

## Cruising Through Traffic Stops: Does Oregon Search & Seizure Law Place a Subject Matter Limitation on Officer Inquiries?

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The constitutional and statutory law blends into a single rule: Traffic stops should be the minimum possible intrusion on Oregon motorists, and not an excuse to begin questioning, searching or investigating that is unrelated to the traffic reason for the stop.<sup>1</sup>

INTRODUCTION

Imagine that you are driving your car at night in Oregon. Suddenly, you notice a police car following you. The police car initiates its siren and lights and pulls you over. The officer walks to your car, shines a flashlight through your window, and asks for your identifying information. The combination of the officer’s uniform, badge, holstered gun, and red-and-blue flashing squad car serve as a reminder that this officer possesses tremendous authority over you. Upon handing over your driver’s license, registration, and proof of insurance, the officer explains the reason for the stop. Unaware, your license plate light had burnt out.<sup>2</sup> The officer runs a records check and begins questioning you while he awaits the results. The officer asks about your travel destination, whether you have consumed any alcohol, and whether there is anything illegal in your car. You give

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<sup>1</sup> *State v. Carter*, 34 Or. App. 21, 32, 578 P.2d 790, 796 (1978).  
<sup>2</sup> See OR. REV. STAT. § 816.090(3) (2011) (requiring lights on registration plates).

truthful, non-incriminating responses to each question. Not satisfied, the officer continues. “What do you have in the backpack on the passenger seat?” You assure the officer that the backpack only contains articles of clothing. You wonder why the officer continues to press on matters that seem to have no relation to your broken license plate light. “May I search the backpack?”, the officer asks. “Can I think about that for a second?”, you respond. There is nothing in your interaction with the officer to give him any suspicion of criminal activity, yet the officer’s questioning feels intrusive and unnecessary. Meanwhile, the officer receives word from dispatch that your records check was uneventful and proceeds to write you a ticket for the inoperable light. As the officer returns to your car and hands you the traffic citation, he asks again for consent to search your backpack. The officer’s persistence makes you question the legality of the officer’s inquiries.

Oregon law has not produced a consistent response as to the legality of the hypothetical officer’s intrusive questioning of the motorist. In the past, Oregon law restricted law enforcement from questioning motorists about matters unrelated to the initial reason for the traffic stop unless the officer had a reasonable suspicion of criminal activity afoot. In other words, Oregon law recognized a subject matter limitation to the scope of officer questioning during traffic stops. Support for such a limitation appeared in statutory law as well as in federal and state case law.<sup>3</sup> The purpose of the subject matter limitation was to prevent law enforcement from using routine traffic stops to shoehorn broader criminal investigations.<sup>4</sup>

However, the enactment in 1997 of ORS 136.432, Oregon’s statutory exclusionary rule, created doubt as to the continuing validity of a subject matter limitation. The exclusionary rule spawned a line of Oregon cases examining the Oregon Constitution for support of a subject matter limitation for traffic stops. When the Oregon Court of Appeals announced its decision in *State v. Gomes* in 2010, following *State v. Rodgers*, the court did not interpret the Oregon Constitution to contain a subject matter limitation. Nonetheless, current Oregon

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<sup>3</sup> For examples of Oregon’s statutory support for a subject matter limitation, see *infra* notes 16–17. For cases concluding that the Oregon Constitution recognizes a subject matter limitation, see *infra* note 12. For a discussion of *Terry v. Ohio*, a U.S. Supreme Court case that supports a constitutionally recognized subject matter limitation, see *infra* Part V.A.1.

<sup>4</sup> See *Carter*, 34 Or. App. at 32, 578 P.2d at 796.

statutes still prescribe a subject matter limitation to officer conduct during traffic stops.

The apparent contradiction between Oregon statutory law and modern Oregon case law regarding a subject matter limitation confuses citizens and police officers alike. On one hand, ORS 131.615 and ORS 810.410, Oregon's subject matter limitation statutes, clearly restrict the type of questions officers may ask during routine traffic stops.<sup>5</sup> For citizens, the language of the subject matter limitation statutes appears to grant motorists the right to be free from baseless, invasive questioning by overreaching police officers. For police officers, the subject matter limitation statutes provide some guidance as to the propriety and legality of officer questioning during traffic stops. On the other hand, Oregon's statutory exclusionary rule and modern case law do not recognize a subject matter limitation to traffic stops. As a result, evidence obtained in violation of Oregon's subject matter limitation statutes is nonetheless admissible unless it offends the U.S. or Oregon Constitutions.

This Comment will present three possible approaches to addressing the disparity between Oregon's apparent statutory subject matter limitation and Oregon case law that rejects such a limitation. Before discussing those approaches, the Comment first reviews Oregon search and seizure law. Next, the Comment examines the origins of a subject matter limitation in Oregon and summarizes its historical progression in Oregon case and statutory law before the enactment of Oregon's statutory exclusionary rule. The Comment then discusses Oregon's statutory exclusionary rule and how its enactment led Oregon courts to abandon statutory law as a basis for imposing a subject matter limitation and, instead, required courts to analyze whether article I, section 9, of the Oregon Constitution supports such a limitation. The Comment then summarizes recent case law that did not interpret the Oregon Constitution as imposing a subject matter limitation on traffic stops and explores federal cases concerning subject matter limitations and how those cases may have influenced recent Oregon case law. The Comment scrutinizes the rationales underlying the Oregon Court of Appeals decisions in *Amaya* and *Gomes* and examines some of the apparent shortcomings of those decisions.

Finally, through three perspectives, the Comment explores the implications of the disparity between current federal and Oregon state

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<sup>5</sup> See *infra* notes 16–17.

case law and the subject matter limitation statutes. From one perspective, the subject matter limitation statutes were meant to remain current law in spite of the disparity between the statutes and current case law. From another perspective, the subject matter limitation statutes should be amended to reflect modern federal and Oregon state case law. From a final perspective, the disparity between statutory and case law implies that the subject matter limitation statutes should be amended to protect motorists from intrusive officer questioning.

## I

### AN INTRODUCTION TO OREGON SEARCH AND SEIZURE LAW

Article I, section 9 of the Oregon Constitution protects people against unreasonable searches and seizures by government actors.<sup>6</sup> Over time, Oregon case law has fleshed out workable definitions for article I, section 9 searches and seizures. For example, in *State v. Owens*, the Oregon Supreme Court held that an article I, section 9 “search” occurs when a person’s privacy interests are invaded.<sup>7</sup> Further, in *State v. Ashbaugh*, the Oregon Supreme Court articulated that

[a] “seizure” of a person occurs under Article I, section 9, of the Oregon Constitution: (a) if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual’s liberty or freedom of movement; or (b) if a reasonable person under the totality of the circumstances would believe that (a) above has occurred.<sup>8</sup>

Oregon case law acknowledges that a traffic stop constitutes a seizure under the Oregon Constitution because it results in a temporary

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<sup>6</sup> Compare OR. CONST. art. I, § 9 (“No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure . . .”) with 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 . . .”).

<sup>7</sup> *State v. Owens*, 302 Or. 196, 206, 729 P.2d 524, 530 (1986).

<sup>8</sup> *State v. Ashbaugh*, 349 Or. 297, 316, 244 P.3d 360, 370 (2010). The *Ashbaugh* opinion abrogated the previous test to determine an article I, section 9 seizure from *State v. Holmes*, 311 Or. 400, 409–10, 813 P.2d 28, 34 (1991) (holding that a seizure occurs under article I, section 9 whenever a person subjectively believes that a law enforcement officer significantly has restricted or interfered with that person’s liberty or freedom of movement and such a belief is objectively reasonable under the circumstances). In *Ashbaugh*, the court did away with the subjective component of the *Holmes* test.

restraint of a person's liberty.<sup>9</sup> The lawfulness of a traffic stop depends on the nature of the stop. If the purpose of the traffic stop is a criminal investigation, the stop "must be justified by a reasonable suspicion of criminal activity."<sup>10</sup> On the other hand, if the purpose of the traffic stop is to investigate one or more traffic infractions, the officer must have probable cause to lawfully execute the stop.<sup>11</sup>

## II

### HISTORICAL LIMITATIONS TO TRAFFIC STOPS IN OREGON

The idea that law enforcement can pepper motorists with questions about anything may not seem significant. After all, the hypothetical motorist likely only suffered minor anxiety and delay as a result of the officer's intrusive questioning.<sup>12</sup> Further, officers have a duty to root out crimes and should be able to investigate them as freely as possible. However, Oregon law recognized the need to adopt safeguards for traffic stops in order to keep them from being used by officers as an excuse to execute full-blown criminal investigations.

From the 1970s until the late 1990s, Oregon courts recognized certain restrictions to officer conduct during routine traffic stops. For one, Oregon case law articulated a temporal restriction to the duration of a traffic stop. The temporal restriction was meant to prevent law enforcement from prolonging the duration of a traffic stop beyond the time reasonably required to issue a traffic citation.<sup>13</sup> Additionally, Oregon case law acknowledged a subject matter limitation to the scope of officer inquiries during a traffic stop.<sup>14</sup> In other words, Oregon law restricted law enforcement from asking motorists incriminating questions and requesting consent to search for evidence of crimes that are unrelated to the reason for the stop. The subject

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<sup>9</sup> See, e.g., *State v. Matthews*, 320 Or. 398, 402 n.1, 884 P.2d 1224, 1226 n.1 (1994) ("Stopping a vehicle and detaining its occupants is . . . a 'seizure' under Article I, section 9, of the Oregon Constitution.").

<sup>10</sup> *State v. Rodgers*, 347 Or. 610, 621, 227 P.3d 695, 702 (2010).

<sup>11</sup> *Matthews*, 320 Or. at 403, 884 P.2d at 1226.

<sup>12</sup> See *supra* pp. 2–3.

<sup>13</sup> See *State v. Carter*, 34 Or. App. 21, 32, 578 P.2d 790, 796 (1978); see also *State v. Evans*, 16 Or. App. 189, 197, 517 P.2d 1225, 1229 (1974) (holding that detention and inquiry beyond the time, place, and subject matter limits codified in ORS 131.615 constitute an invalid random intervention into the liberty and privacy of a person). As this Comment discusses *infra* Part V, modern Oregon law still recognizes the temporal restriction on the duration of traffic stops.

<sup>14</sup> *Carter*, 34 Or. App. at 32, 578 P.2d at 796; *Evans*, 16 Or. App. at 197, 517 P.2d at 1229.

matter restriction was meant to prohibit law enforcement conduct that strays from the original justification for the traffic stop.<sup>15</sup>

Oregon courts relied on statutory law as a basis for imposing both the temporal and subject matter limitations on traffic stops. ORS 131.615, the investigatory stops statute, imposes both limitations on peace officers in subsections (1) through (3).<sup>16</sup> Similarly, ORS 810.410, the powers-to-arrest statute, prohibits peace officers from inquiring into matters unrelated to the traffic reason for a stop unless there exists an independent, reasonable suspicion of criminal activity.<sup>17</sup>

Relying on the subject matter limitation statutes, ORS 131.615 and 810.410, Oregon courts imposed a subject matter limitation on traffic stops for many years until the legislature enacted Oregon's exclusionary rule. For example, in *State v. Carter*, the court relied on ORS 131.615 in recognizing a subject matter limitation to traffic stops.<sup>18</sup> The officer in *Carter* pulled over the defendants for

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<sup>15</sup> *Carter*, 34 Or. App. at 32, 578 P.2d at 796.

<sup>16</sup> The statute reads:

(1) A peace officer who reasonably suspects that a person has committed or is about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry.

(2) The detention and inquiry shall be conducted in the vicinity of the stop and for no longer than a reasonable time.

(3) The inquiry shall be considered reasonable if it is limited to:

(a) The immediate circumstances that aroused the officer's suspicion;

(b) Other circumstances arising during the course of the detention and inquiry that give rise to a reasonable suspicion of criminal activity; and

(c) Ensuring the safety of the officer, the person stopped or other persons present, including an inquiry regarding the presence of weapons.

OR. REV. STAT. § 131.615(1)-(3) (2011).

<sup>17</sup> "A police officer . . . [m]ay stop and detain a person for a traffic violation for the purposes of investigation reasonably related to the traffic violation, identification, and issuance of a citation." OR. REV. STAT. § 810.410(3)(b) (2011). "A police officer . . . [m]ay make an inquiry into circumstances arising during the course of a detention and investigation under paragraph (b) of this subsection that give rise to a reasonable suspicion of criminal activity." *Id.* § 810.410(3)(c).

<sup>18</sup> "Detention and inquiry beyond the time, place and subject-matter limits codified in ORS 131.615—all components of what we call 'intrusiveness'—constitute an invalid 'random intervention into the liberty and privacy of a person.'" *Carter*, 34 Or. App. at 31, 578 P.2d at 796 (quoting *Evans*, 16 Or. App. at 197, 517 P.2d at 1229). Although *Evans* predates *Carter*, the *Evans* decision was not based on ORS 131.615 and 810.410. Rather, *Evans* was decided against the backdrop of *Terry v. Ohio*, discussed *infra*.

speeding.<sup>19</sup> After obtaining the defendant-driver's vehicle registration and license, the officer ran a records check on the car and its occupants.<sup>20</sup> Though the records check came back clear, dispatch indicated that the car was registered to a maintenance company, not in the name of Dawson's father, as Dawson had implied.<sup>21</sup> Having aroused the officer's suspicion, the officer asked to search the vehicle.<sup>22</sup> The defendants consented to the search, which revealed large quantities of marijuana.<sup>23</sup> Relying on ORS 131.615, the *Carter* court remanded the case for findings on the issue of the officer's intrusiveness.<sup>24</sup> The *Carter* court held that the officer had no objectively reasonable suspicion that an illegal substance was present in the car before requesting consent to search.<sup>25</sup> Of further importance to the *Carter* decision was the court's view that one of the purposes of enacting ORS 131.615 was to codify the constitutional limitations to investigatory stops recognized in *Terry v. Ohio*.<sup>26</sup>

In *State v. Foster*, the court relied on ORS 810.410 in holding for the suppression of evidence obtained through police inquiries that were unrelated to the traffic infraction.<sup>27</sup> The officer in *Foster* pulled over a car for not having a working rear license plate light.<sup>28</sup> The officer then arrested the defendant-driver after learning that he had an outstanding warrant.<sup>29</sup> After the arrest, the officer then asked and

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<sup>19</sup> *Carter*, 34 Or. App. at 23, 578 P.2d at 792. Before executing the traffic stop, the officer was informed that some juveniles were suspects in recent burglaries and that they might be camped near a utility installation. *Id.* After observing defendants pick up a hitchhiker near a utility station, the officer began following defendants because of the reported burglaries. *Id.* The officer then pulled over defendants after pacing their speed over the legal limit. *Id.*

<sup>20</sup> *Id.* at 23–24, 578 P.2d at 792.

<sup>21</sup> *Id.* at 24, 578 P.2d at 792–93. Although the car was not technically registered to Dawson's father, the court noted that "it seems obvious that [the officer] would have known who the registered owner was as soon as he saw the vehicle registration, which was before he ran the 'records check.'" *Id.* at 24, 578 P.2d at 793.

<sup>22</sup> *Id.* at 25, 578 P.2d at 793. Here, the court noted that the trial record lacked any explanation as to why the officer thought that his request to search the car would clear up his concern about the registered owner of the vehicle. *Id.* at 25 n.2.

<sup>23</sup> *Id.* at 24, 578 P.2d at 792.

<sup>24</sup> *Id.* at 31, 33, 578 P.2d at 796–97.

<sup>25</sup> *Id.* at 33, 578 P.2d at 797.

<sup>26</sup> *Id.* at 31, 578 P.2d at 796; *see also* *State v. Warner*, 284 Or. 147, 164, 585 P.2d 681, 690 (1978) (recognizing that ORS 131.615 is "an attempted restatement of the rule of *Terry v. Ohio*").

<sup>27</sup> *State v. Foster*, 139 Or. App. 303, 306–07, 912 P.2d 377, 378 (1996).

<sup>28</sup> *Id.* at 305, 912 P.2d at 377.

<sup>29</sup> *Id.*



obtained consent from the defendant-passenger to search the car, which resulted in the finding of an illegal narcotic.<sup>30</sup> In holding for the suppression of evidence, the court in *Foster* reasoned that the officer lacked the authority under ORS 810.410 to detain and question the defendant-passenger further after the arrest of the driver was complete. The court disagreed with the State's interpretation of ORS 810.410(3)<sup>31</sup> and concluded that the officer needed some basis other than the traffic infraction to detain and question the defendant.<sup>32</sup>

### III

#### THE ENACTMENT OF ORS 136.432: OREGON'S EXCLUSIONARY RULE

In 1997, the Oregon Legislature introduced ORS 136.432,<sup>33</sup> Oregon's version of the federal exclusionary rule,<sup>34</sup> as section 1 of Senate Bill 936. The intended effect of the bill was to prevent courts from suppressing evidence except when required by the federal or

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<sup>30</sup> *Id.* at 305, 912 P.2d at 377–78.

<sup>31</sup> The State argued that ORS 810.410(3) does not limit officer actions once an officer develops probable cause to arrest a suspect. Thus, according to the State's argument, the defendant's consent to search in *Foster* was valid because the officer's knowledge of the driver's prior drug conviction gave the officer an independent basis for requesting the search. *Id.* at 306, 912 P.2d at 378. The court disagreed, responding that once an investigation of a traffic infraction has ended, an officer's authority to detain and question a defendant-passenger dissipates if there is no other basis to enlarge the scope of the investigation. *Id.*

<sup>32</sup> *Id.* at 307, 912 P.2d at 378.

<sup>33</sup> ORS 136.432 reads:

A court may not exclude relevant and otherwise admissible evidence in a criminal action on the grounds that it was obtained in violation of any statutory provision unless exclusion of the evidence is required by:

- (1) The United States Constitution or the Oregon Constitution;
- (2) The rules of evidence governing privileges and the admission of hearsay; or
- (3) The rights of the press.

OR. REV. STAT. § 136.432 (2011).

<sup>34</sup> Although the U.S. Constitution itself "contains no provision expressly precluding the use of evidence obtained in violation of its commands," the federal exclusionary rule emerged from the Fourth Amendment and its interpretation through federal case law. *United States v. Leon*, 468 U.S. 897, 906 (1984); *see Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (concluding that the exclusionary rule applies to the states through the Fourteenth Amendment: "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court"); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that in a federal prosecution the Fourth Amendment bars the use of evidence obtained through an unconstitutional search and seizure).

state constitutions.<sup>35</sup> However, critics of the bill claimed that the law was really meant to repeal the rules of evidence and render all relevant evidence admissible.<sup>36</sup> In response to that criticism, one of the drafters of the bill clarified that the proposed law “only applies to relevant evidence ‘obtained’ in violation of statute, not relevant evidence . . . made inadmissible by statute.”<sup>37</sup>

In effect, Oregon’s statutory exclusionary rule does not supersede statutes that explicitly call for evidence suppression as a remedy to its violation. However, the exclusionary rule emasculates statutes such as ORS 131.615 and ORS 810.410, the subject matter limitations, that do not expressly require evidence suppression as a statutory remedy. That is because the subject matter limitation statutes essentially grant rights to citizens without providing a statutory remedy for their violation. Because those statutes do not expressly call for evidence suppression as a remedy, Oregon’s statutory exclusionary rule allows the admission of evidence obtained in violation of those statutes.

To help illustrate the effect of Oregon’s statutory exclusionary rule on the subject matter limitation statutes, contrast the investigatory stops statute<sup>38</sup> with ORS 165.540.<sup>39</sup> The statutory language of the investigatory stops statute does not expressly prescribe evidence suppression as a remedy for its violation. As a result, Oregon’s statutory exclusionary rule precludes suppression of any evidence obtained in violation of ORS 131.615 unless the violation offends the U.S. or Oregon Constitutions. To the contrary, ORS 165.540 grants a right, as well as a clear remedy—evidence suppression—if that right

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<sup>35</sup> Audio Tape, *Public Hearing on S.B. 936A Held by the Comm. on Judiciary, Subcomm. on Criminal Law*, 59th Or. Legis. Assemb. (Apr. 17, 1997) (on file with Oregon State Archives) (statement of Norm Frink).

<sup>36</sup> *State v. Thompson-Seed*, 162 Or. App. 483, 489, 986 P.2d 732, 735 (1999).

<sup>37</sup> *Id.* (quoting *Public Hearing on S.B. 936A*, *supra* note 35 (statement of Mark Gardner) (emphasis added)). However, the court in *Thompson-Seed* goes on to add that Gardner’s testimony at the House Subcommittee hearing was not entirely consistent. The court observed, “At another stage in the hearings . . . Gardner testified that [section 136.432] would indeed have the effect of repealing other statutory rules of exclusion. He commented that the legislature could deter violations of statutes by attaching civil or criminal liability as a consequence of a violation without affecting the admissibility of the evidence.” *Id.* at 490, 986 P.2d at 735.

<sup>38</sup> *See supra* note 15.

<sup>39</sup> OR. REV. STAT. § 165.540 (2011) (requiring, in part, that police officers inform individuals when they are being recorded by audio or video equipment if there is a reasonable opportunity to inform).

is infringed.<sup>40</sup> Thus, Oregon's statutory exclusionary rule effectively prevents judges from determining the admissibility of evidence obtained in violation of statutes that do not prescribe suppression as a remedy. However, when statutes expressly require evidence suppression as a remedy, Oregon's statutory exclusionary rule does not factor into the determination of admissibility.

In sum, as a result of Oregon's statutory exclusionary rule, courts could no longer suppress evidence obtained in violation of the subject matter limitation statutes unless the federal or state constitution required its exclusion. The Oregon Legislature hoped to prevent courts from creating new rules on the admissibility of evidence. However, Oregon's statutory exclusionary rule was not intended to supersede preexisting statutes that expressly call for evidence suppression as a remedy.

#### IV

#### DOES THE OREGON CONSTITUTION RECOGNIZE A SUBJECT MATTER LIMITATION?

Before ORS 136.432, Oregon courts had not considered the Oregon Constitution as a basis for a subject matter limitation because the courts found that support in the subject matter limitation statutes. However, the enactment of ORS 136.432 meant that evidence obtained in violation of the subject matter limitation statutes would not be admissible unless the questioning officer violated the state or federal constitutions. Thus, the question whether Oregon law recognizes a subject matter limitation to investigatory stops shifted from a statutory to a constitutional analysis. As this Comment summarizes below, a recent line of Oregon cases concludes that the Oregon Constitution does not require a subject matter limitation to traffic stops.

##### A. *State v. Amaya*

The *Amaya* court held that law enforcement could inquire into matters unrelated to a valid traffic stop so long as the inquiry occurred

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<sup>40</sup> The remedy is actually expressed in a separate statute, ORS 41.910, which was enacted before ORS 136.432. OR. REV. STAT. § 41.910 (2011) (prescribing evidence suppression if obtained in violation of ORS 165.540).

during the stop.<sup>41</sup> In other words, only if the law enforcement conduct unreasonably prolongs the temporal duration of the stop, will the questioning violate the state and federal constitutions.<sup>42</sup>

### 1. *The Amaya Court's State Constitutional Analysis*

In *Amaya*, the court of appeals examined prior Oregon case law to determine whether the Oregon Constitution requires a subject matter limitation on officer inquiries during routine traffic stops. The *Amaya* court's state constitutional analysis essentially revisited *State v. Evans*,<sup>43</sup> *State v. Carter*,<sup>44</sup> and *State v. Toevs*.<sup>45</sup> Before concluding that these prior cases did not interpret article I, section 9 as imposing a subject matter limitation, the *Amaya* court articulated its reasons for rejecting the applicability of those cases to the question of a constitutionally recognized subject matter limitation.

The *Amaya* court first attacked the defendant's reliance on *State v. Evans* and *State v. Carter* as sources of support for a subject matter limitation under the Oregon Constitution. Specifically, the *Amaya* court disagreed with defendant's reliance on *Evans* because the *Evans* holding was premised on federal constitutional law under *Terry v. Ohio*.<sup>46</sup> Further, the *Amaya* court also considered the *Evans* holding<sup>47</sup> to be inapplicable to traffic stops because *Evans* involved a

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<sup>41</sup> *State v. Amaya*, 176 Or. App. 35, 44, 29 P.3d 1177, 1181 (2001). In *Amaya*, the officer pulled over a van after observing it stopped in the middle of the road with a burned-out license plate light. *Id.* at 37, 29 P.3d at 1178. The officer noticed the defendant-passenger tucking something into a purse at her feet as he approached the van. *Id.* During the traffic stop, the officer learned that the driver did not have a valid license. *Id.* Fearing that the defendant-passenger could be armed based on her observed behavior, the officer requested, and received consent, to search of the van. *Id.* at 37–38, 29 P.3d at 1178. However, the officer did not initiate the search until a second officer arrived to assist. *Id.* at 37, 29 P.3d at 1178. While awaiting the second officer's arrival, the officer started asking defendant about her purse and whether he could search it in addition to the van. *Id.* Defendant eventually admitted that she had a pistol in her bag, which was recovered in the subsequent search. *Id.*

<sup>42</sup> *Id.* at 43–47, 29 P.3d at 1181–83.

<sup>43</sup> 16 Or. App. 189, 517 P.2d 1225 (1974). See *supra* note 19 for a brief discussion of the *Evans* case.

<sup>44</sup> 34 Or. App. 21, 578 P.2d 790 (1978). For a discussion of *Carter*, see *supra* Part II.A.

<sup>45</sup> 327 Or. 522, 964 P.2d 1007 (1998).

<sup>46</sup> *Amaya*, 176 Or. App. at 41–42, 29 P.3d at 1180.

<sup>47</sup> Essentially, the *Evans* holding restates part of the U.S. Supreme Court's holding in *Terry v. Ohio*: "the police may seize or search a person with such a degree of intensity as may be justified by the articulable quantum of knowledge they have and by the gravity of the police purpose to be served." *Evans*, 16 Or. App. at 194, 517 P.2d at 1228.

street encounter, whereas *Amaya* and *Terry* involved traffic stops.<sup>48</sup> The factual distinction was important to the *Amaya* court because the *Evans* opinion represented a source of state constitutional support for the bright-line rule from *Carter*: “the scope of an officer’s authority to question a person in the context of a traffic stop is limited by a reasonable suspicion requirement.”<sup>49</sup> Thus, because *Evans* was premised on federal constitutional law involving street encounters, the *Amaya* court concluded that *Evans* was inapplicable to an analysis of a subject matter limitation to traffic stops under the Oregon Constitution.<sup>50</sup> Moreover, because *Evans* formed the basis for the *Carter* holding,<sup>51</sup> the *Amaya* court concluded that *Carter* erroneously read a subject matter limitation into article I, section 9.

Second, the *Amaya* court cited *State v. Toevs* to support its view that officer questioning *during* a traffic stop does not have to be supported with reasonable suspicion of criminal activity unless it detains a defendant *beyond* a completed traffic stop. The *Amaya* court interpreted *Toevs* to mean that officer questioning during a traffic stop does not itself represent a seizure distinct from the traffic stop under article I, section 9 unless it has the “effect of accomplishing a restraint on liberty.”<sup>52</sup> Because officer questioning itself does not amount to a seizure, article I, section 9 is not implicated.<sup>53</sup> Further, because officer questioning itself does not trigger article I, section 9, law enforcement does not require reasonable suspicion of criminal activity before inquiring into subject matter unrelated to the traffic reason for the stop.<sup>54</sup>

Applying its interpretations of *Evans*, *Carter*, and *Toevs* to the facts of the case, the *Amaya* court reasoned that the officer’s questioning did not amount to a seizure because it did not have a

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<sup>48</sup> *Amaya*, 176 Or. App. at 41–42, 29 P.3d at 1180 (“Clearly, *Evans* had nothing to do with the scope of a police inquiry during a traffic stop. . . . [*Evans*’ holding] offers no support for the bright-line rule spelled out in [*Carter*] that the scope of an officer’s authority to question a person in the context of a traffic stop is limited by a reasonable suspicion requirement.”).

<sup>49</sup> *Id.* (summarizing the rule spelled out in *Carter*).

<sup>50</sup> *Id.*

<sup>51</sup> *Carter*, 34 Or. App. at 32, 578 P.2d at 796 (holding that the scope of an officer’s authority to question a person in the context of a traffic stop is limited by a reasonable suspicion requirement).

<sup>52</sup> *Amaya*, 176 Or. App. at 43, 29 P.3d at 1181 (citing *State v. Toevs*, 327 Or. 525, 964 P.2d 1007 (1998)).

<sup>53</sup> *Id.* at 44, 29 P.3d at 1181.

<sup>54</sup> *Id.*

detaining effect on the defendant beyond the completed traffic stop.<sup>55</sup> According to the *Amaya* court, the defendant was “entirely free to leave” when the officer was asking questions while awaiting the arrival of a second officer.<sup>56</sup> Moreover, the *Amaya* court considered the wait time for the arrival of the second officer as part of the ongoing traffic stop. Thus, because the officer’s questioning occurred during the wait time, the questioning took place during the traffic stop and therefore did not prolong the temporal duration of the stop.<sup>57</sup>

## 2. *The Amaya Court’s Federal Constitutional Analysis*

Next, the *Amaya* court examined federal constitutional case law as part of its analysis of a constitutionally prescribed subject matter limitation. First, the court asserted that it was “free to adopt whatever view of the federal constitution that [it] find[s] most persuasive” in the absence of U.S. Supreme Court precedent.<sup>58</sup> Apparently, the *Amaya* court was unaware of any binding U.S. Supreme Court precedent that inferred a subject matter limitation from the federal Constitution. Second, at the time of the *Amaya* decision, federal circuits were split as to whether police inquiries during the course of a lawful traffic stop amounted to a Fourth Amendment search or seizure.<sup>59</sup> According to some federal circuits, officer questioning during a traffic stop did not implicate Fourth Amendment protections because the questioning itself did not amount to a search or seizure under the federal Constitution.<sup>60</sup> As a result, these circuits concluded that such questioning is permissible even without a reasonable suspicion of criminal activity, so long as the questioning itself does not unreasonably prolong the traffic stop. On the other hand, some federal circuits concluded that officer questioning alone *does* amount to a Fourth Amendment search or seizure, and therefore law enforcement may not question a traffic stop detainee over matters

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<sup>55</sup> *Id.* at 44, 29 P.2d at 1182.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 46–47, 29 P.2d at 1183 (citing *Joyce v. Multnomah Cnty.*, 114 Or. App. 244, 248, 835 P.2d 127, 129 (1992)).

<sup>59</sup> *Id.* at 45, 29 P.3d at 1182.

<sup>60</sup> *See, e.g., infra* note 61 (discussing the Fifth Circuit’s position that questioning, by itself, during a lawful traffic stop does not amount to a constitutional search or seizure).

unrelated to the purpose of the stop unless the officer has reasonable suspicion of illegal activity.<sup>61</sup>

The *Amaya* court considered the opposing viewpoints of the Fifth and Tenth Circuits in its determination as to whether federal law recognized a subject matter limitation to traffic stops. On one hand, the Fifth Circuit, as illustrated in *United States v. Shabazz*,<sup>62</sup> did not view the Fourth Amendment as imposing a subject matter limitation to the scope of a traffic stop.<sup>63</sup> The *Shabazz* court reasoned that because the officers' questioning occurred during a records check of the defendants, the questioning did not extend the duration of the valid seizure and was therefore lawful.<sup>64</sup> On the other hand, the Tenth Circuit, under *United States v. Holt*, held that "an officer conducting a routine traffic stop may not ask the detainee questions unrelated to the purpose of the stop, even if the questioning does not extend the normal length of the stop, unless the officer has reasonable suspicion of illegal activity."<sup>65</sup>

Ultimately, the *Amaya* court sided with the Fifth Circuit.<sup>66</sup> The Fifth Circuit's reasoning persuaded the court, in light of the U.S. Supreme Court's holding in *Florida v. Bostick*, that officer questioning, by itself, does not equate to a Fourth Amendment search or seizure.<sup>67</sup> The *Amaya* court went on to attack the Tenth Circuit's position<sup>68</sup> before reaching its holding that "questioning during the

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<sup>61</sup> See, e.g., *infra* note 64 (discussing the Tenth Circuit's position that law enforcement may not ask questions unrelated to the purpose of the stop unless the officer has reasonable suspicion of illegal activity).

<sup>62</sup> 993 F.2d 431 (5th Cir. 1993). In *Shabazz*, officers ran a computer check on the identifications of defendants after pulling them over for speeding. *Id.* at 433. During the computer check, the officers questioned the defendants, which produced incriminating information. *Id.* The defendants unsuccessfully moved to suppress evidence obtained during the computer check, arguing that the questioning was not supported by reasonable suspicion of any criminal activity. *Id.* at 435–38.

<sup>63</sup> *Id.* at 436 (rejecting "any notion that a police officer's questioning, even on a subject unrelated to the purpose of the stop, is itself a Fourth Amendment violation").

<sup>64</sup> *Id.* at 437.

<sup>65</sup> *United States v. Holt*, 229 F.3d 931, 936 (10th Cir. 2000). The *Holt* court based its decision on "prior Tenth Circuit decisions [that] compelled adherence to the rule that police may not engage in questioning unrelated to the purpose of the stop without reasonable suspicion of illegal activity." *United States v. Amaya*, 176 Or. App. 35, 46, 29 P.3d 1177, 1183 (2001) (citing *Holt*, 229 F.3d at 936–37).

<sup>66</sup> *Amaya*, 176 Or. App. at 47, 29 P.3d at 1183.

<sup>67</sup> *Id.* (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

<sup>68</sup> See *id.* (criticizing the court in *United States v. Holt* for failing to explain "why mere questioning during the course of a lawful traffic stop rises to the level of a search or a seizure").

course of a traffic stop does not offend the Fourth Amendment unless it has the effect of further detaining the defendant without reasonable suspicion of illegal activity.”<sup>69</sup>

### B. State v. Rodgers/Kirkeby

After the court of appeals’ decision in *Amaya*, the Oregon Supreme Court decided *State v. Rodgers/Kirkeby*, a consolidation of two cases from the court of appeals.<sup>70</sup> In *State v. Rodgers/Kirkeby*, the Oregon Supreme Court framed and analyzed the key question: does article I, section 9 of the Oregon Constitution impose a subject matter limitation on traffic stops?

In *Rodgers/Kirkeby*, both defendants argued that the evidence discovered during the respective searches of their vehicles were products of unconstitutional seizures under article I, section 9 of the Oregon Constitution.<sup>71</sup> In response, the State asserted that law enforcement could engage in mere conversation during a lawful traffic stop to inquire into unrelated matters, so long as the questioning did not unreasonably prolong the duration of the stop.<sup>72</sup> According to the State, such inquiries were of the same type held to be permissible in officer–citizen street encounters, and therefore did

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<sup>69</sup> *Id.*

<sup>70</sup> *State v. Rodgers (Rodgers II)*, 347 Or. 610, 227 P.3d 695 (2010) (consolidating *State v. Rodgers (Rodgers I)*, 219 Or. App. 366, 182 P.3d 209 (2008) and *State v. Kirkeby*, 220 Or. App. 177, 185 P.3d 510 (2008) for purposes of opinion). In *Rodgers I*, the officer pulled the defendant over for driving with a burned-out license plate light. *Rodgers I*, 219 Or. App. at 368, 182 P.3d at 211. The officer developed suspicion of methamphetamine possession after observing sores on the defendant’s face and two odd containers in the defendant’s car. *Id.* While the officer waited for the results of a records check of defendant, a second officer arrived to assist. *Id.* After the records check came back clear, the two officers questioned the defendant about the contents of the odd containers. *Id.* at 368–69, 182 P.3d at 212. The officers eventually obtained consent to search the vehicle and, during the search, the officers recovered numerous precursor materials for manufacturing methamphetamine. *Id.* at 369, 182 P.3d at 212. In *Kirkeby*, the officer observed the defendant, whom the officer knew to have a suspended license, driving a car. *Kirkeby*, 220 Or. App. at 179, 185 P.3d at 511. After the officer stopped the car, the defendant was unable to present the officer with a valid driver’s license. *Id.* at 180, 185 P.3d at 512. Instead of issuing a citation, the officer asked the defendant about weapons, which the defendant denied having. *Id.* The officer also asked for consent to pat down the defendant for weapons, which the defendant gave. *Id.* Although the pat down did not reveal any weapons, the officer nonetheless asked, and received consent, to examine the contents of defendant’s pockets. *Id.* The search revealed methamphetamine, and the defendant was arrested and charged with possession of a controlled substance. *Id.* at 181, 185 P.3d at 512.

<sup>71</sup> *Rodgers II*, 347 Or. at 614–16, 227 P.3d at 698–99.

<sup>72</sup> *Id.* at 618, 227 P.3d at 700.



not implicate article I, section 9.<sup>73</sup> The defense responded by distinguishing mere conversation in officer–citizen street encounters from mere conversation during traffic stops.<sup>74</sup> During a mere street encounter with police, the defense argued, a person’s conversation with an officer does not amount to a seizure because the person can end the encounter and walk away at any time.<sup>75</sup> Conversely, during a traffic stop, a driver is obligated to remain and interact with the officer.<sup>76</sup> In other words, “the traffic stop itself is a seizure for constitutional purposes.”<sup>77</sup> Thus, the defendants argued, article I, section 9 limits officers to “investigatory questions about the vehicle code violation for which a driver is stopped, unless the officer develops reasonable suspicion or probable cause to believe that [criminal activity is afoot].”<sup>78</sup>

In holding for the suppression of evidence for both defendants, the court adopted the defendants’ arguments in multiple respects. First, the court agreed with the defendants’ differentiation between street and traffic stop encounters with law enforcement: “in contrast to a person on the street, who may unilaterally end an officer–citizen encounter at any time, the reality is that a motorist stopped for a traffic infraction is legally obligated to stop at an officer’s direction.”<sup>79</sup> Second, the court agreed with the defendants that article I, section 9 provides both temporal *and* subject matter limitations to law enforcement conduct during traffic stops: “[p]olice conduct during a noncriminal traffic stop does not further implicate Article I,

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<sup>73</sup> *Id.* at 617, 227 P.3d at 700 (citing *State v. Holmes*, 311 Or. 400, 410, 813 P.2d 28, 34 (1991)). The Court in *Holmes* observed that “police–motorist encounters, like pedestrian encounters, are not *per se* ‘seizures.’” *Holmes*, 311 Or. at 409–11, 813 P.2d at 34. The court explained, “[L]aw enforcement officers may approach persons on the street or in public places, question them, and even accompany them to another location without the encounter necessarily constituting a ‘seizure’ of a person under Article I, section 9.” *Id.* at 409, 813 P.2d at 34. According to the *Holmes* test, a “seizure” under the Oregon Constitution occurs only when law enforcement “(a) . . . intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual’s liberty or freedom or movement; or (b) whenever an individual believes that (a), above, has occurred and such belief is objectively reasonable in the circumstances.” *Id.* *But see* *State v. Ashbaugh*, 349 Or. 297, 244 P.3d 360 (2010) (abrogating the *Holmes* test for a seizure under article I, section 9).

<sup>74</sup> *Rodgers II*, 347 Or. at 619, 227 P.3d at 700.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 622–23, 227 P.3d at 702.

section 9, so long as the detention is limited and the police conduct is reasonably related to the investigation of the noncriminal traffic violation.”<sup>80</sup> The court agreed with some of the state’s arguments, notably the contention that police inquiries during a traffic stop in and of themselves do not require any justification because they are neither searches nor seizures.<sup>81</sup> However, the court ultimately held that “police inquiries unrelated to a traffic violation, when combined with physical restraint or a police show of authority, may result in a restriction of personal freedom that violates article 1, section 9.”<sup>82</sup> Because both defendants successfully proved that the officers’ conduct constituted showings of authority that limited the defendants’ freedom of movement,<sup>83</sup> the *Rodgers II* court concluded that the officers’ unrelated questioning resulted in an unlawful seizure under article I, section 9.<sup>84</sup>

### C. State v. Gomes

In 2010, the Oregon Court of Appeals decided *State v. Gomes*.<sup>85</sup> The *Gomes* decision is integral to the discussion of a constitutional,

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<sup>80</sup> *Id.* at 624, 227 P.3d at 703.

<sup>81</sup> In *Rodgers II*, the State relied on *State v. Holmes*, 311 Or. 400, 813 P.3d 28 (1991). The court in *Holmes* observed that police encounters with motorists, like those with pedestrians, are not *per se* seizures: “law enforcement officers may approach persons on the street or in public places, question them, and even accompany them to another location without the encounter necessarily constituting a ‘seizure’ of a person under Article 1, section 9.” *Holmes*, 311 Or. at 409–11, 813 P.3d at 34. This was because, according to the *Holmes* test, a “seizure” under the Oregon Constitution only occurred when law enforcement “(a) . . . intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual’s liberty or freedom of movement; or (b) whenever an individual believes that (a), above, has occurred and such belief is objectively reasonable in the circumstances.” *Id.* at 409, 813 P.3d at 34.

<sup>82</sup> *Rodgers II*, 347 Or. at 624, 227 P.3d at 703.

<sup>83</sup> The *Rodgers II* court found that the officers involved in both *Rodgers*’s and *Kirkeby*’s respective stops demonstrated a sufficient showing of authority and physical restraint while posing their inquiries. In *Rodgers*’s circumstance, the *Rodgers II* court concluded that the officer’s position at the driver’s side window and the second officer’s presence on the passenger’s side of the car “was a sufficient ‘show of authority’ that, in combination with the unrelated questions concerning the items in the car and the request to search the car, resulted in a significant restriction of defendant’s freedom of movement.” *Id.* at 627, 227 P.3d at 705. As for *Kirkeby*, the *Rodgers II* court concluded that “the deputy’s show of authority that accompanied his request that defendant consent to a patdown and subsequent request that defendant consent to an examination of the contents of defendant’s pockets occurred after the point that defendant should have been issued a citation and sent on his way.” *Id.* at 628, 227 P.3d at 705.

<sup>84</sup> *Id.*

<sup>85</sup> 236 Or. App. 364, 236 P.3d 841 (2010).

subject matter limitation because it presented the first opportunity for the Oregon Court of Appeals to apply the holding from *Rodgers II*. As this Comment explores below, the *Gomes* decision represents a clear message from the Oregon Court of Appeals that the Oregon Constitution does not impose a subject matter limitation to officer questioning during traffic stops.

In *Gomes*, the police pulled over a driver for speeding and failing to signal during a lane change.<sup>86</sup> As the officer approached the driver's side window, he observed in plain view a butane cigarette lighter and an empty cigarette pack.<sup>87</sup> While the driver was retrieving his identification documents, the officer asked to see the cigarette pack, in which he found a pill of Cialis.<sup>88</sup> At this point, the officer asked for consent to search the car, explaining to both the driver and defendant-passenger that the desire to search the car arose in response to concern about the Cialis.<sup>89</sup> After the driver gave his consent to search the car, the officer also asked defendant-passenger if he could search her purse, and she initially declined.<sup>90</sup> The defendant eventually consented to a search of her purse after the officer asked her a series of questions, one of which elicited the admission that there were drugs in her purse.<sup>91</sup> The officer found cocaine, the disputed evidence, in the purse.<sup>92</sup>

The court in *Gomes* ultimately held that the officer's inquiries, though unrelated to the reason for the stop and not supported by a reasonable suspicion of criminal activity, did not implicate article I, section 9 because the questioning did not unreasonably prolong the

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<sup>86</sup> *Gomes*, 236 Or. App. at 366, 236 P.3d at 842.

<sup>87</sup> *Id.* The officer later testified at trial that, based on his training and experience, the lighter and cigarette pack led to his suspicion that illegal drugs were also in the car. *Id.*

<sup>88</sup> *Id.* at 366–67, 236 P.3d at 842. The pill was identified as Cialis. After the defendant admitted that a friend gave him the pill, the officer found probable cause to find that the driver violated ORS 689.765(6): “No person shall sell, give away, barter, dispense, distribute, buy, receive or possess any prescription drug except as authorized by law.” *Id.* at 367, 236 P.3d at 842.

<sup>89</sup> *Id.* at 367, 236 P.3d at 842. At first, the driver did not consent to a search of his car. *Id.* However, after the officer threatened to impound the car until he could obtain a search warrant, the driver eventually consented to a search. *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 368, 236 P.3d at 843. At this point in the traffic stop, the officer's questioning of defendant occurred when defendant was handcuffed and after she had been read her *Miranda* rights. *Id.*

<sup>92</sup> *Id.*

duration of the traffic stop.<sup>93</sup> The *Gomes* court's holding was based in large part on its interpretation that *Rodgers II* meant that the Oregon Constitution only imposes a temporal limitation on officer inquiries during a traffic stop.<sup>94</sup> In the eyes of the *Gomes* court, because the questioning occurred during the time that the officer was lawfully conducting the traffic stop, the questioning did not result in an unlawful extension of the stop.<sup>95</sup>

## V

### CRITIQUING THE UNDERLYING RATIONALES TO THE *AMAYA* AND *GOMES* OPINIONS

In *State v. Amaya*, the Oregon Court of Appeals rejected its statutory reasoning from prior decades to hold that, under article I, section 9, police may inquire into matters that are unrelated to the traffic stop, so long as the inquiry occurs during the traffic stop and does not prolong the temporal duration of the stop. Although the *Amaya* court held that officer questioning does not *per se* result in a constitutional seizure, the court noted that some officer questioning might rise to the level of a seizure based on the circumstances.<sup>96</sup> Subsequently, in *Rodgers II*, the Oregon Supreme Court held that “police inquiries unrelated to a traffic violation, when combined with physical restraint or a police show of authority, may result in a restriction of personal freedom that violates article I, section 9.”<sup>97</sup> However, the *Rodgers II* opinion sent mixed signals about the existence of a subject matter limitation.

On one hand, the *Rodgers II* court stated that “[p]olice conduct during a noncriminal traffic stop does not further implicate article I, section 9, so long as the detention is limited *and* the police conduct is reasonably related to the investigation of the noncriminal traffic violation.”<sup>98</sup> On the other hand, the *Rodgers II* court left open to interpretation the question of a subject matter limitation: “[w]e express no opinion about the effect of unrelated police inquiries that

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<sup>93</sup> *Id.* at 371, 236 P.3d at 845.

<sup>94</sup> *Id.* “We take the language to confirm our *Rodgers III*] opinion and our opinion in *State v. Amaya*, 176 Or.[App. 35, 29 P.3d 1177 (2001) . . . that there are no Article 1, section 9, implications if an inquiry unrelated to the traffic stop occurs during a routine stop but does not delay it.” *Id.*

<sup>95</sup> *Id.* at 372, 236 P.3d at 845.

<sup>96</sup> *Amaya*, 176 Or. at 44, 29 P.3d at 1181.

<sup>97</sup> *State v. Rodgers (Rodgers II)*, 347 Or. 610, 624, 227 P.3d 695, 703 (2010).

<sup>98</sup> *Id.* (emphasis added).

occur during the course of the traffic violation investigation and that do not result in any further restriction of movement of the individual.”<sup>99</sup> Finally, in *Gomes*, the Oregon Court of Appeals divined the following rule from the *Rodgers II* opinion: “[w]e take the language [from *Rodgers II*] to confirm our . . . opinion in *State v. Amaya* . . . that there are no article I, section 9, implications if an inquiry unrelated to the traffic stop occurs during a routine stop but does not delay it.”<sup>100</sup>

Based on its decisions in *Amaya* and *Gomes*, the Oregon Court of Appeals does not recognize the Oregon Constitution to impose a subject matter limitation on a lawful stop. However, was the limitation in *Gomes* and *Amaya* a correct interpretation of preexisting state and federal case law? Below, this Comment first dissects the *Amaya* opinion in order to fully understand how the court came to its conclusion concerning a subject matter limitation. Second, this Comment scrutinizes the *Gomes* opinion in order to better comprehend the court’s interpretation of prior state case law, including the Oregon Supreme Court’s decision in *Rodgers II*.

*A. Understanding the Amaya Decision in Light of Preexisting State and Federal Case Law*

As a result of the *Amaya* decision, the Oregon Court of Appeals rejected its statutory reasoning from prior decades to hold that, as a matter of constitutional law, police may inquire into matters that are unrelated to the stop, so long as the inquiry occurs during the traffic stop. The *Amaya* court claimed that its decision was made in a vacuum because of a purported lack of binding state and federal precedent.<sup>101</sup> However, the *Amaya* court was constrained by prior case law.

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<sup>99</sup> *Id.* at 627 n.5, 227 P.3d at 705 n.5.

<sup>100</sup> *Gomes*, 236 Or. App. at 371, 236 P.3d at 845. Here, the *Gomes* court was referring to the following language from *Rodgers II*:

‘Because police inquiries during a traffic stop are neither searches nor seizures, [such] police inquiries in and of themselves require no justification and do not necessarily implicate Article I, section 9’ unless ‘combined with physical restraint or a police show of authority,’ in which case they ‘may result in a restriction of personal freedom that violates Article I, section 9.’

*Id.* (alteration in original) (citing *Rodgers II*, 347 Or. at 623–24, 227 P.3d at 702–03).

<sup>101</sup> “In no case . . . have we held that the federal or state constitution precludes an officer from questioning a defendant during a traffic stop in the absence of reasonable suspicion.” *State v. Amaya*, 176 Or. App. 35, 42, 29 P.3d 1177, 1180–81 (2001).

### 1. *Revisiting the Amaya Court's Consideration of State v. Evans*

The *Amaya* court was incorrect to ignore *Evans* in its constitutional analysis of a subject matter limitation. After all, the *Evans* holding was meant to replicate the holding from *Terry v. Ohio*, a case that dealt with the Fourth Amendment of the U.S. Constitution and its limitations on the scope of police conduct during investigatory stops.<sup>102</sup> Moreover, the *Terry* holding is pertinent in the traffic stop context because traffic stops are analogous to *Terry* stops.<sup>103</sup> So, contrary to the assertion of the *Amaya* court,<sup>104</sup> the *Evans* opinion had at least *something* to do with the scope of police inquiries during traffic stops, because the *Terry* stop in *Evans* is analogous to traffic stops.<sup>105</sup> Further, because *Terry* stops are analogous to traffic stops, the temporal and scope limitations articulated in *Terry*<sup>106</sup> would therefore equally apply to traffic stops as they do to other investigatory stops.<sup>107</sup> Therefore, in rejecting the applicability of *Evans* to the court's state constitutional analysis, the *Amaya* court wrongfully ignored the guiding precedent of *Evans*.

### 2. *Revisiting the Amaya Court's Treatment of Carter*

Even if the *Amaya* court was correct to exclude *Evans* from its state constitutional analysis, its rejection of *Evans* does not necessitate a rejection of *Carter* as a source of constitutional support for a subject matter limitation. Without *Evans*, the *Carter* holding survives solely

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<sup>102</sup> *Terry* can be read as having multiple holdings. The holding referred to here is the two-pronged test to determine whether an investigatory stop satisfied constitutional protections under the Fourth Amendment. Under that test's first prong, the traffic stop must be reasonable in its inception. *Terry*, 392 U.S. at 19–20. The key inquiry to this prong is whether the facts available to the officer at the moment of the seizure or the search “warrant a man of reasonable caution in the belief that the action taken was appropriate?” *Id.* at 21–22 (internal quotations omitted). Second, the search or seizure must be narrowly tailored to the scope of the original reason for the stop. *Id.* at 20.

<sup>103</sup> *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

<sup>104</sup> “Clearly, *Evans* had nothing to do with the scope of a police inquiry during a traffic stop.” *Amaya*, 176 Or. App. at 42, 29 P.3d at 1180.

<sup>105</sup> See *Berkemer*, 468 U.S. at 439.

<sup>106</sup> See *Terry*, 392 U.S. at 19–20 (holding that the stop must be related in scope and intensity to original justification for stop).

<sup>107</sup> See Wayne LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1862 (2004) (noting that, because *Berkemer* supports the characterization of a traffic stop as a *Terry* stop, the temporal and subject matter limitations imposed by *Terry* “would lead one to believe that [those] limitations . . . would apply with equal force to the so-called ‘routine traffic stop’”).

on its application of ORS 131.615.<sup>108</sup> However, even without *Evans*, the basis for the holding in *Carter* still implicates constitutional considerations in light of the legislative purpose behind ORS 131.615, which was “to protect interests of the kinds which are protected by the Fourth Amendment to the United States Constitution and by Art[icle] I, s[ection] 9, of the Oregon Constitution.”<sup>109</sup> Thus, the *Amaya* court’s characterization of *Carter* as not being a source of state constitutional support for a subject matter limitation is inaccurate.

Moreover, the law permits officers to execute traffic stops for the administrative, noncriminal purpose of enforcing the vehicle code. However, the purpose of a criminal stop is to investigate the commission of a crime.<sup>110</sup> Recognizing that the bases for routine traffic stops and criminal stops are different, *Carter* intended to draw a clear line between the justification required for a routine traffic stop and that for a criminal investigatory stop by applying a reasonable suspicion requirement to lawful criminal stops. By drawing that line, the *Carter* court clarified the basis for its belief that “traffic stops should be the minimum possible intrusion on Oregon motorists, and not an excuse to begin questioning, searching or investigating that is unrelated to the traffic reason for the stop.”<sup>111</sup> The *Carter* court adhered to that belief in order to prevent routine traffic stops from becoming wholesale criminal investigations. However, after the *Amaya* decision, law enforcement can now shoehorn a full-blown criminal investigation into a routine traffic stop without any reasonable suspicion of criminal activity so long as the questioning does not prolong the duration of the routine traffic stop. The *Amaya*

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<sup>108</sup> See *supra* note 17.

<sup>109</sup> *State v. Valdez*, 277 Or. 621, 629, 561 P.2d 1006, 1011 (1977); see also *State v. Toevs*, 327 Or. 525, 534, 964 P.2d 1007, 1013 (1998) (“The analysis of a defendant’s rights under those statutes, therefore, ‘is substantially the same as [an] analysis of [the defendant’s] rights under the search and seizure provisions of the Oregon and Federal constitutions.’” (alteration in original) (citing *State v. Kennedy*, 290 Or. 493, 496–97, 624 P.2d 99, 101 (1981), *invalidated on other grounds by State v. Hall*, 339 Or. 7, 115 P.3d 908 (2005))); *State v. Warner*, 284 Or. 147, 164, 585 P.2d 681, 690 (“In other words, the statutes are an attempted restatement of the rule of *Terry v. Ohio* . . .”).

<sup>110</sup> “A routine traffic stop to investigate a traffic violation is not a criminal investigatory stop; rather, it is a seizure to enforce a civil, administrative motor vehicle code provision.” Respondent’s Brief on the Merits at 26–27, *State v. Kirkeby*, 220 Or. App. 177, 185 P.3d 510 (2008) (S056237); see also *State v. Anderson*, 304 Or. 139, 141, 743 P.2d 715, 715–16 (1987) (observing that the legislature may authorize an administrative search unless criminal sanctions are the intended consequences of the search).

<sup>111</sup> *State v. Carter*, 34 Or. App. 21, 32, 578 P.2d 790, 796 (1978).

opinion muddles the distinction between the purposes of a traffic stop and a criminal stop.

### 3. *Revisiting the Amaya Court's Treatment of Federal Case Law*

Ultimately, the *Amaya* court chose to side with the rationale of the U.S. Court of Appeals for the Fifth Circuit—that is, officer questioning that is unrelated to the traffic stop does not itself amount to a Fourth Amendment seizure.<sup>112</sup> The *Amaya* court reasoned that it could take its pick between diverging federal circuit court opinions because of a perceived lack of binding U.S. Supreme Court precedent. However, was the law truly devoid of any binding precedent concerning a subject matter limitation on traffic stops at the time of the *Amaya* opinion?

In 1968, the U.S. Supreme Court decided *Terry*,<sup>113</sup> and it has not overturned or abrogated that decision since. In *Terry*, an officer observed two men, Terry and Chilton, involved in suspicious activity outside of a downtown store.<sup>114</sup> Fearing the men might be armed, the officer directly confronted them and requested their names.<sup>115</sup> The men “mumbled something” in reply<sup>116</sup> and, in response, the officer grabbed Terry and patted him down for weapons.<sup>117</sup> The officer’s search revealed a revolver in Terry’s overcoat.<sup>118</sup> The defendants in *Terry* were formally charged with carrying concealed weapons and moved to suppress evidence of the guns at trial.<sup>119</sup> The trial court denied the motion to suppress because the officer, the court found, had a reasonable suspicion that the defendants’ conduct warranted some sort of interrogation.<sup>120</sup> The court reasoned that the officer had a right to pat the men down for his own protection.<sup>121</sup> On a grant of certiorari, the U.S. Supreme Court concluded that the officer’s seizure and search were reasonable under the Fourth Amendment of the U.S.

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<sup>112</sup> *State v. Amaya*, 176 Or. App. 35, 47, 20 P.3d 1177, 1183 (2001).

<sup>113</sup> *Terry v. Ohio*, 392 U.S. 1 (1986).

<sup>114</sup> *Id.* at 5–6. After observing the men repeatedly scout out a store through its front window, the officer believed that the men were planning to rob the store. *Id.* at 6.

<sup>115</sup> *Id.* at 6–7.

<sup>116</sup> *Id.* at 7.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* The officer also searched Chilton and Katz and found another revolver on Chilton but no weapons on Katz. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 8.

<sup>121</sup> *Id.*



Constitution and affirmed the trial court's denial of the defendants' motion to suppress.<sup>122</sup>

The *Terry* decision stands for a number of important legal concepts concerning the reasonableness of a Fourth Amendment search or seizure. For one, a determination of the reasonableness of a search or seizure requires a two-pronged inquiry: (1) was the search or seizure reasonable at its inception; and (2) was the search or seizure "reasonably related in scope to the circumstances which justified the interference in the first place?"<sup>123</sup>

In *Florida v. Royer*,<sup>124</sup> the U.S. Supreme Court elaborated on the *Terry* holding by clarifying that the permissible scope of an investigatory stop depends on the length of the detention as well as the types of questioning and investigating that occur during the stop. "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."<sup>125</sup>

Returning to the *Amaya* decision, why did that court seemingly ignore binding U.S. Supreme Court case law like *Terry* and its progeny that imposed a subject matter limitation on officer questioning absent some reasonable suspicion of criminal activity? The *Amaya* court's rejection of *Evans* was an implicit rejection of *Terry* and its two-pronged test for determining the reasonableness of a search or seizure. After all, the *Evans* court's analysis was entirely

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<sup>122</sup> *Id.* at 30–31. Before reaching this conclusion, the U.S. Supreme Court first analyzed whether the officer's stop and frisk of the *Terry* defendants amounted to "seizures" and "searches," respectively, under the Fourth Amendment of the U.S. Constitution. The Court held that a "seizure" occurs under the Fourth Amendment any time law enforcement "accosts an individual and restrains his freedom to walk away." *Id.* at 16. Additionally, the Court held that a police frisk of a citizen amounts to a "search" under the Fourth Amendment. *Id.* at 16–17.

<sup>123</sup> *Id.* at 19–20. The first prong of the *Terry* analysis is often referred to as the reasonable suspicion test. See LaFave, *supra* note 107, at 1862 ("The first *Terry* prong, of course, has to do with whether the stop was made on reasonable suspicion."); see also Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 149 (1996) ("The first prong has evolved into a well-entrenched reasonable suspicion requirement."). Under the reasonable suspicion test, the *Terry* Court's key inquiry was whether "the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate." *Terry*, 392 U.S. at 21–22 (internal quotation omitted).

<sup>124</sup> 460 U.S. 491 (1983).

<sup>125</sup> *Id.* at 500 (citation omitted).

based on its application of *Terry* and the Fourth Amendment.<sup>126</sup> The *Amaya* court considered *Evans* to be inapplicable to its analysis because “*Evans* had nothing to do with the scope of a police inquiry during a traffic stop.”<sup>127</sup> Yet, *Berkemer v. McCarty*, a U.S. Supreme Court case decided before the *Amaya* decision, observed that “the usual traffic stop is more analogous to a so-called ‘*Terry* stop’ . . . than to a formal arrest.”<sup>128</sup> Thus, the *Amaya* court was wrong to dismiss the applicability of *Evans* in its analysis of a subject matter limitation in the U.S. Constitution just because *Evans* dealt with a street encounter instead of a traffic stop. Because traffic stops are akin to *Terry* stops, the temporal and subject matter limitations that apply to non-vehicular investigatory stops, as in *Terry*, would therefore apply with equal vigor to traffic stops.

#### 4. Problems in Applying the *Amaya* Standard

The *Amaya* court read *Toevs* to mean that officer questioning during a valid traffic stop does not require reasonable suspicion because the inquiries themselves do not amount to detention, and therefore do not implicate article I, section 9 of the Oregon Constitution. Put differently, the *Amaya* court believed officer questioning during a routine traffic stop was functionally equivalent to “mere conversation” in non-traffic investigatory stops.<sup>129</sup> Because “mere conversation” itself does not amount to a detention under *Holmes*,<sup>130</sup> the *Amaya* court inferred that officer questioning alone does not trigger article I, section 9 protections.<sup>131</sup> However, is officer questioning during a traffic stop truly indistinct from mere conversation during a street encounter, as the *Amaya* court

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<sup>126</sup> See generally *State v. Evans*, 16 Or. App. 189, 517 P.2d 1225 (1974).

<sup>127</sup> *State v. Amaya*, 176 Or. App. 35, 42, 29 P.3d 1177, 1180 (2001).

<sup>128</sup> *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); see also *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (noting that a traffic stop is more like a *Terry* encounter than an arrest and any additional intrusions into the driver’s or passenger’s search and seizure rights must be independently justified); LaFave, *supra* note 107, at 1862 (“In lower-court cases involving . . . the Fourth Amendment question of what temporal and scope limitations apply during a traffic stop, that characterization from *Berkemer* has often been quoted with apparent approval.”). LaFave then cites to lower-court decisions such as *United States v. Rodriguez-Arreola*, 270 F.3d 611 (8th Cir. 2001), and *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003), that support the notion that traffic stops are akin to *Terry* stops.

<sup>129</sup> *Amaya*, 176 Or. App. at 42–43, 29 P.3d at 1181.

<sup>130</sup> See *State v. Holmes*, 311 Or. 400, 407, 813 P.2d 28, 32 (1991) (“[P]olice-citizen encounter without any restraint of liberty (e.g. mere conversation, a non-coercive encounter) is not a ‘seizure . . .’”).

<sup>131</sup> *Amaya*, 176 Or. at 44, 29 P.3d at 1181.

concluded? Contrary to the *Amaya* court's assertion, the terms "mere conversation" and "seizure" describe two exclusive concepts.<sup>132</sup> On one hand, "mere conversation" occurs only between an officer and a person who is *not* seized—"that is, a person who is free to end the interaction and walk away from the officer."<sup>133</sup> On the other hand, a traffic stop is a seizure for constitutional purposes because a stopped motorist is compelled to interact with the officer and is not free to leave the encounter without the officer's assent.<sup>134</sup> Therefore, officer questioning itself during a traffic stop is not mere conversation because the questioning occurs during a seizure—the traffic stop.

Further, when an officer poses unrelated questions during a routine traffic stop, the questioning morphs the routine traffic stop into a broader criminal investigation. But according to the *Amaya* court, the questioning itself does not amount to a separate seizure and therefore does not trigger Oregon constitutional protections. Why does the questioning itself amount to a new seizure to trigger those protections? Consider the hypothetical from before, except in this version the officer asks to search the motorist's house instead of the backpack.<sup>135</sup> Under the *Amaya* standard, the traffic stop ended when the officer gave the motorist the citation for the defective license plate light. However, it is unclear under *Amaya* whether the officer's request to search the home occurred before or after the completion of the traffic stop. Thus, the *Amaya* standard is problematic because it fails to account for baseless officer questioning that does not delay the duration of the traffic stop.

Additionally, the *Amaya* standard does not help to determine the lawfulness of the officer's requests to search the driver's home because the standard does not take into account the intensity of the officer questioning. Assuming that the officer never developed a reasonable suspicion of criminal activity at the driver's house, the officer's request to search the house seems incredibly unreasonable, in addition to being well outside the scope of the traffic stop.

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<sup>132</sup> See Respondent's Brief on the Merits at 2, *State v. Kirkeby*, 220 Or. App. 177, 185 P.3d 510 (2008) (S056237).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*; see also OR. REV. STAT. § 811.535 ("(1) A person commits the offense of failing to obey a police officer if the person refuses or fails to comply with any unlawful order, signal, or direction of a police officer who: (a) Is displaying the police officer's star or badge; and (b) Has lawful authority to direct, control, or regulate traffic.").

<sup>135</sup> See hypothetical *supra* pp. 2–3.

Lastly, the *Amaya* Court declined to address the defendant's argument that the officer had seized her without a reasonable suspicion by questioning her about the purse prior to searching it. The court concluded that even if the officer had seized the defendant, the seizure was justified by concern for officer safety.<sup>136</sup> However, *Rodgers II* and *Gomes*, cases where the concern for officer safety were not at issue as in *Amaya*, cite to the *Amaya* opinion for the proposition that officer questioning alone is not a *per se* seizure. Because the *Amaya* court carved out a standard based on the need for ensuring officer safety, one doubts whether the *Amaya* standard is even applicable to *Rodgers II* and *Gomes*. Further, the omission of any meaningful article I, section 9 seizure analysis in the *Amaya* opinion sets a confusing precedent. The confusion manifests in the *Gomes* opinion, when the court ignores the bright-line test from *Holmes* for determining whether a seizure occurred under article I, section 9.<sup>137</sup> In sum, the broad application of the narrow *Amaya* standard to intrusive officer inquiries seems misplaced when considering that the officer inquiries in *Amaya* were posed in order to ensure officer and public safety.

*B. Understanding the Gomes Opinion in Light of State v. Amaya and State v. Rodgers/Kirkeby*

In *State v. Gomes*, the Oregon Court of Appeals interpreted *State v. Amaya* and *State v. Rodgers II* to mean that article I, section 9 imposes only a temporal limitation on the duration of a traffic stop.<sup>138</sup> Below, this Comment focuses on the *Gomes* court's consideration of the *Rodgers II* opinion and ultimately explains how the *Gomes* opinion's rejection of a constitutionally recognized subject matter limitation is in line with the current trend in the U.S. Supreme Court.

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<sup>136</sup> *Amaya*, 176 Or. App. at 38, 29 P.3d at 1178.

<sup>137</sup> [A] "seizure" of a person occurs under [a]rticle I, section 9, of the Oregon Constitution (a) if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual's liberty or freedom of movement; or (b) whenever an individual believes that (a), above, has occurred and such belief is objectively reasonable in the circumstances.

*State v. Holmes*, 311 Or. 400, 409, 813 P.2d 28, 34 (1991).

<sup>138</sup> *State v. Gomes*, 236 Or. App. 364, 371, 236 P.3d 841, 845 (2010) ("We take that language to confirm our *Rodgers* opinion and our opinion in *State v. Amaya* . . . that there are no [a]rticle I, section 9, implications if an inquiry unrelated to the traffic stop occurs during a routine stop but does not delay it.").

To begin, the *Gomes* court construed the *Rodgers II* opinion to mean that, although officer questioning combined with a show of authority may result in a constitutional seizure, that seizure is unlawful only if it occurs after the completion of the investigation of the traffic violation and without a reasonable suspicion of criminal activity. In other words, *Gomes* establishes that law enforcement can inquire, without any reasonable suspicion of criminal activity, into any matter during a routine traffic stop so long as the questions do not unreasonably prolong the duration of the stop.

Looking back to cases such as *Carter*, one can appreciate the major change in Oregon traffic-stop law ushered in by *Gomes*. As mentioned before, much of that change can be attributed to the enactment of Oregon's exclusionary rule and emerging federal circuit case law.<sup>139</sup> On the other hand, the apparent validity of *Terry*, and its dual-pronged test for determining the reasonableness of a seizure and search, still suggests that law enforcement conduct during traffic stops must be tailored to the scope of the circumstances that justified the initial interference, unless it is otherwise supported by reasonable suspicion. Although *Gomes* appears somewhat at odds with the *Terry* holding, modern U.S. Supreme Court case law has signaled the death of *Terry*.<sup>140</sup> Further, the *Gomes* opinion echoes the modern trend in U.S. Supreme Court decisions rejecting the notion that the federal Constitution supports a subject matter limitation on traffic stops.

*C. Arizona v. Johnson: The Supreme Court's Current Position on Fourth Amendment Restrictions to Law Enforcement Conduct*

In *Arizona v. Johnson*, the U.S. Supreme Court held that an officer's questioning of a passenger during a lawful traffic stop amounted to reasonable conduct under the Fourth Amendment despite the irrelevance of the questioning to the justification for the stop.<sup>141</sup> The defendant was a passenger in a car pulled over for a vehicle registration violation.<sup>142</sup> While one officer obtained the driver's

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<sup>139</sup> See *supra* Part III (discussing the effect of Oregon's statutory exclusionary rule on a subject matter limitation prescribed by statute); Part IV.A.2 (discussing the *Amaya* court's observation of the federal circuit split concerning a subject matter limitation under the U.S. Constitution).

<sup>140</sup> See Levit, *supra* note 123, at 146 (suggesting that the outcome of *U.S. v. Whren*, 517 U.S. 806 (1996), also signaled the death of *Terry*).

<sup>141</sup> 555 U.S. 323, 333–34 (2009).

<sup>142</sup> *Id.* at 327.

information, another officer approached the defendant and asked him questions about his gang activity.<sup>143</sup> Based on the defendant's answers while seated in the car, the officer suspected that the defendant might be armed and asked him to get out of the car.<sup>144</sup> When the defendant exited the car, the officer patted him down for officer safety and uncovered a gun from the defendant's waistband.<sup>145</sup> The defendant was arrested, charged with possession of a weapon by a prohibited possessor, and moved to suppress the evidence at trial as the result of an unlawful search.<sup>146</sup>

The *Johnson* Court disagreed with the Arizona Court of Appeals opinion that, prior to the frisk, the detention had transformed into a separate encounter stemming from an unrelated investigation of the defendant's possible gang affiliation.<sup>147</sup> The *Johnson* Court apparently abolished the rule in *Terry* that law enforcement conduct must be reasonably related in scope to the justification for the intrusion.<sup>148</sup> Instead, the Court recognized only a temporal limitation on the duration of the police interference: "[a]n officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."<sup>149</sup>

## VI

### THE IMPLICATIONS OF MODERN OREGON AND FEDERAL CASE LAW ON OREGON STATUTORY LAW

After the enactment of ORS 136.432, Oregon courts stopped looking to statutes and started analyzing the Oregon Constitution to determine whether there was a subject matter limitation on questioning during a traffic stop. Yet, modern Oregon case law fails to extrapolate a subject matter limitation from the Oregon

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<sup>143</sup> *Id.* at 328. The officer asked these questions after observing the defendant's blue bandana, which the officer considered identification of Crips gang membership, and a police scanner visible in the defendant's pocket, which the officer considered to be a possible indication that the defendant was involved in criminal activity. *Id.* Both observations aroused the officer's suspicions.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 333.

<sup>149</sup> *Id.* (citation omitted).

Constitution. Further, the U.S. Supreme Court in *Johnson* unequivocally announced that the Fourth Amendment of the U.S. Constitution does not recognize a subject matter limitation on traffic stops. However, ORS 131.615 and ORS 810.410 currently impose a subject matter restriction on officer questioning during traffic stops.<sup>150</sup> Do these laws still serve some function in light of the enactment of ORS 136.432? Or have these statutes been emasculated to such an extent that they no longer serve their original purpose?

*A. Perspective 1: The Subject Matter Limitation Statutes Are Meant to Remain Current Law*

Despite the deterioration of the subject matter limitation statutes,<sup>151</sup> they were meant to stand as current law. Through legislation, Oregon citizens collectively voiced their expectation that peace officers, when lacking reasonable suspicion of criminal activity, should conduct themselves in a manner relevant to the primary purpose of the traffic stop: investigating a traffic violation.

Most citizens acquiesce to an implied social contract with law enforcement to cooperate during traffic stops. Such cooperation stems in part from the respect that citizens generally have toward law enforcement. The average citizen understands that he or she is not free to leave in the middle of a traffic stop, and that certain information must be surrendered to officers to assist their investigation. When officers limit themselves to asking pertinent questions concerning the traffic stop, their intentions are obvious and understandable to the driver. By respecting the scope of the traffic-related reason for the stop, law enforcement symbolically confirms its mutual respect for and acknowledgment of this social contract. Thus, the statutes pertaining to subject matter limitation enforce the social contract between officers and citizens by promising specific restrictions on officer conduct during traffic stops.

But how do those statutes actually deter officer misconduct? After all, neither statute expressly articulates a remedy for a violation, and further, ORS 136.432 specifically disallows the suppression of evidence as recourse for violations of those statutes. As the statutes currently stand, they promise certain rights to citizens without defining any remedy for the deprivation of those rights.

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<sup>150</sup> See OR. REV. STAT. §§ 131.615(1)–(3)(b), 810.410 (2011).

<sup>151</sup> *Id.* §§ 131.615, 810.410.

*B. Perspective 2: ORS 131.615 and 810.410 Should Be Amended to Reflect the Current State of Oregon Law*

From a different perspective, the coupling of modern case law and the enactment of ORS 136.432 express a clear judicial and legislative intent to do away with a statutorily mandated subject matter limitation on traffic stops. Through legislation, Oregonians have shown that they value the police's ability to conduct their investigative function without worrying about procedural technicalities. During a traffic stop, society wants to empower law enforcement to lawfully be able to seize a person and search his or her automobile for weapons in order to ensure officer and public safety. In addition, Oregon wants to do its part to fight the war on drugs, a war that frequently takes place on Oregon highways. Appropriately, citizens of Oregon grant police the freedom to investigate crime through traffic-stop inquiries to make certain that public roads are not being used as conduits for drug trafficking.

Accordingly, the subject matter limitation statutes should be repealed. After all, neither the Oregon state nor the federal courts recognize such a subject matter limitation, so leaving the statutes as they are misstates the true law of the land and confuses Oregonians, officers, and citizens alike.

*C. Perspective 3: ORS 131.615 and 810.410 Should Be Amended to Protect Motorists from Intrusive Officer Conduct*

Due to the legislative purpose and history of case law behind the subject matter limitation statutes, the Oregon State Legislature ought to amend these statutes to include evidentiary suppression as a viable remedy for peace officer violations. In *State v. Thompson-Seed*, the court explained that Oregon legislators likely intended ORS 136.432 to address only the exclusion of evidence required by judicial ruling, not to repeal current laws.<sup>152</sup> “[I]t is well settled that... repeals by implication are not favored by the courts” because existing statutes reflect the popular will of the people.<sup>153</sup> Therefore, amending ORS 131.615 and ORS 810.410 to expressly include evidence suppression as a possible remedy restores the intended effect of the statutes—law

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<sup>152</sup> 162 Or. App. 483, 488, 986 P.2d 732, 736 (1999).

<sup>153</sup> *Id.* at 491, 986 P.2d at 736 (quoting *State ex rel. Med. Pear Co. v. Fowler*, 207 Or. 182, 195, 295 P.2d 167, 173 (1956)).



enforcement deterrence.<sup>154</sup> Such an amendment also would restore some judicial authority in analyzing the reasonableness of law enforcement conduct during traffic stops. Although ORS 136.432 seeks to eliminate wholesale judicial determinations of evidence suppression,<sup>155</sup> Oregon courts have historically encouraged at least some judicial input when deciding suppression issues. “Statutes should . . . ‘be so phrased as to leave a certain amount of judicial elbow room for the exercise of discretion.’”<sup>156</sup>

#### CONCLUSION

This Comment has examined nearly forty years of Oregon state and statutory law to answer the question posed from the start: Is there a subject matter limitation on officer inquiries during routine traffic stops in Oregon? Twenty years ago, the answer would have been “yes,” based on case law, such as *State v. Evans* and *State v. Carter*, and its application of ORS 131.615 and 810.410. However, the enactment of ORS 136.432, in addition to subsequent case law such as *State v. Amaya* and *State v. Gomes*, has collectively answered “no” to whether Oregon law recognizes a subject matter limitation. In sum, Oregon law does not recognize a subject matter limitation to officer inquiries that are unrelated to the traffic reason for the stop—for the time being.

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*The difficulty springs from the inherent tension between our commitment to safeguarding the precious, and all too fragile, right to go about one's business free from unwarranted government interference, and our recognition that the police must be allowed some latitude in gathering information from those individuals who are willing to cooperate. Given these difficulties, it is perhaps*

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<sup>154</sup> To clarify, violations of either ORS 131.615 or ORS 810.410 would not automatically trigger evidence suppression. As was the case before the enactment of ORS 136.432, Oregon courts have repeatedly stated that the “[v]iolation of a law by law enforcement personnel does not necessarily require suppression.” *State v. Trenary*, 316 Or. 172, 176, 850 P.2d 356, 358 (1993).

<sup>155</sup> See *Thompson-Seed*, 162 Or. App. at 488, 986 P.2d at 734 (noting that the language of ORS 136.432 is consistent with the intention to focus more narrowly on court-created rules of exclusion).

<sup>156</sup> *State v. Tourtillott*, 289 Or. 835, 841, 618 P.3d 423, 426 (1980).

*understandable that our efforts to strike an appropriate balance have not produced uniform results.*<sup>157</sup>

– Justice Brennan

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<sup>157</sup> INS v. Delgado, 466 U.S. 210, 226 (1984) (Brennan, J., concurring in part and dissenting in part).