a product of that stop. But when, as here, the initial stop is lawful, the situation is different. The continued detention of the vehicle does not necessarily entail the detention of its occupants; they could simply be permitted to walk away. If a passenger is unlawfully detained after the stop, he can of course seek to suppress evidence that is the product of that invasion of his own rights. But a passenger with no possessory interest in a vehicle usually cannot object to *its* continued detention or suppress the fruits of that detention, because *Fourth Amendment* rights are personal rights which . . . may not be vicariously asserted.²³⁷

As the above passage reasons, the initial (lawful) stop cannot, as a matter of physics, be performed without having the car and all its occupants come to rest at some point in space, thus constituting one seizure. Yet, although that seizure has never ended, at some later point in time (presumably before becoming unlawful) it has morphed into at least three *new* seizures: that of the car, that of the driver, and that of any passengers. In the words of Justice Stewart in *Katz v. United States*, such a “limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law.”²³⁸ It simply makes no sense to speak of the passenger as having been seized or detained twice, once lawfully and once unlawfully, when he was stopped only once and not subsequently released.²³⁹

The case law regarding temporary investigative stops supports the single-detention understanding of this situation. In *United States v. Sharpe*, the Court, in determining whether an investigatory stop of a vehicle had exceeded its lawful scope, framed the inquiry thus: “whether the officer’s action was justified at its

237. *Id.* at 788–89 (citations omitted) (internal quotation marks omitted). This passage also demonstrates the confusion between standing and fruit analyses. The passenger clearly has standing, because he bases his claim for suppression on the unlawful detention of his person, and not the unlawful seizure of the driver’s car. Further, the possessory interest in the searched car only has relevance, after *Rakas*, with respect to whether one with such an interest has a legitimate expectation of privacy in that car (and thus, “standing” to contest the search).

238. 389 U.S. 347, 362 (1967).

239. One could make the argument that what is at issue is really the extended detention, while the initial stop is merely the means of effectuating the detention, in order to sever the causal connection. This is similar to the argument made by the Court in *Hudson v. Michigan*, holding that a violation of the knock-and-announce rule does not result in the exclusion of evidence. 547 U.S. 586, 602 (2006). The court classified the violation as implicating only the “manner of entry” and not the discovery of evidence during the warranted search of the home; thus the illegal entry was not the but-for cause of finding and securing the evidence. *Id.* at 592. Additionally, however, the *Hudson* Court reasoned that the interests protected by the knock-and-announce rule, such as the protection of property, privacy, and dignity, were unrelated to (or attenuated from) the discovery of evidence. *Id.* at 593–94. In the traffic stop context, the initial stop is not quite so easily conceived of as a mere “manner of detaining.” Had the police not stopped the car, there would be no ensuing detention, so it seems illogical to separate the two. Further, there is only one interest at stake: the interest in being free from unreasonable seizures.

inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”²⁴⁰ Note that the analysis assumes only *one* detention or “action” by the police, and calls for an examination of both the front and back ends of that action to determine its reasonableness.

Similarly, in *Illinois v. Caballes*, the Court, in holding that a canine sniff conducted on a lawfully stopped vehicle did not violate the Fourth Amendment, reasoned that “conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent’s constitutionally protected interest in privacy.”²⁴¹ Again, the analysis implies that if the initially lawful stop is executed in such a way as to change its character, the entire stop would then be considered unlawful.

Finally, two more cases addressing vehicle stops support an understanding of the entire detention of the passenger as one event. In *Pennsylvania v. Mimms*, the Court held that police can direct lawfully stopped drivers to exit their vehicles.²⁴² The Court balanced the officer’s interest in ensuring his safety during a traffic stop against what it considered to be a de minimis additional intrusion.²⁴³ Ordering the driver out of the car, however, did not implicate a new seizure, but added a feature to the existing detention: “The police have already lawfully decided that the driver shall be briefly detained, the only question is whether he shall spend *that period* sitting in the driver’s seat of his car or standing alongside it.”²⁴⁴

The Court extended the holding of *Mimms* to passengers in *Maryland v. Wilson*.²⁴⁵ Interestingly, the Court noted that, during a traffic stop, a passenger’s liberty interest is arguably more substantial than the driver’s.²⁴⁶ Where the driver has committed a traffic offense, even though there is no reason to seize the passenger, his detention is a necessary incident of the stop of the driver.²⁴⁷ The Court does not differentiate between drivers and passengers, reasoning that since passengers are also stopped,²⁴⁸ “the only change in their circumstances which will result . . . is that they will be outside of, rather than inside of, the stopped car.”²⁴⁹ Again, the Court sees this as simply a change in circumstance occurring during the detention.

240. 470 U.S. 675, 682 (1985) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

241. 543 U.S. 405, 408 (2005). The court held that the dog sniff did not implicate a protected privacy interest. *Id.*

242. 434 U.S. 106, 111 n.6 (1977).

243. *Id.* at 110–11.

244. *Id.* at 111 (emphasis added).

245. 519 U.S. 408, 413, 415 (1997) (holding that “an officer making a traffic stop may order passengers to get out of the car pending completion of the stop”).

246. *Id.* at 413.

247. *Id.* at 413–14.

248. *Wilson* was decided a decade before the Court held that passengers are seized during traffic stops in *Brendlin v. California*, 551 U.S. 249 (2007).

249. *Wilson*, 519 U.S. at 414.

2. A Lawful-Turned-Unlawful Traffic Stop Does Not Make Two

For a perhaps imperfect, but instructive analogy from a different realm of criminal procedure, we turn once more to police interrogation. In *Miranda v. Arizona*,²⁵⁰ the Supreme Court, concerned with the “inherent pressures of the interrogation atmosphere,”²⁵¹ held that police are required to provide certain warnings informing a suspect subject to custodial interrogation of his rights.²⁵² In *Oregon v. Elstad*,²⁵³ the Court determined the admissibility of a defendant’s post-arrest, written confession, obtained at the station after the administration of *Miranda* warnings, in light of the defendant’s earlier, unwarned statement, made in his home to the arresting officer while being arrested.²⁵⁴ The Court held that “a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.”²⁵⁵ The Court characterized the conversation between the officer and the defendant in his home as a “brief exchange” that the officer perhaps felt did not qualify as “custodial interrogation” such as would trigger the dictates of *Miranda*.²⁵⁶ In any case, the Court felt that “[w]hatever the reason for [the officer’s] oversight, the incident had none of the earmarks of coercion.”²⁵⁷ Under such circumstances, the Court reasoned, that the “subsequent administration of *Miranda* warnings . . . ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.”²⁵⁸

Many years later, however, the Court was faced with very different circumstances, and with the deliberate exploitation of the *Elstad* holding. At issue in

250. 384 U.S. 436 (1966).

251. *Id.* at 468.

252. *Id.* at 476. The suspect must validly waive those rights before his statements may be introduced against him at trial. *Id.* The *Miranda* Court felt that the use of “adequate protective devices” was necessary to “dispel the compulsion inherent in custodial surroundings,” and that in the absence of such safeguards, “no statement obtained from the defendant can truly be the product of his free choice,” thus implicating the “privilege against self-incrimination” contained within the Fifth Amendment. *Id.* at 458. The Fifth Amendment states, in relevant part, that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V.

253. 470 U.S. 298 (1985).

254. *Id.* at 300–02. The trial judge excluded the initial statement (made in the defendant’s home) but admitted the subsequent, warned confession. *Id.*

255. *Id.* at 318.

256. *Id.* at 315. Two officers went to the eighteen-year-old defendant’s home to arrest him, pursuant to a warrant, for the burglary of a neighbor’s home. *Id.* at 300. The officers, led by the defendant’s mother, found the defendant in his bedroom and asked him to come with them to the living room. *Id.* While one officer entered the kitchen to speak with the defendant’s mother, the other remained in the living room with the defendant, asking him a few questions and telling him that the officers felt that he was involved with the robbery, to which the defendant responded, “Yes, I was there.” *Id.* at 300–01.

257. *Id.* at 316. The court rejected the argument that the previous disclosure by the defendant created a subtle compulsion that might render his subsequent statement and waiver involuntary, *id.* at 312–13, as well as the argument that because he was not informed that the earlier statement would be inadmissible, his subsequent waiver was not fully informed. *Id.* at 316–17.

258. *Id.* at 314.

Missouri v. Seibert was a police interrogation practice that involved interrogating a suspect without *Miranda* warnings until a confession was obtained, and only then administering the warnings before re-interrogating the suspect on the same subject.²⁵⁹ The government could comfortably forgo admissibility of the initial statement with the knowledge that the subsequent, warned confession would be admissible. Despite its ruling in *Elstad*, the Court held that under *these* circumstances, the subsequent statement was inadmissible.²⁶⁰

The interrogation regarding the murder of the mentally ill teenage boy living in the defendant's care, was conducted as follows:

After Seibert had been taken to the police station and left alone in an interview room for 15 to 20 minutes, Officer Hanrahan questioned her without *Miranda* warnings for 30 to 40 minutes, squeezing her arm and repeating "Donald was also to die in his sleep." After Seibert finally admitted she knew Donald was meant to die in the fire, she was given a 20-minute coffee and cigarette break. Officer Hanrahan then turned on a tape recorder, gave Seibert the *Miranda* warnings, and obtained a signed waiver of rights from her. He resumed the questioning . . . and confronted her with her prewarning statements²⁶¹

Not surprisingly, Seibert confessed (again).²⁶² The reasoning underlying the Court's ruling in this case supports, by way of analogy, the argument against the analytic separation of the traffic stop into two seizures, one lawful and one unlawful, for purposes of circumventing exclusion.

For the Court, the question to be resolved was whether the "question-first" practice, meant "to render *Miranda* warnings ineffective," succeeded in its goal.²⁶³ In other words, would the *Miranda* warnings convey to the defendant that he still had a choice, going forward, about whether or not to speak, given his earlier statement?²⁶⁴ To answer that question, the Court examined the nature of the two sessions of questioning, their relationship to one another, and the effect of the *Miranda* warnings inserted in between, turning to various factors including:

[T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the

259. 542 U.S. 600, 604 (2004).

260. *Id.* The facts of *Seibert* are rather disturbing: the defendant's son, who suffered from cerebral palsy, died in his sleep. *Id.* The defendant feared being charged with child neglect, because of the presence of bedsores on her son's body. *Id.* To eliminate such evidence of neglect, the defendant decided to burn down the mobile home in which they lived (with her son's body inside), but also decided to leave a mentally ill teenager who resided with the family in the home so that it would not appear that her deceased son had been left unattended. *Id.*

261. *Id.* at 604–05 (citations omitted).

262. *Id.* at 605.

263. *Id.* at 611–12.

264. *Id.* at 612.

degree to which the interrogator's questions treated the second round as continuous with the first.²⁶⁵

Applying these factors, the Court found that the two sessions of questioning reasonably would have been perceived as “parts of a continuum,” with the second session a “mere continuation” of the first.²⁶⁶ In reaching this determination, the Court noted that

[I]t would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.²⁶⁷

Similarly, in the lawful-turned-unlawful traffic stop context, the entire event should be considered as one seizure for purposes of fruit analysis, although the sequence of events is opposite to what was just described above. In *Seibert*, the initial, unwarned interrogation was clearly unlawful. The intra-interrogation event was the provision of the constitutionally required warnings—in compliance with the letter, though not the spirit, of *Miranda*. Nonetheless, the Court treated both stages of questioning as one continuous event, found the *Miranda* warnings to be ineffective, and thus held that the interrogation, in its entirety, was conducted outside the strictures of *Miranda*.²⁶⁸ In the traffic stop situation, the initial police action is *lawful* and the intra-detention event is the *unlawful* extension in scope or duration of the stop. If, in *Seibert*, a change in circumstance—the administration of *Miranda* warnings—that at least superficially tends towards lawfulness does not sever the police action into two episodes, one can certainly argue that the change in the detention from a lawful to an unlawful state should also not “punctuate” the seizure from one into two.

Of course, the analogy between *Seibert* and the traffic stop cases at issue here seems a bit tenuous on one level. After all, the Court in *Seibert* sought to characterize the nature of the interrogation to determine whether the *Miranda* warnings inserted midway were effective in protecting the defendant's right against compelled self-incrimination. If not, then the post-warning confession was in effect as non-*Mirandized* as the first, unwarned one. At a deeper level, though, both scenarios involve the police using the Court's rulings to gain an advantage over suspects in ways that are troubling. In *Seibert*, the “question-first” practice was fruit (pun intended) of the Court's decision in *Elstad*. In the traffic stop

265. *Id.* at 615. The Court contrasted the two-part interrogation at issue in this case with the facts of *Oregon v. Elstad*, 470 U.S. 298 (1985), finding them to be at the “opposite extreme.” *Id.* at 615–16.

266. *Id.* at 616–17.

267. *Id.* at 614. In fact, in these circumstances, the warnings would be more likely to mislead defendants than to adequately apprise them of their rights. *Id.* at 613–14.

268. *Id.* at 616–17.

context, the Court's decision in *Whren*²⁶⁹ enables officers to stop any motorist committing the most minor traffic offense, even if the officer is acting on a desire to obtain evidence unrelated to the stop or, worse yet, if the officer's goal is simply to harass members of a minority group.²⁷⁰

This discussion would not be complete without bringing purpose into the equation. Justice Kennedy, providing the crucial fifth vote in the Court's judgment in *Seibert*, wrote separately.²⁷¹ Justice Kennedy felt that, generally, statements obtained after the recitation of the *Miranda* warnings would be admissible under *Elstad* without inquiry into the effectiveness of those warnings—that is, unless, as was the case in *Seibert*, the “two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.”²⁷² In other words, the subjective motivation of the officer matters in determining the nature of the interrogation as a whole.

Similarly, the motivation of the officer in lawfully stopping, unlawfully keeping, and then searching the car, should be taken into account in assessing the nature of the stop as a whole. Once the detention has exceeded its lawful scope, the original traffic-related basis for the stop should not, in effect, erase the subsequent illegality with respect to the passenger by treating it as separate from the stop of the car, especially if the officer was not actually motivated to enforce the traffic rules. If one reframes an account of the traffic stop to include the officer's subjective motivation, it actually begins to look a great deal more like *Seibert*.

The facts of *Pulliam*²⁷³ provide a perfect blueprint.²⁷⁴ In a nutshell, officers suspect, but do not have reasonable suspicion, that an individual is involved in criminal wrongdoing. They observe him enter an automobile as a passenger. At this point, their motivation is to stop this individual to investigate, though they have no constitutional basis to do so. This motivation, of course, is incompatible with the Fourth Amendment, and can be characterized as an unlawful motivation.²⁷⁵ This can be compared to the officer in *Seibert*, motivated by a desire to obtain a confession in the absence of *Miranda* warnings.²⁷⁶

The *Pulliam* officers follow the car containing their suspect, waiting for the driver to commit some traffic violation, upon which they pull over the car. At this

269. 517 U.S. 806 (1996); see *supra* notes 14–15 and accompanying text.

270. *Id.* at 813.

271. *Seibert*, 542 U.S. at 618–22 (Kennedy, J., concurring).

272. *Id.* at 622. Because Justice Kennedy's vote was the necessary fifth vote to solidify the judgment of the Court, his limitation to the plurality's rule must control.

273. 405 F.3d 782, 783–785 (9th Cir. 2005).

274. See *supra* notes 101–10 and accompanying text for a full description of the facts.

275. Of course, intent alone is not unlawful, but must be accompanied by some action. The Article refers to the motivation as being unlawful for purposes of creating a parallel with the two-step interrogation of *Seibert*.

276. Although the *Seibert* officer adds action to his motivation—by interrogating the suspect—such action in and of itself does not violate the Constitution. As the Court has stated, “[p]otential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.” *United States v. Patane*, 542 U.S. 630, 641 (2004) (holding that the physical evidence derived from unwarned statements is admissible).

point, they have interjected a lawful action into their investigation, akin to the *Seibert* officer delivering the required *Miranda* warnings. Next, the *Pulliam* officers direct the driver and passenger to exit the car (as the officers are permitted to do), handcuff them, pat them down (finding nothing), and immediately proceed to search the car, finding the evidence against the defendant. This stage, then, is the continuation of the detention (just as the *Seibert* officer continued his interrogation) until the original motivation is satisfied. Now, in both scenarios the same pattern emerges: unlawful motivation to get evidence—interjection of a legal act—continuation of the investigation. Just as the Court ruled in *Seibert*, the legal act (which in both cases is committed as a pretext)²⁷⁷ should not act as a talisman that transforms the entire investigatory event into two separate and distinct components.

It may not always be the case that the officers conduct the initial stop with an investigatory purpose. For example, a car and its occupants may be stopped pursuant to a lawful checkpoint and then unlawfully detained.²⁷⁸ In that case, the unlawful motivation arises after the initial stop. Regardless, the entire course of action should be considered as one unlawful seizure, in which case it simply does not matter whether the initial stop was lawful. Under this construction, the fruit analysis is “crystal clear given the proximity in time and in location of the events, and the unbroken links between them.”²⁷⁹ The passenger is unlawfully seized, and the ensuing search of the car and discovery of the evidence stem directly from that seizure. In addition, once the seizure, in its entirety, is deemed unlawful, any discussion of the applicability of the exclusionary rule should take into account the officer’s subjective motivations in conducting the unlawful seizure and subsequent search.

D. *The Elephant in the Courtroom: Whren v. United States and the Role of Subjective Motivations*

1. *Whren v. United States: Unlawfully Motivated But Lawfully Justified*

In 1996, the Supreme Court decided *Whren*, holding that a traffic stop is reasonable if objectively supported by probable cause that a violation has been committed, regardless of the actual motivations of the officer conducting the stop.²⁸⁰ With that decision, local traffic codes were transformed into powerful

277. Recall that the very object of utilizing the question-first technique is to “render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.” *Missouri v. Seibert*, 542 U.S. 600, 611 (2004).

278. These are the basic facts of *United States v. DeLuca*, 269 F.3d 1128, 1130–31 (10th Cir. 2001). See *supra* notes 88–92 and accompanying text. The district court in *DeLuca* found this to be “a flagrant misuse of such checkpoints.” *DeLuca*, 269 F.3d at 1140 (Seymour, J., dissenting).

279. *Id.* at 1144 (Seymour, J., dissenting).

280. 517 U.S. 806, 810, 813 (1996). For a brief recitation of the facts, see *supra* note 15. For a very thorough discussion of *Whren*, its history, and its consequences, see Kevin R. Johnson, *How Racial Profiling in America*

investigative tools. As stated by Professor David A. Harris, “with the traffic code in hand, any officer can stop any driver any time. The most the officer will have to do is ‘tail [a driver] for a while,’ and probable cause will materialize like magic.”²⁸¹

If a core value of the Fourth Amendment is to prevent arbitrary assertions of search and seizure power by the police, the Court, in *Whren*, has frustrated that purpose while seemingly embracing it,²⁸² by “insulat[ing] pretextual traffic stops from Fourth Amendment challenges.”²⁸³ Thus, the officer subjectively seeking to investigate his suspicion of criminal activity, upon observing the commission of one of a “myriad of traffic offenses,”²⁸⁴ can do exactly what the Fourth Amendment forbids: seize an individual “on nothing more than a hunch.”²⁸⁵ Under *Whren*, the traffic stop provides the officer with a veritable cloak of reasonableness that, not unlike the “Cloak of Invisibility” worn by Harry Potter,²⁸⁶ makes the officer’s subjective motivations disappear, and permit him to easily glide around the boundaries of the Fourth Amendment, evading the usual requirement of either reasonable suspicion or probable cause.²⁸⁷

Of course, the virtually unfettered discretion of whom to single out for further investigation (assuming the traffic violation) leads to the next major criticism of *Whren*: the Court’s tolerance of racial profiling, at least in the context of the Fourth

Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering, 98 GEO. L.J. 1005, 1045–77 (2010) (arguing that the Supreme Court has “effectively authorized racial profiling in law enforcement” and predicting that “racial profiling will continue to plague criminal and immigration law enforcement for the indefinite future”).

281. David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 559 (1997). Professor Harris argues that because of the sheer breadth of the traffic codes, “no driver can avoid violating *some* traffic law during a short drive, even with the most careful attention,” making “any citizen fair game for a stop, almost any time, anywhere, virtually at the whim of police.” *Id.* at 545.

282. See *Whren v. United States*, 517 U.S. 806 (1996).

283. Lewis R. Katz, “Lonesome Road”: Driving Without the Fourth Amendment, 36 SEATTLE U. L. REV. 1413, 1414–15 (2013); see also, e.g., Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 167–68 (1996).

284. Katz, *supra* note 283, at 1413.

285. David A. Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, 66 GEO. WASH. L. REV. 556, 574 (1998).

286. See J.K. ROWLING, HARRY POTTER AND THE SORCERER’S STONE 205 (1st Am. ed. 1998) (“He slipped out of bed and wrapped the cloak around himself. Looking down at his legs, he saw only moonlight and shadows. It was a very funny feeling. *Use it well.* Suddenly, Harry felt wide-awake. The whole of Hogwarts was open to him in this cloak He could go anywhere in this, anywhere . . .”).

287. See, e.g., Katz, *supra* note 283, at 1413–14 (“Once an officer stops a motorist for a traffic offense, the officer has discretion to transform that traffic stop into an investigation of other serious crimes without the check of reasonable suspicion or probable cause to limit the inquiry.”); Levit, *supra* note 283, at 167. Professor Levit argues that by adopting the “could” standard, meaning that the Court bases its assessment of reasonableness on what an officer “could” do, rather than what a reasonable officer “would” do, the Court “blindly sanction[s] pretextual traffic stops, ignores and circumvents reasonable suspicion, and, concomitantly, undermines the purpose behind the Fourth Amendment.” *Id.*

Amendment.²⁸⁸ In *Whren*, the Court tip-toed carefully around the issue of race, noting but refusing to address in any meaningful way (like the proverbial elephant) the very real concerns over racial profiling arising from the decision.²⁸⁹ The Court described what occurred in *Whren* as a “run-of-the-mine case.”²⁹⁰ That assessment, unfortunately, is all too true. Officers stop African-Americans and Hispanics in disproportionate numbers—in fact, so routinely that “African-Americans sometimes say they have been stopped for the offense of ‘driving while black.’”²⁹¹ And, what ostensibly begins as a traffic stop quickly evolves into a search for narcotics.²⁹²

If the Court’s ruling in *Whren* endangers Fourth Amendment values on its own facts, how much more so when the legitimacy of a pretextual traffic stop is used to insulate the government from the exclusionary rule even when the traffic stop has become unlawful? This is precisely what occurs when courts apply the heightened factual nexus approach to preclude exclusion for passengers. Once a traffic stop has exceeded its lawful scope, *Whren* should no longer apply, and, for purposes of determining the applicability and desirability of exclusion, officers’ subjective intentions should once again be relevant. To support this argument, the Article examines and classifies the various contexts, in addition to traffic stops, in which the Court has addressed the appropriateness of an inquiry into officers’ subjective motivations.

288. Numerous scholars have noted the impact of *Whren* on minorities. See, e.g., Devon W. Carbado, (*E*)racing the Fourth Amendment, 100 MICH. L. REV. 947, 1033 (“In *Whren*, the Supreme Court makes it clear that, at least under the Fourth Amendment, racial profiling claims are not constitutionally cognizable.”); Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, *supra* note 285, at 558 (“African Americans and people of color will suffer this treatment in numbers far out of proportion to their representation in the driving population.”); Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, *supra* note 281, at 546 (“Police will *not* subject *all* drivers to traffic stops in the way *Whren* allows. Rather . . . they will use the traffic code to stop a hugely disproportionate number of African-Americans and Hispanics.”); Johnson, *supra* note 280, at 1009 (“*Whren v. United States* . . . effectively immunized racial profiling by police on the streets and highways of the United States from legal sanction under the Fourth Amendment, and offered a toothless (futile in most cases) equal protection remedy in return.”); Alberto B. Lopez, *Racial Profiling and Whren: Searching for Objective Evidence of the Fourth Amendment on the Nation’s Roads*, 90 KY. L.J. 75, 121 (2002) (“[T]he legitimacy of the traffic code masks the illegitimate use of race and its alleged link to criminality in search decisions by providing police officers with a justifiable reason to stop vehicles whether or not the officers normally enforce the given traffic code provisions.”); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342 (“Currently, the [Fourth] Amendment protects a black motorist only when there is no probable cause that he has committed a traffic offense; if probable cause exists, police are free to conduct a traffic stop at their whim.”).

289. *Whren v. United States*, 517 U.S. 806, 813 (1996) (“We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”).

290. *Id.* at 819.

291. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, *supra* note 281, at 546.

292. *Id.*

2. *Subjective Motivations: When They Can and Should Matter*

a. *Classifying the Court's Decisions Regarding Subjective Intent of Government Actors*

In *Whren*, the Court noted that previously, it had been “unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.”²⁹³ The Court may have slightly overstated this proposition, although generally it is true: the Court has for the most part avoided scrutiny of the subjective motivations of officers when ruling on Fourth Amendment issues, with a few exceptions.²⁹⁴ Broadly, there are five categories of cases in which the Court has either rejected or permitted inquiry into officer motivations when making Fourth Amendment, as well as other constitutional, determinations. The Court decisions found within the first three of these categories demonstrate the Court’s general unwillingness to examine subjective motivations. However, the decisions in the final two categories suggest that in some contexts, subjective intent *does* matter.

i. *Determining Reasonableness: The Existence of Objective Justification*

This first classification involves cases in which the Court examined objective circumstances to rule on the reasonableness of a given police action. In these cases, as long as the circumstances objectively justified the action, the Court held it was improper to consider the officer’s actual motivations. *Whren* is, of course, one of these cases. Nearly twenty years before *Whren*, the Court decided *United States v. Robinson*, upholding the full search of the defendant’s person and a container on his person incident to his lawful arrest.²⁹⁵ Of particular importance, the Court reasoned that the lawfulness of the arrest provided the only necessary justification for the searches, even though the arresting officer “did not indicate any subjective fear of the respondent or . . . suspect that respondent was armed.”²⁹⁶

In the context of determining the existence and nature of an exigency permitting an officer’s warrantless entry into the home, the Court, in *Brigham City v. Stuart*, again instructed that “[a]n action is ‘reasonable’ under the Fourth Amendment,

293. *Whren*, 517 U.S. at 813.

294. While it is beyond the scope of this Article to classify every decision in which the Supreme Court has addressed the role of subjective motivations, the Article seeks to situate enough of these decisions within categories to provide a framework for understanding the extent to which subjective intentions should play a role in the traffic stops at issue in this Article. For a thorough exposition and discussion of the Supreme Court’s treatment of subjective intentions in various contexts, see George E. Dix, *Subjective “Intent” As a Component of Fourth Amendment Reasonableness*, 76 Miss. L.J. 373 (2006).

295. 414 U.S. 218, 235–36 (1973). The search incident to a lawful arrest is predicated on “the need to disarm and to discover evidence . . .” *Id.* at 235.

296. *Id.* at 236.

regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'²⁹⁷ Continuing with exigent circumstances, the Court, in *Kentucky v. King*, considered whether that exception to the warrant requirement applied when officers, by knocking and announcing their presence at the door, prompted those inside to begin destroying evidence.²⁹⁸ The Court held that officers may rely on the exigent circumstances rule "when [they] do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment."²⁹⁹ The Court, however, rejected an inquiry as to whether the officers acted in bad faith or deliberately created the exigency, reaffirming its reluctance to utilize a subjective approach.³⁰⁰

As one more example, although implicating the Fifth, rather than the Fourth Amendment, the Court, in *New York v. Quarles*, recognized "a 'public safety' exception" to *Miranda*'s requirements, and further held "that the availability of that exception does not depend upon the motivation of the individual officers involved."³⁰¹ Because of the difficulty in determining precisely what motivates an individual officer, it is sufficient, for purposes of *Miranda*, that police questioning is "reasonably prompted by a concern for public safety."³⁰² As the above cases demonstrate, as a general matter, when the Court is ruling on the reasonableness of police conduct, it is unwilling to examine officers' intentions where there is some objectively reasonable justification for the conduct.

297. 547 U.S. 398, 404 (2006) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978) (emphasis added)). The court went on to hold that the officers, "confronted with *ongoing* violence occurring *within* the home," were permitted to enter without a warrant pursuant to their role as peace officers. *Id.* at 405–06. *Scott v. United States* concerned the interception of communications pursuant to a statute that required officers acting under a court order to minimize the number of communications they intercepted—a directive they failed to follow. 436 U.S. at 132. Although the officers did not comply, they did not actually capture any communications beyond those they would have intercepted had they acted with the required restraint. *Id.* at 134. The Court found the alleged bad faith irrelevant in terms of Fourth Amendment reasonableness, stating that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." *Id.* at 136. The Court did, however, in passing, note that officers' subjective motivations "may play some part in determining whether application of the exclusionary rule is appropriate *after* a statutory or constitutional violation has been established." *Id.*

298. 131 S. Ct. 1849, 1854 (2011).

299. *Id.* at 1862.

300. *Id.* at 1859. I place *King* within this first category of cases, although it may be understood as straddling the first three categories. On the one hand, objective factors are being used to determine the existence of a justification for the warrantless entry (if the police had unlawfully created the exigency, they would not have a lawful justification to enter). On the other hand, this case could also fall into the second category: cases involving the determination of purpose (threatening to violate the Fourth Amendment) from objective factors, or even the third: when an objective inquiry is used to gauge the effect of police conduct on the defendant (here, perhaps whether the police conduct can objectively be perceived as a threat to violate the Fourth Amendment, thus prompting the attempted disposal of evidence).

301. 467 U.S. 649, 655–56 (1984).

302. *Id.* at 656.

ii. Threshold Matters: Defining Purpose Objectively

In this next category of cases, purpose is determined by examining objective circumstances. In determining the applicability of the Sixth Amendment's Confrontation Clause³⁰³ to statements offered against a defendant, the Court, in *Davis v. Washington*, sought to clarify the meaning of the phrase, "testimonial statements."³⁰⁴ The Court provided the following guidance:

Statements are nontestimonial when made in the course of police interrogation under circumstances *objectively* indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances *objectively* indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.³⁰⁵

The Court emphasized in *Michigan v. Bryant* that determining the "primary purpose" of the questioning does not involve delving into the actual purpose of the actors involved, but entails an inquiry as to "the purpose that reasonable participants would have had" under the circumstances.³⁰⁶

Vehicle checkpoints provide another context in which "primary purpose" must be determined. In *Indianapolis v. Edmond*, the Court held that such checkpoints violate the Fourth Amendment if their "primary purpose . . . is to uncover evidence of ordinary criminal wrongdoing."³⁰⁷ The Court approved "an inquiry into purpose at the programmatic level,"³⁰⁸ but felt the need to "caution that the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers"³⁰⁹ Making this determination will generally entail the examination of objective circumstances and external demonstrations of programmatic purpose.

303. The Sixth Amendment states, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

304. 547 U.S. 813, 821 (2006). The *Davis* Court was expanding on the Court's earlier holding in *Crawford v. Washington*, in which the Court stated that the Confrontation Clause prohibits "'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)). For purposes of the Confrontation Clause, the statement's nature as "testimonial" renders its declarant a "witness." *Id.*

305. *Id.* at 822.

306. 131 S.Ct. 1143, 1156 (2011).

307. 531 U.S. 32, 41–42 (2000). Put another way, the Court found the primary purpose of the particular checkpoint at issue was to "advance 'the general interest in crime control.'" *Id.* at 44 (quoting *Delaware v. Prouse*, 440 U.S. 648, 659 (1979)).

308. *Id.* at 46. The Court noted that, unlike *Whren*, which involved "'ordinary, probable-cause Fourth Amendment analysis,' . . . cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)).

309. *Id.* at 48.

iii. Threshold Matters: Focus on the Defendant

The cases in this category involve determining whether, under the Fourth Amendment, a seizure or search has occurred, and, under the Fifth Amendment and *Miranda*, whether the suspect is in custody and has been interrogated. These questions are (for the most part) answered by considering the effect of the officer's conduct on the reasonable person. Therefore, the focus is, once again, on objective circumstances rather than on subjective intent.

In *United States v. Mendenhall*, the Court defined a Fourth Amendment seizure as having occurred when “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”³¹⁰ The Court provided examples of such circumstances, including “the use of language or tone of voice” that would indicate that compliance was required, concluding ultimately that “nothing in the record suggests that the respondent had any *objective* reason to believe that she was not free to . . . proceed on her way.”³¹¹

Turning to searches, the Court again eschewed an inquiry into official intent in *Rakas*.³¹² The *Rakas* Court, in holding that only those with a “legitimate expectation of privacy in the particular areas” searched have the ability to contest an allegedly unlawful search,³¹³ rejected the so-called “target theory” of standing.³¹⁴ The target theory was suggested by language in *Jones v. United States*, in which the Court defined a “person aggrieved by an unlawful search and seizure” in part as “one against whom the search was directed.”³¹⁵ Thus, for purposes of standing (and defining the Fourth Amendment search)³¹⁶ the officer's purpose in seeking information is irrelevant, and only the effect of the officer's conduct—specifically whether that conduct impinges on the suspect's legitimate expectation of privacy—matters.

In *Berkemer v. McCarty*, the Court considered “whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered ‘custodial interrogation.’”³¹⁷ Specifically addressing whether a driver, stopped on suspicion of driving while intoxicated but not yet arrested, was “in custody,” the Court acknowledged that the officer had decided to place the driver into custody from the moment the driver exited the car.³¹⁸ However, the officer did not

310. 446 U.S. 544, 554 (1980).

311. *Id.* at 554–55 (emphasis added).

312. 439 U.S. 128, 130 (1978). For a more complete discussion of *Rakas*, see *supra* notes 2–7 and accompanying text.

313. *Id.* at 148.

314. *Id.* at 136–37.

315. 362 U.S. 257, 261 (1960) (internal quotations marks omitted).

316. See *supra* note 2 for a discussion of the merger of the standing inquiry with the substantive definition of a search.

317. 468 U.S. 420, 435 (1984). The ultimate issue the Court sought to resolve was the applicability of *Miranda*'s requirements to the traffic stop context.

318. *Id.* at 441–42.

communicate that intention to the driver prior to the arrest, leading the Court to state the rule as follows: “A policeman’s unarticulated plan has no bearing on the question whether a suspect was ‘in custody’ at a particular time; the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”³¹⁹

Finally, in this category, the Court, in *Rhode Island v. Innis*, defined “interrogation” under *Miranda* as

[E]xpress questioning or its functional equivalent. That is to say, the term “interrogation” . . . refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.³²⁰

Thus, the primary focus is not on the actual intent of the officer, but on the effect of the officer’s words or conduct on the suspect, and the officer is held to the standard of reasonableness, taking into account, however, what the officer may know about the personal characteristics of the suspect.³²¹

iv. Threshold Matters: Official Intent in Defining Searches and Seizures

In this category, the Court has brought officers’ intent back into focus, although in a fairly limited way. Recently, the Court, in defining the Fourth Amendment search, has supplemented the *Katz* reasonable-expectation-of-privacy test,³²² by holding that the government’s conduct constitutes a search when it “engage[s] in physical intrusion of a constitutionally protected area *in order to obtain information*.”³²³ In *Florida v. Jardines*, the Court held that an officer bringing a drug-detection dog onto defendant’s front porch in order to investigate suspicion of marijuana cultivation in the home conducted a Fourth Amendment search.³²⁴ The Court reached this result because the officers obtained their information by “physically intruding on Jardines’ property to gather evidence.”³²⁵

In determining the nature of the physical intrusion, the Court found no “customary invitation” or “license” to bring a narcotics-sniffing police dog onto

319. *Id.* at 442.

320. 446 U.S. 291, 300–01 (1980).

321. *Id.* at 300. The Court stated that “[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response.” *Id.* at 302 n.8. The Court also noted that an officer’s intent, particularly if using a method designed to produce a response, may be relevant to ascertaining what the officer should have known. *Id.* at 301 n.7.

322. *See supra* note 2.

323. *United States v. Jones*, 132 S. Ct. 945, 951 (2012) (emphasis added) (holding that the government’s placing of a Global Position System (GPS) on the defendant’s vehicle, and the subsequent monitoring of his movements over a period of four weeks, constituted a Fourth Amendment search).

324. 133 S. Ct. 1409, 1417–18 (2013).

325. *Id.* at 1417.

the porch “*in hopes of discovering* incriminating evidence.”³²⁶ The Court countered the State’s reliance on prior decisions holding officers’ subjective motivations to be irrelevant by distinguishing *Whren* and similar cases as “merely hold[ing] that a stop or search that is *objectively reasonable* is not vitiated by the fact that the officer’s real reason for making the stop or search has nothing to do with the validating reason.”³²⁷

The last case in this category involves the definition of a Fourth Amendment seizure. Quite unremarkably, the Court, in *Brower v. County of Inyo*, held that a seizure does not occur, even if the government *causes* the “termination of an individual’s freedom of movement,” unless that freedom of movement is curtailed “through means intentionally applied.”³²⁸ It seems self-evident that if an officer driving a vehicle accidentally collided with an individual’s vehicle, causing the individual’s freedom of movement to be, in fact, terminated, this would not constitute a Fourth Amendment seizure.

v. Assessing Violations: Flagrancy of Police Misconduct

In this last, and most relevant, grouping of cases, the Court seems the most willing to examine officers’ subjective motivations. For the most part, the cases included here involve the propriety of excluding evidence in light of officers’ violations of constitutional rules or norms.³²⁹ Turning first to cases involving the application of the Fourth Amendment exclusionary rule, the Court, in *Brown v. Illinois*, directed that courts consider a variety of factors in determining whether evidence is “obtained by exploitation” of a constitutional violation.³³⁰ *Brown* involved the admissibility of a properly Mirandized confession obtained after a flagrantly unlawful arrest.³³¹ The Court stated that, in addition to the *Miranda* warnings, courts should consider “[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.”³³²

In its delineation of the so-called “good faith exception” to the exclusionary

326. *Id.* at 1416 (emphasis added).

327. *Id.*

328. 489 U.S. 593, 597 (1989).

329. The previous categories of cases sought to determine whether the constitutional provisions were in fact violated, or if they were even triggered in the first place. In this set of cases, the police have arguably violated a defendant’s constitutional rights, and the question is one of the proper sanction, if any. This Section will highlight the main cases best exemplifying the Court’s approach and, as is the case with the preceding sections, is not an exhaustive catalog of the Court’s treatment on this issue.

330. 422 U.S. 590, 600 (1975).

331. *Id.* at 591–94.

332. *Id.* at 603–04 (citation omitted). Notice that not only is inquiry into the subjective intent of the officer proper, but it is accorded particular significance in this context, which is consistent with the purposes of the exclusionary rule. *See id.* at 602 (“If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted.”).

rule, the Court has not been quite as clear about the relevance of subjective motivations. In *United States v. Leon*, the Court held that the exclusionary rule does not apply when an officer obtains evidence by acting “in objectively reasonable reliance on a subsequently invalidated search warrant.”³³³ The Court reasoned that “[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.”³³⁴ The Court muddied the waters, however, by adding that the officer should be acting “with *objective* good faith”³³⁵ and that his reliance must be “*objectively* reasonable.”³³⁶

This language leaves open the question of whether the officer must actually believe that the warrant is proper, with such belief being objectively reasonable. The Court answered this question in a footnote:

Although we have suggested that, “[o]n occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule,” we believe that “sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.”³³⁷

The proper inquiry, then, is “whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.”³³⁸

In *Herring v. United States*, the Court addressed the admissibility of evidence discovered pursuant to an arrest based on an invalid arrest warrant.³³⁹ The Court discussed police flagrancy as an important component in its good-faith analysis³⁴⁰ and traced the history of the exclusionary rule as a development to counter deliberate violations of constitutional rights,³⁴¹ going as far as to say that to “trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct.”³⁴² The Court, citing to *Leon*, however, reiterated that the inquiry is, despite

333. 468 U.S. 897, 922 (1984).

334. *Id.* at 919 (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975)).

335. *Id.* at 920 (emphasis added).

336. *Id.* at 922 (emphasis added).

337. *Id.* at 922 n.23 (citations omitted).

338. *Id.* This leaves open another question: whether the officer who *knows* that the warrant is invalid, even though a reasonable officer might not, is acting in “good faith.”

339. 555 U.S. 135, 138 (2009). The mistake was the result of erroneous computer records maintained by the sheriff’s office. *Id.*

340. *Id.* at 143 (citing *Leon*, 468 U.S. at 911).

341. *Id.* at 143–44.

342. *Id.* at 144. The Court also referenced *Franks v. Delaware* in which the Court held that in order to trigger review of whether a warrant should be voided due to the false statements provided by the officer, “there must be

the preceding language, an objective one.³⁴³ Nevertheless, “good faith” cases belong in this category because of the importance (even if objectively determined) of the flagrant and deliberate nature of constitutional violations in the determination of whether the exclusionary rule should apply.

Turning briefly to the Sixth Amendment right to counsel,³⁴⁴ this Section would not be complete without mentioning *Massiah v. United States*, in which the Court held that a defendant’s statements, which had been “deliberately elicited from him after he had been indicted and in the absence of his counsel,” were inadmissible against him at trial.³⁴⁵ Thus, *Massiah* involved the government’s deliberate interference with a defendant’s right to assistance of counsel, fitting within this category of cases where the government’s subjective intent to violate a defendant’s constitutional rights is most directly at issue.

Finally, as discussed above,³⁴⁶ the Court in *Seibert* was also concerned with the deliberate attempt, in conducting a purposeful two-stage interrogation, to render *Miranda* warnings ineffective to obtain an incriminating statement. Although, unlike the exclusionary rule cases above, because of the nature of the Fifth Amendment violation, no constitutional violation has yet occurred at the time of questioning.³⁴⁷ Nonetheless, one can understand the deliberate failure to initially provide *Miranda* warnings as the violation of a constitutional norm.

b. Categorizing the Lawful-Turned-Unlawful Traffic Stop as a Flagrant Violation

This Article argues that the ultimately unlawful stop of a vehicle and seizure of its occupants, even if initially lawful, should be classified within the last category of cases, where the officer’s subjective intent and the flagrancy of the violation are relevant to determining whether a passenger is permitted to exclude the evidence found during that detention. Once a traffic stop has exceeded its lawful bounds, it should not be considered as a Category (i) case (with respect to the relevance of the officer’s subjective motivations), as the objective justification that made the stop initially reasonable no longer exists. Thus, the government should not be able to shield itself from the consequences of intentionally seeking to violate constitutional norms (by conducting seizures and searches in order to investigate criminal activity without the requisite level of suspicion).

allegations of deliberate falsehood or of reckless disregard for the truth,” rather than mere negligence or mistake. *Id.* at 145 (quoting *Franks v. Delaware*, 438 U.S. 154, 171 (1978)).

343. *Id.* at 145 (quoting *Leon*, 468 U.S. at 922 n.23). The Court ultimately held that exclusion was not required when the police mistake at issue was simply one of negligence, rather than “systemic error or reckless disregard of constitutional requirements.” *Id.* at 147–48.

344. The Sixth Amendment states, in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI.

345. 377 U.S. 201, 206 (1964).

346. *See supra* notes 259–68 and accompanying text.

347. *See supra* note 276.

Further, once the detention of the car and its occupants has become unlawful, these cases fall directly into Category (v), where official motives and flagrancy of misconduct should be scrutinized with the ultimate aim of determining whether exclusion of evidence is appropriate. Thus, although this Article maintains that, when viewed as one event, the unlawful seizure of the passenger does not present any real question of but-for causation between the seizure and the discovery of evidence,³⁴⁸ a defendant passenger should not be precluded from offering evidence that an officer, in deciding to (lawfully) stop the vehicle in which he was traveling, was motivated by a desire to investigate the passenger, thereby strengthening the causal connection between *his* seizure and the discovery of evidence.³⁴⁹

By the same token, as the Court made clear in *Brown*, the deterrent purposes of the exclusionary rule are best served when officers are not permitted to use a quick constitutional fix, such as the recitation of *Miranda* warnings (in *Brown*) or the ostensible legality of a traffic stop (in this context) to mask the egregiousness of the official misconduct, which is of “particular” importance.³⁵⁰ The reasoning in *Brown* counsels against the use of the heightened factual nexus test, in effect, to attenuate the discovered evidence from the violation that led to its discovery. Finally, considering the deterrent purpose of exclusion, the heightened factual nexus test, in the words of Judge Wardlaw, “invites police officers to engage in patently unreasonable detentions, searches, and seizures every time an automobile contains more than one occupant [Officers] will have little to lose, but much to gain, by legally stopping but illegally detaining vehicles occupied by more than one person.”³⁵¹ The Article next turns to examining Judge Wardlaw’s prediction to see to what extent officers may in fact be targeting vehicles containing multiple occupants.

III. SOME PRELIMINARY DATA ON TRAFFIC STOPS INVOLVING PASSENGERS

According to a recent study conducted by the Department of Justice analyzing all contacts between law enforcement and the public, in 2008 a staggering number—nearly 60%—of all such contacts were traffic-related.³⁵² Approximately 5% of all traffic-related stops led to a search—of either the vehicle or the driver or both.³⁵³ Hit rates were surprisingly low: 2.1% for searches of the driver only, 1.6%

348. See *supra* text accompanying note 279.

349. This was the argument made by the defendant (unsuccessfully) in *United States v. Pulliam*, 405 F.3d 782, 787–88 (9th Cir. 2005). See *supra* note 116 and accompanying text.

350. See *supra* note 332.

351. *Pulliam*, 405 F.3d at 796 (Wardlaw, J., dissenting).

352. CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 3 tbl.2 (2011) [hereinafter D.O.J. STUDY], available at <http://www.bjs.gov/content/pub/pdf/cpp08.pdf>. The relevant group of the public for which data is being collected is United States residents aged sixteen or over. *Id.*

353. *Id.* at 10. At least half of these searches are conducted pursuant to consent. *Id.*

for searches of the vehicle only, and 14.3% for searches of both the driver and vehicle.³⁵⁴ Thus, if these traffic stops are pretextual (as *Whren* permits), the police seem to be poor predictors of criminal activity (or of the likelihood that a search will uncover incriminating evidence), at least on a nationwide level.³⁵⁵

Further, if the police generally err in their predictions of whether a search will turn up evidence of crime, more alarming still is that when it comes to minorities, the record is even worse. Various studies and numerous scholars have noted the racial dimensions of the traffic stop: minority drivers are disproportionately stopped³⁵⁶ and searched,³⁵⁷ with lower (or in some studies, similar) hit-rates, than their white counterparts.³⁵⁸ In addition, studies have noted that minority drivers, once stopped, tend to be detained longer³⁵⁹ and are also more likely receive a

354. *Id.* at 10 tbl.15. These statistics represent national figures, and the search and hit rates would be expected to vary based on specific location targeted by a study.

355. *But see* JACK McDEVITT & CHAD POSICK, INST. ON RACE & JUSTICE, NE. UNIV., TRAFFIC ENFORCEMENT BY VERMONT STATE POLICE JULY 2010 TO JUNE 2011, at 2 [hereinafter VERMONT STUDY], available at vsp.vermont.gov/sites/vsp/files/Documents/Vermont-Racial_Profiling_Report_FINAL_2011.pdf (finding that when searches were conducted, officer found contraband in nearly two thirds of those searches, a hit rate that far exceeds the national average). This report did also find that non-whites were subjected to searches “slightly more than whites” although resulting in a lower hit-rate. *Id.*

356. *See, e.g.*, STEPHEN M. HAAS ET AL., DIV. OF CRIMINAL JUSTICE SERVS., CRIMINAL JUSTICE STATISTICAL ANALYSIS CTR., WEST VIRGINIA TRAFFIC STOP STUDY FINAL REPORT, at i (2009) [hereinafter WEST VIRGINIA STUDY], available at www.djcs.wv.gov/SAC/Documents/WVAC_Traffic_NEWOverviewofStatewideFindings2009.pdf (“State-level results indicate that black drivers are 1.64 times more likely . . . [and] Hispanics were 1.48 times more likely to be stopped compared to white drivers.”); AMY FARRELL ET AL., INST. ON RACE & JUSTICE, NE. UNIV., RHODE ISLAND TRAFFIC STOP STATISTICS ACT FINAL REPORT EXECUTIVE SUMMARY 1 (2003) [hereinafter RHODE ISLAND STUDY], available at www.racialprofilinganalysis.neu.edu/IRJ_docs/RIFinalReport.pdf (“In most communities in Rhode Island non-white drivers are stopped disproportionately to their presence in the driving population.”); *see supra* note 288.

357. *See, e.g.*, WEST VIRGINIA STUDY, *supra* note 356, at i (“The search rates for black and Hispanic drivers were 10.64 and 10.24 respectively, compared to 4.32 for white drivers.”); RHODE ISLAND STUDY, *supra* note 356, at 1 (“Once stopped, 8.9% of the non-white drivers are searched compared to only 3.6% of white drivers.”); ALEXANDER WEISS & DENNIS P. ROSENBAUM, CTR. FOR RESEARCH IN LAW & JUSTICE, THE UNIV. OF ILL. AT CHI., ILLINOIS TRAFFIC STOPS STATISTICS ACT 2010 ANNUAL REPORT: EXECUTIVE SUMMARY 10 (2011) [hereinafter ILLINOIS STUDY], available at www.dot.il.gov/travelstats/2010_20ITSS_20Executive_Summary.pdf (“[V]ehicles driven by African-Americans and Hispanics are twice as likely to be the subject of a consent search tha[n] those driven by Caucasians.”); AM. CIVIL LIBERTIES UNION OF ARIZ., DRIVING WHILE BLACK OR BROWN: AN ANALYSIS OF RACIAL PROFILING IN ARIZONA 3 (2008) [hereinafter ACLU STUDY], available at www.acluaz.org/sties/default/files/documents/DrivingWhileBlackorBrown.pdf (finding that Native Americans were 3.25 times more likely, and African Americans and Hispanics 2.5 times more likely to be subjected to searches than whites).

358. *See, e.g.*, WEST VIRGINIA STUDY, *supra* note 356, at i (“The contraband hit rate for black and Hispanic drivers was 43.11 and 30.23 respectively compared to 47.17 for white drivers.”); RHODE ISLAND STUDY, *supra* note 356, at 1 (“Statewide 23.5% of white motorists who were searched were found with contraband compared to only 17.8% of non-white motorists.”); ILLINOIS STUDY, *supra* note 357, at 10 (finding that, pursuant to consent searches, contraband was found 25% of the time in vehicles driven by Caucasian drivers, compared to 19% in cars being driven by minority drivers); ACLU STUDY, *supra* note 357, at 3 (“Higher search rates for minorities were not justified by higher rates of transporting contraband.”).

359. *See* ACLU STUDY, *supra* note 357, at 3 (“Minorities, including African Americans, Hispanics and Middle Easterners, were consistently stopped for longer periods of time than whites . . .”).

citation than similarly stopped white drivers.³⁶⁰

While the studies on traffic stops generally, and racial profiling in particular, are numerous, it seems that very few have sought to examine a correlation between the number of occupants in a vehicle and the likelihood of the car being stopped and searched. One study, however, sought to explain the disparity in search rates between African-American and Hispanic drivers and white drivers by examining characteristics (other than race) that increase the likelihood of being searched, including the number of passengers.³⁶¹ The study concluded that once the groups' differences with respect to these other characteristics were taken into account, there was no disparity in the search rates for minority motorists, but that each group was equally likely to experience discretionary searches.³⁶² Although the study found "that the race/ethnicity of a driver, by itself, is not a strong determining factor in search decisions," the study also noted that "it does appear that African-Americans and Hispanics are more likely to exhibit characteristics which are apt to increase any driver's chances of being searched, such as being male, stopped at night, and *having passengers in the car*."³⁶³

According to the data (collected over a five-year period), of the total number of traffic stops, 32% were stops of multi-occupant vehicles.³⁶⁴ Examining all types of searches (including inventory searches), the study found that "[v]ehicles with more passengers were significantly more likely to be searched, holding other factors constant" and that "[h]aving a passenger increased the odds of one being searched by 38 percent."³⁶⁵ Further, when focusing on discretionary searches only, the odds of being searched if the car contained more than one occupant increased to 44%.³⁶⁶

The study offers a possible reason that having multiple occupants in a vehicle increases the risk of being searched, speculating that this "may increase an officer's perception of suspicious behavior" or that it "may also create a bystander

360. See, e.g., WEST VIRGINIA STUDY, *supra* note 356, at i ("Black and Hispanic drivers were more likely to receive a citation and/or be arrested once stopped by law enforcement."); ILLINOIS STUDY, *supra* note 357, at 7 ("[M]inority drivers are more likely to be cited than Caucasian drivers.").

361. BRIAN C. RENAUER & EMILY COVELLI, PORTLAND STATE UNIV., FACTORS PREDICTING SEARCH DECISIONS DURING TRAFFIC STOPS IN CORVALLIS, OREGON 3 (2009) [hereinafter PORTLAND STATE STUDY], available at [http://www.pdx.edu/cjpri/sites/www.pdx.edu.cjpri/files/LECCReport_PredictingSearchDecisions_FINAL\[1\].pdf](http://www.pdx.edu/cjpri/sites/www.pdx.edu.cjpri/files/LECCReport_PredictingSearchDecisions_FINAL[1].pdf).

362. *Id.*

363. *Id.* at 4 (emphasis added). The study indicated that "[t]he reasons why stops of African American and Hispanic drivers are more likely to involve these risk factors cannot be determined from the data and could be examined in future research." *Id.* However, "[i]f a subset of drivers is more likely than other driver subsets to be stopped at night, stopped in high crime areas, or have more passengers in the car, they are more likely to be searched." *Id.* at 7.

364. *Id.* at 12.

365. *Id.* at 14. The number of passengers was found not be a significant factor with respect to searches incident to an arrest. *Id.* at 15.

366. *Id.* at 16.

effect where the officer feels more compelled to exercise his/her authority.”³⁶⁷ Another possible reason, as noted by Judge Wardlaw,³⁶⁸ is that officers, at least in jurisdictions applying the heightened factual nexus approach to passenger exclusion, may be well aware that passengers are unable to contest the search of the car, and may not even be able to successfully seek exclusion based on their own unlawful seizures.

What remains troubling is that the study found that a larger percentage of stopped vehicles driven by minority drivers contained multiple occupants than those of white drivers.³⁶⁹ In fact, taking into account the eight risk factors the study examined, “[s]tops of African American drivers were more likely to contain 5 out of the 8 risk factors compared to stops of White drivers”³⁷⁰ and “[s]tops of Hispanic drivers were more likely to contain 7 out of the 8 risk factors compared to stops of White drivers.”³⁷¹ Further, while this study focuses on the likelihood of a *search* stemming from a traffic stop, the critical question is what role the number of passengers, particularly when combined with racial or ethnic characteristics, plays in the decision to stop in the first place. The study fails to identify why stops of minority drivers are more likely to exhibit these risk factors, but raises the possible (but admittedly unlikely) explanation that African American and Hispanic drivers generally exhibit more of the identified risk factors than white drivers.³⁷² In other words, with respect to the number of occupants in the vehicle, one possible explanation for the disparity is that minority drivers as a group tend to travel with others more than do white drivers.³⁷³ More likely, though, police may be stopping vehicles driven by minority drivers exhibiting the various risk factors at a greater rate than those of similarly situated white drivers. This is an issue that deserves serious study. For present purposes, though, it is quite significant that the number of occupants in a car is a factor that contributes to the likelihood of a search following a traffic stop.

Finally, in order to get a preliminary sense of the breakdown of traffic stops

367. *Id.* at 9.

368. *See supra* text accompanying note 351.

369. *See* PORTLAND STATE STUDY, *supra* note 361, at 20. The study quantified this factor: “37 percent of African American drivers had one or more passengers versus 31 percent of the White drivers” and “45 percent of Hispanic drivers had one or more passengers versus 31 percent of White drivers.” *Id.*

370. *Id.* at 19. The risk factors that African American stops exhibited more frequently than stops of white drivers were: “being a city resident, stop occurred at nighttime, there were one or more passengers in the vehicle, driver was male, and the stop reason was based on following up on preexisting information.” *Id.*

371. *Id.* The risk factors that Hispanic stops exhibited more frequently than stops of white drivers were: “being a city resident, stop occurred at nighttime, there was one or more passengers in the vehicle, driver was male, the stop reason was based on preexisting knowledge, an officer following up on a call for service, or labeled as other.” *Id.*

372. *Id.*

373. Of course, since one of the risk factors for being searched is being a male driver, similar logic would dictate that African American and Hispanic drivers are more likely to be male than white drivers, an unlikely proposition.

involving vehicles with multiple versus single occupants, this Article examined the appeals of motions to suppress across the various circuits that have addressed the heightened factual nexus test in any significant way.³⁷⁴ To that end, searches were conducted for each of the relevant circuits between 2008 and 2013, using the following search: ““motion to suppress & traffic &stop or violation.””³⁷⁵ Further, cases that, upon examination of the facts, did not actually involve traffic stops were deleted from the results, as were the cases in which it was unclear from the facts how many occupants were in the vehicle. The table below reflects the results of the searches, breaking down (from the total number of appeals) the number of appeals arising from stops of vehicles containing only one occupant, the number of appeals arising from stops of vehicles containing multiple occupants, and their corresponding percentages of the total appeals. The table is then arranged in order of highest percentage of multiple-occupant vehicles to the lowest.

Circuit	Total Number of Appeals	Total Sole-Occupant Vehicles	Total Multi-Occupant Vehicles	Percent Sole-Occupant Vehicles	Percent Multi-Occupant Vehicles
Ninth	17	4	13	24%	76%
Sixth	63	20	43	32%	68%
Eighth	75	25	50	33%	67%
Third	39	15	24	38%	62%
Tenth	80	33	47	41%	59%
Fifth	49	21	28	43%	57%
Total	323	118	205	37%	63%

Because of the parameters of this particular search, the information to be gained is limited. After all, the numbers only reflect traffic stops resulting in the seizure of evidence subject to a suppression motion, culminating in an appeal of the outcome of that motion. Thus, these findings do not tell us anything about traffic stops where no evidence is found, or about those cases in which defendants plead guilty rather than facing trial, or even of those cases in which defendants choose not to appeal the decisions regarding motions to suppress.

Nonetheless, even these numbers indicate that the correlation between traffic stops and the number of occupants in the vehicle, and, as suggested by the Portland State study above,³⁷⁶ the role of race and ethnicity, should be further explored. For present purposes, it is interesting to note that consistently, through all circuits, the

374. These circuits' approaches to the use of the heightened factual nexus test are discussed *supra* Parts I.B. and I.C.

375. The searches were conducted using the Westlaw database of cases.

376. See *supra* notes 361–73 and accompanying text.

significant majority of such appeals involve the stops of vehicles with multiple occupants. Also, the results indicate that the Ninth and Sixth Circuits (expressly adopting the heightened factual nexus test)³⁷⁷ and the Eighth Circuit (implicitly adopting the heightened factual nexus test)³⁷⁸ showed the highest percentages of multi-occupant vehicles, while the Fifth Circuit (implicitly rejecting the heightened factual nexus test) showed the lowest. This is too small of a sample to make any definitive conclusions, but at the very least the results indicate that further study might yield fruitful information regarding the extent to which the number of occupants in a vehicle influences police officers in their decisions regarding whether and whom to stop.

CONCLUSION

If the Supreme Court's decision in *Rakas v. Illinois* heralded an assault on passengers, *California v. Brendlin* offered passengers a victory by permitting them to seek exclusion of evidence derived from allegedly unconstitutional seizures of their persons. What seems, in *Brendlin*, to be a nod to passengers is in practice more of a wink to law enforcement, in light of *Whren v. United States*, which provided police with an almost unlimited ability to pull over any vehicle regardless of their actual motivation to do so. After all, it does not take a great deal to lawfully effectuate a traffic stop—only probable cause that the driver committed one of a myriad of traffic offenses. However, the officer whose true motivation is to uncover criminal activity must investigate expeditiously (perhaps by asking for consent to search), without unreasonably prolonging the traffic stop. It is in this situation—the “legal traffic stop that became illegal when the police continued to detain the vehicle”³⁷⁹—that *Brendlin* should shield passenger defendants from police overreaching.

In the three (possibly more) circuits adopting the heightened factual nexus approach to exclusion for passengers, police are invited to essentially have their cake and eat it: they may rely on the lawful justification for the stop and simultaneously avoid the evidentiary consequences for exceeding that justification—at least with respect to passengers. In other words, the arguably improper motivations to investigate crime via the traffic stop are obscured by the objective legality of the stop, and the heightened factual nexus approach permits the police to benefit from pursuing those improper motivations even after the legitimate justification no longer exists.

While there is a significant lack of empirical evidence addressing the extent to which the number of occupants in a car contributes to its being stopped (and subsequently searched), some preliminary inquiry suggests that there may be some

377. See *supra* Part I.B.

378. See *supra* Part I.B.

379. *Mosley v. United States*, 454 F.3d 249, 255 (3d Cir. 2006).

correlation. It is certainly worth further study to see if Justice White's prediction in *Rakas* of an "open season" on multi-occupant vehicles³⁸⁰ is indeed coming to fruition. Further, although not every circuit has expressly voiced its position respecting the heightened factual nexus test, the Supreme Court may eventually need to resolve a circuit split on this matter. As this Article has argued, the application of the heightened factual nexus approach creates an impermissible bind for passengers, is inconsistent with Supreme Court exclusionary rule precedent (and is contrary to the deterrent purposes of that rule), and deprives passengers of any meaningful right to be free from unreasonable seizures.

380. *Rakas v. Illinois*, 439 U.S. 128, 156–57 (1978) (White, J., dissenting); see *supra* notes 6–7 and accompanying text.