

3-2011

## The Vulnerable Passenger: An Analysis of the Constitutionality of Terry Frisking Vehicle Passengers Not Suspected of Criminal Activity in *Arizona v. Johnson*, 129 S. Ct. 781 (2009)

Mark R. Richardson  
*University of Nebraska College of Law*

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

---

### Recommended Citation

Mark R. Richardson, *The Vulnerable Passenger: An Analysis of the Constitutionality of Terry Frisking Vehicle Passengers Not Suspected of Criminal Activity in Arizona v. Johnson*, 129 S. Ct. 781 (2009), 89 Neb. L. Rev. (2010)  
Available at: <https://digitalcommons.unl.edu/nlr/vol89/iss3/4>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Note\*

# The Vulnerable Passenger: An Analysis of the Constitutionality of *Terry* Frisking Vehicle Passengers Not Suspected of Criminal Activity in *Arizona v. Johnson*, 129 S. Ct. 781 (2009)

## TABLE OF CONTENTS

I. Introduction .....	516
II. Background .....	517
A. The Basics of <i>Terry</i> .....	517
B. Getting from <i>Terry</i> to <i>Johnson</i> .....	518
1. Applying <i>Terry</i> to Traffic Stops .....	518
2. Bringing Passengers Under <i>Terry</i> .....	520
3. Passengers' Standing Recognized .....	522
C. <i>Arizona v. Johnson</i> .....	523
1. Facts .....	523
2. Holding .....	524
III. Analysis .....	526
A. Deficiencies in <i>Johnson's</i> Reasoning .....	526
1. An Inaccurate Interpretation of the <i>Terry</i> Test .	526
2. Failure to Properly Evaluate Government Interest and Personal Privacy .....	528
3. <i>Johnson</i> Incorrectly Held that <i>Wilson</i> Authorized Pat-downs .....	528
4. The Missing Dissents .....	530
5. Officer Safety During Traffic Stops .....	532
B. Future Application .....	533
1. Not a True Automatic Companion Rule .....	533
2. Extent of "No Suspicion of Criminal Activity" ...	534

---

© Copyright held by the NEBRASKA LAW REVIEW.

\* Mark R. Richardson, Nebraska Wesleyan University, B.S., Political Science, May 2005; University of Nebraska College of Law, J.D. expected, May 2011.

3. Likelihood that the Supreme Court Will Stop at <i>Johnson</i> .....	535
IV. Conclusion .....	537

## I. INTRODUCTION

In 1968, the Supreme Court held that police pat-downs could be conducted when there was a reasonable suspicion that a person on the street was armed and dangerous and involved in criminal activity.<sup>1</sup> This type of stop and limited search became known as the *Terry* stop-and-frisk.<sup>2</sup> Forty-one years later, the Supreme Court in *Arizona v. Johnson* decided that a police officer could conduct a *Terry* stop-and-frisk without any suspicion of criminal activity so long as the officer was dealing with a passenger involved in a routine traffic stop.<sup>3</sup>

With its decision in *Johnson* in 2009, the Supreme Court continued its thirty-year trend of expanding the authority of police officers during routine traffic stops. In a unanimous decision, the Court concluded that it was not a violation of a passenger's Fourth Amendment rights to be subjected to a pat-down even when the police officer did not suspect that the passenger was involved in criminal activity.<sup>4</sup> This conclusion broadened the authority of police officers beyond the acceptable scope of the Fourth Amendment as determined by *Terry*. In *Johnson*, the Court indicated it was relying on precedent to conclude that a passenger could be subjected to a stop-and-frisk.<sup>5</sup> While certain precedent may have supported the Court's conclusion on the matter,<sup>6</sup> the Court had never directly addressed the issue. As a result, the Court did not conduct the analysis mandated by *Terry*. The consequence has been another significant reduction in an individual's right to privacy as afforded by the Fourth Amendment's prohibition on unreasonable searches and seizures.<sup>7</sup> Of even greater concern are the possible implications this rule may have on future police-citizen interactions in both traffic stops and other situations.

---

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

2. Kevin Robert Glandon, Note, *Bright Lines on the Road: The Fourth Amendment, the Automatic Companion Rule, the "Automatic Container" Rule, and the New Rule for Drug- or Firearm-Related Traffic Stop Companion Searches Incident to Lawful Arrest*, 46 AM. CRIM. L. REV. 1267, 1272 (2009).

3. *Arizona v. Johnson*, 129 S. Ct. 781, 784 (2009).

4. *Id.* at 787.

5. *Id.* at 788.

6. See *Brendlin v. California*, 551 U.S. 249 (2007).

7. See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

In *Johnson*, the Court removed an established element that must be satisfied prior to conducting a *Terry* stop-and-frisk for passengers in motor vehicles. This Note will examine *Terry* and the analytical framework it established. Three cases that arose between *Terry* and *Johnson* will then be analyzed to understand the continued abrogation of privacy rights in vehicles leading to the *Johnson* decision. The facts of *Johnson* and the Court's interpretation of its own precedent will be scrutinized. It will be demonstrated that, while *Johnson* did not adopt an automatic companion rule, its ruling contained similar elements. Finally, this Note will discuss possible future implications of *Johnson*.

## II. BACKGROUND

### A. The Basics of *Terry*

*Terry* involved a police officer patrolling downtown Cleveland while in street clothes.<sup>8</sup> The officer spent approximately ten to twelve minutes observing three different individuals demonstrating suspicious behavior.<sup>9</sup> Specifically, the officer observed two of the men walking back and forth along a sidewalk while stopping repeatedly to look into the same store window.<sup>10</sup> After walking off together and meeting up with a third man, the police officer stopped them because he suspected that they might have been casing the store.<sup>11</sup> The officer conducted a pat-down of all three men.<sup>12</sup> After feeling a gun under two of the men's coats, the officer reached inside the coat pockets and removed the weapons.<sup>13</sup> The two men were charged with and convicted of carrying concealed weapons.<sup>14</sup>

The *Terry* decision made it explicitly clear that the detention and subsequent pat-down of the suspects constituted a search and seizure that was subject to the Fourth Amendment.<sup>15</sup> In determining that the search and seizure was not unreasonable, *Terry* balanced the govern-

---

8. 392 U.S. 1, 5 (1968).

9. *Id.* at 6.

10. *Id.*

11. *Id.*

12. *Id.* at 7.

13. *Id.*

14. *Id.*

15. *Id.* at 16 (“There is some suggestion in the use of such terms as ‘stop’ and ‘frisk’ that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a ‘search’ or ‘seizure’ within the meaning of the Constitution. We emphatically reject this notion. 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. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a ‘search.’”).

mental interest in conducting the search and seizure with the level of personal invasion that occurred.<sup>16</sup> The specific governmental interest at issue was the safety of the police officer.<sup>17</sup> *Terry* focused on the situation where an officer was investigating a person whose suspicious behavior gave the officer a justified belief that the individual was armed and dangerous.<sup>18</sup> In that situation, the Supreme Court ultimately concluded that it would be unreasonable to deny an officer the ability to take necessary steps to determine if that person was carrying a weapon.<sup>19</sup>

While the Court found the government's interest prevailed, it made clear that the intrusion resulting from a stop-and-frisk-style search was significant.<sup>20</sup> The Court limited its holding to situations where an officer has a reasonable belief that criminal activity is ongoing and that the suspect is armed and dangerous.<sup>21</sup>

## B. Getting from *Terry* to *Johnson*

### 1. Applying *Terry* to Traffic Stops

The first relevant decision following *Terry* occurred nearly a decade later in 1977.<sup>22</sup> *Pennsylvania v. Mimms* expanded the authority of a police officer to conduct *Terry* stop-and-frisks to situations where the only criminal activity involved was a routine traffic stop.<sup>23</sup> *Mimms* involved a police officer stopping an individual for a routine traffic violation.<sup>24</sup> While the driver was in the car, the officer noticed a bulge in the driver's jacket that the officer suspected was a weapon.<sup>25</sup> Concerned for his own safety, the officer ordered the driver out of the car and conducted a pat-down where it was discovered the driver was carrying a loaded gun.<sup>26</sup>

*Mimms*'s primary focus was on the constitutionality of the seizure that occurred when the police officer ordered the driver out of the car.<sup>27</sup> Applying part of the balancing test called for by *Terry*, the

---

16. *Id.* at 24.

17. *Id.*

18. *Id.* (“[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest.”).

19. *Id.*

20. *Id.* at 24–25 (“Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must be an annoying, frightening, and perhaps humiliating experience.”).

21. *Id.* at 30.

22. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

23. *Id.* at 111.

24. *Id.* at 107.

25. *Id.*

26. *Id.*

27. *Id.* at 111.

Court found that ordering the driver out of the car was only a “de minimis” intrusion into the driver’s personal liberty when weighed against the safety concerns of the officer.<sup>28</sup> It is significant that a complete *Terry* analysis did not occur in *Mimms*. Instead of analyzing the reasonableness of both the search and the seizure, the Court looked only at the seizure and explicitly rejected the necessity to analyze the search.<sup>29</sup> This is particularly troublesome because of the significant emphasis the Court in *Terry* placed on its conclusion that a pat-down was far more than a de minimis intrusion.<sup>30</sup>

The *Mimms* decision only briefly discussed the reason why having to step out of a car was a de minimis intrusion.<sup>31</sup> Further, *Mimms* only addressed the subsequent pat-down in one paragraph at the end of the opinion.<sup>32</sup> Relying on *Terry*, the Court simply determined the driver was legitimately stopped and the officer had a reasonable belief the suspect was armed and dangerous.<sup>33</sup> At no point did *Mimms* discuss the intrusion into the driver’s personal liberty stemming from the pat-down.<sup>34</sup> The issue of any suspected criminal activity was also not addressed. As a result, *Mimms* substantially increased the authority of police officers when compared to the authority provided by *Terry*.<sup>35</sup>

- 
28. *Id.* (“The driver is being asked to expose to view very little more of his person than is already exposed. 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. Not only is the insistence of the police on the latter choice not a ‘serious intrusion upon the sanctity of the person,’ but it hardly rises to the level of a ‘petty indignity.’ What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer’s safety.”).
29. *Id.* at 109 (“This inquiry must therefore focus not on the intrusion resulting from the request to stop the vehicle or from the later ‘pat down,’ but on the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped.”).
30. 392 U.S. 1, 16–17 (1968) (“[I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’ It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.”).
31. *Mimms*, 434 U.S. at 111.
32. *Id.* at 111–12.
33. *Id.*
34. *See id.* at 111 (discussing only the intrusion on the personal liberty of the driver stepping out of the car—not the invasion resulting from the pat-down).
35. *See* Charles W. Elliot, *An Anomaly in the Reasonable Suspicion Doctrine*: Pennsylvania v. Mimms, 51 U. COLO. L. REV. 289, 295 (1980) (“The actual decision of *Mimms* is a drastic departure from the reasonable suspicion standard of *Terry*. Under *Mimms*, the police officer now need not be concerned at all for his safety, or the safety of those nearby, nor must he have any reasonable suspicion of criminal activity. The police officer merely must have made a lawful detention for a traffic violation. At this point, under *Mimms*, the police officer has absolute discretion to make a seizure by ordering the driver from his car. This discretion exists without any form of judicial regulation or supervision, a situation unique

While *Terry* seemed to make clear that situations like *Mimms* would have to be addressed on their specific facts, *Mimms* only undertook a truncated *Terry* analysis.<sup>36</sup> There was no discussion of suspected criminal activity and no analysis of the serious intrusion into personal liberty resulting from a pat-down.<sup>37</sup>

## 2. *Bringing Passengers under Terry*

In *Maryland v. Wilson*, the Supreme Court extended its analysis of traffic stops to include passengers in vehicles.<sup>38</sup> *Wilson* involved a passenger of a car that was pulled over for speeding.<sup>39</sup> When the police officer noticed that the passenger appeared nervous, the officer asked the passenger to step out of the vehicle.<sup>40</sup> While the passenger was exiting the vehicle cocaine fell out of the car and onto the ground.<sup>41</sup> The passenger was arrested and charged with possession of cocaine with the intent to distribute.<sup>42</sup>

Extending the authority *Mimms* gave to police officers over *drivers*, *Wilson* held that officers also had the right to order *passengers* out of the vehicle during a routine traffic stop.<sup>43</sup> The Court recognized that the basis for ordering a passenger out of the vehicle was different than the basis for ordering the driver out of the vehicle.<sup>44</sup> The major difference was that there existed no probable cause to believe the passenger had committed any criminal offense or was involved in any kind of wrongdoing.<sup>45</sup> Nonetheless, the Court found that it was simply more practical to allow police officers to order passengers to exit the vehicle.<sup>46</sup> According to the Court, allowing this practice was much safer

---

in fourth amendment law. This results in a denial of an individualized balancing of the facts in each particular case. Instead of an individualized inquiry, the Court has implicitly applied the fourth amendment balancing test and determined as an absolute that it is reasonable for a police officer to seize the driver of any lawfully detained vehicle." (footnotes omitted).

36. *Mimms*, 434 U.S. at 111.

37. *Id.* at 111–12.

38. 519 U.S. 408, 410 (1997).

39. *Id.*

40. *Id.* at 410–11.

41. *Id.* at 411.

42. *Id.*

43. *Id.* at 410.

44. *Id.* at 414–15.

45. *Id.*

46. *Id.* at 413–14 (“[A]s a practical matter, the passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car. Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered

for the police officer and was only a minimal additional intrusion for the passenger.<sup>47</sup>

*Wilson* did not address the authority of a police officer to conduct a pat-down of passengers once they had exited the vehicle. Instead, the minimal intrusion only included the act of having the passenger get out of the car.<sup>48</sup> While the Court's decision only briefly touched on the issue of personal liberty, Justice Stevens's dissent displayed a much clearer acknowledgment of the expansion of police power.<sup>49</sup> He challenged the majority's contention that being ordered out of the car was a minimal intrusion into one's personal liberties.<sup>50</sup> Justice Stevens made clear that being ordered out of the car may be a mere inconvenience for some, but other people may have a much greater sense of personal privacy and would feel this was a major intrusion.<sup>51</sup>

*Wilson* was decided on a different basis than *Mimms*. While *Mimms* applied a truncated interpretation of the balancing test developed in *Terry*, *Wilson* contained no such analysis.<sup>52</sup> In fact, the *Wilson* decision did not make a single reference to *Terry* in its analysis.

---

during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.”).

47. *Id.* at 414–15.

48. *Id.*

49. *Id.* at 419 (Stevens, J., dissenting).

50. *Id.*

51. *Id.* (“That burden may well be ‘minimal’ in individual cases. But countless citizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands may well consider the burden to be significant. In all events, the aggregation of thousands upon thousands of petty indignities has an impact on freedom that I would characterize as substantial, and which in my view clearly outweighs the evanescent safety concerns pressed by the majority.” (citation omitted)).

52. This is particularly noticeable because *Terry* clearly mandated that such an analysis was to take place whenever this issue came before the court. See Karen Y. Vicks, *Supreme Court Gives Cops Green Light to Make Fourth Amendment Seizures of Passengers Without Individualized Suspicion*: Maryland v. Wilson, 9 TEMP. POL. & CIV. RTS. L. REV. 211, 220–21 (1999) (“In *Terry*, the Court recognized that in all cases of reasonableness the ‘inquiry is a dual one: whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.’ The Court, in determining reasonableness, must weigh the necessity for the governmental invasion against the individual’s interest in protecting his or her constitutional right that is to be infringed upon. In evaluating the reasonableness of an officer’s conduct ‘due weight must be given, not to his [or her] inchoate and unparticularized suspicion or “hunch,” but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.’ The Court’s rationale behind this statement is that there must be some basis for reviewing the necessity of a police officer’s intrusion on an individual’s right to personal liberty or the Court will be forced to rely on the good faith efforts of law enforcement officers. The effect of the Supreme Court’s decision in *Wilson* is to defer to the subjective good faith of law enforcement officers.” (citations omitted)).



The only time *Terry* was discussed was in Justice Stevens's dissent.<sup>53</sup> Nevertheless, *Wilson* was a major part of the foundation upon which *Johnson* was decided, and *Johnson* appears to have misinterpreted this decision.<sup>54</sup>

### 3. *Passengers' Standing Recognized*

*Brendlin v. California* involved a passenger who was in a vehicle that an officer pulled over to check its registration, even though the officer had no reason to believe there was any unlawful operation of the car.<sup>55</sup> During the stop, the officer recognized the passenger and suspected he had violated his parole.<sup>56</sup> The officer then searched the vehicle and found several drug-related items.<sup>57</sup> The passenger was charged with possession and manufacture of methamphetamines.<sup>58</sup>

The passenger sought to have the evidence suppressed because it was the product of an unreasonable search and seizure.<sup>59</sup> The California Supreme Court determined that the police officer did not actually seize the passenger because the passenger was not the primary target of the detention.<sup>60</sup> After all, the Fourth Amendment seems to indicate that in order to assert a violation of Fourth Amendment rights, an individual must first be considered seized.<sup>61</sup> However, the United States Supreme Court disagreed with the California Supreme Court in *Brendlin*, holding that even though the driver's conduct precipitated the detention, the effect on the passenger was the same.<sup>62</sup> Thus,

---

53. *Id.*

54. *See infra* Part IV.

55. 551 U.S. 249, 252 (2007).

56. *Id.*

57. *Id.*

58. *Id.* at 253.

59. *People v. Brendlin*, 136 P.3d 845, 855 (Cal. 2006), *rev'd*, 551 U.S. 249 (2007).

60. *Brendlin*, 551 U.S. at 253.

61. U.S. CONST. amend. IV.

62. *Brendlin*, 551 U.S. at 257. ("A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on 'privacy and personal security' does not normally (and did not here) distinguish between passenger and driver. An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would 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. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but 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." (citations omitted)).

passengers possessed the standing necessary to challenge a stop on Fourth Amendment grounds.<sup>63</sup>

While *Brendlin* recognized that the Constitution gave passengers an important right, it simultaneously provided the Court with the reasoning necessary to conclude one of the two prongs for the *Terry* pat-down test were met in *Johnson*. Because passengers were now considered lawfully seized during a routine traffic stop, *Johnson* stated the only remaining hurdle was for the police officer to reasonably believe the passenger was armed and dangerous.<sup>64</sup> It is this specific aspect of *Johnson* that, while technically consistent with precedent, appears to run counter to the emphasis of *Terry*.

### C. *Arizona v. Johnson*

#### 1. *Facts*

On April 19, 2002, Lemon Montrea Johnson was riding in the back-seat of a car when the car was pulled over because the vehicle's registration had been suspended.<sup>65</sup> During the stop, Officer Maria Trevizo, a member of Arizona's gang task force, made several observations that led her to believe Johnson was a member of a local gang. Among these observations were that Mr. Johnson kept his eyes on the police officers as they approached, wore a blue bandana, and had a scanner in his jacket pocket.<sup>66</sup>

Officer Trevizo testified that it was unusual for an ordinary person to be carrying around a police scanner unless a person intended to carry out some sort of criminal activity.<sup>67</sup> Nevertheless, Officer Trevizo did not testify that she believed Mr. Johnson was actually engaged in any criminal activity at the time of the stop. While still in the vehicle, Mr. Johnson told the officers that he was from an area known by Officer Trevizo to be home to a Crips gang.<sup>68</sup> Mr. Johnson further indicated that he had spent time in prison for burglary and only had been out for approximately one year.<sup>69</sup>

Officer Trevizo then asked Mr. Johnson to step out of the car so that she could question him away from the other passengers.<sup>70</sup> Officer Trevizo stated that she was trying to "gain intelligence about the gang [Mr. Johnson] might be in."<sup>71</sup> Officer Trevizo conducted a pat-down of Mr. Johnson after he exited the car because she was con-

---

63. *Id.* at 263.

64. *Arizona v. Johnson*, 129 S. Ct. 781, 786 (2009).

65. *Id.* at 784.

66. *Id.* at 784–85.

67. *Id.* at 785.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

cerned that Mr. Johnson might be armed.<sup>72</sup> This suspicion arose from answers Mr. Johnson gave Officer Trevizo while he was still in the car.<sup>73</sup> During the pat-down, Officer Trevizo felt a gun at Mr. Johnson's waist and subsequently placed him under arrest.<sup>74</sup> Mr. Johnson was charged with possession of a weapon by a prohibited possessor.<sup>75</sup> After unsuccessfully attempting to suppress the weapon as the result of an unlawful search, Mr. Johnson was convicted of the gun-possession charge.<sup>76</sup>

The Arizona Court of Appeals overturned Mr. Johnson's conviction.<sup>77</sup> It concluded that, prior to the pat-down, the interaction between Officer Trevizo and Mr. Johnson had "evolved into a separate, consensual encounter stemming from an unrelated investigation by Officer Trevizo of Johnson's possible gang affiliation."<sup>78</sup> The court's reasoning was based largely on Officer Trevizo's own testimony that indicated she believed Mr. Johnson had the ability to refuse to get out of the car and submit to the pat-down as well as the finding that a reasonable person in Mr. Johnson's situation would have considered the encounter consensual.<sup>79</sup> The state appellate court also found that without "reason to believe Mr. Johnson was involved in criminal activity, Officer Trevizo had no right to pat him down for weapons, even if she had reason to suspect he was armed and dangerous."<sup>80</sup> After the Arizona Supreme Court denied review, the U.S. Supreme Court granted certiorari.<sup>81</sup>

## 2. *Holding*

The Supreme Court applied a version of the two-pronged test established by *Terry*.<sup>82</sup> The first prong requires that the investigatory stop be lawful.<sup>83</sup> A stop is lawful "whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation."<sup>84</sup> According to the Court these encounters included minor vehicular violations.<sup>85</sup> For an officer to proceed from the lawful

---

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *State v. Johnson*, 170 P.3d 667 (Ariz. Ct. App. 2007), *rev'd*, 129 S. Ct. 781 (2009), remanded to 207 P.3d 804 (Ariz. Ct. App. 2009).

78. *Arizona v. Johnson*, 129 S. Ct. 781, 786 (2009) (quoting *Johnson*, 170 P.3d at 673).

79. *Id.* at 787.

80. *Id.* at 785 (quoting *Johnson*, 136 P.3d at 673).

81. *Id.*

82. *Id.* at 784.

83. *Id.*

84. *Id.* at 787 (citing *Maryland v. Wilson*, 519 U.S. 408, 413 (1997)).

85. *Id.* at 784.

seizure to a subsequent pat-down, the second prong of *Terry* requires that the police officer possess sufficient reason to believe the passenger is armed and dangerous.<sup>86</sup> As previously noted, *Johnson* determined that a police officer is not required to have any cause to believe a passenger is involved in criminal activity.<sup>87</sup>

The Supreme Court reversed the decision of the Arizona Court of Appeals.<sup>88</sup> The opinion focused primarily on whether the encounter between Mr. Johnson and Officer Trevizo had turned into a consensual encounter at the time of the pat-down.<sup>89</sup> *Johnson* rejected the finding of the Arizona Court of Appeals and found that the interaction was not consensual.<sup>90</sup> Relying on *Brendlin*, the Court reiterated the reasoning that during a traffic stop a reasonable passenger would not think he or she is free to end the police encounter.<sup>91</sup> According to the Court, nothing occurred during the encounter between Officer Trevizo and Mr. Johnson that would reasonably have communicated to Mr. Johnson that he was able to leave the scene without the officers' permission.<sup>92</sup>

While the nature of the encounter was at the center of the Court's discussion, that particular analysis was not as troublesome as the much more brief discussion in which the Court concluded that officers may frisk passengers in the first place. The Court reached its conclusion by analyzing *Terry* stops with reference to *Mimms*, *Wilson*, and *Brendlin*.<sup>93</sup> The Court stated *Mimms* allowed officers to order the driver out of the vehicle and conduct a pat-down.<sup>94</sup> It specifically emphasized the *Mimms* holding that the government's interest in officer safety outweighed the "de minimis" intrusion to the driver.<sup>95</sup>

The Court's analysis of *Wilson* led it to conclude that the rule established by *Mimms* also applied to any passengers in a vehicle.<sup>96</sup> According to the Court's opinion in *Johnson*, *Brendlin* "completed the picture" by holding that passengers, along with the driver, are seized as soon as the car is stopped along the side of the road.<sup>97</sup> This seizure satisfied the first prong of the *Terry* pat-down test and also gave pas-

---

86. *Id.*

87. *Id.*

88. *Arizona v. Johnson*, 129 S. Ct. 781, 786 (2009).

89. *Id.* at 787–88.

90. *See id.*

91. *Id.* at 788.

92. *Id.*

93. *Id.* at 786.

94. *Id.* (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977)).

95. *Id.* (citing *Mimms*, 434 U.S. at 110–11).

96. *Id.*

97. *Id.* (citing *Brendlin v. California*, 551 U.S. 249, 263 (2007)).

sengers the standing necessary to challenge the constitutionality of the stop.<sup>98</sup>

The case was remanded for further proceedings because the Arizona Court of Appeals never decided the issue of whether Officer Trevizo's suspicion that Mr. Johnson was armed and dangerous was reasonable.<sup>99</sup>

### III. ANALYSIS

#### A. Deficiencies in *Johnson's* Reasoning

##### 1. *An Inaccurate Interpretation of the Terry Test*

In *Johnson*, the Court interpreted *Terry* in a way that was not immediately obvious upon reading the *Terry* opinion. Instead of applying the test as explicitly laid out in *Terry*, the Court interpreted *Terry* to set down a more generic rule. The Court stated in *Johnson* that *Terry* set forth two requirements that must be satisfied before a stop and pat-down may occur. First, the stop must be lawful.<sup>100</sup> Second, a police officer must have a reasonable suspicion the individual is armed and dangerous.<sup>101</sup> This second requirement was clearly and explicitly established by *Terry*.<sup>102</sup>

Less clear, however, was the first requirement the Court asserted in *Johnson*—that the stop be lawful. This requirement was not the exact rule declared in *Terry*. While the stop involved in *Terry* was lawful, *Terry* did not make the rule as general in nature as the Court in *Johnson* interpreted it.<sup>103</sup> Instead, the first requirement in *Terry* was that a police officer must reasonably suspect criminal activity before conducting a pat-down.<sup>104</sup> Even though *Terry's* holding was limited to its specific facts, there was no indication in *Terry* that the specified test should only be applied to “on-the-street encounters” between police officers and private citizens. Rather, the same test should be used in every situation and requires an officer to have a justified belief that an individual was involved in wrongdoing before conducting a *Terry* frisk.

Justice Harlan's concurring opinion in *Terry* supports the argument that the Court mistakenly decided *Johnson* by not requiring the officer to reasonably believe that a person was engaging in wrongdo-

---

98. *Id.* at 787 (citing *Brendlin*, 551 U.S. at 256–59).

99. *Id.* at 788 n.2 (citing *State v. Johnson*, 170 P.3d 667, 673 (2006)).

100. *Id.* at 784.

101. *Id.*

102. 392 U.S. 1, 30 (1968).

103. *Id.* at 30 (authorizing a limited search “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous”).

104. *Id.*

ing before conducting a pat-down.<sup>105</sup> Justice Harlan clarified that the interruption of freedom in *Terry* was justified solely because the situation *demand*ed an encounter by the police officer investigating a crime.<sup>106</sup> According to Justice Harlan, this justification was implicit in *Terry*'s majority holding.<sup>107</sup> Nothing in the circumstances arising in *Johnson* demanded that Officer Trevizo interact with Mr. Johnson in the way that she did. In accordance with Justice Harlan's view, the voluntary nature of Officer Trevizo's exploration of Mr. Johnson and his circumstances would have denied her the authority to invade his personal right to privacy.

It is true that the holding in *Terry* was limited to its particular facts: indeed, the Court noted that each case involving *Terry* stops would have to be decided on its own facts.<sup>108</sup> Based on this, an argument could be made that *Johnson* was justified in applying a slightly different standard than that applied in *Terry*. However, if *Terry* truly only applies to its narrow facts, then the Court in *Johnson* need not have found that the officer had a reasonable suspicion that the individual was armed and dangerous (as would be the case if *Terry* were not limited to its facts).<sup>109</sup> Instead, the Court could have adopted a broader approach—the same way that the Court in *Johnson* rejected *Terry*'s requirement of suspicion of criminal activity in favor of requiring that the stop merely be lawful.<sup>110</sup> If this were the case, the Court could have held, for example, that a police officer need only believe that a person poses a potential threat, regardless of whether the officer has any reason to believe the individual is armed. The inconsistency in *Johnson*'s interpretation of the prongs required by *Terry* is alarming because it directly authorizes a substantial expansion of police power, as well as provides a potential basis for even broader interpretations of *Terry* in the future.

---

105. See Brief for Amicus Curiae National Association of Criminal Defense Lawyers at 3, *Johnson*, 129 S. Ct. 781 (No. 07-1122) (“[I]t is implicit in the Court’s holding that the mere permissibility of the officer’s presence is not enough: the frisk in *Terry* was permissible ‘only because circumstances warranted forcing an encounter with *Terry* in an effort to prevent or investigate a crime.’ Absent the justification created by the need to investigate reasonably suspected criminal activity, the officer is ‘at liberty to avoid a person he considers dangerous,’ and accordingly officer safety cannot justify an invasion of the person’s privacy.” (citations omitted)).

106. *Terry*, 392 U.S. at 34 (Harlan, J., concurring) (“Officer McFadden’s right to interrupt *Terry*’s freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with *Terry* in an effort to prevent or investigate a crime.”).

107. *Id.* at 33–34.

108. *Id.* at 29.

109. See *Terry*, 392 U.S. 1 (holding that police officers may conduct pat-downs when they reasonably suspect that a person on the street was armed and dangerous and involved in criminal activity).

110. See *Johnson*, 129 S. Ct. at 784.

## 2. *Failure to Properly Evaluate Government Interest and Personal Privacy*

*Johnson* and the cases that preceded it also did not conduct the important balancing test between the government's legitimate interest in officer safety and the rights of individuals to be free from unreasonable searches and seizures. In *Terry*, there was a significant level of concern about the invasion of privacy endured by a person's body during a pat-down. *Terry* refused to classify such a search as a "petty indignity."<sup>111</sup> Instead, the Court determined that a pat-down was "a serious intrusion upon the sanctity of the person."<sup>112</sup>

The Supreme Court began downplaying this intrusion in *Mimms* when it found ordering an individual out of a car was only a de minimis intrusion associated with the traffic stop.<sup>113</sup> *Johnson* continued the trend when the Court barely spoke to the issue at all. Instead of conducting the balancing test called for by *Terry*, *Johnson* relied on the *Mimms* rationale that the scale tipped towards the public's interest in officer safety in a traffic stop.<sup>114</sup> This reliance is particularly relevant given the different nature of seizing a driver (as in *Mimms*) as opposed to seizing a passenger (as in *Johnson*). A driver who has been seized because of suspected wrongdoing is more in line with *Terry* where those who were seized were also suspected of wrongdoing. The passenger in *Johnson*, on other hand, was merely seized because he was in the same vehicle and not because he was suspected of wrongdoing.<sup>115</sup>

## 3. *Johnson Incorrectly Holds that Wilson Authorized Pat-downs*

The reasoning the *Johnson* Court used to connect *Mimms*, *Wilson*, and *Brendlin* to apply *Terry* pat-downs to passengers in traffic stops is clear. The Court first held that drivers could be ordered out of the car and searched.<sup>116</sup> The Court then held that this rule also extended to passengers.<sup>117</sup> Finally, the Court held that, in this situation, the passengers were legally seized under the Fourth Amendment and thus had the standing necessary to challenge the constitutionality of the stop.<sup>118</sup> It appears, however, that this is not a complete and accurate depiction of one of these three cases.

The Court in *Johnson* appears to have drawn a conclusion that was not supported by *Wilson*. *Johnson* specifically stated that "*Wilson*

---

111. *Terry*, 392 U.S. at 16–17.

112. *Id.*

113. *See Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

114. *See Johnson*, 129 S. Ct. at 786.

115. *See id.* at 784.

116. *See id.* (citing *Mimms*, 434 U.S. 106).

117. *See id.* at 786–87 (citing *Maryland v. Wilson*, 519 U.S. 408 (1997)).

118. *See id.* at 787 (citing *Brendlin v. California*, 551 U.S. 249 (2007)).

held that the *Mimms* rule applied to passengers as well as to drivers.”<sup>119</sup> This assertion is only partially true. While it is clear that *Wilson* allowed passengers to be ordered out of the vehicle in the same way as a driver, it said nothing about officers being allowed to frisk passengers, which was a key finding of *Mimms*.<sup>120</sup> Extending *Mimms* to pat-downs of passengers without weighing the interests of the two parties involved is a distressing and unacceptable departure from *Terry*.

In fact, because *Wilson* made clear that the basis for ordering passengers out of the car was different than the basis for doing the same to drivers, the Supreme Court’s own precedent would seem to indicate passenger pat-downs should not be allowed. In *Brown v. Texas*, the Court stated, “In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant’s right to personal security and privacy tilts in favor of freedom from police interference.”<sup>121</sup>

*Brown* concerned an “on-the-street” seizure similar to that of *Terry*.<sup>122</sup> *Brown*, however, involved a less intrusive invasion into personal liberty than what took place in *Terry*. It did not even include the more intrusive pat-down present in both *Terry* and *Johnson*.<sup>123</sup> Nevertheless, the *Brown* Court concluded that the basis for the stop, as in *Terry*, must include some suspicion of wrongdoing on the part of the individual seized.<sup>124</sup>

The Supreme Court reemphasized the requirement for an individualized suspicion of criminal wrongdoing in *United States v. Cortez*.<sup>125</sup> In analyzing the validity of a traffic stop, *Cortez* affirmed that “the whole picture must yield a particularized suspicion” and “must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.”<sup>126</sup> Referring to *Terry*, *Cortez* reinforced the concept that “specificity . . . is the central teaching of [the Supreme] Court’s Fourth

---

119. *Id.* at 786.

120. *See Wilson*, 519 U.S. at 414–15.

121. 443 U.S. 47, 52 (1979).

122. *Id.* at 48–49.

123. *Id.*

124. *Id.* at 51.

125. 449 U.S. 411, 417–18 (1981). This case involved border patrol officers stopping two men suspected of picking up and transporting illegal aliens after they had crossed the border from Mexico. *See id.* at 415–16. The arresting officers never witnessed the vehicle loading individuals into the back or any individuals in the vehicle assisting illegal aliens. *See id.* at 419–21. The stop was instead based on evidence gathered by the officers that indicated a vehicle similar to the defendants’ would likely be traveling along the route staked out by the officers. *See id.* The Supreme Court ultimately found that the officers had obtained enough “specific and articulable facts” and inferences to warrant pulling the vehicle over. *Id.* at 422–23.

126. *Id.* at 418.



*Amendment jurisprudence.*"<sup>127</sup> When *Wilson* recognized that the basis for ordering passengers out of a vehicle was one of practicality and not an individualized suspicion of wrongdoing, a critical aspect of a *Terry* stop-and-frisk was discarded.

*Johnson* implied that these additional intrusions into the privacy of passengers are minimal when compared to the safety of the officers involved.<sup>128</sup> This implication, however, is significantly disconnected from one of the primary concerns of *Terry*. While *Wilson* may have asserted that merely ordering passengers out of the car is a minimal intrusion, being subjected to a pat-down appears to be a much greater intrusion in the eyes of *Terry*. *Terry* found that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."<sup>129</sup>

Four decades later, the Supreme Court appears to have changed its perspective about the level of intrusion resulting from a pat-down. Officer safety is undoubtedly an important concern during traffic stops, but the necessity for the rule created by *Johnson* was called into question by observers shortly after the Court's ruling was announced.<sup>130</sup> Even more disconcerting is that the Court took this position without ever properly conducting the balancing test presented in *Terry*. Thus, the purported humiliating experience described in *Terry* slowly evolved to a de minimis intrusion when compared to a police officer's safety without the appropriately thorough examination.

#### 4. *The Missing Dissents*

Another mysterious aspect of *Johnson* is its unanimity. In both *Mimms* and *Wilson*, Justice Stevens authored dissenting opinions highly critical of the majority's rule, which allowed intrusion into personal liberties.<sup>131</sup> In *Mimms*, Justice Stevens even predicted the outcome of *Johnson* thirty-two years before it occurred.<sup>132</sup> Later in *Wilson*, Justice Stevens was joined by Justice Kennedy in criticizing the expansion of *Mimms* to passengers. Justice Stevens found that, as opposed to the seizure of the driver, the "restraint on the liberty of

---

127. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968)).

128. *See Arizona v. Johnson*, 129 S. Ct. 781, 787 (2009).

129. *Terry*, 392 U.S. at 24–25.

130. *See Michael Edmund O'Neill, (Un)Reasonableness and the Roberts Court: The Fourth Amendment in Flux*, 2009 CATO SUP. CT. REV. 183, 199.

131. *See Maryland v. Wilson*, 519 U.S. 408, 415–22 (1997) (Stevens, J., dissenting); *Pennsylvania v. Mimms*, 434 U.S. 106, 115–24 (1977) (Stevens, J., dissenting).

132. *Mimms*, 434 U.S. at 122 (Stevens, J., dissenting) ("Most narrowly, the Court has simply held that whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car. Because the balance of convenience and danger is no different for passengers in stopped cars, the Court's logic necessarily encompasses the passenger.").

blameless passengers . . . is, in contrast, entirely arbitrary.”<sup>133</sup> Justice Stevens rightfully recognized that intrusions into personal liberty must always be based on individual inquiries into the reason behind the intrusion.<sup>134</sup>

Justice Kennedy further articulated this disagreement with the majority in *Wilson* when he displayed concern for the arbitrary control the majority ruling gave to police officers.<sup>135</sup> By automatically allowing officers to order passengers out of the car, Justice Kennedy felt a major constitutional safeguard had been removed.<sup>136</sup> Kennedy recognized that the practical effect of requiring an officer to have a legitimate reason to ask passengers would not be far different from the automatic rule. Nevertheless, Justice Kennedy still felt the requirement was essential.<sup>137</sup> This argument applies to *Johnson*, given the dispute over whether Mr. Johnson was ordered out of the car or voluntarily exited at the officer’s request. While Officer Trevizo articulated a reason for asking Mr. Johnson to step out of the vehicle,<sup>138</sup> an argument following Justice Kennedy’s perspective in *Wilson* would have brought into question the necessity of the officer’s actions from the start.

In addition to the strong merits of Justice Stevens’s and Justice Kennedy’s arguments, their dissents are particularly relevant because both Justices were on the Court when *Johnson* was decided. Observers have noted that Justice Stevens’s vote in *Johnson* was a “detour” from his usual position in Fourth Amendment cases.<sup>139</sup> Because the decision was unanimous, the thought processes that led both Justices to change their view of what constitutes a de minimis intrusion will remain a mystery unless the two Justices decide to comment on the case at a later date. Some have speculated that Justice Stevens and Justice Kennedy chose not to dissent in this case due to simple reliance on precedent.<sup>140</sup> What is clear, however, is that the lack of any dissent silenced another meaningful means of advocating for the rights of individuals against unreasonable searches and seizures.

---

133. *Maryland v. Wilson*, 519 U.S. 408, 420 (1997) (Kennedy, J., dissenting).

134. *See Mimms*, 434 U.S. at 121 (Stevens, J., dissenting).

135. *See Wilson*, 519 U.S. at 423 (Kennedy, J., dissenting).

136. *See id.* (“If the command [for passengers to exit the vehicle] were to become commonplace, the Constitution would be diminished in a most public way. As the standards suggested in dissent are adequate to protect the safety of the police, we ought not to suffer so great a loss.”).

137. *See id.*

138. Johnson was wearing types of clothing that the officer believed to be associated with gang membership, and he had a police scanner in his pocket “which people normally do not have ‘unless they’re going to be involved in some kind of criminal activity or going to try to evade police by listening to the scanner.’” *See State v. Johnson*, 170 P.3d 667, 669 (Ariz. Ct. App. 2007).

139. *See, e.g., O’Neill, supra* note 130, at 214.

140. *Id.*

### 5. *Officers' Safety During a Traffic Stop*

The basis for the rule in *Johnson* was officer safety.<sup>141</sup> *Johnson*, however, provided no new evidence that officers are in any greater danger during traffic stops than during other police encounters. The Court instead relied upon its own precedent indicating this to be the case.<sup>142</sup> In *Wilson*, the majority utilized statistics compiled by the Federal Bureau of Investigation to support its conclusion that traffic stops present unusually dangerous situations for police officers.<sup>143</sup> Similar data, however, existed to indicate that traffic stops were no more dangerous than other types of police encounters.<sup>144</sup> The actual amount of relative danger presented by traffic stops cannot be determined without a detailed study that compares traffic stops to other forms of police encounters, because corollary statistics can often be found to support whichever side of an argument an individual chooses.

The dangerous nature of a traffic stop in general is not the only safety question that remains unanswered. There is also debate as to whether ordering individuals out of the vehicle is the safest course of action for a police officer. It has been suggested that this technique has the opposite effect in actual practice.<sup>145</sup> If armed passengers are aware they legally can be subjected to a pat-down after exiting the vehicle, they may be more inclined to use potentially deadly force to resist such an order. Furthermore, if there were multiple passengers, it would seem more dangerous to try and frisk each of them. This certainly is true for officers on patrol by themselves. Justice Stevens expressed significant concern about this very issue in his dissent in *Mimms*.<sup>146</sup> Unfortunately, these concerns are not addressed in the unanimous *Johnson* decision.

---

141. *Arizona v. Johnson*, 129 S. Ct. 781, 786 (2009).

142. *Id.*

143. *Wilson*, 519 U.S. at 413 ("In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops.")

144. See Brief for Respondent at 37-38, *Wilson*, 519 U.S. 408 (No. 95-1265) ("The only reason that 10.5% of police assaults arise from traffic stops and pursuits is that traffic stops and pursuits are probably, by far, the most frequent type of encounter between the police and the public. From July 1, 1994, through June 30, 1995, there were 1,088,982 criminal misdemeanor traffic court cases filed in the District Court of Maryland. This probably means at least one million traffic [sic] stops annually in the State of Maryland alone. Although some defendants have multiple traffic violations arising from one incident, the judiciary's one million plus cases do not include those stops that resulted in only verbal warnings and reprimands, in written warnings, in safety violation orders, and in other encounters not resulting in a traffic court case." (citation omitted)).

145. *Pennsylvania v. Mimms*, 434 U.S. 106, 119 (1977) (Stevens, J., dissenting) (referencing human behavior experts who recommended never allowing individuals to get out of a car during a traffic stop due to the various dangers that can arise when individuals exit vehicles).

146. *Id.* (citing two vehicle stops manuals that give explicit instructions not to allow individuals to exit vehicles).

## B. Future Application

### 1. *Not a True Automatic Companion Rule*

In *Johnson*, the Supreme Court did not adopt what has become known as the “automatic companion rule.”<sup>147</sup> The automatic companion rule would have subjected any occupant of a vehicle to a *Terry* frisk, so long as it was incident to the driver’s arrest.<sup>148</sup> The argument supporting this rule is that it would establish a well-defined rule for police officers to follow while ensuring their safety.<sup>149</sup>

While *Johnson* did not explicitly reject this rule, it certainly did so implicitly.<sup>150</sup> Requiring officers to have a reasonable suspicion the passenger was armed and dangerous was an unmistakable rejection of the notion that any and all passengers could be arbitrarily searched during a traffic stop. Another major difference between the automatic companion rule and *Johnson* is that the automatic companion rule is argued for in situations where the police have probable cause to arrest the driver.<sup>151</sup> *Johnson* dealt with situations where the driver was not suspected of anything other than a routine traffic violation.

Unfortunately, the practical result of *Johnson* may not be far different from an automatic companion rule. What constitutes a reasonable suspicion that someone is armed and dangerous is not clearly defined. Observers have noted that relevant factors have included the location of the stop, the time of day, passengers’ actions, whether the passenger was known to carry weapons, and the proximity of the stop to a “crime infested neighborhood.”<sup>152</sup>

In essence, the reasonable suspicion test places a great deal of authority in the hands of the police officer. Although *Johnson* remanded the case to the Arizona Court of Appeals to determine whether Officer Trevizo possessed reasonable suspicion, the mere ambiguity of the test tends to favor the police officer’s authority. Given the wide range of relevant factors, it would not be difficult for a police officer to present a list of reasons why an individual appeared armed and dangerous. In the absence of a requirement that the officer reasonably believes an individual has some connection with criminal activity, a police officer is free to physically frisk individuals based on their looks, where they live, or even possibly where they may simply be passing through. The

---

147. Glandon, *supra* note 2, at 1283.

148. *Id.*

149. *Id.* at 1284.

150. *Arizona v. Johnson*, 129 S. Ct. 781, 784 (2009) (“To justify a patdown of . . . a passenger during a traffic stop . . . the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.”).

151. See Glandon, *supra* note 2, at 1284.

152. Kristi Michelle Bellamy, Note, *The “Automatic Companion” Rule and its Unconstitutional Application to the Frisk of Car Passengers*, 27 AM. J. CRIM. L. 217, 230 (2000).

concern then becomes that private citizens are subject to the “hunches” of police officers.<sup>153</sup> The result of *Johnson* was making a private vehicle a surprisingly exposed place.

## 2. *Extent of “No Suspicion of Criminal Activity”*

The *Johnson* decision also raises the question of whether the Supreme Court would be willing to extend the *Johnson* ruling beyond vehicular stops. At the present time, the extent of police power under the *Johnson* line of cases appears to be limited to private vehicular settings.<sup>154</sup> *Mimms*, *Wilson*, and *Johnson* all noted that vehicular stops present an unusually high risk of danger for police officers.<sup>155</sup> Accordingly, the Supreme Court has been unwilling to allow similar searching of visitors who happened to be in a bar when criminal activity of others was suspected.<sup>156</sup> Absent reasonable suspicion that specific visitors were involved in the criminal activity, the Supreme Court held *Terry* stop-and-frisks violated the Fourth Amendment.<sup>157</sup>

The fact that the Supreme Court has not yet extended the authority granted in *Johnson* in other scenarios does not ensure it will not do so in the future. *Johnson* may very well open the door to police officers infringing an individual’s personal liberty in other settings. The only apparent requirement to support such an extension is a situation that presents a higher risk of danger to police officers.

For example, while *Johnson* clearly applies to private vehicles, the test applied in *Johnson* seems to apply equally to public transportation. Passengers on a city bus or subway car appear to be subject to the same type of seizure present in *Johnson*. Much like *Brendlin* and *Johnson*, individuals seated on a bus that is pulled over by the police would reasonably assume they are subject to the authority of the officers present. With the first prong of the test satisfied, the only remaining requirement is for the officer to reasonably believe a given passenger is armed and dangerous. At what point does the dangerous situation leave the vehicular setting? Does the platform of a subway

---

153. Harold Baer, Jr., *Got a Bad Feeling? Is That Enough? The Irrationality of Police Hunches*, 4 J.L. ECON. & POL’Y 91, 98 (2007) (“The very nature of hunches suggests a barrier to *Terry*’s requirements. Hunches are intuitive judgments that rise to our consciousness without explanation. Formed in part of the brain known as the ‘adaptive unconscious,’ hunches derive from an individual’s pattern recognition, memories, and experience. Since hunches are heuristic, rather than analytical, in nature, they are based on all of our experiences, not only those learned and practiced. As such, hunches may be biased by experiences and personal morals, which inevitably affect their accuracy.” (footnote omitted)).

154. *Johnson*, 129 S. Ct. at 786.

155. *Id.* at 786; *Maryland v. Wilson*, 519 U.S. 408, 412 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977).

156. *Ybarra v. Illinois*, 444 U.S. 85, 88–89 (1979).

157. *Id.* at 93–94.

or the bus stop also present a police officer with a uniquely dangerous set of circumstances? At the time *Terry* was decided, answering such questions in the affirmative would be an enormous stretch of proper police authority. Now that *Johnson* has solidified the expanded authority of police officers to include individuals who are suspected of no criminal wrongdoing whatsoever, examining these other settings seems like a natural progression given the Supreme Court's evolution of continually expanding police power.

### 3. *Likelihood that the Supreme Court Will Stop at Johnson*

As previously noted, *Johnson* did not adopt the automatic companion rule. The Court, however, did not explicitly reject it either. Is it possible that *Johnson* is just an intermediate step laying the framework for the adoption of this considerably more invasive rule? Given the fact that the primary focus of *Johnson* centered on the question of when a seizure ends and when a consensual encounter begins, this appears to be at least a possibility. With the potential uncertainty surrounding what factors are involved in determining if a police officer had a reasonable suspicion that a passenger was armed and dangerous, the next step would be to conclude that, as a practical matter, it would be safer to allow police to search anyone seized in a routine traffic stop.

Fortunately, however, little else in *Johnson* or previous cases indicates the Supreme Court would be willing to adopt such a rule. Even in this latest expansion of police authority, the Court made it clear that pat-downs must be based on a reasonable suspicion of individual persons. This is distinct from the level of guilt-by-association involved with the automatic companion rule.<sup>158</sup>

Further, even those advocating the automatic companion rule do so only in situations where there is probable cause for the driver's arrest.<sup>159</sup> The situation in *Johnson* was an expansion of police authority to situations where the only suspected wrongdoing of anyone in the vehicle was a minor traffic violation. While there is still a concern for guilt-by-association in situations like *Johnson*, there does appear to be a discernable difference when a police officer is investigating a scene where an arrest has been made versus a scene where only a minor traffic violation has taken place.

---

158. George M. Dery III, *Improbable Cause: The Court's Purposeful Evasion of a Traditional Fourth Amendment Protection in Wyoming v. Houghton*, 50 CASE W. RES. L. REV. 547, 549 (2000) ("[P]recedent promoting individual privacy against the government's assumption of guilt by association was dismissed as involving 'traumatic consequences' that simply 'are not to be expected' by searches of a car.").

159. Glandon, *supra* note 2, at 1284.

Under *Johnson*, the implication that a pat-down is merely yet another de minimis intrusion into the personal liberty of passengers is the strongest indication that police power may be further broadened at some point in the future. When future situations arise involving the authority of police officers to conduct *Terry* stop-and-frisks, courts will now have precedent indicating the pat-down involved is a minimal intrusion into an individual's right to privacy. There is nothing to indicate that *Johnson* ended the thirty-year trend of reducing what was once considered a major intrusion to nothing more than a minimal inconvenience.

At the very least, a line needs to be drawn indicating the expansion of police authority has reached its limit with regard to the search and seizure of individuals during traffic stops. Ideally the Supreme Court would reanalyze the incremental steps it has taken and realize that it has gone far beyond what was allowable under the Fourth Amendment and *Terry*. In order to properly apply the Fourth Amendment and the *Terry* stop-and-frisk test, the Supreme Court should have recognized the type of seizure endured by passengers during a routine traffic stop as distinctly different from a *Terry* stop. *Brendlin* correctly held that passengers are seized along with drivers. However, because the basis for the seizure of the passenger is different than the basis for the driver, the Court should have examined more deeply the governmental interest against an individual's privacy.

Had the Supreme Court done this, it would have confronted its own precedent in *Terry*, which made clear that a frisk is a major intrusion into an individual's personal liberty.<sup>160</sup> Further, the Court would have had to explain how its reasoning was not directly opposed to *Brown v. Texas*. The question before the Court each time was whether the balance should favor police protection or individual privacy rights when an individual was suspected of no wrongdoing. *Brown* made clear that the balance must shift towards individual privacy rights in situations where an individual is not suspected of being involved in any criminal activity. *Johnson*, on the other hand, determined just the opposite to be true. Reconciling these two differing viewpoints is necessary if private citizens are going to understand their rights when encountering police officers in everyday situations.

---

160. Notably, the Respondent's brief lacked any arguments relating to the seriousness of the intrusion or the fact that the passenger was not suspected of any criminal activity. See Brief for Respondent, *Arizona v. Johnson*, 129 S. Ct. 781 (2008) (No. 07-1122). While the Court partially analyzed this question anyway, it did not explain its reasoning that *Wilson* somehow extended *Mimms* beyond merely ordering an individual out of the car. See *Johnson*, 129 S. Ct. at 787. Further, the Court did not address its implication that being submitted to a pat-down was just another de minimis intrusion into personal liberty. See *id.* at 787-88. Most importantly, such an argument by the Respondent might have forced the Court to conduct the proper balancing test called for by *Terry*.

Subjecting a person who is not suspected of any crime and did nothing to cause their own seizure is beyond what *Terry* would have found acceptable. Further, in reanalyzing the situation, the Court could very well have realized that once an individual has exited the vehicle it is difficult to distinguish this situation from an on-the-street encounter. A proper analysis of its own precedent along with a recognition of passengers' unique situation would allow the Court to conclude *Johnson* involved an improper use of police authority.

#### IV. CONCLUSION

*Johnson* is an unfortunate continuation of a thirty-year trend of individuals in private vehicles losing important Fourth Amendment rights in the name of police officer safety. In an opinion that spent little time addressing the importance of the right to be free from unreasonable searches and seizures, the most significant result of *Johnson* appears to be an official recognition that, in certain circumstances, police officers can now frisk private citizens who are not suspected of any wrongdoing. It is difficult to imagine this was a result the Supreme Court envisioned when it decided *Terry*.

Nevertheless, average Americans in an everyday setting now may be physically searched by police officers even though they are not suspected of criminal activity. When *Terry* was decided, the primary concern of the Supreme Court was whether a police officer required probable cause for an arrest before frisking an individual.<sup>161</sup> *Terry* clarified that, although probable cause for arrest is not required, a reasonable suspicion of criminal activity is required for a lawful frisk.<sup>162</sup> *Johnson* has taken the precarious step of now allowing these searches based on a far less demanding test. While it may be difficult to believe the Supreme Court would go any further than it has in *Johnson*, it may have been equally unbelievable to think a decision like *Johnson* would be allowed in the immediate aftermath of *Terry*.

---

161. *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

162. *Id.* at 30–31.