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

INTRODUCTION

If police officers stop a vehicle without probable cause, the vehicle has been illegally seized, and the driver can invoke the

exclusionary rule to have all incriminating evidence found in the vehicle suppressed as the fruit of the driver's illegal seizure. The fact that the driver has "standing"[1] to challenge the illegal seizure and subsequent vehicle search is well established in case law and is no longer questioned. However, the same cannot be said of a passenger.

Passenger "standing" to challenge vehicle seizures that are initially illegal presents a surprisingly under-analyzed question, both in academic literature and in case law.[2] This Comment will examine this important but overlooked issue by analyzing the current unreflective[3] method of determining passenger "standing" used by the lower courts. This Comment proposes a different method of analyzing passenger "standing," and gives examples of potential arguments under the proposed theory for both the passenger and the prosecution in a series of case tests and hypothetical situations. This Comment seeks to both highlight and eliminate the disparity between the current scope of passengers' rights in an arbitrary traffic stop and the doctrine of Fourth Amendment "standing."

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[1] This Comment places quotation marks around the term "standing" because the United States Supreme Court no longer recognizes the term "standing" in a Fourth Amendment context. The Supreme Court has said that Fourth Amendment "standing" is not actually standing, but rather a "rigorous application of the principle that Fourth Amendment rights are personal." Rakas v. Illinois, 439 U.S. 128, 139 (1978); *see also infra* Part I.B. The Court admits that the two concepts are similar, but insists that Fourth Amendment "standing" is not actual standing, and is therefore not the proper term to use in analyses of the Fourth Amendment. *Id.* The lower courts, however, still use "standing" in the Fourth Amendment context, and this Comment refers to their use of "standing" in quotation marks to illustrate the fact that the lower courts are using a term that the Supreme Court has said is no longer applicable to the Fourth Amendment. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 87 (1998) ("The Minnesota courts analyzed whether respondents had a legitimate expectation of privacy under the rubric of "standing" doctrine, an analysis that this Court expressly rejected 20 years ago in *Rakas*.").

[2] *See* Brendlin v. California, 551 U.S. 249 (2007). *See generally* Dante P. Trevisani, Note, *Passenger Standing to Challenge Searches and Seizures: A Distinction Without A Constitutional Difference*, 61 FLA. L. REV. 329 (2009).

[3] See *United States v. Bristol*, one of the most recent passenger "standing" cases, which devotes a mere sentence to the analysis of whether the illegal vehicle seizure warranted suppression of incriminating evidence for the seized passenger. United States v. Bristol, 819 F. Supp. 2d 135, 144-45 (E.D.N.Y. 2011) ("Because the vehicle stop in this case was impermissible, the Officers' search of Bristol's person and the subsequent seizure of the firearm are tainted as fruit of the poisonous tree.").

Fourth Amendment rights are personal rights, and a party can only assert a violation of his own Fourth Amendment rights—which the courts call "standing."[4] In determining whether passengers have standing to allege a violation of their Fourth Amendment rights in an illegal traffic stop, the court must first test the "factual nexus" between the violation of the passenger's Fourth Amendment rights and the discovery of the evidence.[5] The courts currently see the link between the initial stop and the subsequent discovery of the evidence as "self-evident" and do not engage in a thorough analysis of the question of personal rights on the unreflective assumption that the seizure of an automobile is synonymous with the seizure of the people within the automobile.[6] The doctrine of "standing" shows that this is wrong.

Under the Supreme Court's view of Fourth Amendment rights as "personal," vehicle passengers should lack standing to assert any violations of Fourth Amendment rights, besides the search and seizure of their person and their property.[7] The current method of determining passenger standing contends that the causal link between illegal seizure of a vehicle and discovery of evidence is "self-evident."[8] This method holds that what amounts to a "bubble"[9] of causation encloses a vehicle and links the illegality of the stop to the Fourth Amendment rights of all of the occupants. The current method, which this Comment calls the "Bubble Theory," fails to require a Fourth Amendment analysis of personal rights and thereby violates the doctrine of "standing." By failing to perform the analysis of personal rights as they would in every other Fourth Amendment context, courts single out an illegal vehicle seizure that includes passengers as a situation deserving special exclusionary rule protection. When the exclusionary rule is broadened to include passengers whose own Fourth Amendment rights have not even been violated, crime-committing passengers are afforded a "windfall," in the form of

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[4] *See infra* Part I.B.

[5] *See infra* Part I.D.1.

[6] *Id.*

[7] *See infra* Part II.C.

[8] *See infra* Part I.D.1.

[9] United States v. Mosley, 454 F.3d 249, 251 (3d Cir. 2006) ("The metaphorical bubble of causation encapsulates the entire vehicle and links the illegality of the stop to the Fourth Amendment rights of all of the occupants.").

suppressed evidence, simply because courts assume that all evidence found in the illegal seizure of a vehicle is tainted.

The Personal Rights Approach to passenger "standing"—which this Comment suggests that courts should adopt—has two analytical prongs. First, a traffic stop involving a driver and passenger is separated into three distinct seizures: the stop of the driver, the stop of the passenger, and the stop of the vehicle.[10] If the initial stop is unlawful, each person has the right to object to his own stop as only that specific person's Fourth Amendment rights have been violated in each stop. Courts consider a car to be an extension of the driver, like a large piece of clothing, so the driver has the ability to assert the "car's rights" if they have been violated.[11] Second, courts will analyze whether the seizure of the passenger was the but-for cause of the discovery of the incriminating evidence through a counterfactual analysis: If the passenger had not been in the vehicle to be seized, would the evidence have still been discovered?[12] Evidence in the car that would still be found, regardless of the passenger's presence, should be admissible under the exclusionary rule as the incriminating evidence was not found as a result of the passenger's illegal seizure.

Part I of this Comment gives a brief description of the evolution of Fourth Amendment "standing" jurisprudence and outlines the major United States Supreme Court and federal circuit cases dealing with passengers' rights in a vehicle. Part II argues that the current method of determining whether a passenger may suppress evidence discovered after an illegal seizure of a vehicle violates the doctrine of "standing." Part III proposes that courts adopt the Personal Rights Approach, a new two-pronged test to determine passenger "standing" to challenge vehicle seizures. And Part IV offers counterarguments to the new approach.

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[10] *See infra* Part III.A.1.

[11] *Id.*

[12] *See infra* Part III.A.2.

I. BACKGROUND

A. The Exclusionary Rule

If incriminating evidence is found during a traffic stop, the vehicle occupants' goal is to make the State's case against them as weak as possible through suppression of the evidence at trial. The exclusionary rule helps make this goal possible. The exclusionary rule is a judicially created device to protect Fourth Amendment rights by deterring police misconduct.[13] The Supreme Court's chosen method of deterrence, suppression of evidence, allows the victim of an unreasonable search or seizure to suppress the evidence found as a result of that illegal search or seizure as fruits of the poisonous tree.[14] This method of deterrence essentially returns the State to the position it would have been in had the violation of Fourth Amendment rights never happened by suppressing all evidence that flows from the illegal action.

It is important to note, though, that the exclusionary rule is designed to provide police deterrence. Its purpose is not to vindicate a particular defendant's rights by providing a personal remedy, although that does happen as a by-product of the Court's chosen manner of deterrence.[15] The purpose of the exclusionary rule is to deter future violations of Fourth Amendment rights.[16] The evidence suppressed in an individual case is only suppressed

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[13] United States v. Calandra, 414 U.S. 338, 348 (1974) ("[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").

[14] *See* Herring v. United States, 555 U.S. 135, 143 (2009) ("[T]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights." (quoting Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965) (internal quotation marks omitted))).

[15] *See id.* at 141 ("[T]he exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence.'" (quoting United States v. Leon, 468 U.S. 897, 909 (1984))).

[16] *Id.* ("We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future." (citations omitted)); *see also Calandra*, 414 U.S. at 347 ("The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." (quoting Elkins v. United States, 364 U.S. 206, 217 (1960))).

as a consequence of deterring future violations, not because it is the defendant's "right."[17] In order to reap the benefits of suppression as a by-product of deterring police-misconduct, the defendant must have "standing" to object.[18]

B. Fourth Amendment "Standing" Jurisprudence

The Supreme Court once held that a person who has "standing" to object to a search must "have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."[19] This early definition of "standing" meant that a person had to claim and prove an ownership interest in the evidence seized or ownership of the thing being searched (e.g., house, car, etc.) in order to have an expectation of privacy.[20] "[T]he Fourth Amendment's protection against unreasonable searches is predicated on the invasion by the government of a person's reasonable expectation of privacy," which is why an expectation of privacy is also necessary to have standing in the Fourth Amendment context.[21]

Following the Court's decision in *Jones v. United States*, "standing" became automatic. *Jones* held that the defendant is not obligated to establish that his own Fourth Amendment rights have been violated in cases where the defendant is charged with possession of seized evidence, but only that the search and seizure of the evidence was unconstitutional.[22] However, the Court later overturned the concept of automatic standing, holding instead that defendants charged with crimes of possession "may only

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[17] *Leon*, 468 U.S. at 906 ("[T]he Fourth Amendment 'has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.'" (quoting Stone v. Powell, 428 U.S. 465, 486 (1976))).

[18] *See Calandra*, 414 U.S. at 348 ("[S]tanding to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search.").

[19] Jones v. United States, 362 U.S. 257, 261 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

[20] *Id.*

[21] United States v. Mosley, 454 F.3d 249, 253 (3d Cir. 2006).

[22] *Jones*, 362 U.S. at 261-62.

claim the benefits of the exclusionary rule if their *own* Fourth Amendment rights have in fact been violated."[23]

According to the Supreme Court in *Rakas v. Illinois*, the doctrine of "standing" in the context of the Fourth Amendment is met by focusing on "the extent of a particular defendant's rights under the Fourth Amendment."[24] The *Rakas* Court further stipulated that the inquiry under "standing" is the same as a "[r]igorous application" of the principle that Fourth Amendment rights are personal.[25] Moreover, by concluding that "Fourth Amendment rights are personal rights . . . which may not be vicariously asserted," the Court resolved the issue of whether an individual has the right to object to a search or seizure, regardless of categorizing it as "standing" analysis.[26]

C. Passenger "Standing" to Challenge Searches and Seizures

Two United States Supreme Court decisions define Fourth Amendment "standing" as it relates to vehicle passengers. *Rakas v. Illinois* discusses passenger standing to challenge searches while *Brendlin v. California*[27] explores passenger standing to challenge seizures.

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[23] *Salvucci*, 448 U.S. at 85 (emphasis added). The holding in *Jones* contains two parts, one of which confers the now-overruled notion of "automatic standing." *Jones*, 362 U.S. at 261-62. The *Jones* Court also held that "when . . . possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence." Simmons v. United States, 390 U.S. 377, 390 (1968) (discussing *Jones*, 362 U.S. 257). This part of the *Jones* holding is still valid law and is recognized by courts today. It was in fact strengthened in *Simmons v. United States*, where the Court held that a defendant's testimony in support of a motion to suppress evidence on Fourth Amendment grounds may not be admitted against him at trial to help the Government prove his guilt, unless the defendant makes no objection. *Id.* at 394. The *Simmons* holding applies to all crimes, not just charges of possession, as in *Jones*. *See id.* at 391-93.

[24] Rakas v. Illinois, 439 U.S. 128, 139 (1978).

[25] *Id.* Since the *Rakas* Court admitted that the "personal rights" analysis will not yield different results than a "standing" analysis and called the two concepts "theoretically separate, but invariably intertwined," "standing" will be used interchangeably with the "personal rights" analysis in this Comment. *Id.*

[26] *Id.* at 133-34 (quoting Alderman v. United States, 394 U.S. 165, 174 (1969)) (internal quotation marks omitted).

[27] 551 U.S. 249 (2007).

1. The *Rakas* Decision

In *Rakas*, officers pulled over a vehicle that matched the description they had received for a getaway car in a robbery.[28] In a search of the vehicle, the officers found a sawed-off rifle under the front passenger seat and a box of rifle shells in the locked glove compartment.[29] The driver and passengers were arrested for the robbery.[30] At trial, the passengers moved to suppress the rifle and shells by challenging the search of the vehicle as a violation of their Fourth Amendment rights,[31] but the motion was denied.[32] On appeal, Justice Rehnquist, writing for the 5-4 majority, framed the issue as whether the challenged search or seizure violated the Fourth Amendment rights of a defendant attempting to exclude the evidence obtained during the challenged search or seizure.[33] The Court stated that "[this] inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect."[34] After engaging in that analysis, the *Rakas* Court issued the bright-line rule that "mere" passengers have no expectation of privacy in a vehicle and therefore lack "standing" to challenge a vehicle search following an initially legal traffic stop.[35]

2. The *Brendlin* Decision

In *Brendlin v. California*,[36] police officers stopped a vehicle to check its registration without reasonable suspicion that the vehicle was being operated unlawfully.[37] The officers recognized Brendlin, a passenger, as a parole violator, arrested him, and

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[28] *Rakas*, 439 U.S. at 130.

[29] *Id.*

[30] *Id.*

[31] *Id.* The passengers did not attempt to challenge the seizure of the vehicle, so the *Rakas* Court did not have to address probable cause or the validity of the initial traffic stop. *Id.*

[32] *Id.* at 131. The trial court first denied the motion, citing the defendants' lack of "standing" to object to the constitutionality of the search. The Illinois appellate court affirmed, and the state supreme court declined to hear the case. *Id.* at 131-32.

[33] *Id.* at 140.

[34] *Id.*

[35] *Id.* at 131, 148-49.

[36] 551 U.S. 249 (2007). *See* discussion *infra* Part II.A.

[37] *Id.* at 252.

searched his person, the vehicle, and the driver.[38] The officers found methamphetamine paraphernalia in the pockets of both Brendlin and the driver, as well as in the car during the search.[39] At trial, Brendlin moved to suppress the paraphernalia found in the search of the car and his person as the fruit of an unconstitutional seizure[40] because the officers lacked probable cause or reasonable suspicion to stop the automobile.[41] On appeal, the U.S. Supreme Court framed the issue as "whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself."[42] The Court found only that "Brendlin was seized from the moment [the driver's] car came to a halt on the side of the road" and that it was error to deny Brendlin's motion to suppress because he was not seized until the formal arrest.[43] The *Brendlin* decision gives passengers "standing" to challenge seizures but leaves state courts to consider whether "suppression turns on any other issue."[44]

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[38] *Id.*

[39] *Id.*

[40] Brendlin did not claim that the search of the automobile was unconstitutional, so the Court did not analyze this issue under *Rakas*. *Id.* at 253.

[41] *Id.* The trial court denied this motion. The California Court of Appeal reversed, holding that Brendlin was unlawfully seized by the traffic stop. *Id.* The California Supreme Court reversed the appellate court, finding that Brendlin was not seized until he was formally arrested. *Id.* at 253-54.

[42] *Id.* at 256-57 (quoting Florida v. Bostick, 501 U.S. 429, 436 (1991)). The Court used the objective *Mendenhall* test to determine whether the passenger was seized, which views all the circumstances surrounding an incident to decide whether a reasonable person would have believed that he was not free to leave. *Id.* at 255.

[43] *Id.* at 263.

[44] *Id.*

D. The Conventional Wisdom Interpretation of Passenger "Standing" Used by the Lower Courts[45]

The Supreme Court has established a basic framework for analyzing passenger "standing" with the *Rakas* and *Brendlin* decisions, but the lower courts are left to interpret the nuances of that framework and apply it to specific fact patterns.

1. Vehicle Seizure That Is Illegal at the Outset

An illegal vehicle seizure occurs when a law enforcement officer stops an automobile without reasonable suspicion of any criminal activity, regardless of whether the officer believed there was reasonable suspicion at the time of the stop.[46] The conventional wisdom of the circuit courts[47] is that the "dispositive legal issue" in determining passenger standing in an initially illegal vehicle seizure case is "the causal relationship between the traffic stop and the discovery of the evidence: whether the evidence found in the car was 'fruit' of the illegal stop."[48] The Third Circuit sees the causal relationship as "self-evident,"[49] which it uses as the basis for what this Comment calls the "Bubble Theory," in which a "metaphorical bubble of causation encapsulates the entire vehicle and links the illegality of the stop

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[45] The Third Circuit, in *United States v. Mosley*, is the only lower court that offers a thorough explanation for its decisions regarding passenger "standing." The rest of the circuits are in accord with the *Mosley* court but do not enumerate the steps that they take to reach their decisions. *See* United States v. Mosley, 454 F.3d 249, 251 (3d Cir. 2006) ("In so holding, we join all of our sister circuits that have directly faced this issue."). This Comment will refer to the *Mosley* court's "Bubble Theory" as being reflective of the other lower courts' method of analysis, because the *Mosley* court's opinion represents of the unspoken analysis of the rest of the circuits.

[46] *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) ("Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.").

[47] *See Mosley*, 454 F.3d at 254 ("The 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").

[48] *Id.* at 253.

[49] *Id.* at 266 ("[T]he dominant view in the circuits is that the causal nexus between the traffic stop and the discovery of evidence is self-evidently sufficient to support suppression.").

to the Fourth Amendment rights of all of the occupants."[50] The "Bubble Theory" can be broken into two components, which this Comment calls "unitary seizure" and a "post hoc"[51] method of determining causation.

a. Unitary Seizure

An officer's act of pulling over a vehicle that holds a driver and one or more passengers is conventionally seen as a single action.[52] The *Mosley* court reasoned that "[a] police officer who pulls over a vehicle does not . . . 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."[53]

b. Post Hoc Method of Determining Causation

The *Mosley* court, putting into words what the other circuits merely assume, reasoned that a seizure of a passenger necessarily happens when a vehicle is pulled over by police and evidence is found in the vehicle after it has been pulled over.[54] The post hoc method of determining causation postulates that because the evidence cannot be found without the stop of the vehicle, and because the passenger is stopped when the vehicle is stopped, the stop of the passenger is the but-for cause of the discovery of the evidence.[55] Since the passenger's seizure is the "but-for" cause of the discovery of the evidence, the post hoc method dictates that the evidence should be suppressed.[56]

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[50] *Id.* at 251.

[51] *See id.* at 266 ("The simplest statement of the concept of but-for causation is that event A is a but-for cause of event B if event B could not happen without event A happening first.").

[52] *Id.* at 267.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] In *Mosley*, the court discusses determining causation through a counterfactual analysis of the situation but ultimately rejects that method because "whatever the utility of the . . . counterfactual analysis to fact patterns not before us, it is not the proper analytical model for the case that is before us." *Id.* at 256.

2. Reasonable Traffic Stop That Becomes an Illegal Seizure

When analyzing passenger "standing" for an initially valid traffic stop that later becomes illegal,[57] courts depart from the Bubble Theory method of analysis in favor of a strict "standing" and counterfactual causation analysis. The Sixth Circuit examines passenger "standing" in this type of situation by determining whether the illegal police action was the root cause of the discovery of the evidence.[58] To perform this analysis, the court essentially inquires: "If the passenger was not in the vehicle to be seized, would the incriminating evidence still have been found?"[59]

In *United States v. Carter*, the court acknowledged that the vehicle passenger, Carter, had standing to challenge the constitutionality of his detention by the police.[60] However, it did not necessarily follow that "the discovery and seizure of the marijuana represented 'fruit' of Mr. Carter's unlawful detention"[61] because Carter's unlawful detention was "not the proximate cause of the search of the van."[62] The *Carter* method has since been discussed as being abrogated by *Brendlin v. California* in *United States v. Torres-Ramos*,[63] but the *Torres-Ramos* court misread *Brendlin*, which stands for a much narrower proposition. *Brendlin* established the right of vehicle passengers to object to their

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[57] This type of situation occurs if the suspect is detained for an unreasonable amount of time or if the police exceed the scope of search allowed. *See, e.g.*, Illinois v. Caballes, 543 U.S. 405, 407-08 (2005).

[58] *See* United States v. Carter, 14 F.3d 1150, 1154 (6th Cir. 1994), *abrogation recognized by* United States v. Torres-Ramos, 536 F.3d 542 (6th Cir. 2008). *See also infra* notes 51-52 and accompanying text.

[59] *See id.* The *Carter* court uses the following counterfactual example involving the facts of the case:

> 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.

Id.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 1155.

[63] 536 F.3d at 549 n.5 ("[T]he Supreme Court's recent decision in *Brendlin v. California* established that all the passengers in a vehicle are seized during a traffic stop. Hence, both a driver and passengers have standing to contest their illegal detention." (citation omitted)).

seizure in an illegal traffic stop; however, the *Brendlin* Court left it to the California Supreme Court on remand to determine whether evidence found in the vehicle should be suppressed, or whether other issues—such as standing and causation—would render the evidence admissible.[64] Therefore, while recognizing that passengers have "standing" to contest an illegal vehicle seizure, the *Brendlin* decision does not bar courts from implementing the *Carter* counterfactual method.

II. ARGUMENT

A. The Supreme Court's Decision in Brendlin v. California Does Not Support the "Bubble Theory" or Preclude Application of the Personal Rights Approach

Before beginning an in-depth analysis of the lower courts' approach to determining passenger standing, the "Bubble Theory," and the Personal Rights Approach, *Brendlin v. California* must be discussed further. *Brendlin* became a landmark case when it definitively stated that vehicle passengers are seized when the vehicle is seized.[65] The Supreme Court bolstered its holding by noting that it is in accord with the view held by all of the Federal Courts of Appeals, most state courts, and treatise writers.[66] The Court then cited a specific passage from Professor Wayne LaFave's treatise, *Search and Seizure*:

> If either the stopping of the car, the length of the passenger's detention thereafter, or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car *which is their fruit*.[67]

The Court's adoption of LaFave's language might give one the impression that the Supreme Court has validated the conventional wisdom approach of the lower courts, therefore

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[64] Brendlin v. California, 551 U.S. 249, 251, 263 (2007).

[65] *Id.* at 251.

[66] *Id.* at 258-59.

[67] *Id.* at 259 (emphasis added) (quoting 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.3(e), at 194 (4th ed. 2004)) (internal quotation marks omitted).

making counterfactual analysis under the Personal Rights Approach moot, as the court in *United States v. Torres-Ramos* believed.[68] However, the *Brendlin* dictum does not preclude the Personal Rights Approach for two reasons. First, the LaFave language works in tandem with the Personal Rights Approach. Under the Personal Rights Approach, the passenger does have standing to object to his or her own constitutional violations and to "have suppressed any evidence found in the car which is their fruit."[69] The Personal Rights Approach simply tests what evidence in the car is the fruit of the passenger's seizure, rather than assuming that *all* evidence in the car is the fruit of the passenger's seizure, as the Bubble Theory does.[70]

Second, the LaFave quote is dictum, which the Supreme Court has previously held is not binding if "the point now at issue was not fully debated."[71] In *Brendlin*, the issue before the Court was whether the seizure of a passenger occurs when the vehicle in which he is riding is seized.[72] The Court specifically withheld judgment about whether a violation of a passenger's Fourth Amendment rights would warrant suppression of any evidence in the vehicle through the exclusionary rule, leaving that for the California Supreme Court to decide.[73] The issue of suppression was not fully debated in *Brendlin*; therefore, the dictum regarding it would not be controlling in a future case regarding suppression. *Brendlin* does not endorse what this Comment calls the Bubble Theory or the Personal Rights Approach; it simply states that a passenger is seized when a vehicle is seized, which is the cornerstone of both theories.

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[68] *See supra* Part I.D.2.

[69] *Brendlin*, 551 U.S. at 259 (quoting LAFAVE, *supra* note 67) (internal quotation marks omitted).

[70] United States v. Mosley, 454 F.3d 249, 266 (3d Cir. 2006).

[71] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006).

[72] *Brendlin*, 551 U.S. at 251.

[73] *Id.* at 263.

B. The Conventional Approach to Determine Passenger "Standing" to Contest an Initially Illegal Vehicle Seizure Provides Results That Are Inconsistent with Binding Precedential Decisions of the Supreme Court

An analysis of the conventional unitary seizure and post hoc approaches to determining passenger "standing" yields results inconsistent with Supreme Court precedent, as illustrated by the *Mosley* court in a *reductio ad absurdum* to highlight a flaw in the Bubble Theory.[74] If the police were to enter a parked mobile home without probable cause and seize the occupants inside to search for evidence, the homeowner and any long-term guests could object to the seizure and suppress any incriminating evidence found in the search.[75] A short-term guest, however, would not have standing to contest the seizure, and any evidence found in the search would be admissible against him.[76] If this same mobile home were being driven down the street and stopped by the police without reasonable suspicion, the short-term guest would suddenly become a vehicle passenger.[77] Under the Bubble Theory, the short-term guest (passenger) would be able to contest the seizure of the mobile home (vehicle) and suppress any evidence found in a subsequent search.[78]

This result stands in direct opposition to the Court's intention that individuals are to have more constitutional rights in their home than in their vehicle.[79] The *Mosley* court argued that the results of the *reductio ad absurdum* are justified because police illegally seize vehicles more often than they forcibly enter homes;[80] however, the United States Supreme Court generally uses this argument to support less of an expectation of privacy in the vehicle, rather than more.[81] The Court has stated that "[t]he

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[74] *See Mosley*, 454 F.3d at 259.

[75] *Id.*

[76] *Id.* (citing Minnesota v. Olson, 495 U.S. 91 (1990)).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 269.

[81] *See, e.g.*, California v. Carney, 471 U.S. 386, 392 (1985) ("Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted,

public is fully aware that it is accorded less privacy in its automobiles because of [the] compelling governmental need for regulation."[82] The *Mosley* court is not convinced that the inconsistent results of their *reductio ad absurdum* justifies adopting an approach other than the "Bubble Theory," but its failure to correct this problem cannot be reconciled with the U.S. Supreme Court's express view of the differing levels of Fourth Amendment protection for houses and automobiles.

A second example shows the illogical emphasis that the Bubble Theory places on the physical location of the passenger. Two suspects walking down the street who are halted in a single action by a police officer unquestionably cannot contest the seizure of their companion and subsequently suppress any evidence found during a search of their companion. Each person may only contest their own seizure. Under the "Bubble Theory," if the two individuals are riding in a car together on that same street, both the driver and the passenger would have "standing" to contest the seizure of the vehicle and could suppress evidence found in a subsequent search of the vehicle, in a search of the individual's own pockets, and a search of their companion's pockets. What is the difference between the two individuals standing next to each other on the street and sitting next to each other in the car? A few inches of glass and metal apparently give a third party the ability to suppress incriminating evidence based solely upon the individual's location at the time of the seizure.

C. The "Bubble Theory" of Conventional Wisdom Violates Fourth Amendment "Standing" Jurisprudence and Should Be Rejected

1. Viewing a Traffic Stop Involving a Driver and Passengers as a Unitary Seizure Does Not Conduct a Thorough Analysis of a Passenger's Personal Rights

The *Rakas* Court stipulated that the inquiry under standing is the same as a "[r]igorous application" of the principle that

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or if headlights or other safety equipment are not in proper working order." (quoting South Dakota v. Opperman, 428 U.S. 364, 368 (1976)) (internal quotation marks omitted)).

[82] *Id.*

Fourth Amendment rights are personal.[83] The conventional wisdom of the "Bubble Theory" looks at the issue through an analysis of but-for causation and merely assumes that the "personal rights" standard is met. The Bubble Theory's "self-evident" analysis does not comply with standing or a "rigorous application" of Fourth Amendment rights as personal rights that are not to be asserted vicariously.

The *Mosley* court supported its "Bubble Theory" of causation by viewing a traffic stop as a single action.[84] The court neglected, however, to give a reason as to why this "bubble" should apply specifically to people in a vehicle. If a police officer detained a group of people walking together on the sidewalk, each person in the group would unquestionably have the right to contest his own seizure, but no one else's.[85] In the setting of a house, an overnight guest has standing to challenge a violation of his Fourth Amendment rights, but one who is merely present with the consent of the homeowner does not.[86] Thus, the unitary seizure component of the "bubble theory" allows greater Fourth Amendment protections to an automobile passenger than a houseguest or pedestrian, even though the Court has expressly stated that persons in vehicles have less of an expectation of privacy.[87]

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[83] Rakas v. Illinois, 439 U.S. 128, 139 (1978). Since the *Rakas* Court admitted that the "personal rights" analysis will not yield different results than a "standing" analysis and called the two concepts "theoretically separate, but invariably intertwined," "standing" will be used interchangeably with the "personal rights" analysis in this Comment. *Id.*

[84] *See supra* Part I.D.1.a.

[85] The Fourth Amendment provides that "[t]he 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." U.S. CONST., amend. IV (emphasis added). Conventional wisdom indicates that the Fourth Amendment rights of one individual cannot be invoked by that individual's walking companion. *See, e.g.,* Minnesota v. Carter, 525 U.S. 83, 88 (1998) ("The [Fourth] Amendment protects persons against unreasonable searches of "their persons [and] houses" and thus indicates that the Fourth Amendment is a personal right that must be invoked by an individual.").

[86] *See, e.g.*, *Carter*, 525 U.S. at 90.

[87] *See, e.g.*, *Rakas*, 439 U.S. at 148 (holding that vehicle occupants who do not assert a property or possessory interest in the automobile or an interest in the property seized do not have an expectation of privacy in the vehicle); *see also* Cardwell v. Lewis, 417 U.S. 583, 590 (1974) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the

2. The "Post Hoc" Method of Determining Causation Does Not Actually Determine Causation

The dominant view in the circuits is that the causal nexus between the traffic stop and the discovery of evidence is "self-evident."[88] The Third Circuit in *United States v. Mosley*, however, attempted to give a thorough analysis of the "self-evident" connection, which this Comment refers to as the "post hoc" method.[89] A simple counterfactual hypothetical shows the fallacy of the post hoc method. An officer sees a suspicious looking car drive by and decides to detain the vehicle. While stopping the suspicious vehicle, the driver applies his own brakes, and his brake lights come on. The officer's vehicle and the suspect's vehicle both come to a stop after the officer's brake lights come on. The officer then talks to the suspect and sees incriminating evidence in the car. Under the post hoc method of analysis, the officer's brake lights can be seen as the but-for cause of the discovery of the evidence. The officer's brake lights came on before he discovered the evidence, and the evidence could not have been found without the officer first stopping his car, during which time the brake lights came on; therefore, the officer's brake lights are the but-for cause of the discovery of the evidence. Common sense, however, dictates that this is not actually the case.

Counterfactual causal analysis better comports with intuition and common sense in this situation. To analyze the matter counterfactually, one can ask whether, if the officer's taillight bulb had been burned out so that the brake lights were not on when the officer stopped, the suspect still would have been stopped by the officer and the evidence still found in the vehicle. Obviously, the officer's burned out brake light would likely not prevent the officer from making the stop or finding the evidence. Thus, the illumination of the officer's brake lights is not a but-for cause of the stop of the vehicle or the discovery of the evidence. No action should be viewed as the but-for cause of discovery of evidence simply because it happens to precede the discovery of the evidence; there should be a firmer, common-sense link between

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repository of personal effects. . . . It travels public thoroughfares where its occupants and its contents are in plain view.").

[88] United States v. Mosley, 454 F.3d 249, 261 (3d Cir. 2006).

[89] *See supra* Part I.D.1.b.

the two. As shown in the hypothetical, counterfactual analysis can establish a causal link (or lack thereof), while the post hoc method suggests causal links that simply do not exist in any meaningful sense.

The *Mosley* court justified the post hoc method by viewing but-for causation as "an inference drawn from regularly observed correlation."[90] The *Mosley* court further reasoned that "[s]cience progresses by repeated testing and attempted invalidation of causal hypotheses."[91] Therefore, "[t]hose that survive the process persist" and are seen by the courts as but-for causation.[92] However, with the exception of *Mosley*, the circuits' view of the causal connection as "self-evident" is, by their own admission,[93] hardly consistent with the notion of "repeated testing" and "attempted invalidation" of causal hypotheses.[94]

D. The Conventional Wisdom "Bubble Theory" Is Analogous to the "Target Theory" Previously Rejected in Rakas

The conventional-wisdom "Bubble Theory" is analogous to the "Target Theory" that the *Rakas* Court expressly rejected in the quintessential passenger-vehicle search case.[95] The passenger-defendant in *Rakas* urged the Court to consider the earlier holding of *Jones v. United States*:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, *one against whom the search was directed*, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.[96]

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[90] *Mosley*, 454 F.3d at 266.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] Rakas v. Illinois, 439 U.S. 128, 135 (1978) ("To the extent that the language [in *Jones v. United States*] might be read more broadly, it is dictum which was impliedly repudiated in *Alderman v. United States*, and which we now expressly reject." (citation omitted)).

[96] *Id.* at 134-35 (quoting Jones v. United States, 362 U.S. 257, 261 (1960) (emphasis added), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980)).

The italicized language (emphasized by the defendant) is the basis of what the *Rakas* Court called the "target theory," in which the defendant asked the Court to broaden the *Jones* rule of "automatic standing" to anyone against whom a search was directed.[97] The Court rejected the italicized language as "merely . . . a parenthetical equivalent of the . . . phrase 'a victim of a search or seizure,'"[98] and declined to extend the "target theory."[99]

The Court rejected the "target theory" because it would confer "standing to raise vicarious Fourth Amendment claims,"[100] which is exactly what the Bubble Theory does. By blanketly extending the "bubble of causation which links a traffic stop to a subsequent search"[101] to "all occupants of the stopped vehicle"[102] without first analyzing whether the evidence found in the subsequent search is actually linked to the stop of the individual, the *Mosley* court has resurrected the "target theory" of automatic standing. The *Rakas* Court found that using the "target theory" would lead to substantial administrative burdens[103] and "a more widespread invocation of the exclusionary rule during criminal trials."[104] The *Rakas* Court attempted to prevent passengers from asserting vicarious Fourth Amendment claims by rejecting the "target theory." Because the Bubble Theory is its mirror image in the realm of vehicle seizures, courts should reject the Bubble Theory and use a different approach to determine passenger standing.

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[97] *Id.* at 135.

[98] *Id.*

[99] *Id.* at 133.

[100] *Id.* at 137.

[101] United States v. Mosley, 454 F.3d 249, 269 (3d Cir. 2006).

[102] *Id.*

[103] *Rakas*, 439 U.S. at 136-37 (citing Alderman v. United States, 394 U.S. 165, 188 n.1 (1969) (Harlan, J., concurring in part and dissenting in part)).

[104] *Id.* at 137.

III. RECOMMENDATION

A. Courts Should Adopt the "Personal Rights" Approach to Determine Passenger "Standing" to Challenge a Vehicle Seizure

Since the current method of determining whether passengers can object to vehicle seizures and invoke the exclusionary rule to suppress any evidence found in a search thereafter violates the doctrine of "standing" and allows passengers to have greater Fourth Amendment protections than the courts intended, a new method of determining passenger "standing" should be developed. Courts must engage in both a thorough examination of a passenger's personal Fourth Amendment rights and an analysis of whether a violation of the passenger's personal rights was the but-for cause of the wrong that the passenger seeks to redress.

1. Prong One: Analytic Separation[105]

The stop of a driver and passenger riding in a vehicle is traditionally thought to be one stop.[106] The courts could also view a traffic stop as three distinct stops: the stop of the driver, the stop of the passenger, and the stop of the car.[107] If the initial stop is unlawful, each person has the right to object to his or her own stop, as only that specific person's Fourth Amendment rights have been violated in each stop. Courts consider a car to be an extension of the driver, like a large piece of clothing, so the driver has the ability to assert the "car's rights," if they have been violated.[108] The driver is the only person who can object to both the illegal seizure of his person and the illegal search and seizure

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[105] In *Mosley*, the circuit court posed the question:

> Is an illegal traffic stop of a car occupied by a driver and a passenger a single constitutional violation, with two victims, each of whom can seek to suppress all fruits of that violation? Or is it *analytically separable* into two individual constitutional violations, each with one victim, each of whom may seek to suppress only the fruits of the violation of his individual right?

Mosley, 454 F.3d at 257-58 (emphasis added).

[106] *See supra* Part I.D.1.a.

[107] *See supra* note 94.

[108] *See, e.g.*, *Mosley*, 454 F.3d at 253 ("Fourth Amendment rights are personal rights, and a search of a car does not implicate the rights of non-owner passengers: the car is treated conceptually like a large piece of clothing worn by the driver.").

of the car.[109] Therefore, the driver alone can suppress evidence found in the search of the car. Evidence found in the car that incriminates the passenger in this situation could be admissible at a hearing against the passenger, but not the driver, as the passenger's Fourth Amendment rights were not violated in the search and seizure of the car. Viewing a traffic stop in this manner meshes with the *Rakas* personal-rights test and does not allow passengers to vicariously assert others' Fourth Amendment rights, as the current method does.

Support for analytic separation can be found in the Ninth Circuit case *United States v. Diaz-Castaneda*.[110] There the court found the passenger-defendant had standing to object to the stop of the vehicle in which he was riding and the request for his identification and license check since "[t]h[o]se actions were directed at [the passenger] himself, rather than [the driver] or Diaz's vehicle."[111] Even while rejecting the theory of analytic separation, the court in *Mosley* described the logic of analytic separation and proved its soundness through the following hypothetical situation[112]: Suppose a car pulls over to let out the passenger, X, who gets out and begins walking.[113] Just as the car gets back on the road, the police (without reasonable suspicion) turn on their lights to pull over the car while yelling at X to halt.[114] The police find evidence in a subsequent search of the car that incriminates both the driver and X.[115] The driver is able to suppress the evidence because the stop was illegal, but can X suppress the evidence?[116]

The court answered: "Certainly not. The two seizures are clearly separate causal events for Fourth Amendment purposes. Nor can X challenge a search of the car, no matter how illegal,

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[109] *Id.*

[110] 494 F.3d 1146, 1150 (9th Cir. 2007).

[111] *Id.*

[112] *Mosley*, 454 F.3d at 258 (noting that analytic separation "can be defended both on logical grounds and via a reductio ad absurdum"). *See also id.* at 267 ("We do not ignore the fact that the analytic separation of individual constitutional violations is a plausible logical deduction from the proposition that Fourth Amendment rights are personal.").

[113] *Id.* at 258.

[114] *Id.*

[115] *Id.*

[116] *Id.*

because he has no privacy interest in the car."[117] Imagine that X had not gotten out of the vehicle. There is no legal significance in X's change of position.[118] The court also noted that in the same way that "X's seizure on the sidewalk cannot logically or legally have been a cause of the discovery of evidence inside the car, neither can his seizure while inside the car as a passenger be a logical or legal cause of the discovery of evidence inside the car."[119]

Circuit courts conventionally reject the use of analytic separation because viewing a traffic stop as a single act "comports with the commonsense experience of everyone who has ever ridden in a car."[120] While the *Mosley* court argued against the "logical plausibility"[121] of analytic separation, it admitted that its view of a traffic stop as a unitary seizure can yield inconsistent results.[122] The circuits put erroneous faith in the commonsense of unitary seizure but ignore the logic and solid precedential footing of analytic separation. The courts must analytically separate traffic stops to conduct proper analysis of Fourth Amendment rights to ensure that each defendant is challenging a violation of his own personal rights.

2. Prong Two: Counterfactual Analysis to Determine But-For Causation

After determining whether a passenger has "standing" to object to a seizure, courts must then determine whether the evidence that the passenger seeks to suppress is the "fruit" of the illegal seizure. To determine but-for causation, some courts engage in counterfactual analysis, wherein the court examines whether the actual set of circumstances and an alternate scenario

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[117] *Id.*

[118] *Id.* at 258-59. While the change in position makes it physically impossible for the car and driver to be detained without also seizing X, "X's legal situation with respect to the car and driver remains the same: as a passenger, his privacy interest in the interior of the car is precisely what it was when he was standing on the sidewalk—zero". *Id.*

[119] *Id.* at 259.

[120] *See id.* at 267.

[121] *Id.* at 260.

[122] *Id.* (After describing a *reductio ad absurdum* in favor of analytic separation, the *Mosley* court stated that they "have set out a coherent logical argument for an analytic separation rule, and highlighted an apparently anomalous contrast between vehicle and home seizure cases that rejection of that rule might seem to entail.").

would yield the same results.[123] In dicta in *Hudson v. Michigan*, the Court engaged in a counterfactual analysis to determine whether officers' failure to knock-and-announce their presence before executing a search warrant at the suspect's residence requires suppression of all evidence found in the search.[124] In *Hudson*, the police officers had a valid search warrant but entered the suspect's home without knocking-and-announcing their presence.[125] The Court stated in dicta that the violation in this case was not the "but-for" cause of discovering the evidence and noted that "[w]hether that preliminary misstep had occurred or not, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house."[126]

The Court has advocated for using a hypothetical—or counterfactual—analysis when determining whether the taint of the initial unlawful police action can be purged.[127] In *Hudson*, the Court framed the issue as whether the police would have found the evidence had they not violated the knock-and-announce rule.[128] Applying the Court's *Hudson* counterfactual analysis to the vehicle-passenger scenario, the courts must determine whether the police could have discovered the evidence in the vehicle had the passenger not been in the vehicle to be seized, which is wholly different from the courts' current determination of whether the illegal seizure of the vehicle could have happened without the illegal seizure of the passenger.

In this scenario, imagine that the passenger is not present in the car. The police pull over a vehicle containing only the driver on a hunch and see contraband in plain view. The contraband somehow incriminates a third person—perhaps the person's name is contained on a list of drug sales or his fingerprints are on the handle of an illegal weapon. Whatever the case, the police have

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[123] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 592 (2006).

[124] *Id.*

[125] *Id.* at 588-89.

[126] *Id.* at 592 (emphasis omitted).

[127] *See, e.g.*, *id.*

[128] *Id.* Justice Scalia, writing for the majority, noted that the Court has "never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police.'" *Id.* (quoting Segura v. United States, 468 U.S. 796, 815 (1984) (internal quotation marks omitted)).

discovered evidence of a crime, and the incriminating evidence can be used against the third party, even though it cannot be used against the driver. What is the difference, then, if the third party is asleep at home or sitting next to the driver in the car? The police discover evidence that incriminates the third party either way, regardless of the third party's absence or presence in the car. A third party should not have the ability to suppress incriminating evidence based solely upon his own location at the time of the seizure. Since the issue revolves around the location of the evidence, and not the location of the passenger, a passenger should not have the ability to suppress any evidence that is not the fruit of *his own* illegal seizure.

Support can be found for adopting counterfactual analysis in an illegal vehicle seizure case through the approach that the circuits take in analyzing passenger standing in an initially legal traffic stop that becomes an illegal seizure of the occupants.[129] The circuits already utilize a counterfactual approach in this situation.[130] There is arguably no legal difference between a situation that starts out as illegal and one that becomes illegal; either way the police have violated the Fourth Amendment. The two situations should be given the same treatment in the eyes of the law. By using counterfactual analysis, the Personal Rights Approach will bring the illegal-vehicle-seizure-involving-a-passenger situation into line with other Fourth Amendment analyses.

B. Counterfactual Analysis Under the Personal Rights Approach Is a Variation of the Inevitable Discovery Exception to the Exclusionary Rule

The Supreme Court first recognized the doctrine of inevitable discovery in *Nix v. Williams*.[131] The doctrine of inevitable

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[129] *See supra* Part I.D.2.

[130] *Id.*

[131] 467 U.S. 431 (1984). *Nix* appeals decision in Williams's second murder trial. His first trial was the famous "Christian burial case," *Brewer v. Williams*, 430 U.S. 387 (1977), in which statements made by Williams about the location of a body were found to be inadmissible at trial because the information was gained as a result of an interrogation in violation of Williams's Sixth Amendment right to counsel. *Id.* at 405-06. In *Nix*, the Court decided that while the statements themselves were inadmissible, evidence regarding the body should be admissible at trial because the police and search

discovery is a type of counterfactual hypothetical situation posed by the Court (e.g., "Would the police have eventually discovered the evidence through legal means had they not first discovered the evidence by pursuing an illegal method?").[132] Traditionally, the purpose of the exclusionary rule is to disgorge police of any benefit received from an illegal action in an effort to prevent future illegal actions.[133] However, inevitable discovery exists as an exception to the exclusionary rule for situations in which the government can show, "by a 'preponderance of the evidence,' that the evidence would have been 'ultimately or inevitably' discovered by legal means. Under such circumstances, the Court believes, 'the deterrence rationale has so little basis that the evidence should be received.'"[134]

Counterfactual analysis under the Personal Rights Approach simply shifts the focus from a variation in police action to a variation in the situation that police encounter. Instead of asking, "Would the police have found the evidence through a lawful source if the illegal action had not occurred?" the Personal Rights Approach asks, "Would the police have still found the evidence if the passenger was not present in the vehicle to be illegally seized?" If the prosecution can show that the police would have found the evidence in a stop of the driver even if the passenger had not been there to be illegally seized, and the police have not exploited the seizure of the passenger to obtain the evidence, then the prosecution should be able to argue that the evidence should be admitted.

The rationale behind the traditional version of inevitable discovery also applies to the Personal Rights Approach. Inevitable discovery is recognized by courts because, while courts do not

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parties looking for the body would have eventually found it in relatively the same condition in which it was found as a result of Williams's illegally gained statements. *Nix*, 467 U.S. at 443-44.

[132] When analyzing whether evidence should be suppressed because police entered a defendant's home to execute a search warrant in violation of the knock-and-announce rule, Justice Scalia reasoned that "[w]hether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house." *Hudson*, 547 U.S. at 592.

[133] *See supra* Part I.A.

[134] THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION § 13.5, at 644-45 (2008) (footnote omitted) (quoting Nix v. Williams, 467 U.S. 431, 444 (1984)).

want to put the prosecution in a "better position than it would have been in if no illegality had transpired," courts also do not want to put the prosecution in a worse position "simply because of some earlier police error or misconduct."[135] By excluding all evidence through the Bubble Theory, including that which does not derive from the illegal seizure of the passenger, the lower courts put the prosecution in a "worse position" because "the police would have obtained that evidence if no misconduct had taken place."[136]

The Supreme Court accepts that evidence must be excluded at "the high social cost of letting persons obviously guilty go unpunished for their crimes" when it is for the purpose of deterring police misconduct and protecting constitutional rights.[137] However, when evidence would have been discovered inevitably by lawful means, "the deterrence rationale has so little basis that the evidence should be received,"[138] and the Court believes it would "reject logic, experience, and common sense" to impose the "high social cost" of letting the obviously guilty go unpunished in such a situation.[139] Therefore, courts should adopt the Personal Rights Approach, which would allow for the admission of evidence that would have been found "inevitably," regardless of whether the passenger was illegally seized.

C. Application of the Personal Rights Approach

Courts fear that adopting the Personal Rights Approach would simply be the opposite of the Bubble Theory—instead of all evidence being suppressed, all evidence would be admitted against passengers.[140] However, the Personal Rights Approach provides for much more complex arguments to be made by both the

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[135] *Nix*, 467 U.S. at 443.

[136] *Id.* at 444.

[137] *Id.* at 443.

[138] *Id.* at 444.

[139] *Id.*

[140] *See, e.g.*, Brendlin v. California, 551 U.S. 249, 263 (2007) ("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. The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of 'roving patrols' that would still violate the driver's Fourth Amendment right." (footnote omitted)).

prosecution and the passenger-defendant for admission of certain evidence and suppression of certain evidence, respectively. To show how the Personal Rights Approach would work in practice, this Comment will first illustrate the different arguments to be made for admission or suppression of evidence found in a traffic stop. Then, this Comment will demonstrate the Personal Rights Approach in practice by applying it to a series of case tests and hypothetical situations for a more concrete analysis.

Under the Personal Rights Approach, the passenger-defendant could argue that any physical evidence found in the car after the illegal seizure that was in his possession or that he claims ownership of should be suppressible.[141] Analyzing the discovery of the evidence through counterfactual analysis, the trier of fact would decide whether the evidence would still have been found if the passenger and his property had not been in the vehicle to be illegally seized. If the trier of fact finds that the incriminating evidence was property that the passenger would have with him if he was not in the vehicle, then the evidence is likely suppressible. The passenger could also argue for the suppression of the police officer's observations after the illegal traffic stop.[142] The police officer's observation of the passenger near the incriminating evidence is a key piece of evidence that would be missing if the passenger was not in the car to be illegally seized. During oral arguments in *Tolentino v. New York*,[143] Justice Scalia opined:

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[141] Passenger-defendants can assert a claim of ownership for incriminating evidence at a suppression hearing without fear that their admission will be used against them at trial to prove guilt. However, some courts will allow this evidence to be used to impeach passenger-defendants if they ultimately take the stand at trial and deny possession. *See supra* note 23 (discussing this principle as analyzed in Simmons v. United States, 390 U.S. 377 (1968)). And, a number of lower courts have held that a defendant's testimony of ownership of incriminating evidence at a suppression hearing is admissible at trial for impeachment purposes. *See* United States v. Salvucci, 448 U.S. 83, 93 n.8 (1980). The Supreme Court, however, has expressly reserved judgment regarding this impeachment exception. *See id.* at 93-94.

[142] In a recent oral argument before the Supreme Court, Justice Alito reasoned that while knowledge of criminal behavior gained by police through an illegal traffic stop cannot be suppressed, defendants can "suppress observations by the police on the scene that flow directly from the illegal stop." Transcript of Oral Argument at 21, Tolentino v. New York, 131 S. Ct. 1387 (2011) (No. 09-11556).

[143] 131 S. Ct. 1387 (2011) (per curiam), *dismissing cert. to* 131 S. Ct. 595 (2010). In *Tolentino*, the petitioner was stopped by police who used petitioner's name to run a search of Department of Motor Vehicle (DMV) records and discovered that the

> [I]t gets you nowhere to say John Smith. You have to say John Smith was driving the car. It's the driving of the car that you want suppressed. . . . [Y]ou can say John Smith . . . all you like at court. It's . . . not going to get a conviction.
>
> But when you say John Smith was driving the car, then you are eliciting testimony from the officer *concerning information he would not have had but for the stop*, that John Smith was driving the car . . . [.][144]

In the same vein, without the observation of the passenger near the incriminating evidence (during which the passenger was illegally seized), there is arguably no link between the passenger and the incriminating evidence. The incriminating evidence would likely be admissible but is useless without an admissible way to link the defendant to it, and the defendant-passenger would likely not be tried because of the lack of admissible evidence.

If, however, any of the tangible evidence that the trier of fact determines would have been left in the vehicle by the passenger contained physical evidence, DNA, or fingerprints that implicated the passenger, then the prosecution could argue that the evidence should be admissible. This leaves the prosecution room to argue that evidence found in the vehicle should be admissible when it would have both implicated the passenger—independent of the police officer's observation of the passenger near the evidence—and been left in the vehicle to be found—regardless of the passenger's presence. The prosecution could also argue that police observations made *before* the illegal stop should be admissible. For instance, if a police officer observed the passenger give something to the driver before entering the vehicle, and the officer learned

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petitioner's driver's license had been suspended. People v. Tolentino, 926 N.E.2d 1212, 1213-14 (N.Y. 2010). The police arrested the petitioner, who challenged the initial vehicle seizure as illegal and argued that the evidence gained from the DMV records through a search based on the petitioner's name should be suppressed as "fruit of the poisonous tree." *Id.* The case was appealed up to the U.S. Supreme Court, which heard oral arguments from counsel for the petitioner and the State of New York. After hearing oral argument, the Justices dismissed the writ of certiorari as being improvidently granted because the initial traffic stop may have, in fact, been legal, as the officer claimed to have stopped the petitioner because his music was too loud, in violation of a New York ordinance. *See* Transcript of Oral Argument, *supra* note 142, at 39-40.

[144] Transcript of Oral Argument, *supra* note 142, at 22-23 (emphasis added).

that it was illicit after a subsequent illegal seizure of the vehicle, the prosecution could argue that the officer should be able to testify about the observation at a suppression hearing because it happened before the illegal stop.[145]

1. Hypothetical Scenario

In some cases, the Personal Rights Approach would allow prosecutors to argue that evidence that would traditionally be suppressed under the conventional wisdom of the Bubble Theory should be admissible. Consider the following situation: A vehicle containing a drug buyer/user as driver and a drug dealer as passenger is illegally stopped by a police officer who did not have the requisite level of reasonable suspicion to do so. While chatting with the vehicle occupants, the police officer spots a bag of cocaine on the seat next to the driver. The passenger has just sold the cocaine to the driver, and the bag contains the passenger's fingerprints. The police officer arrests both the driver and the passenger, but the evidence is inadmissible at a trial against the driver, as the police officer's discovery of it was the fruit of an illegal seizure of the driver's vehicle. At a suppression hearing for the passenger, the judge must decide whether the bag of cocaine will be admissible.

a. Conventional Wisdom

Under the unitary seizure prong, everyone in the vehicle is illegally seized when the vehicle is illegally seized. Through the post hoc-causation analysis, it is clear that because the cocaine was found after the illegal seizure, the illegal seizure was the but-for cause of the discovery of the evidence. Under conventional wisdom, all evidence found in the car must be suppressed against all occupants of the vehicle.[146]

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[145] *See id.* at 22. At oral argument in the *Tolentino* case, Justice Kennedy asked the defendant's attorney, "If you say that you can suppress his identity from information they gained after the stop when they saw him, why couldn't they say, well, we saw this man before we stopped him?" *Id.*

[146] The analysis is the same for every illegal seizure of a vehicle containing passengers and thus will not be repeated in the rest of the case tests.

b. Personal Rights Approach

Under analytic separation—the first prong of the Personal Rights Approach—the rights of the driver, vehicle, and passenger are violated by the illegal seizure of the vehicle, and each must assert a violation of their own rights.[147] In this scenario, the passenger has only the right to object to his own seizure, not the seizure of the car or driver. Under the second prong of the Personal Rights Approach, the question of causation becomes: "Would the evidence have been found if the passenger and the passenger's property were not in the car?" In this case, the answer is "Yes." The cocaine no longer belongs to the drug dealer/passenger; therefore, if the passenger is hypothetically lifted out of the car, the bag of cocaine containing the passenger's fingerprints remains in the vehicle. Thus, the prosecution has a strong argument that the incriminating evidence should be admissible against the passenger.

Statements made by the driver or other passengers in the traffic stop are further examples of evidence that could possibly be admissible against the passenger-defendant. Consider again the hypothetical scenario, but now imagine that the bag of cocaine does not contain the passenger's fingerprints, which could stand alone as incriminating against the passenger. The police question the driver about the cocaine, and the driver says, "He [the passenger] sold it to me." The prosecution could argue at a suppression hearing that this evidence should be admissible against the passenger, as this statement would be made regardless of his presence in the vehicle. The passenger could argue that the statement was made as a direct result of his seizure or because he was there, but that would be a difficult argument to make. Common sense dictates that a person is less likely to "rat out" another person who is in their presence; therefore, hypothetically removing the passenger from the scene strengthens, rather than weakens, the chances of a statement being made against the passenger.

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[147] Like the entire conventional wisdom analysis, Prong 1 of the Personal Rights approach remains the same in every case and will not be described in the rest of the case tests.

2. *Rakas v. Illinois*[148]

The Court in *Rakas* analyzed passengers' rights only in the context of an illegal search of a vehicle.[149] It did not address whether the initial seizure of the vehicle was legal. For the purpose of this analysis, assume that the initial seizure in *Rakas* was illegal because, for instance, the tip to police about the robbers' vehicle did not come from a credible source.

In *Rakas*, the passengers did not claim an ownership interest[150] in the ammunition or the rifle, so the evidence would still be found under counterfactual analysis if the passengers and

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[148] *See supra* Part I.C.1 for a description of the facts and evidence obtained in *Rakas*.

[149] Becase both the trial petitioners and the prosecution only raised issues regarding the search of the vehicle, the Court did not analyze whether there was probable cause for the initial seizure. Rakas v. Illinois, 439 U.S. 128, 130-32 (1978).

[150] The 1968 holding of *Simmons v. United States* allows defendants to assert ownership of contraband or other incriminating evidence in order to establish standing at a suppression motion without fear that their admission will be used at trial to prove guilt. *See* Simmons v. United States, 390 U.S. 377, 389-94 (1968). While such evidence will be admissible for impeachment purposes in many lower courts, that prospect will have a limited effect on most defendants. If the motion to suppress is successful, the charges against the defendant will likely be dropped; if the motion is unsuccessful, most defendants will not testify, instead reaching a plea agreement with the prosecution or ultimately invoking their privilege against self-incrimination at trial. *Id.* at 392-94; *see also supra* note 23. If the *Rakas* defendants had claimed ownership of the rifle and shells, however, there is a good chance that the Court still would have found that they did not have a legitimate expectation of privacy to contest the search, as the Court in *Rawlings v. Kentucky* later did in a similar situation. Rawlings v. Kentucky, 448 U.S. 98, 105-06 (1980) (finding that petitioner who claimed ownership of drugs in an acquaintance's purse lacked standing to challenge a search of the purse). The *Rawlings* Court also noted that:

> While petitioner's ownership of the drugs is undoubtedly one fact to be considered in this case, *Rakas* emphatically rejected the notion that "arcane" concepts of property law ought to control the ability to claim the protections of the Fourth Amendment. Had petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy.

Id. (citations omitted). Had the passengers claimed ownership, or even temporary use of the firearms, such that the firearms would be in their possession were they not in the vehicle under a counterfactual analysis, the passengers would have a strong argument for suppression under the Personal Rights approach, effectively eliminating the more stringent *Rawlings* requirement of a legitimate expectation of privacy in order to have "standing" to suppress evidence.

their property had not been in the vehicle to be illegally seized.[151] However, regardless of whether the rifle and ammunition would be found, the key piece of evidence that would be missing if the passengers were not in the car is the police officers' observation of the passengers nearness to the incriminating evidence. Without that observation (during which the passengers were illegally seized), there is no obvious link between the passengers and the incriminating evidence. Because the police observation could not have been made but-for the illegal seizure of the passengers, it should be suppressed. Consequently, the prosecution would likely choose not to prosecute the passenger-defendants—admission of the rifle and shells into evidence does the prosecution no good if there is no admissible way to link the passengers to the rifle and shells.

If, however, the rifle or shells had contained physical evidence, DNA or fingerprints, which would link the passengers to the rifle and shells without the police observation, then the prosecution could argue that the rifle and shells should be admissible. The physical evidence contained on the rifles and shells is incriminating evidence that would still be found, regardless of the passengers' presence in the vehicle.

3. *Brendlin v. California*[152]

In *Brendlin*, the initial stop of the vehicle was illegal.[153] *Brendlin* stands specifically for the acknowledgment that passengers have the right to object to their seizure when a vehicle is illegally seized. However, the *Brendlin* Court remanded the matter to the state court and did not analyze what evidence should be suppressed.[154] For this analysis, assume that there was no outstanding arrest warrant to dissipate the taint.

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[151] The evidence would still be found unless the passengers were claiming that they were temporarily using (but did not own) the firearms; therefore, the firearms would be in the passengers' possessions if they were counterfactually not in the vehicle. This determination would ultimately be made by the judge at the passengers' suppression hearings.

[152] *See supra* Part I.C.2 for a full description of the facts of *Brendlin*.

[153] *See* Brendlin v. California, 551 U.S. 249, 256 (2007) ("The State concedes that the police had no adequate justification to pull the car over.").

[154] The California Supreme Court did not analyze what specific evidence should be suppressed because it found that "the existence of [Brendlin's] outstanding arrest

Under the prong of counterfactual analysis of the Personal Rights Approach, there is no question that the orange syringe cap found in Brendlin's pocket would not have been found, but-for the illegal seizure of his person, and Brendlin has a strong argument for suppression. The other evidence requires a deeper inquiry: Would the tubing, scale, and other things used to produce methamphetamine that were found when the police searched the car have been found if Brendlin had not been in the vehicle to be seized? If Brendlin claimed to be the owner of the materials, the materials would likely be with Brendlin—outside of the seized vehicle. Therefore, Brendlin can argue that the materials should be suppressed.

At first glance it would appear that the syringes and bag of "green leafy substance" found in a search of the driver's person would be admissible and helpful in building a case against Brendlin, as it would be found regardless of Brendlin's presence in the vehicle.[155] But just as in the *Rakas* analysis, unless the syringes or bag contain something that incriminates Brendlin (such as his name, DNA, or fingerprints), the only thing that links Brendlin to the syringes and bag is the police officer's observation of his presence in the vehicle. Without something other than the police officer's observation of Brendlin near the incriminating evidence, the prosecution has no admissible way to connect Brendlin to the incriminating evidence. Just as in the *Rakas* analysis, the prosecution would likely choose not to prosecute Brendlin, as the admissible incriminating evidence can only be a valuable tool with an admissible way to connect it to the defendant.

4. *United States v. Mosley*

Mosley was a passenger riding in the back of a car who was stopped by police acting on an anonymous tip.[156] The police saw a gun sitting on the seat next to Mosley, a convicted felon.[157] The

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warrant—which was discovered after the unlawful traffic stop but before the search of his person or the vehicle—dissipated the taint of the illegal seizure and rendered suppression of the evidence seized unnecessary." People v. Brendlin, 195 P.3d 1074, 1077 (Cal. 2008) (emphasis omitted).

[155] *See supra* Part III.A.2.

[156] United States v. Mosley, 454 F.3d 249, 251 (3d Cir. 2006).

[157] *Id.*

police then arrested him.[158] Applying the Personal Rights Approach, the determinative question is: Would the gun have been found in the seizure of the car had Mosley not been in the car? The answer is not so clear. If Mosley *and his property* were not in the vehicle at the time that the vehicle was seized, the incriminating evidence might not have been found, though this would be a factual matter for the court to determine at Mosley's suppression hearing.[159] Also, just as in the *Rakas* and *Brendlin* hypothetical situations, a key piece of evidence (the officer's observation of Mosley near the gun) is lost if Mosley is not in the vehicle to be seized. Under the Personal Rights Approach, the discovery of the incriminating evidence could flow directly from the seizure of Mosley; therefore, Mosley should have "standing" to object to the seizure and potentially suppress the incriminating evidence as "fruit of the poisonous tree," after a factual determination by the judge at the suppression hearing. Paradoxically, the Personal Rights Approach has the potential to yield the same results as the decision in *Mosley*, which the *Mosley* court believed to be an impossibility.[160]

IV. COUNTERARGUMENTS

A. Allowing Inclusion of Incriminating Evidence Against Passengers Found After an Illegal Traffic Stop Will Give the Police Incentive to Stop Any Vehicle Carrying Passengers to Conduct a "Free Search"

The exclusionary rule's purpose is to deter police misconduct.[161] The *Mosley* and *Brendlin* courts are troubled by the

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[158] *Id.*

[159] There is always the possibility that Mosley is not the owner of the gun, but that he simply used it or had it in his possession at some point in time, which would still garner him a felon-in-possession charge, if proven. *See, e.g.*,18 U.S.C. § 922(g)(1) (2006). It would be a factual determination for the court to make regarding whether or not the gun would still be in the car if Mosley was not in the car, based upon the specific details of the case.

[160] When arguing against the use of analytic separation, the *Mosley* court claimed that "decisions about . . . the application of the [Exclusionary] rule are pragmatic decisions requiring practical wisdom rather than syllogisms." *Id.* at 269.

[161] United States v. Calandra, 414 U.S. 338, 347 (1974) ("[T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . .").

possibility that denying a passenger's standing to invoke the exclusionary rule to suppress evidence discovered through an illegal seizure would give police an incentive to "run the kind of 'roving patrols' that would still violate the driver's Fourth Amendment right."[162] However, engaging in a thorough analysis of standing through the Personal Rights Approach does not mean that passengers automatically lack standing to challenge all incriminating evidence.

The opposite of the "bubble theory," where all incriminating evidence found after an illegal seizure is suppressed for everyone in the vehicle, is not that all evidence should be admissible. The Personal Rights Approach specifically excludes police observation of a passenger during an illegal seizure from possible admission at trial because the illegal seizure is unquestionably the but-for cause of the discovery of that "evidence." During a recent hearing of oral arguments before the Supreme Court, the Court voiced the opinion that suppression of police observations that flowed from an illegal seizure would remove the incentive for police to make the kinds of suspicionless stops that the *Mosley* and *Brendlin* courts are concerned about.[163]

Allowing this type of evidence to be admitted can also be rationalized by the *Hudson* Court's public policy reasoning.[164] The *Hudson* Court made a conscious decision to narrow the scope of the exclusionary rule because it is meant to be a deterrent to police misconduct, not a constitutional remedy amounting to a "get-out-of-jail-free card" for suspects.[165] The Court was especially concerned with the high cost of exclusion of evidence against law enforcement officers and society, which sometimes includes "setting the guilty free and the dangerous at large."[166] Because of

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[162] Brendlin v. California, 551 U.S. 249, 263 (2007).

[163] Transcript of Oral Argument, *supra* note 142, at 20 ("[I]f you allow the suppression of the policeman's identification of the individual driving the car[,] . . . what incentive is there to make these suspicionless stops?").

[164] *See* Hudson v. Michigan, 547 U.S. 586, 595 (2006).

[165] *Id.*

[166] *Id.* at 591; *see also* Rakas v. Illinois, 439 U.S. 128, 137 (1978) ("Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected."); United States v. Leon, 468 U.S. 897, 907-08 (1984) ("Particularly when law enforcement officers have acted in objective good

the high cost, the Court has always been cautious in expanding the exclusionary rule and calls suppression of evidence the Court's last resort, not its first impulse.[167]

Allowing this narrow portion of evidence to be admissible against passengers can be thought of as a safeguard to ensure that criminals cannot circumvent the justice system by asserting a violation of personal rights that belong to another person. In discussing whether to extend the exclusionary rule to passengers who wish to object to a vehicle search, the *Rakas* Court gave a public policy reason that is applicable to passenger seizure challenges as well:

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.[168]

B. Vacating the Current Bright-Line Rule of Passenger Standing Will Lead to Difficult and Complex Analyses of the Facts in Every Vehicle Seizure Case

The Bubble Theory *is* a "bright-line" rule, and vacating it *will* make for a more difficult and complex analysis of the facts in every vehicle seizure case. However, avoiding a more complex analysis is no reason to cling to a "bright-line" rule that allows passengers to violate the doctrine of "standing" and assert rights that they simply do not have. The *Rakas* Court addressed a similar issue when it dispensed with the "legitimately on premises test":

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faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.").

[167] *Hudson*, 547 U.S. at 591.

[168] *Rakas*, 439 U.S. at 137 (quoting Alderman v. United States, 394 U.S. 165, 174-75 (1969)) (internal quotation marks omitted).

> In abandoning "legitimately on premises" for the doctrine that we announce today, we are not forsaking a time-tested and workable rule, which has produced consistent results when applied, solely for the sake of fidelity to the values underlying the Fourth Amendment. Rather, we are *rejecting blind adherence to a phrase which at most has superficial clarity* and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment.[169]

Saying that a passenger has standing to contest a seizure without fully analyzing whether the passenger's rights have been violated does not mean that the passenger actually has standing. The simplicity of the Bubble Theory does not make it right, and courts must engage in the more complex personal rights analysis for passengers to bring it into line with the rest of Fourth Amendment "standing" jurisprudence.

CONCLUSION

The conventional wisdom method of the lower courts to determine passenger "standing" to suppress all evidence derived from an illegal traffic stop breaks with the traditional analysis of "standing" used for every other violation of the Fourth Amendment. It affords vehicle passengers a blanket right to suppress evidence that they would not have had through a Fourth Amendment violation in a comparable setting (e.g., while walking down the street or as a short-term house guest). Courts must dispense with the conventional wisdom "Bubble Theory" in favor of an approach that actually determines whether a passenger has "standing" to suppress evidence, not simply because of the passenger's presence in the car, but because of the link between the illegal seizure of the passenger and the discovery of the evidence. The Personal Rights Approach provides such an avenue. It comports with traditional Fourth Amendment analyses of "standing" and still allows vehicle passengers to challenge their own illegal seizure by arguing for the suppression of evidence that flows therefrom. While the Personal Rights Approach involves a more complex analysis than the current standard, the legal

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[169] *Id.* at 147 (emphasis added).

system has never been one to shy away from applying a more complex rule, especially when the complex rule yields just results.[170] For these reasons, courts should apply the Personal Rights Approach in deciding whether passengers may suppress evidence derived from an illegal traffic stop.

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[170] *See supra* note 169 and accompanying text.

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