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# “Lonesome Road”\*: Driving Without the Fourth Amendment

Lewis R. Katz\*\*

## I. INTRODUCTION

While America promotes the need for governments to act in accord with the rule of law throughout the world, we have abandoned the rule of law in our own country. Our streets and highways have become a police state where officers have virtually unchecked discretion about which cars to stop for the myriad of traffic offenses contained in state statutes and municipal ordinances, and that discretion is often aimed at minority motorists. Courts look the other way and will not inquire into the officer’s decision to stop a particular motorist if the reviewing court finds that the officer had sufficient facts to believe that the motorist committed a traffic offense.<sup>1</sup> Where there is an objectively reasonable justification for the stop, pretextual traffic stops may not be challenged even when the underlying reason for the stop is race.<sup>2</sup>

Once an officer stops a motorist for a traffic offense, the officer has discretion to transform that traffic stop into an investigation of other serious crimes without the check of reasonable suspicion or probable cause

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\* BOB DYLAN, *Ain’t Talkin’*, on MODERN TIMES (Columbia Records 2006) (“Ain’t no altars on this long and lonesome road”); BOB DYLAN, *Don’t Think Twice, It’s All Right*, on THE FREEWHEELIN’ BOB DYLAN (Columbia Records 1963) (“I’m walkin’ down that long, lonesome road, babe”); BOB DYLAN, *Tough Mama*, on PLANET WAVES (Asylum Records 1974) (“With the badge of the lonesome road sewed in your sleeve”).

\*\* Lewis R. Katz is the John C. Hutchins Professor of Law at Case Western Reserve University Law School. He is grateful for the research support provided by the Law School and for the comments and suggestions of several colleagues, Michael Benza, George Dent, Sharona Hoffman, and Jacqui Lipton. He is especially grateful for the research and editorial assistance provided by his research assistants, Emily Myers, Noah Fowle, and Thomas Kelly. He thanks Deborah Dennison, the Head of Bibliographic Access at the CWRU Law Library, for her magic in finding even the most obscure and hidden sources.

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

2. See Tracey Maclin, *United States v. Whren: The Fourth Amendment Problem with Pretextual Stops*, in WE DISSENT 90, 94 (Michael Avery ed., 2009) (“Tellingly, the decision in *Whren* did not question the defendants’ claim that racial profiling had occurred in their case or was occurring nationwide.”).

to limit the inquiry.<sup>3</sup> The only limitation on the investigation of other crimes is that the duration of that stop is subject to the Fourth Amendment reasonableness standard.<sup>4</sup> Courts disagree on what length of time is reasonable, but even a fifteen-minute traffic stop is long enough for an officer to run a drug dog around the car, ask the motorist about nontraffic offenses, and request permission to search the car.<sup>5</sup> Many police routinely ask people stopped for nonarrestable traffic violations for permission to search the car, obviously to look for evidence unrelated to the traffic offense. Whether the motorist voluntarily consents to the search will be litigated only if that search leads to the discovery of evidence; courts determine the voluntariness of the consent without regard to the critical issue of whether the motorist knew that he or she had a right to refuse.

In some states, police also have discretion to arrest rather than issue a traffic citation even for a minor traffic offense, further enhancing the officer's status as the unchecked king of the highway. The Supreme Court has held that an arrest for the most trivial offense does not violate the Fourth Amendment if state law allows it.<sup>6</sup> In states where officers have the discretion to write a ticket or to arrest, officers may base that decision upon whether they want to search the motorist and possibly even the vehicle.<sup>7</sup> The law has developed so that the officer need not articulate a legal basis for the search.<sup>8</sup> When the officer's testimony of the incident indicates an absence of lawful justification for the search, the reviewing and appellate courts will uphold the search if there are other legal grounds for the search.<sup>9</sup> The message those courts are sending to the police is search the car now, and a reviewing court will find a lawful justification for the search later.

The protections of the Fourth Amendment on the streets and highways of America have been drastically curtailed. This Article traces the debasement of Fourth Amendment protections on the road and how the Fourth Amendment's core value of preventing arbitrary police behavior

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3. See *infra* Part II.

4. See *infra* Part II.C.

5. Not all courts concur that a fifteen-minute stop is automatically reasonable. See *United States v. Digiovanni*, 650 F.3d 498, 511 (4th Cir. 2011) (“[T]he government’s argument fails to recognize that investigative stops must be limited both in scope *and* duration. Creating a rule that allows a police officer fifteen minutes to do as he pleases reduces the duration component to a bright-line rule and eliminates the scope inquiry altogether. In its reasonableness jurisprudence the Supreme Court has ‘consistently eschewed bright-line rules,’ and the scope of a police officer’s actions remains relevant in Fourth Amendment traffic stop inquiry.” (emphasis in original) (citations omitted)).

6. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

7. See *infra* Part II.D–E.

8. See, e.g., *United States v. Drayton*, 536 U.S. 194 (2002).

9. *Id.*

has been marginalized.<sup>10</sup> Over the past fifteen years, the Supreme Court has handed down four decisions solidifying police discretion and largely eliminating Fourth Amendment oversight of the decision to stop a particular car and the scope of investigation that follows the stop.<sup>11</sup> The remaining Fourth Amendment issues provide scant protection for motorists. This Article first discusses *Whren v. United States*,<sup>12</sup> which insulates pretextual traffic stops from Fourth Amendment challenges.

This Article contends that the existence of a traffic offense should not be the end of the inquiry but the first step, and that defendants should be able to challenge the reasonableness even when there is proof of a traffic offense.<sup>13</sup> Similarly, the Article contends that the existence of state law authorizing arrests for minor, often trivial traffic offenses should be assessed next in determining the reasonableness of an officer's decision to make a custodial arrest for a minor traffic offense.<sup>14</sup> The Article outlines the many different categories of encounters between police and motorists, and then sets forth how police are empowered to transform the traffic stop into an investigation of more serious crimes.<sup>15</sup> Finally, the Article proposes that a police officer should be required to offer a reasonable explanation for subjecting a defendant stopped for a minor traffic offense to an expanded investigation.<sup>16</sup> Motorists subject to the broader inquiry tend to be young, black or Hispanic men who are profiled as po-

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10. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979) (“The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents . . . .” (citations omitted)); *City of Ontario v. Quon* 130 S. Ct. 2619, 2627 (2010) (“The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government.” (internal quotation marks omitted)); see also Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1492 (“Nothing in the Fourth Amendment requires that reasonableness review be ultra-deferential. Indeed, given the reasons why the Fourth Amendment was included in the Bill of Rights—the desire to constrain arbitrary and exploratory governmental searches and seizures—a non-deferential standard of review is more appropriate than deferential, pro-government review.”).

11. See *Arizona v. Johnson*, 555 U.S. 323 (2009) (allowing police discretion to remove driver or passenger from a car to pat them down for weapons); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (allowing police discretion to arrest a motorist for minor traffic violations); *Ohio v. Robinette*, 519 U.S. 33 (1996) (allowing police to pull a motorist out of a vehicle to ask questions unrelated to the traffic stop); *Whren v. United States*, 517 U.S. 806 (1996) (holding that officer's motivation is not determinative in establishing the reasonableness of a lawful traffic stop under the Fourth Amendment).

12. *Whren*, 517 U.S. 806.

13. See *infra* Part II.D.

14. *Id.*

15. And this Article explores whether the opportunity to investigate for other crimes may have motivated the officer's initial decision to single out a specific motorist from others committing the same traffic offense. See *infra* Part II.

16. See *infra* Part II.D.

tential drug carriers.<sup>17</sup> The Supreme Court has turned its back on this population and has eliminated meaningful Fourth Amendment review of what happens on the streets and highways after it is established that a traffic offense has occurred. This Article suggests that the Supreme Court reconsider its uninterrupted line of cases over the past fifteen years that have stripped the Fourth Amendment of its meaningfulness on the roads and highways of America. The Article proposes the following: (1) police should be limited in the stops that they can make, and stops should be required to serve a highway safety purpose; (2) the commission of a minor traffic offense should not be sufficient justification for a custodial arrest without a showing of additional need; (3) police should not be allowed to escalate every traffic stop into an inquiry about more serious offenses without reasonable suspicion; and (4) police should demonstrate a reason for requesting to search a minor traffic offender's vehicle. Without such reform, American motorists will continue to be subject to the whims of police officers every time they step foot into their cars.

## II. THE COLLAPSE OF FOURTH AMENDMENT PROTECTIONS IN TRAFFIC STOPS

### A. *Whren v. United States*

Many factors influence a police officer's decision not only to single out and stop a vehicle for a traffic infraction, but whether to warn, cite, or arrest the motorist in jurisdictions where arrest for a traffic offense is an available option.<sup>18</sup> The law finds some factors permissible and beyond reproach, such as when the traffic violation creates a risk to the motorist or to other cars on the road.<sup>19</sup> However, some factors are not beyond reproach; some motorists are targeted because the officer wants to investigate more serious crimes and hopes to obtain the motorist's "consent" to

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17. See, e.g., *United States v. Harvey*, 16 F.3d 109, 110 (6th Cir. 1994).

18. See *Whren v. United States*, 517 U.S. 806, 818 (1996) ("[T]hat the multitude of applicable traffic and equipment regulations is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop." (internal quotation marks omitted)); David A. Harris, "Driving While Black" and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 559 (1997) ("[W]ith the traffic code in hand, any officer can stop any driver any time. The most the officer will have to do is 'tail a driver for a while,' and probable cause will materialize like magic.").

19. *Delaware v. Prouse*, 440 U.S. 648, 658 (1979) ("We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed."); *New York v. Class*, 475 U.S. 106, 112 (1986) ("In *Delaware v. Prouse* we recognized the 'vital interest' in highway safety and the various programs that contribute to that interest.").

search the vehicle.<sup>20</sup> Some officers single out motorists from the larger driving population based on race or ethnicity, which is an unconstitutional practice.<sup>21</sup> However, the Supreme Court has foreclosed the pretext challenge under the Fourth Amendment if a legal basis existed for the traffic stop, regardless of the officer's motivation.<sup>22</sup> Moreover, the Equal Protection Clause, as demonstrated below, is unlikely to gain footing as a viable alternative to litigate and control pretextual stops.

In *Whren v. United States*,<sup>23</sup> plainclothes officers in two unmarked police cars patrolling in a "high drug area" observed young black men in a truck with temporary license plates.<sup>24</sup> The men were stopped at a stop sign for more than twenty seconds, and the driver was looking down into his passenger's lap. The driver turned right without signaling and sped off at an unreasonable speed. One of the unmarked police cars went after the truck and stopped alongside the truck, which by then was stopped at a red light behind other traffic. The officer testified that he intended to issue a warning to the driver for his failure to signal a turn and for speeding. When the officer approached the driver's side of the vehicle and or-

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20. Harris, *supra* note 18, at 575 ("[O]fficers ask the people they stop to consent to a search. While those asked need not consent, many do. . . . [T]he predominant reason drivers consent lies with the police officers. Their goal, plain and simple, is to get people to agree to a search.").

21. *Farm Labor Organizing Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533–34 (6th Cir. 2002) ("[I]f the plaintiffs can show that they were subjected to unequal treatment based upon their race or ethnicity during the course of an otherwise lawful traffic stop, that would be sufficient to demonstrate a violation of the Equal Protection Clause. . . . An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [practice] bears more heavily on one race than another." (internal quotation marks omitted)). *But see id.* at 553 (Kennedy, J., dissenting) ("I believe there is the same need for the *Whren* analysis in equal protection claims, a holding that an officer may arrest with probable cause and that the court will not examine whether the officer also had discriminatory purpose.").

22. *Whren*, 517 U.S. at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2078 (2011) ("A warrant based on individualized suspicion grants more protection than existed in most of this Court's cases eschewing inquiries into intent."). *But see State v. Heath*, 929 A.2d 390, 406 (Del. 2006) ("Therefore, for an officer to conduct an investigation beyond that required in order to complete the purpose of the traffic stop, the occupants must consent or the officer must have independent facts sufficient to justify this additional intrusion. . . . While *Whren* is utilized to declare that a purely pretextual stop is not offensive to the Fourth Amendment, the standard announced by the *Caldwell* Court effectively works to place a restriction on 'police officers' authority to employ marginally applicable traffic laws as a device to circumvent constitutional search and seizure requirements." (quoting *Caldwell v. State*, 780 A.2d 1037, 1048 (Del. 2001))); *State v. Ochoa*, 206 P.3d 143, 153 (N.M. Ct. App. 2008) ("We believe that our constitutional requirement that searches and seizures be reasonable based on the particular facts of each case should preclude our adoption of the mechanical federal rule that a technical violation of the traffic code automatically legitimizes a stop. Further, consistent with our previous departures from federal precedent, we do not believe that the federal bright-line rule is justified.").

23. *Whren*, 517 U.S. 806.

24. *Id.* at 808 (internal quotation marks omitted).

dered the driver to put the car in park, the officer saw two large plastic bags that appeared to contain crack cocaine in the driver's hands. By initiating the traffic stop, the officers violated District of Columbia police regulations that allow plainclothes officers in unmarked police cars to enforce traffic laws "only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others."<sup>25</sup> At the pretrial suppression hearing, the arresting officer denied that he stopped the car because of racial profiling.<sup>26</sup>

Justice Scalia, writing for a unanimous Court, said, "We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race,"<sup>27</sup> but then eliminated Fourth Amendment pretext challenges based upon race in a criminal case: "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."<sup>28</sup> The officer's state of mind "does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."<sup>29</sup> When the prosecution can demonstrate probable cause or reasonable suspicion to justify a traffic stop or arrest, an officer's ulterior motive is irrelevant. Of course, in most cases it will be impossible to prove an officer's ulterior motive—as in *Whren* where the officer denied engaging in racial profiling. However, the Court's test also forecloses such challenges even when the officer admits on the record that race or a desire to investigate other crimes motivated the stop and that there was no probable cause or reasonable suspicion to justify investigating the other offenses.<sup>30</sup> The Court failed to address cases of admitted racial profiling, but its general rule applies to those cases as well.

The Supreme Court did not explain how a court could ignore an officer's admission to a pretextual motivation for the stop or why our society should place its imprimatur of approval on such stops, especially in light of our country's troubled history of race relations and the ongoing story of police interference with black motorists.<sup>31</sup> The Court would sure-

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25. *Id.* at 815 (quoting WASHINGTON, D.C., GENERAL ORDER 303.1, pt. 1, OBJECTIVES & POLICIES (A)(2)(4) (Apr. 30, 1992)).

26. *United States v. Whren*, 53 F.3d 371, 373 (D.C. Cir. 1995) ("[Officer Soto] testified that the decision to stop the Pathfinder was not based upon the 'racial profile' of the appellants, but rather on the actions of the driver.").

27. *Whren*, 571 U.S. at 813.

28. *Id.* ("But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."); see also *Arkansas v. Sullivan*, 532 U.S. 769, 769 (2001) ("[A]ny improper subjective motivation of police officer for stopping defendant's vehicle did not render arrest violative of Fourth Amendment . . .").

29. *Whren*, 571 U.S. at 813 (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)).

30. See *supra* notes 26–27 and accompanying text.

31. See *supra* notes 26–27 and accompanying text.

ly respond that they do not approve of stops based on racial profiling, but their holding in *Whren* rebuts that denial.<sup>32</sup>

The Supreme Court also rejected an alternative pretext challenge that avoids the subjective analysis of the police officer's actual motivation by substituting a "reasonable officer" standard, focusing on whether a reasonable officer would have made the stop or arrest under the same circumstances.<sup>33</sup> In advancing this argument, the petitioners in *Whren* focused on the local police regulations that restricted stops by plainclothes officers absent an "immediate threat to the safety of others."<sup>34</sup> Justice Scalia dismissed the reasonable officer test as a subterfuge for challenging pretextual stops based on subjective intent, "the more sensible option," but one that he had already foreclosed.<sup>35</sup> The principal basis of the rule "is simply that the Fourth Amendment's concern with 'rea-

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32. The current Supreme Court has even applied the "objective reasonableness" standard to unrelated areas where the actual belief of the officer is relevant to determining whether that officer's conduct was reasonable under the Fourth Amendment, in each case to expand police power under the emergency or exigency theory where the officers' conduct belied a belief in the actual existence of an emergency or exigent circumstances. See *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006) (rejecting the Utah Supreme Court finding that the officers did not act to assist the injured person but acted exclusively in their law enforcement capacity by arresting the adults and that "the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning"), construed in *United States v. Najjar*, 451 F.3d 710, 718 (10th Cir. 2006) (reading *Brigham* as eliminating inquiry into whether police officers were motivated to enter with investigatory intent); *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011) (holding that in limiting the scope of the police-created exigency rule upon the exigent circumstances exception to the warrant requirement, "[l]egal tests based on reasonableness are generally objective, and this Court has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer'" (quoting *Horton v. California*, 496 U.S. 128, 138 (1990))); *Michigan v. Fisher*, 130 S. Ct. 546, 549 (2009) (using an objective reasonableness test "even if the failure to summon medical personnel conclusively established that [the officer] did not subjectively believe, when he entered the house, that Fisher or someone else was seriously injured").

33. See, e.g., *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986) ("Furthermore, we reject the government's contention that the stop nevertheless was valid because Trooper Vogel could have stopped the car to investigate the possibility of drunk driving. We conclude that in determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer would have made the seizure in the absence of illegitimate motivation."); *United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988), overruled by *United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995) ("For these reasons, we believe the Eleventh Circuit has established the better test for determining whether an investigatory stop is unconstitutional: a court should ask 'not whether the officer could validly have made the stop, but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose.'" (construing *Smith*, 799 F.2d 704).

34. *Whren*, 517 U.S. at 815 (emphasis in original).

35. *Id.* at 814 ("Why one would frame a test designed to combat pretext in such fashion that the court cannot take into account *actual and admitted pretext* is a curiosity that can only be explained by the fact that our cases have foreclosed the more sensible option.").



sonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."<sup>36</sup>

The Court also dismissed the relevancy of local regulation as a test for how a reasonable officer would have responded, holding that "[w]e cannot accept that the search and seizure protections of the Fourth Amendment are so variable, and can be made to turn upon such trivialities."<sup>37</sup> Of course, the Court used the same District of Columbia general police regulation to buttress the bright-line rule allowing a full-body search of an arrested motorist.<sup>38</sup> The Court has also used a reasonable officer test to support expanded police power in other contexts where the officer's actual belief did not support the same expansion of police authority.<sup>39</sup>

The Court's holding in *Whren* institutionalizes pretextual stops and arrests. It serves as a green light for police officers to stop whomever they please, regardless of the officer's reason, provided that the officer can show facts and circumstances rising to the level of a traffic violation. No matter how selective the stop, *Whren* forecloses the issue under the Fourth Amendment. Moreover, the Court failed to address several questions, including (1) why stopping a particular motorist for a traffic offense committed by other motorists at the same time is reasonable under the Fourth Amendment, and (2) why courts should ignore the racial aspects of these cases. Police enforcement practices that focus on minority drivers serve only to increase tensions between minority communities and the police and deserve an airing under the Fourth Amendment reasonableness standard. The Court's silence on this critical concern removes the Fourth Amendment from a possible solution to vexing racial issues and acts as a cowardly endorsement of such policies. Following *Whren*, the Supreme Court expressed general discomfort with "the 'vast amount of discretion' granted to the police in its enforcement," but the Court expressed its discomfort in a case challenging an anti-gang ordi-

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36. *Id.* (emphasis in original).

37. *Id.* at 815 (citations omitted).

38. *See infra* notes 203–04 and accompanying text; *see also* United States v. Robinson, 414 U.S. 218, 223 n.2 (1973) ("[O]fficers are instructed to examine the 'contents of all of the pockets' of the arrestee in the course of the field search. . . . [T]hese standard operating procedures were initiated by the police department primarily, for the officer's own safety and, secondly, for the safety of the individual he has placed under arrest and, thirdly, to search for evidence of the crime." (internal quotation marks and alterations omitted)).

39. *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) (finding public safety exception to the requirement that police issue *Miranda* warnings to an arrestee before asking questions; officer's explanation that he asked the question because he wanted to find the gun to use as evidence was not decisive because the "reasonable officer" would have been concerned that the unfound gun posed a threat to public safety).

nance on First Amendment grounds.<sup>40</sup> The Supreme Court has not revisited the issues raised in *Whren* other than to reaffirm its commitment to the *Whren* doctrine.

*B. Use of Race in Traffic Stops, Before and After Whren*

The Court's holding in *Whren* merely solidified a trend in United States jurisprudence toward ignoring police officers' racial biases, admitted or otherwise. In fact, courts have upheld traffic stops even when the police officer openly admits to using race as the motivating factor behind making the stop. In *United States v. Harvey*,<sup>41</sup> a pre-*Whren* case, the defendants were driving in a 1978 Chevrolet automobile with a missing headlight and bumper, three miles over the speed limit.<sup>42</sup> The police officer later admitted to making the stop based on race.<sup>43</sup> The defendant clearly committed a traffic violation, albeit slight at just three miles over the speed limit, but as the dissent said,

The problem . . . is the officer said he stopped the vehicle because the occupants were African-Americans. Officer Collardey testified if the occupants had not been African-Americans, he would not have stopped the car. Officer Collardey's improper motivation for the stop inserted an unconstitutional illegality into the stop. . . . Yet, the majority acquiesces to an officer's substitution of race for probable cause and essentially licenses the state to discriminate.<sup>44</sup>

A more recent term for using race in making traffic stops is "depolicing," which the New Jersey Superior Court defined as "officers, on their own, decid[ing] to stop taking pro-active steps to engage citizens."<sup>45</sup> Officers who take this approach believe "that if they don't initiate contact with members of the public, they can't be accused of using racial biases."<sup>46</sup>

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40. *United States v. Morales*, 527 U.S. 41 (1999), *aff'g* 687 N.E.2d 53 (Ill. 1997) ("The gang loitering ordinance fails to meet these standards. The ordinance provides such ambiguous definitions of its elements that it does not discourage arbitrary or discriminatory enforcement. The definition of loitering as 'to remain in any one place with no apparent purpose' provides absolute discretion to police officers to decide what activities constitute loitering. Moreover, police are given complete discretion to determine whether any members of a group are gang members. These guidelines do not conform with accepted standards for defining a criminal offense.")

41. *United States v. Harvey*, 16 F.3d 109 (6th Cir. 1994).

42. *Id.* at 110.

43. *Id.* at 113 (Keith, J., dissenting).

44. *Id.* at 113-14.

45. *Gacina v. State*, No. L-1427-05, 2011 WL 9275, at \*7 (N.J. Super. Ct. App. Div. Nov. 16, 2010).

46. *Id.*

In *United States v. Hare*,<sup>47</sup> a U.S. district court discussed a state trooper's admitted use of de-policing in a defendant's selective enforcement claim. Trooper Pelster pulled the defendant over on the highway one night for improperly changing lanes and cutting off both Pelster and another driver. The defendant offered Pelster's testimony that he "would sometimes intentionally refrain from stopping minority motorists who had committed traffic violations in an attempt to avoid being perceived as a racist."<sup>48</sup> Pelster called this practice de-policing, and he explained that it never meant choosing to stop a driver, only choosing not to stop a driver, based on race.<sup>49</sup> The court held,

While this testimony may prove that Pelster was unsophisticated, and quite frightened about being called a racist, it certainly does not have any tendency to prove that he stopped, searched, or arrested the defendants, or anyone else, because of their race or ethnicity. If it proves anything, it proves the opposite of the inference suggested by the defendants. This is particularly true where, as here, the evidence showed that the officer acted professionally when dealing with members of the minority public.<sup>50</sup>

The court disparaged Pelster's actions, holding that "[s]topping some 'threshold' number of white motorists does not permit occasional mistreatment of non-white motorists. To hold otherwise would make a mockery of the protections of the Equal Protection Clause."<sup>51</sup> The court even acknowledged that Pelster's de-policing practice amounted to selective enforcement based on race, but stopped short of finding for the defendant, since Pelster stopped the defendant at night and Pelster testified that he could not de-police in the dark unless the area was well-lit.<sup>52</sup> The court addressed Trooper Pelster's behavior with a mere slap on the wrist, saying that he should be ordered to cease and desist from his use of selective enforcement based on race.<sup>53</sup> In any event, decisions not to stop based on race, just as decisions to stop based on race, are arbitrary and lawless.

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47. *United States v. Hare*, 308 F. Supp. 2d 955, 966 (D. Neb. 2004).

48. *Id.* at 966.

49. *Id.* at 975-76.

50. *Id.* at 966.

51. *Id.* at 995.

52. *Id.* at 994 ("As such, unless he was patrolling in areas particularly well lighted during nighttime hours, any efforts he made to stop more white motorists would likely occur in the daytime when he could readily see the driver's race or skin color.").

53. *Id.*

*C. Alternative Challenges to Pretext Stops: Equal Protection*

The absence of Fourth Amendment challenges to a traffic stop supported by reasonable suspicion or probable cause should not end the inquiry into how police select those to stop and those not to stop. The selection process deserves scrutiny, given that most of us give police cause to stop us every time we operate a vehicle,<sup>54</sup> and we understand from the outset that it is impossible for police to stop every driver who commits an infraction.<sup>55</sup> Real safety concerns necessitate certain traffic laws, and stops made in furtherance thereof are beyond question. There is adequate control upon an officer's discretion when the statute or ordinance includes an element requiring that the traffic offense or equipment violation create a dangerous driving condition.<sup>56</sup> However, most traffic laws do not include such a limitation on the officer's discretion, in which case, observation of a violation is sufficient to justify the traffic stop.<sup>57</sup>

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54. See Harris, *supra* note 18, at 558 ("Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation.")

55. See, e.g., *Approximate Number of Traffic Citations*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., <http://portal.nhtsa-tsis.net/triprs/f?p=103:12:4359233143959016> (click "Browse TRI"; then browse by state; then click on "Traffic Citation Data System"; then refer to question #2, approximate number of traffic citations) (last visited Feb. 17, 2013) (Illinois: 2,387,413 (May 17, 2012); New York: 4,000,000 (Apr. 16, 2012); Colorado: 185,000 (Mar. 19, 2010); Arizona: 953,000 (June 2, 2007)).

56. *Compare* People v. McQuown, 943 N.E.2d 1242 (Ill. App. Ct. 2011) (upholding the stop and search of a vehicle because "the officer indicated defendant had been stopped for having an obstructed windshield based on air fresheners hanging on the rearview mirror"), *with* People v. Arias, 159 P.3d 134, 138 (Colo. 2007) (holding that mere observation of an air freshener cannot be the basis for a traffic stop); *Swagerty v. State*, 982 So. 2d 19 (Fla. Dist. Ct. App. 2008) (finding a statute authorized stop for cracked windshield only if officer reasonably believed that crack rendered vehicle in such unsafe condition as to endanger person or property); *State v. Kendall*, No. 2009-CA-0010, 2010 WL 308038, at \*3 (Ohio Ct. App. Jan. 25, 2010) ("The Court concluded that the simple appearance of a crack in a windshield does not give rise to a reasonable suspicion of a violation of R.C. 4513.02(A). Rather, this Court has recognized that the size and placement of the crack must be sufficient to create a reasonable suspicion that R.C. 4513.02 was being violated." (citation omitted)); *State v. Elmore*, 250 P.3d 439, 443 (Or. Ct. App. 2011) ("As defendant posits, 'a crack is not a tangible or physical object separate from the window itself. It does not have its own substance beyond pure window glass.' Here, the deputy stopped defendant because he saw a crack in defendant's windshield. Accordingly, because the facts, as the deputy actually perceived them, did not satisfy the elements of ORS 815.220(2) [which requires 'material' on the windshield], he lacked objective probable cause to stop defendant."); *and* Commonwealth v. Shabazz, 18 A.3d 1217 (Pa. Super. Ct. 2011) (finding police reasonably believed a driver was in violation of a statute that prohibited hanging of material obstructions from vehicle's inside rearview mirror and thus supported traffic stop; officer testified specifically about the size and nature of the air fresheners and fuzzy dice he observed hanging from the rearview mirror and explained how these items might impair a driver's view).

57. See *United States v. Contreras Trevino*, 448 F.3d 821, 824–25 (5th Cir. 2006) ("[The] district court also found that the appellant's license plate frame covered the state motto, 'The Lone Star State,' as well as a picture of oil derricks and much of the 'cowboy in the country' design. The defendant does not contest these factual findings, nor do we believe that the district court clearly erred in making them. We affirm the district court's finding that the defendant's license plate violat-

Oftentimes, traffic stops may be less about real safety issues and more about investigating other crimes and drug interdiction.<sup>58</sup> The federal government, through training and by providing financial incentives to local police departments,<sup>59</sup> encourages local governments to engage in high-volume traffic stops to stop the flow of illegal narcotics. Although federal and state materials disclaim the use of profiles in “Operation Pipeline,”<sup>60</sup> the facts indicate otherwise<sup>61</sup>: Young male African-

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ed section 502.409(a)(7) [which provides that the license plate must be readable] and that the officers had probable cause to stop the appellant’s vehicle.”); *Haynes v. State*, 937 N.E.2d 1248, 1253 (Ind. Ct. App. 2010) (“As such, we find that Officer McCollum had reasonable suspicion to stop Haynes and therefore the stop was legal. The Officer personally observed that Haynes’s car was illegally parked in the handicap spot. The car had no handicap license plate and no visible permits inside.”); *State v. Jones*, No. 92820, 2009 WL 3490947, at \*5 (Ohio Ct. App. Oct. 29, 2009) (“Officer Jones therefore had probable cause to approach Jones because he observed Jones violating an East Cleveland parking ordinance. The fact that it was a parking violation, and not a traffic violation, is a distinction without a difference.”).

58. See Maclin, *supra* note 2, at 101 (“We know, of course, that police officers will not use the discretion granted by [*Whren*] against every motorist . . . police will utilize this discretionary power selectively. As in this case, African American male motorists will bear the brunt of this arbitrary police power. . . . The Court has permitted police to conduct arbitrary traffic seizures in order to pursue drug investigations unsupported by objective evidence of criminality.” (construing *Whren v. United States*, 517 U.S. 806 (1996))).

59. See generally *United States v. Sosa*, 104 F. Supp. 2d 722, 727–29 (E.D. Mich. 2000) (noting that “[w]hile, under *Whren*, ‘Operation Pipeline’ is not itself illegal, judges should be mindful of the potential affect [sic] a request to make a ‘pipeline’ stop may have on a police officer’s observations of an automobile” and upholding the “pipeline stop” even though the officers openly admitted that his true motive for making the stop was to search for contraband in defendant’s car, because the traffic stop was based on probable cause). *But see Arnold v. Ariz. Dep’t of Public Safety*, No. CV-01-1463-PHX-LOA, 2006 WL 2168637, at \*1 (D. Ariz. 2006). In *Arnold*, the District Court of Arizona approved a class action settlement agreement between the Arizona Department of Public Safety and eleven named plaintiffs, “African-American and Hispanic individuals who were stopped, detained, and searched by DPS officers and drug-detection dogs while traveling on the interstate highways in northern Arizona,” as a part of Operation Pipeline. *Id.* The settlement included the following: provisions prohibiting the use of racial profiling and racial discrimination for the purposes of traffic stops and investigations; a modification of traffic stop procedures to prohibit the detention of a vehicle and its occupants for investigative purposes for longer than is reasonably necessary to accomplish the purpose of the traffic stop; requirement of a written “consent-to-search” the vehicle prior to a consensual vehicle search; videotaping of all traffic stops for the duration of all traffic stops; special training of all DPS officers in a racial profiling curriculum; and collection and publication of data regarding traffic stops conflicts for three years from the date of settlement, to be made available to the ACLU of Arizona on a semi-annual basis at no cost. *Id.* at \*2–4. While, of course, the district court’s decision does not overturn *Whren*, it indicates willingness on the part of state authorities to address obvious, race-based pretextual traffic stops and searches. See also *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996) (granting a motion to suppress evidence obtained in traffic stops resulting from discriminatory enforcement of the traffic laws).

60. See MICHAEL D. LYMAN, *DRUGS IN SOCIETY* 333 (6th ed. 2010) (describing the DEA’s nationwide highway drug interdiction program: “[a]lthough Operation Pipeline relies in part on training officers to use characteristics to determine potential drug traffickers, it is important to understand that the program does not advocate such profiling by race or ethnic background” (quoting Drug Enforcement Agency, 2007)).

Americans and Latinos in “high-crime areas” are more likely to be stopped, as are motorists driving beat-up cars and rentals.<sup>62</sup> Additionally, if police initiate a traffic stop based on a legitimate traffic violation, courts uphold it even if the officer making the stop received Operation Pipeline training and made a pretextual stop.<sup>63</sup> Some states, either by statute or as a result of a settlement agreement in a civil rights action,

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61. See *Soto*, 734 A.2d at 353 (citing John Lamberth’s New Jersey Turnpike statistical study, showing that “a black was 4.85 times as likely as a white to be stopped”); AM. CIVIL LIBERTIES UNION OF ARIZ., DRIVING WHILE BLACK OR BROWN 5–14 (2008), available at <http://acluaz.org/sites/default/files/documents/DrivingWhileBlackorBrown.pdf> (analyzing data collected by the Arizona Department of Public Safety as part of the settlement agreement for *Arnold v. Arizona Dep’t of Public Safety*, and finding that “African Americans, Hispanics and Native Americans were searched more frequently than whites and that these search rates are not justified by rates of contraband seizures. . . . This finding supports the overall conclusion of this analysis that racial and ethnic minorities were treated differently on Arizona interstate highways during the study period.”); STATE POLICE REV. TEAM, FINAL REPORT OF THE STATE POLICE REV. TEAM (1999), available at [http://www.state.nj.us/lps/Rpt\\_ii.pdf](http://www.state.nj.us/lps/Rpt_ii.pdf) (finding disparate treatment of minorities in traffic stops); NORTHWESTERN UNIV. CTR. FOR PUBLIC SAFETY, ILL. TRAFFIC STOPS STATISTICS STUDY 11 (2007), available at <http://www.dot.state.il.us/trafficstop/results07.html> (“[A]lthough minority drivers are about 2.5 times as likely as Caucasian drivers to be the subject of a consent search, they are half as likely to have contraband in their vehicle.”); COUNCIL ON CRIME & JUSTICE AND INST. ON RACE & POVERTY, UNIV. OF MINN. LAW SCHOOL, MINN. STATEWIDE RACIAL PROFILING REPORT: REPORT TO THE MINN. LEGISLATURE 22 (2003), available at <http://www.law.umn.edu/uploads/cb/94/cb94cf65dc50826424729d214a1f6b82/27-Racial-Profiling-Aggregate-Report.pdf> (“[H]igh discretionary search rates are not justified by high hit rates. American Indians, Blacks, and Latinos were all searched more often than Whites even though contraband was found in searches of Whites more often than in searches of members of these groups.”). But see JOHN C. LAMBERTH ET AL., FINAL REPORT FOR THE SAN ANTONIO POLICE DEP’T 5 (2003) available at <http://www.policeforum.org/library/?folderPath=/library/racially-biased-policing/supplemental-resources/#documents> (“The results of this study are among the ‘best’ that we have seen in our work around the country. They provide virtually no evidence for targeting of either Blacks or Hispanics in San Antonio.”).

62. *Cf.* *United States v. Monterro-Camargo*, 208 F.3d 1122, 1132 n.15 (9th Cir. 2000) (“It is a well-known fact, of which we can take judicial notice, that Mexican males, driving old model General Motors sedans, blend into the morning commuter traffic to transport tons of Mexican marijuana from ports of entry in small towns along the Arizona–Sonora border. It is also well known that many thousands more Mexican males drive old model General Motors cars to work every morning. This phenomenon might justify the installation of a checkpoint where all cars could be inspected, but it does not justify the random stopping of ‘suspicious’ looking cars.” (internal quotation marks and alterations omitted)).

63. *United States v. Harvey*, 24 F.3d 795, 796–98 (6th Cir. 1994) (Martin, Jr., J., dissenting) (citing police testimony that “[a]lmost every time that we have arrested drug traffickers from Detroit, they’re usually young black males driving old cars,” and commenting that “[i]ndeed, by adopting the position that the police may stop any automobile with a minor equipment defect, or one whose driver commits any petty traffic violation, we have effectively declared that citizens relinquish all meaningful Fourth Amendment protections simply by choosing to enter an automobile. Armed with the comforting knowledge—available only in hindsight—that the car in this case did contain contraband, the Court has validated a police officer’s mere hunch as the basis for a legitimate traffic stop. In doing so, we appear to have abandoned the Fourth Amendment solely to expediency”); *Pupo v. State*, 371 S.E.2d 219, 221 (Ga. Ct. App. 1988) (finding that although the arresting officer had participated in Operation Pipeline, his initial detention of defendant’s automobile was based on a valid traffic stop and therefore legal).

have instituted procedures to track police traffic stops by race.<sup>64</sup> However, while interesting, this data serves no legal purpose in a criminal action, and the burden of proof for a § 1983 action remains so high that it might not even help a defendant prove his prima facie case.

The U.S. Supreme Court has not conclusively decided whether the exclusionary rule under the Fourth Amendment applies in an Equal Protection claim for a racially motivated pretextual arrest, search, or seizure.<sup>65</sup> The Court looks with disfavor upon the exclusionary rule as a remedy for Fourth Amendment violations; it is very unlikely to adopt the remedy in criminal cases for equal protection violations. Some lower courts have addressed equal protection claims in criminal cases, exploring and applying remedies with mixed results. Some defendants are successful,<sup>66</sup> but many courts decline to extend the exclusionary rule to Equal Protection challenges altogether because of their readings of *Whren*.<sup>67</sup> Without Supreme Court direction, courts have been reluctant to

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64. Several state police agencies collect statistics detailing the race and arrest statistics. For many states, those statistics show that African-Americans and Hispanics are statistically more likely to be pulled over, arrested, and searched than white drivers. For more details and tables regarding the specific numbers, see RONNIE A. DUNN & WORNIE REED, RACIAL PROFILING: CAUSES AND CONSEQUENCES 64–65 (2011).

65. *United States v. Armstrong*, 517 U.S. 456, 461 n.2 (1996) (“We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race.”); *United States v. Chavez*, 281 F.3d 479, 486–87 (5th Cir. 2002) (“Neither the Supreme Court nor our Court has ruled that there is a suppression remedy for violations of the Fourteenth Amendment’s Equal Protection Clause, and we do not find it necessary to reach that issue here.”); *United States v. Benitez*, 613 F. Supp. 2d 1099, 1101 (S.D. Iowa 2009) (“The remedy for an equal protection violation in the criminal setting is uncertain, as the Supreme Court has yet to decide whether suppression is an appropriate remedy for a violation of the Equal Protection Clause.”).

66. *See, e.g., United States v. Pollard*, 209 F. Supp. 2d 525 (D.V.I. 2002), *rev’d on other grounds*, 326 F.3d 397 (3d Cir. 2003) (addressing defendant’s motion to have a statement she made at an airport suppressed because, she claimed, it was obtained as the result of an unconstitutional seizure under the Fourth Amendment and a violation of her right to equal protection under the law, and granting the motion to suppress based on the following reasoning: “[t]he Supreme Court has not closed the door on an equal protection violation forming an independent basis for a motion to suppress a search or seizure that results from such discriminatory action. . . . To remedy an equal protection violation by suppressing the evidentiary fruit of that violation fully comports with the aim of the exclusionary rule as a judicially created remedy designed to safeguard rights generally. . . . This is particularly true given the United States’ position, supported by the Supreme Court in *Whren*, that Pollard may not bring her equal protection claim under her Fourth Amendment motion to suppress. It would be a toothless and hollow remedy indeed if the defendant can only bring a separate civil lawsuit to vindicate her right to due process and equal protection, as the United States asserts, while she is helpless in her criminal prosecution to move to suppress evidence extracted from her during a seizure that violates those due process and equal protection rights. . . . To follow what the Government of the United States suggests would mock the Constitution and its guarantees of due process and equal protection of the laws. I therefore expressly hold that suppression is a viable remedy for an equal protection violation” (internal quotation marks, citations, and alterations omitted)).

67. *Cf. United States v. Montes*, No. 07-CR-0064-CVE, 2007 WL 1723492, at \*5 (N.D. Okla. June 13, 2007) (declining to find a violation of defendant’s Fourth Amendment rights based on

apply the exclusionary rule to equal protection claims, even when the courts see it as a potentially valid application. As the U.S. District Court for Nebraska said, “it is an issue which cries out for resolution by the appellate courts.”<sup>68</sup>

Only New Jersey courts have granted motions to suppress in Fourteenth Amendment equal protection claims,<sup>69</sup> based on their interpretation of the New Jersey Constitution.<sup>70</sup> To prevail on a motion to suppress based on a violation of Equal Protection, New Jersey requires that a defendant establish a prima facie case of selective enforcement and that the State fail to rebut that claim.<sup>71</sup> In *State v. Soto*, seventeen African-American defendants claimed that their arrests on the New Jersey Turnpike were a result of discriminatory enforcement of traffic laws by New Jersey State Police involved in the Drug Interdiction Training Unit (DITU), a program stemming from Operation Pipeline.<sup>72</sup> In a selective enforcement cause of action, New Jersey law requires the defendant to prove the existence of purposeful discrimination.<sup>73</sup> Discriminatory intent may be inferred from statistical proof presenting a “stark pattern” of discriminatory practices, or even a less extreme pattern in certain contexts.<sup>74</sup>

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selective enforcement because the initial traffic stop was valid) (citing *United States v. Adkins*, 1 F. App'x 850 (10th Cir. 2001)); *United States v. Rendon*, No. 2:09-cr-48-WHA, 2010 WL 3879542, at \*4 (M.D. Ala. Sept. 1, 2010) (“Thus, *Whren* requires this court look first for a reasonable basis for a traffic stop, and if found, an officer’s subjective intentions are to be discarded.”); *United States v. DeJesus*, No. 2:09-CR-22-WKW, 2009 WL 3488690, at \*9 (M.D. Ala. Oct. 22, 2009) (“*Whren* requires this court look first for a reasonable basis for a traffic stop, and if found, an officer’s subjective intentions are to be irrelevant.”).

68. *United States v. Hare*, 308 F. Supp. 2d 955, 961 n.2 (D. Neb. 2004) (“[E]ven if the trooper violated the defendants’ rights as alleged, there is little or no federal authority for imposing the remedy of dismissal or suppression. Without precedent from the Supreme Court or the Eighth Circuit supporting such a result, I probably would not dismiss this federal criminal case or suppress the evidence even if the state trooper violated the defendants’ equal protection and travel rights. Like Judge Piester, I do not reach this question, although it is an issue which cries out for resolution by the appellate courts. As a practical matter, the federal trial courts need an answer in order to know whether the discovery and lengthy evidentiary hearings conducted in this case are ever necessary.”).

69. *State v. Segars*, 172 N.J. 481 (N.J. 2002); *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

70. N.J. CONST. of 1947, art. I, para. 1 (“All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”); *Id.* para. 5 (“No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.”).

71. *Soto*, 734 A.2d at 352.

72. *Id.* at 352, 358; see *supra* note 59–60 and accompanying text.

73. *Soto*, 734 A.2d at 360.

74. *Id.* (“[D]iscriminatory intent may be inferred from statistical proof presenting a stark pattern or an even less extreme pattern in certain limited contexts . . . [But] discriminatory intent may be inferred from statistical proof in a traffic stop context probably because only uniform variables



To rebut defendant's claim, the State must present specific evidence "showing that either there actually are defects in the defendant's evidence which bias the results or missing factors, when properly organized and accounted for, eliminate or explain the disparity."<sup>75</sup> The New Jersey Superior Court found that the defendants established a *de facto* policy on the part of state police of targeting black drivers for investigation and arrest, and that the discretionary power of troopers to stop any car illustrated a selection process susceptible to abuse.<sup>76</sup> Further, the superior court held, "The utter failure of the State Police hierarchy to monitor and control a crackdown program like DITU or investigate the many claims of institutional discrimination manifests its indifference if not acceptance."<sup>77</sup> In addition to extensive statistics detailing the racial profiling of black drivers compiled for the defendants, the defense presented direct testimony from New Jersey State Police Officers that "they were trained and coached to make race based 'profile' stops to increase their criminal arrests."<sup>78</sup> The court found that defendants met their burden and that the State failed to rebut the selective enforcement claim, and it granted defendants' motions to suppress.<sup>79</sup>

The U.S. Supreme Court did not reach its decision in *Whren* for another three months after the *Soto* decision, but the *Soto* court recognized the importance of objective standards in reviewing police conduct, noting that "the courts will not inquire into the motivation of a police officer whose stop of a vehicle was based upon a traffic violation committed in his presence."<sup>80</sup> More importantly, the *Soto* court held:

[W]here objective evidence establishes "that a police agency has embarked upon an officially sanctioned or *de facto* policy of targeting minorities for investigation and arrest," any evidence seized will be suppressed to deter future insolence in office by those charged with enforcement of the law and to maintain judicial integrity.<sup>81</sup>

In *State v. Segars*,<sup>82</sup> the defendant raised a Fourteenth Amendment equal protection claim in his motion to suppress evidence obtained when a police officer ran his license plates on a Mobile Data Terminal (MDT).

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(Title 39 violations) are relevant to the challenged stops and the State has an opportunity to explain the statistical disparity.") (interpreting *State v. Kennedy*, 588 A.2d 834 (N.J. Super. Ct. App. Div. 1991)).

75. *Id.*

76. *Soto*, 734 A.2d at 360.

77. *Id.*

78. *Id.* at 356.

79. *Id.* at 360.

80. *Id.*

81. *Id.* (quoting *State v. Kennedy*, 588 A.2d 834, 839 (N.J. Super. Ct. App. Div. 1991)).

82. *State v. Segars*, 799 A.2d 541, 547 (N.J. 2002).

The Supreme Court of New Jersey articulated its standard for proving discriminatory targeting.<sup>83</sup> The court found that the defendant had established a prima facie case of discriminatory targeting through the defendant's testimony, documentary evidence, and the arresting officer's inaccurate testimony, and that the State failed to rebut this claim by offering a race-neutral basis for its action.<sup>84</sup> Running license plates prior to a stop does not constitute a search, nor does it implicate Fourth Amendment concerns; however, the New Jersey Supreme Court said that police may not base checking license plates on race or other impermissible criteria.<sup>85</sup> The New Jersey Supreme Court reversed the lower courts, granting the motion to suppress evidence of the defendant's suspended driver's license and finding that race solely motivated the officer's use of the MDT. The court reasoned:

Once it has been established that selective enforcement has occurred . . . the fruits of that search will be suppressed. The rationales that support the suppression of evidence . . . namely, deterrence of impermissible investigatory behavior and maintenance of the integrity of the judicial system, apply equally, if not more so, to cases of racial targeting.<sup>86</sup>

The Sixth Circuit also expressed willingness to consider exclusion of evidence under the Fourteenth Amendment Equal Protection Clause before falling in line with *Whren* and limiting equal protection challenges to § 1983 civil rights cases and not criminal cases.<sup>87</sup> In *United States v. Avery*,<sup>88</sup> the Sixth Circuit affirmed the district court's denial of defendant's motion to suppress cocaine recovered from his carry-on bag in an airport. The defendant, a young African-American man, argued to exclude the evidence because airport officials targeted, pursued, and interviewed him based solely on his race.<sup>89</sup> He argued that they seized his bag without reasonable suspicion and unreasonably detained him in violation of the Fourth Amendment.<sup>90</sup> He did not challenge his ultimate arrest under the Fourth Amendment, but he offered a Fourteenth Amendment

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83. *Id.* at 551 ("We apply a similar analysis to this record. When a defendant claims that an MDT check was based on his race, he bears the burden of establishing a prima facie case by producing relevant evidence that would support an inference of discriminatory enforcement. If the defendant does so, the burden shifts to the State to produce evidence of a race-neutral reason for the check. Ultimately, the defendant bears the burden of proving discriminatory treatment by a preponderance or greater weight of the credible evidence.").

84. *Id.*

85. *Id.*

86. *Id.* at 548–49 (citations omitted).

87. *United States v. Navarro-Camacho*, 186 F.3d 701 (6th Cir. 1999).

88. *United States v. Avery*, 137 F.3d 343 (6th Cir. 1997).

89. *Id.* at 346.

90. *Id.*

challenge to the officers' actions leading up to his encounter.<sup>91</sup> The court commented,

Although Fourth Amendment principles regarding unreasonable seizures do not apply to consensual encounters, an officer does not have unfettered discretion to conduct an investigatory interview with a citizen. The Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures. This protection becomes relevant even before a seizure occurs. . . . If law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred.<sup>92</sup>

However, the court found that the evidence Avery presented fell short of proving a prima facie case under the Equal Protection Clause, and the court did not order the evidence suppressed.

In *United States v. Taylor*,<sup>93</sup> another consensual encounter case involving airport security, the Sixth Circuit did not find that security selected the defendant for a consensual interview because he was African-American. However, the court held that if law enforcement officers at the Memphis airport "implemented a general practice or pattern that primarily targeted minorities for consensual interviews, or . . . incorporated a racial component into the drug courier profile,"<sup>94</sup> those facts would give rise to "due process and equal protection constitutional implications cognizable by this court."<sup>95</sup> Likewise in *United States v. Jennings*,<sup>96</sup> the Sixth Circuit held that "[a] law enforcement officer would be acting unconstitutionally were he to approach and consensually interview a person of color solely because of that person's color, absent a compelling justification . . . [and] evidence seized in violation of the Equal Protection Clause should be suppressed."<sup>97</sup>

In *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, the Northern District of Ohio closed the door on equal protection challenges for evidence seized in a pretextual traffic stop, leaving only a § 1983 suit as an option for Hispanic motorists pulled over and searched

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91. *Id.* at 352.

92. *Id.* at 352, 355.

93. *United States v. Taylor*, 956 F.2d 572, 578-79 (6th Cir. 1992).

94. *Id.* at 579.

95. *Id.*

96. *United States v. Jennings*, No. 91-5942, 1993 WL 5927, at \*1 (6th Cir. Jan. 13, 1993).

97. *Id.* at \*4.

based on their ethnicity.<sup>98</sup> Shortly thereafter, the Sixth Circuit followed suit in *United States v. Navarro-Camacho*.<sup>99</sup> In *Navarro-Camacho*, a defendant moved to suppress evidence obtained after police searched his automobile when they stopped him for a valid traffic violation and subjected him to a positive canine narcotic inspection.<sup>100</sup> The Sixth Circuit upheld the stop because police based the decision to stop the defendant's automobile on a valid traffic violation and likewise found the necessary probable cause to justify the subsequent search of the car.<sup>101</sup> Judge Moore concurred but commented that, “[i]n a proper case, I believe that a defendant . . . could achieve suppression of the evidence or dismissal of the prosecution by demonstrating that the investigatory practice had a discriminatory purpose and a discriminatory effect,”<sup>102</sup> and advised that “[t]he district courts should remain open . . . to the possibility of Fourteenth Amendment selective enforcement challenges in future criminal prosecutions.”<sup>103</sup>

However, the Sixth Circuit closed this door in dicta in a recent consensual search case:

While we, of course, agree with the general proposition that selective enforcement of the law based on a suspect's race may violate the Fourteenth Amendment, we do not agree that the proper remedy for such violations is necessarily suppression of evidence otherwise lawfully obtained. . . . Even if the Fourth Amendment were implicated, any challenge to a search or seizure based on legitimate probable cause, but in which it is alleged the officer's subjective motive was discriminatory, is doomed to fail.<sup>104</sup>

The court reasoned that aside from Judge Moore's dissent in *Navarro-Camacho* and the holdings in New Jersey, which were based on provi-

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98. *Farm Labor Organizing Comm. v. Ohio State Highway Patrol*, 991 F. Supp. 895, 902 (N.D. Ohio 1997), *aff'd*, 308 F.3d 523 (6th Cir. 2002) (“In the case at bar, if defendants stopped the plaintiffs' vehicle for violations of motor vehicle laws, the stop was ‘reasonable’ and thus not violative of the Fourth Amendment.”); *Farm Labor Organizing Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533 (6th Cir. 2002) (construing *Whren v. United States*, 517 U.S. 806 (1996)) (“Similarly, the Supreme Court, in *Whren v. United States*, confirmed that an officer's discriminatory motivations for pursuing a course of action can give rise to an Equal Protection claim, even where there are sufficient objective indicia of suspicion to justify the officer's actions under the Fourth Amendment.”).

99. *United States v. Navarro-Camacho*, 186 F.3d 701 (6th Cir. 1999).

100. *Id.* at 703–704.

101. *Id.* at 705, 708–09.

102. *Id.* at 711 (Moore, J., concurring).

103. *Id.* at 711–12.

104. *United States v. Nichols*, 512 F.3d 789, 794 (6th Cir. 2008), *overruled on other grounds* by *United States v. Burton*, 632 F.3d 264 (6th Cir. 2011).

sions of the New Jersey Constitution, no other court has applied suppression as a remedy without a concomitant Fourth Amendment violation.<sup>105</sup>

#### *D. Reasserting the Fourth Amendment in Traffic Stops*

The Equal Protection Clause is unlikely to provide a workable national solution to pretextual traffic stops. If courts seek a solution, they will find it within the Fourth Amendment's reasonableness command through reconsideration of *Whren*.<sup>106</sup> *Whren*'s rule that the only inquiry is whether there was probable cause or reasonable suspicion for a traffic violation to justify a traffic stop is premised upon the Court's inability to develop a broader more sophisticated inquiry to test the legitimacy of traffic stops. The *Whren* inquiry should be only the first step because it fails to offer a complete and final inquiry. The Fourth Amendment was intended to limit and control the exercise of police discretion. A test that ratifies pretextual stops does not meet that purpose.

The Court should permit the defendant to challenge a stop as pretextual even when there is probable cause that a traffic violation occurred. The defendant would carry the heavy burden. Such a claim could only be cobbled together by evidence of many factors: (1) the seriousness of the traffic offense; (2) the officer's own testimony (which will rarely contain an admission of pretext); (3) statistical evidence demonstrating that the officer or the department targets minority drivers or uses traffic control to investigate nontraffic offenses; (4) whether the officer was on the street for traffic control or for investigating other offenses; (5) departmental regulations governing similar stops; (6) whether reasonable

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105. *Id.* at 794 n.4.

106. One alternative solution is the use of state highway safety funds to encourage states to track data on racial profiling in traffic stops and to implement programs to prevent pretextual traffic stops. For example, the Department of Transportation will offer a Racial Profiling Prohibition Grant to a state if it: "1) Enact[s] and enforce[s] a law that prohibits the use of racial profiling in the enforcement of state laws regulating the use of federal-aid highways, and 2) Maintain[s] and allow[s] public inspection of race and ethnicity data for each motor vehicle stop made by law enforcement officials on federal-aid highways," or "[p]rovide[s] assurances to the Department of Transportation that the state [is] undertaking activities to comply with 1) and 2)." *Section 1906 Racial Profiling Prohibition Grants*, GOVERNORS HIGHWAY SAFETY ASSOC., <http://www.ghsa.org/html/stateinfo/programs/1906.html> (last visited Feb. 3, 2012, 8:39 PM) (citing Grant Program to Prohibit Racial Profiling, Pub. L. No. 109-59, 119 Stat. 1468 (2005) (codified at 23 U.S.C. § 402)). States may use these funds to collect data on racial profiling in traffic stops, evaluate the results, and use that data to develop and implement programs to curb pretextual traffic stops. *Id.* However, the use of highway funds under the Spending Clause of the U.S. Constitution, U.S. CONST. art. I, § 8, cl. 1, is subject to the limiting factors set forth in *South Dakota v. Dole*, 483 U.S. 203 (1987). Under *Dole*, Congress may attach conditions on receipt of funds and use the power to further policy objectives, as long as the funds are attached to a program that (1) furthers the general welfare, (2) is clear and unambiguous in its goals, (3) is directly tied to the states' use of those funds, (4) does not violate any other Constitutional provision that would be an independent bar to the program, and (5) is not coercive. *Id.* at 207-08.

officers would have made the stop under the same circumstances; and (7) any other relevant factors. The factors combine subjective and objective elements to reach a reasonableness determination that should always be a fact-based determination. The expanded inquiry is intended to be limited. The burden on the defense would not be an easy one and would not often be met. It is intended to isolate and identify egregious examples of pretextual traffic stops. It is also intended to allow this society to declare that pretextual stops and arrests are unconstitutional and that we will not tolerate obvious examples of pretextual traffic stops. The substituted test is not a perfect solution, but it is better than the *Whren* test because it allows for inquiry beyond the initial question of whether there was a traffic infraction. The possibility of a Fourth Amendment challenge, itself, may impose some restraints on police conduct and departmental policies that have fed on *Whren* and made pretextual traffic stops the rule.

### III. POLICE INTERACTION WITH MOTORISTS

Thirty years ago, I laughed when young police officers attending police training programs offered at our law school boasted to me that they could stop every car legally for at least ten traffic violations. I am not laughing any longer. Do you always signal when you move into or from a parking spot at the curb when there is no other traffic around?<sup>107</sup> Do you religiously signal lane shifts or turns when there is no other traffic in sight?<sup>108</sup> When driving on a highway, do you drift ever so slightly across the right berm line?<sup>109</sup> Is your window tint too dark?<sup>110</sup>

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107. *See, e.g.,* *People v. Haywood*, 944 N.E.2d 846 (Ill. App. Ct. 2011) (upholding arrest based on statute that required a turn signal when leaving a parallel-parking spot). *Compare* *State v. Brunner*, No. 2007CA00285, 2008 WL 4118902, at \*1 (Ohio Ct. App. Aug. 29, 2008) (upholding a stop in violation of Canton ordinance requiring motorist to signal when moving toward the curb to park), *with* *State v. Davidson*, No. 22442, 2009 WL 1387333, at \*3 (Ohio Ct. App. May 15, 2009) (“In the present case, Officer Kennard testified that he observed a traffic violation when he saw Davidson’s vehicle [leave its parking spot] ‘pulling into traffic’ without signaling. Officer Kennard then stated that he stopped the vehicle for ‘failing to use a signal pulling into the lane of traffic.’ As set forth above, pulling into a *lane* of traffic without signaling does not violate R.C.G.O. 72.05 if no other vehicles are present. In light of Officer Kennard’s additional testimony, however, that he saw Davidson ‘pulling into traffic,’ the trial court could have inferred that at least one other vehicle was present nearby on East Third Street. Therefore, Officer Kennard had reasonable, articulable suspicion of a traffic violation, which was sufficient to justify a traffic stop.” (citation omitted) (emphasis in original)).

108. *See, e.g.,* *People v. Tamburrino*, 892 N.Y.S.2d 852 (N.Y. City Ct. 2009) (holding that a New York law requiring a signal to indicate a right or left turn places an absolute duty on the driver to signal regardless of traffic conditions); *State v. Bartone*, No. 22920, 2009 WL 104885, at \*3 (Ohio Ct. App. Jan. 16, 2009) (“What is of significance is that these cases stand for the proposition that Ordinance 71.31 imposes an absolute duty as to giving turn signals that is not conditioned on prevailing traffic conditions. The legislature, in enacting R.C. 4511.39, and the Dayton City Commission, in enacting Ordinance 71.31, could have expressly made the duty to signal dependent on traffic conditions but did not. Indeed, such language might well introduce an undesirable element of

Compliance with an officer's command to stop a vehicle is never a consensual encounter,<sup>111</sup> and the order to stop must always be objectively reasonable under the Fourth Amendment. Most courts have assumed that not only probable cause, the standard for an arrest, but also reasonable suspicion, the standard for a *Terry* investigative stop, must support a traffic stop.<sup>112</sup> Any time police order the driver of an automobile to stop, the stop constitutes a seizure of the driver and his passengers, governed by Fourth Amendment standards,<sup>113</sup> and the driver may challenge that aspect of the encounter. In *Delaware v. Prouse*, the Supreme Court held "people are not shorn of their Fourth Amendment protection when they step from their homes onto the public sidewalks or from the sidewalks into their

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subjectivity which would be a disservice to the motoring public and law enforcement alike." (citation omitted)).

109. See, e.g., *State v. Batchili*, 865 N.E.2d 1282 (Ohio 2007) (crossing over marked lines violated R.C. 4511.33 which constitutes a minor misdemeanor); *Yuskiewicz v. State*, No. 591, 2011 WL 798136, at \*1 (Del. Mar. 8, 2011) (crossing over center line in a wide right turn violated the statute governing right turns); *Stephens v. State*, 18 A.3d 168, 178 (Md. Ct. Spec. App. 2011) ("As previously stated, pavement markings designating lanes of travel constitute 'traffic control devices.' Because appellant was seen swerving from lane to lane '[s]everal times,' the evidence was more than sufficient to sustain appellant's conviction for failure to obey a traffic control device." (brackets in original)); *Dods v. State*, 240 P.3d 1208 (Wyo. 2010) (holding defendant's one instance of crossing the fog line by approximately eight inches for approximately five seconds, or several hundred yards, violated the "single lane of travel statute"); *State v. Malone*, 56 So.3d 336 (La. Ct. App. 2010) (violating a statute stating "[a] vehicle shall be driven as nearly as practicable entirely within a single lane" for no apparent reason provided police with probable cause to believe a traffic violation for improper lane usage occurred).

110. See, e.g., *United States v. Stafford*, No. 4:10-CR-75-FL, 2011 WL 2358058, at \*4 (E.D.N.C. June 9, 2011) ("[P]olice officers had probable cause to initiate a traffic stop based on a suspect window-tinting violation, had reasonable suspicion of additional criminal activity due to defendant's nervous and evasive demeanor, and had probable cause to search defendant's vehicle without a warrant after a drug detection dog alerted."); *United States v. Matias-Maestres*, 738 F. Supp. 2d 281, 293 (D.P.R. 2010) ("[T]he officers' observation of the dark tint of the Ford Ranger's windows gave them probable cause to pull over the vehicle in order to investigate a possible violation of Puerto Rico traffic law. Thus, any ulterior motive of the officers for stopping the pickup is irrelevant to the stop's constitutionality."); *People v. Carter*, 105 Cal. Rptr. 3d 805 (Cal. Ct. App. 2010) (having excessive window tint lawfully gave rise to reasonable suspicion of criminal activity necessary to conduct a traffic stop).

111. *Michigan v. Chesternut*, 486 U.S. 567 (1988).

112. Wayne R. LaFare, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1848 (2004) ("But if, as is clear, probable cause is a permissible basis for a traffic stop, is it the only basis, or will some lesser standard also suffice, such as the reasonable-suspicion standard approved in *Terry v. Ohio* for certain investigative stops? Most courts have assumed the latter, i.e., that traffic stops as a class are permissible without probable cause if there exists reasonable suspicion, that is, merely equivocal evidence. Such an assumption is to be found in the federal-court decisions of the various circuits, as well as in the decisions of most states. In most of these cases the matter has not even been put into issue by the defendant (often because it appears the stop would pass muster even under the probable-cause test), but on the rare occasions when the defendant has made a contrary claim it is often rather summarily dismissed." (footnote omitted)).

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

automobiles.”<sup>114</sup> Fourth Amendment standards govern safety checks, DUI checks, traffic stops and arrests, *Terry* stops, arrests, and searches.<sup>115</sup> The Supreme Court said that such Fourth Amendment standards are implicated even if “the purpose of the stop is limited and the resulting detention quite brief.”<sup>116</sup>

The Fourth Amendment’s proscription of random, suspicionless searches and seizures applies to the stops of automobiles. A vehicle, its driver, and its passengers are no more subject to a random, suspicionless stop than is a pedestrian.<sup>117</sup> Cars may not be randomly stopped by the police to check a driver’s identification, license, and automobile registration.<sup>118</sup>

The Fourth Amendment command of reasonableness is not triggered until an officer orders a motorist to pull over.<sup>119</sup> A police officer may target a car before the officer observes a motorist commit a traffic offense, allowing the officer to follow a targeted car until the driver violates a traffic law.<sup>120</sup> Police surveillance of a motorist does not implicate the Fourth Amendment as long as it occurs “unobtrusively and do[es] not limit defendant’s freedom of movement by so doing.”<sup>121</sup> Part of surveil-

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114. *Id.* at 664–65.

115. *Compare Prouse*, 440 U.S. 648, with *State v. Burroughs*, 955 A.2d 43, 52 (Conn. 2008) (“The officers were uniformed and armed but never unholstered or even gripped their firearms. Although we recognize that a uniformed law enforcement officer is necessarily cloaked with an aura of authority, this cannot, in and of itself, constitute a show of authority sufficient to satisfy the test for a seizure under *Mendenhall*.”).

116. *Prouse*, 440 U.S. at 653.

117. *See Prouse*, 440 U.S. 648.

118. *Brown v. Texas*, 443 U.S. 47, 52 (1979) (“In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant’s right to personal security and privacy tilts in favor of freedom from police interference. . . . When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.”); *see also State v. Garland*, 482 A.2d 139, 142–43 (Me. 1984) (“Random stops of pedestrians or of drivers of motor vehicles while parked, as well as of moving automobiles, for purposes of identification and checking of drivers’ licenses and auto registrations, absent compliance with *Terry* requirements, are unreasonable under the Fourth Amendment.”); *People v. Maksymenko*, 432 N.Y.S.2d 328 (N.Y. Crim. Ct. 1980) (holding that a police officer can only ask for identification if he reasonably believes a crime will be committed and under New York law a citizen has no duty to respond to an officer’s inquiry); *State v. Holly*, No. 92057, 2009 WL 1819491, at \*3 (Ohio Ct. App. June 25, 2009) (“In America, however, the police may not stop an individual for the sole purpose of compelling him to identify himself.”).

119. *Prouse*, 440 U.S. 648.

120. *See, e.g., Whren v. United States*, 517 U.S. 806 (1996).

121. *People v. Thornton*, 667 N.Y.S.2d 705, 707 (N.Y. App. Div. 1998); *see also United States v. Terry*, No. 05-10202-RWZ, 2006 WL 1716737, at \*1 (D. Mass. June 20, 2006); *United States v. Montgomery*, 561 F.2d 875 (D.C. Cir. 1977); *Commonwealth v. Grandison*, 741 N.E.2d 25, 30 (Mass. 2001) (following someone for the purpose of surveillance is not “pursuit” for purposes of determining whether reasonable suspicion is required).



lance inevitably includes a check of the motorist's license plate.<sup>122</sup> For Fourth Amendment purposes, police seize a vehicle, motorist, and passengers once an officer activates a cruiser's overhead lights or forces a car over.<sup>123</sup>

An important state interest exists in maintaining public safety on our streets and highways and represents a valid exercise of police power.<sup>124</sup> State and municipal ordinances contain a myriad of regulations to promote highway safety,<sup>125</sup> but a particular violation or the subsequent police discretion to stop the motorist for the violation may not necessarily implicate safety-related regulations. Over the years, these regulations have multiplied so rapidly that police officers have multiple opportunities to stop individual motorists when the underlying reason for the stop is not necessarily related to safety but the officer's wish to investigate the motorist for other crimes. This multitude of offenses allows a police officer to stop almost any motorist.<sup>126</sup>

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122. See, e.g., *United States v. Walraven*, 892 F.2d 972 (10th Cir. 1989); *United States v. Diaz-Castaneda*, 494 F.3d 1146 (9th Cir. 2007); *United States v. Ellison*, 462 F.3d 557 (6th Cir. 2006); *United States v. Sparks*, 37 F. App'x 826 (8th Cir. 2002); *Olabisiomotosho v. City of Houston*, 185 F.3d 521 (5th Cir. 1999).

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

124. See *In re Park Beyond the Park*, 157 B.R. 887 (B.A.P. 9th Cir. 1993) (regulating automobile traffic by municipalities maintains traffic safety and directly connects with public health and welfare); *Bricker v. Craven*, 391 F. Supp. 601 (D. Mass. 1975) (holding that state officials have wide degree of discretion in dealing with traffic regulation).

125. See *supra* note 18.

126. See Peter Shakow, *Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. U.S.*, 24 AM. J. CRIM. L. 627, 628 (1997) (“[The decision in *Whren*] allows the police unfettered discretion to stop motorists for any traffic violation as a pretext to investigate other unrelated offenses. A police officer need have nothing more than an unsubstantiated hunch, or even an illegitimate bias, that a motorist is engaged in drug or other criminal activity to pull him or her over, if even the most minor traffic infraction has been committed.”); see also *State v. Boudette*, 791 P.2d 1063, 1068 (Ariz. Ct. App. 1990) (“Citing motorists as they violate traffic laws helps ensure that they will obey the laws and also provides law-enforcement agents with the opportunity to check whether motorists have complied with licensing requirements. This is a reasonable exercise of the state's police power.”); *United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1160 (D. Kan. 2004) (“Officers are faced with multiple violations by multiple motorists, requiring a choice of whom to stop. Officers know that effecting a stop of one motorist may prevent them from stopping a more serious violation they observe while they are in the middle of processing that stop. Thus, they make decisions about when and when not to stop. This endowed discretion is necessary and appropriate for the effective enforcement of traffic laws and for the effective protection of public safety.”); *Fertig v. State*, 146 P.3d 492, 501 (Wyo. 2006) (“Because the Vehicle and Traffic Law provides an objective grid upon which to measure probable cause, a stop based on that standard is not arbitrary in the context of constitutional search and seizure jurisprudence. . . . [P]robable cause stops are not based on the discretion of police officers. They are based on violations of law. An officer may choose to stop someone for a ‘minor’ violation after considering a number of factors, including traffic and weather conditions, but the officer's authority to stop a vehicle is circumscribed by the requirement of a violation of a duly enacted law. In other words, it is the violation of a statute that both triggers the officer's authority to make the stop and limits the officer's discretion.” (quoting *People v. Robinson*, 767 N.E.2d 638, 646 (N.Y. 2001)) (brackets and ellipsis in original)).

In *Whren v. United States*, the petitioners tried to raise this issue in the Supreme Court, arguing, as Justice Scalia phrased it, “that the ‘multitude of applicable traffic and equipment regulations’ is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop.”<sup>127</sup> Writing for a unanimous Court, Justice Scalia simply dismissed this argument:

[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement. For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.<sup>128</sup>

The Court should have found some traffic offenses so trivial and under-enforced by reasonable officers that a seizure for such a minor violation violates the Fourth Amendment guarantee to be free from unreasonable seizures. Such a stop led to the arrest in *United States v. Harvey*,<sup>129</sup> where the motorist was travelling on an interstate three miles over the speed limit.<sup>130</sup> It would seem that such a stop should raise a red flag requiring an evaluation of the underlying offense that would not precipitate a stop by other officers. Given the reality that officers cannot possibly stop all motorists for violations, the courts must be willing to recognize that the grounds for certain stops are so trivial (for example, driving on a highway three miles over the limit) that they actually reflect inappropriate pretext. Otherwise, police would likely stop only the most egregious offenders.

#### *A. Consensual Encounters with Motorists*

Not all interactions between law enforcement and individuals implicate the Fourth Amendment.<sup>131</sup> For example, police officers often make investigative inquiries of the occupants of parked cars without the use of force or a show of authority, thereby making the encounter “con-

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127. *Whren v. United States*, 517 U.S. 806, 818 (1996).

128. *Id.* at 818–19.

129. *See United States v. Harvey*, 16 F.3d 109 (6th Cir. 1994).

130. *Id.* at 113 (Keith, J., dissenting).

131. *Florida v. Bostick*, 501 U.S. 429, 434 (1991).

sensual.”<sup>132</sup> If an encounter with a law enforcement officer is found to be consensual, there has not been a Fourth Amendment seizure,<sup>133</sup> and the requirement that the encounter be supported by reasonable suspicion disappears. Any level of force transforms a consensual encounter into an investigative *Terry* stop requiring reasonable suspicion.<sup>134</sup>

A consensual encounter may take place when a police officer walks over to talk with the occupants of a parked car.<sup>135</sup> Likewise, courts may

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132. *Cf.* *United States v. Graham*, 323 F. App'x 793 (11th Cir. 2009) (parking police vehicles around the defendant's car is not a show of force that indicates a seizure); *Baker v. State*, 684 S.E.2d 427 (Ga. Ct. App. 2009) (walking over to the defendant while at a truck stop did not constitute a seizure); *State v. Thompson*, 793 N.W.2d 185, 187 (N.D. 2011) (finding a police-civilian encounter is not a seizure if the officer approaches a parked car and asks questions in a “conversational manner”); *People v. Black*, 872 N.Y.S.2d 791, 793 (N.Y. App. Div. 2009) (holding that the Fourth Amendment was not invoked because the car was already stopped when police officers arrived and “they did not park their patrol vehicle in such a manner as to block the driveway in which the vehicle was parked”).

133. *United States v. Mendenhall*, 446 U.S. 544 (1980) (plurality) (ruling that a voluntary encounter does not rise to level of seizure).

134. *Cf.* *United States v. Jones*, 562 F.3d 768 (6th Cir. 2009) (holding that submitting to a show of force by police constitutes a seizure); *State v. Casas*, 900 A.2d 1120 (R.I. 2006) (concluding that a police officer who halts a vehicle on a highway seizes the driver and passenger for Fourth Amendment purposes and makes them subject to the officer's authority); *see also* *United States v. Maltais*, 295 F. Supp. 2d 1077, 1084 (D.N.D. 2003) (“Assuming, as Maltais seems to contend in his affidavit, that Agent Danley's questioning was so intimidating, threatening or coercive that Maltais did not believe he was free to leave, the Court finds that once Agent Danley instructed Maltais to wait in his truck, the circumstances changed from a consensual encounter into a *Terry* stop.”); *In re Brill*, No. 08CA0015, 2009 WL 1041439, at \*4 (Ohio Ct. App. Apr. 15, 2009) (“Corporal Eckelberry admitted that had appellant pulled out of the driveway and left, he would have stopped him by a show of authority. We conclude [that] even though it appears by the facts to be a consensual encounter, appellant was not free to refuse to give him his driver's license.”).

135. *See* *United States v. Baker*, 290 F.3d 1276 (11th Cir. 2002) (holding that a police officer who walked over to idling car and identified himself did not convey to the defendant that his liberty was restrained because he did not tell the motorist to turn off the car, he did not display his weapon, and he did not use any language or tone indicating compliance with his request was compelled); *State v. Kasparian*, 937 So. 2d 1273, 1275 (Fla. Dist. Ct. App. 2006) (finding a stop to be consensual because “the officers approached wearing uniforms, badges, and weapons and did not even announce themselves before Kasparian threw down the drugs”); *People v. Luedemann*, 857 N.E.2d 187, 208 (Ill. 2006) (“[I]t is clear that Officer Pate did not effectuate a seizure of defendant before observing an open bottle and signs of defendant's intoxication. Rather, precedent shows that Officer Pate acted exactly as a well-trained police officer should when he wishes to question a person seated in a parked vehicle without effectuating a seizure. He drove past defendant's vehicle so as not to block it in its space. He did not turn on his overhead flashing lights to signal that defendant's compliance was expected. He did not use coercive language or a coercive tone of voice, he did not touch defendant, and he did not display his weapon. He approached from the rear driver's side, as he was trained to do, and he used a flashlight because it was nighttime. Objectively viewed, nothing Officer Pate did would communicate to a reasonable person, innocent of any wrongdoing, that he was not free to decline to answer Officer Pate's questions or otherwise go about his business.”); *State v. Boys*, 716 N.E.2d 273, 275 (Ohio Ct. App. 1998) (“A seizure does not occur simply because a police officer approaches an individual and asks a few questions. An encounter that does not involve physical force or a show of authority does not necessarily implicate the Fourth Amendment.”); *State v. Mesley*, 732 N.E.2d 477, 481 (Ohio Ct. App. 1999) (“While the expectation of privacy in automo-

construe an encounter occurring on private property as consensual.<sup>136</sup> Some courts take the position that a police officer who walks over to talk to the driver of a vehicle temporarily stopped at a traffic light or stop sign has not necessarily forcibly detained the occupant; rather, whether it is a forcible seizure or a consensual encounter depends on the facts of the encounter.<sup>137</sup> When a police officer pulls behind a car stopped at a gasoline service station and activates the overhead light on the cruiser, one court said, “[N]o reasonable person would have felt free to leave the gas station . . . .”<sup>138</sup>

The Supreme Court has provided limited guidance in determining what constitutes a consensual encounter, stating that the inquiry turns on whether a reasonable person under the circumstances would feel free to leave.<sup>139</sup> If a reasonable person under the circumstances would have felt free to leave, yet the driver chose to remain and continue to interact with the police officer, the encounter is consensual.<sup>140</sup> This fiction lacks any understanding of the relationship between police and citizens. Few citizens have any understanding of the law, and fewer feel empowered to

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biles may be diluted, people do not abandon all privacy expectations when occupying parked vehicles in a public parking lot on business premises. The cases cited by appellant demonstrate that law enforcement officers had reasonable suspicion to investigate a parked vehicle before they discovered evidence in ‘plain view,’ or prior to making a decision to investigate a particular individual, discovered evidence in ‘open view’ within a vehicle. Here, the discovery of a bag of Dilaudid in appellee’s lap in ‘open view’ did not trigger the officer’s investigation.” (citations omitted); *State v. Maxie*, 230 P.3d 69 (Or. Ct. App. 2010) (ruling that an officer’s encounter with a driver slumped down in a parked car was a consensual encounter even though the car was located in an area frequented by prostitutes; the officer simply approached the car to ask the driver questions regarding his presence in the area).

136. *See State v. Gahner*, 554 N.W.2d 818 (N.D. 1996) (holding that approaching a vehicle did not constitute a seizure because the defendant was parked in a private parking lot after hours; the officer had sufficient basis to approach and inquire about his presence); *State v. Ball*, No. 2009-T-0013, 2010 WL 702291, at \*2 (Ohio Ct. App. Feb. 26, 2010) (“It is well-settled that an encounter may be consensual when a police officer approaches and questions individuals in or near a parked car. Further, an encounter may be consensual if it occurs on private property.” (citation, internal quotation marks, and alterations omitted)).

137. *See, e.g., People v. Ocasio*, 652 N.E.2d 907, 908 (N.Y. 1995) (“Enough was shown here to create a fact question as to whether a seizure occurred, and the trial court considered the appropriate factors. Defendant’s progress was halted by a stoplight, not the police. The officers approached on foot, displayed badges and asked for identification. No sirens or lights were used to interfere with defendant’s transit; no gun was displayed; and defendant was at no time prevented from departing. Defendant consented to accompany the officers to the precinct, and thus was not forcibly detained. While there may be instances in which approach of a car at a stoplight constitutes a seizure, the courts below, having considered the relevant factors, found no seizure. We cannot say, as a matter of law, that this determination was wrong.”).

138. *State v. Broom*, No. 22468, 2008 WL 4447698, at \*1 (Ohio Ct. App. Oct. 3, 2008).

139. *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality)).

140. *Id.*

refuse a police officer's request.<sup>141</sup> Moreover, in some contexts, it would be dangerous for the motorist to test whether he is free to terminate the encounter and drive off. The number of officers, whether or not they draw their weapons, the presence of flashing lights,<sup>142</sup> the words used, and the tone of the officer's questioning factor into the determination of whether a reasonable person would have felt free to refuse to cooperate and drive off.<sup>143</sup> Recreating exact words and tone of voice at a later court hearing is problematic; it results in a he-said-she-said swearing contest. The words and tone used during traffic encounters likely differ from their presentation in court during a suppression hearing, but a judge ruling on

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141. James A. Adams, *Saint Louis University Public Law Review 1993 Symposium: Violence, Crime and Punishment Search and Seizure as Seen by Supreme Court Justices: Are They Serious or Is This Just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413, 440-41 (1993) ("On the other hand, citizens have a right to free movement on public streets and the right to refuse to discuss identity or other information with police. In the clash of rights, police rights now prevail. Virtually any on-the-street police conduct can now qualify as either a consensual stop or a *Terry* stop. Citizens are caught in a 'Catch 22.' Exercise of citizen rights in face of police rights may cause police to escalate the intrusiveness of the encounter and place the citizen at risk of both physical harm and formal arrest. Failure to exercise citizen rights by responding to the officer, however, may be viewed as consensual conduct removing the encounter from Fourth Amendment analysis." (footnote and citations omitted)).

142. See, e.g., *United States v. Taylor*, 95 F. App'x 957, 960 (10th Cir. 2004) (determining that "a police car's flashing lights and sirens provide a clear direction to stop" and thus constitute a seizure of the vehicle); *State v. Donahue*, 742 A.2d 775 (Conn. 1999) (holding that a reasonable person would not feel free to leave after a police vehicle pulled up with its overhead flashing lights activated); *State v. Mireles*, 991 P.2d 878, 880 (Idaho Ct. App. 1999) ("Here by contrast, [the officer's] act of turning on the overhead lights, although not necessarily intended to create a detention, did constitute a technical, *de facto* detention commanding Mireles to remain stopped . . ."). But see *G.M. v. State*, 19 So. 3d 973 (Fla. 2009) (concluding that pulling up behind a juvenile driver in an unmarked car with flashing lights did not constitute a seizure because the driver did not see the lights or realize the police were there); *State v. Brown*, No. CA2001-04-047, 2001 WL 1567340, at \*3 (Ohio Ct. App. 2001) ("A police officer does not necessarily seize the occupants of a parked vehicle through the activation of a police cruiser's overhead lights.").

143. Cf. *United States v. Drayton*, 536 U.S. 194, 203-04 (2002) ("When Officer Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter."); *People v. Ocasio*, 652 N.E.2d 907 (N.Y. 1995) (ruling defendant's progress was halted by a stoplight, not the police; the officers approached on foot, displayed badges and asked for identification; no sirens or lights were used to interfere with the defendant's transit; no gun was displayed; and at no time was defendant prevented from departing); *United States v. Jones*, 374 F. Supp. 2d 143 (D.D.C. 2005) (holding a consensual encounter was elevated to a traffic stop when the Government failed to establish that officers issued no commands to defendant, displayed no weapons or handcuffs, and did not demand identification, nor what the questioning officer's tone of voice was and whether multiple police cars blocked defendant's path); *United States v. Ruesga-Ramos*, 815 F. Supp. 1393, 1401 (E.D. Wash. 1993) ("Where a trooper turns off his patrol vehicle's overhead lights, issues a warning, and tells a driver that he is free to go, the driver would conclude that the stop is over and that he may leave. The driver would understand that he need not answer any further questions. Thus, if the driver does decide to remain, the trooper could reasonably believe that the driver's decision to do so is consensual.").

a motion to suppress is more likely to believe the police officer than the defendant whose car yielded contraband.

### B. Checkpoint Stops

Some stops, while activating the Fourth Amendment's reasonableness command, need not be based on individualized facts and circumstances giving rise to a reasonable belief that the motorist committed a traffic offense.<sup>144</sup> Such stops provide a way around the prohibition against randomly stopping a vehicle to check the motorist's driver's license and car registration by allowing stops of all motorists.<sup>145</sup> Brief checkpoint stops fall within Fourth Amendment seizures but remain permissible so long as they do not single out a particular car or driver. The purpose of the checkpoint stop is to promote safety on the highway.<sup>146</sup> Permissible checkpoint stops include checking drivers' licenses and vehicle registrations<sup>147</sup> and checking for impaired driving.<sup>148</sup> Checkpoint stops are illegal when they are used for "general crime control."<sup>149</sup>

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144. In *Delaware v. Prouse*, the Supreme Court disapproved the police stop of a vehicle to determine whether the motorist was a licensed driver. 440 U.S. 648 (1979). The Court found the stop illegal because it involved a random check of a motorist on the whim of police officers. *Id.* at 658. The Court indicated that the questioning of all oncoming traffic at roadblock-type stops would be permissible. *Id.*; see also *United States v. Henson*, 351 F. App'x. 818, 821 (4th Cir. 2009) (holding that reasonableness and intrusiveness of a checkpoint stop are evaluated by weighing the following factors: "[W]hether the checkpoint: (1) is clearly visible; (2) is part of some systematic procedure that strictly limits the discretionary authority of police officers; and (3) detains drivers no longer than is reasonably necessary to accomplish the purpose of checking a license and registration, unless other facts come to light creating a reasonable suspicion of criminal activity"); *United States v. Huguenin*, 154 F.3d 547, 557 (6th Cir. 1998) ("At a checkpoint, every single person is stopped, not just those persons who have violated a traffic law. Thus, a driver, who has violated no traffic law, whom an officer could not stop for a pretextual purpose away from the checkpoint, may be subjected to a pretextual stop merely for choosing to travel the road on which a checkpoint has been erected." (citation omitted)).

145. See *supra* note 62.

146. See *Mich. Dep't. of State Police v. Sitz*, 496 U.S. 444, 460–62 (1990).

147. *Prouse*, 440 U.S. at 660, 663 n.26 (holding that "[i]n terms of actually discovering unlicensed drivers or deterring them from driving, the spot check does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment," but noting that "our holding today [does not] cast doubt on the permissibility of . . . inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others"); see also *Sitz*, 496 U.S. 444 (restating the dicta in *Prouse* allowing checkpoint stops for discovery of unlicensed drivers or unregistered vehicles).

148. *Sitz*, 496 U.S. 444.

149. *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000). Courts have drawn a distinction between general crime control roadblocks and drunk driving roadblocks because impaired driving presents an "immediate, vehicle bound threat to life and limb that the sobriety checkpoint . . . was designed to eliminate." *Id.* at 43.

[O]ur checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. . . . Because

Courts have approved checkpoint stops even when not all vehicles are stopped.<sup>150</sup> A checkpoint stop need not include every vehicle when the decision regarding which vehicles to stop is not a matter of officer discretion but based on a stated plan to ensure the orderly flow of traffic and to prevent a safety hazard.<sup>151</sup>

Some jurisdictions have specific checkpoint standards: the checkpoint stop must be clearly marked; motorists must be given notice in advance of the checkpoint; and the standards governing whether to stop every motorist or every second, third, or so on motorist must be established in advance to prevent the officers at the checkpoint from acting arbitrarily when selecting which motorists to check.<sup>152</sup> The stop, generally in a line of cars, must be very brief, just long enough to satisfy the valid public purpose justifying the checkpoint.<sup>153</sup> If the checkpoint is to de-

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the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

*Id.* at 41–42; *see also* *Mills v. District of Columbia*, 571 F.3d 1304 (D.C. Cir. 2009) (disallowing suspicionless roadblock stops that have as their primary purpose crime control); *Commonwealth v. Rodriguez*, 722 N.E.2d 429 (Mass. 2000) (holding drug interdiction roadblock is illegal because it aims at criminal investigation, not immediate threat to public safety). *But see* *Illinois v. Lidster*, 540 U.S. 419, 423 (2004) (upholding the constitutional reasonableness of a roadblock stop for information at a location where a fatal hit-and-run accident had occurred one week before and where the driver was arrested for a DUI, even though “[t]he stop’s primary law enforcement purpose was *not* to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others”); *id.* at 428 (Stevens, J., concurring in part and dissenting in part) (acknowledging a valid distinction between a roadblock instituted to determine whether a motorist is committing a crime and a roadblock instituted to solicit information about a crime that occurred a week earlier).

150. *See* *United States v. Huguenin*, 154 F.3d 547, 561 (6th Cir. 1998) (remanding a denied motion to suppress evidence obtained at a highway checkpoint that was “set up as a trap” and was “more akin to a roving patrol stop than to a sobriety checkpoint . . . [because] the procedure did not treat motorists on a non-random basis, but singled out motorists”).

151. *United States v. Prichard*, 645 F.2d 854 (10th Cir. 1981), *cert. denied*, 454 U.S. 832 (1981).

152. *State v. Goines*, 474 N.E.2d 1219, 1221–22 (Ohio Ct. App. 1984) (“Where there is no consent, probable cause, or *Terry*-type reasonable and articulable suspicion, a vehicle stop may be made only where there minimally exists (1) a checkpoint or roadblock location selected for its safety and visibility to oncoming motorists; (2) adequate advance warning signs, illuminated at night, timely informing approaching motorists of the nature of the impending intrusion; (3) uniformed officers and official vehicles in sufficient quantity and visibility to ‘show . . . the police power of the community;’ and (4) a predetermination by policy-making administrative officers of the roadblock location, time, and procedures to be employed, pursuant to carefully formulated standards and neutral criteria.”).

153. *See generally* *Sitz*, 496 U.S. 444 (finding that a brief delay of drivers at a sobriety checkpoint lasting an average of twenty-five seconds and screening only for driving under the influence, is not unreasonable and thus does not violate the Fourteenth Amendment). *But see id.* at 458–59 (Brennan, J., dissenting) (“That stopping every car *might* make it easier to prevent drunken driving . . . is an insufficient justification for abandoning the requirement of individualized suspicion. . . . Without proof that the police cannot develop individualized suspicion that a person is driving while impaired by alcohol, I believe the constitutional balance must be struck in favor of protecting the

test drunk driving, an officer may shine a light on the driver as each car moves to the front of the line to determine whether there are visible signs of intoxication; alternatively, the officer may request the motorist to roll down his window to ascertain whether there is an odor of alcohol or an indication of intoxication that can be detected from the driver's speech. The officer may use a portable device to measure the air quality within a few inches of the driver to ascertain alcohol content.<sup>154</sup> Each interaction with a motorist in line must be extremely brief, no more than a minute or two at the most.<sup>155</sup>

During that brief, cursory stop, if facts and circumstances give rise to a reasonable suspicion to believe that a motorist is driving without a valid license or that the motorist is impaired, the motorist may be pulled out of the line for further investigation.<sup>156</sup> Once police divert a motorist from the regular flow of traffic past the checkpoint, the stop becomes an investigative stop of a single vehicle and driver for which particularized suspicion is required.<sup>157</sup>

If the checkpoint stop is to detect drunk driving, reasonable suspicion must develop during the checkpoint stop to order the motorist out of line for further inquiry.<sup>158</sup> Field sobriety tests must be supported by facts and circumstances giving rise to a reasonable suspicion to believe that

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public against even the 'minimally intrusive' seizures involved in this case."); *see also* *People v. Burke*, No. 08-406, 899 N.Y.S.2d 61, at \*2 (N.Y. Crim. Ct. July 28, 2009) (holding that the court "has no issue with any officer utilizing a reasonably idiosyncratic version" of protocol for a sobriety checkpoint).

154. *See Kraushaar v. Flanigan*, 45 F.3d 1040 (7th Cir. 1995).

155. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 437 (1984) ("[D]etention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes.").

156. *Sitz*, 496 U.S. at 457 (Brennan, J., dissenting) ("I agree with the Court that the initial stop of a car at a roadblock under the Michigan State Police sobriety checkpoint policy is sufficiently less intrusive than an arrest so that the reasonableness of the seizure may be judged, not by the presence of probable cause, but by balancing 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.'"); *State v. Bauer*, 651 N.E.2d 46, 47 (Ohio Ct. App. 1994) (reversing the trial court's suppression of evidence, and finding that a police checkpoint met constitutional requirements under the Fourth Amendment when the Police Chief set the standard for stopping cars as follows: "A typical pattern . . . would involve stopping two vehicles, waving the next five through and then repeating the pattern, to give a random stop ratio of two cars in seven. As traffic volume decreased through the night, Chief McCoy . . . would increase the proportion of cars stopped").

157. *Bauer*, 651 N.E.2d at 49 ("Detention of selected motorists for more extensive field sobriety testing continues to require satisfaction of an individualized suspicion under *Terry v. Ohio* and its progeny.").

158. *Sitz*, 496 U.S. at 451 (determining that although police may set up roadblocks without any individual suspicion, "[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard").



the motorist is impaired.<sup>159</sup> Most American states do not make drinking and driving illegal<sup>160</sup> unless the motorist is impaired.<sup>161</sup> If the motorist dispels reasonable suspicion by passing the initial sobriety tests, the investigatory detention should end.<sup>162</sup> However, the field sobriety testing, supported by reasonable suspicion, may give rise to probable cause to support an arrest of the motorist for drunk driving. Once police arrest a motorist on probable cause, the police can require a chemical test to determine the level of alcohol or other drugs in the motorist's body.<sup>163</sup>

### C. Custodial Arrest

States that permit police to either ticket or arrest drivers for minor offenses create situations ripe for pretextual stops and arrests.<sup>164</sup> Other than when the arrestable offense is unquestionably related to highway safety, such as driving without a license or with a suspended license, custodial arrests for minor traffic offenses should have to be justified beyond the commission of the minor violation. A custodial arrest carries severe ramifications.

If the motorist spends any time in a lockup following the arrest before release, that time spent is punishment that likely is not even available as a penalty following conviction. Even if the statute carries a potential jail sentence, that sentence will likely be a fine and not confinement.<sup>165</sup> Any time in a lockup subjects the arrestee to some risk of assault or worse. Even if he or she is released immediately from the police sta-

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159. *Rogala v. District of Columbia*, 161 F.3d 44, 52 (D.C. Cir. 1998) (“Because of the significant public interest in preventing a motorist whom an officer reasonably believes may be intoxicated from continuing to drive, and because further detention for a field sobriety test is a minimal intrusion on an already legally stopped individual’s privacy, however, many state courts have held that an officer may detain a motorist for such testing so long as there is reasonable suspicion that the driver may be intoxicated.”).

160. *See, e.g.*, BARRY S. JACOBSON, UNDERSTANDING THE SCIENTIFIC STRENGTHS AND WEAKNESSES IN DWI SCIENCE AND APPLYING YOUR KNOWLEDGE TO THE CASE (Thomson Reuters/Aspatore eds., 2010) (citing New York DWI law).

161. *Id.*

162. *See generally* *United States v. Burton*, 441 F.3d 509, 512 (7th Cir. 2006) (“A ‘stop’ without limiting the suspect’s freedom requires no suspicion; a brief detention calls for reasonable suspicion; an arrest requires probable cause; invasive techniques such as surgery require more.”).

163. *See, e.g.*, *Schmerber v. California*, 384 U.S. 757, 770–71 (1966) (holding that because alcohol in the blood begins to diminish shortly after a person stops drinking, the attempt to secure blood without a warrant was appropriate incident to the appellant’s arrest).

164. In general, New York law favors citations over arrests for traffic infractions. *See, e.g.*, *People v. Marsh*, 228 N.E.2d 783, 785 (N.Y. 1967) (“[A] traffic infraction is not a crime” and N.Y. VEH. & TRAF. LAW § 207 “statutes authorize . . . [issuance of] a summons in lieu of arrest.” (construing N.Y. VEH. & TRAF. LAW § 155)); *see also infra* note 189.

165. *Marsh*, 228 N.E.2d at 785.

tion or jail, the arrest carries a degree of humiliation that may be indelible.<sup>166</sup>

Custodial arrests for minor traffic offenses are problematic on several levels. An arrest for a simple traffic violation signals that the police singled out the motorist for special treatment and attention. Why should one motorist not be stopped at all for the same offense; why should another be stopped and given a traffic citation; and why should a third motorist be arrested for the same offense? The disparate treatment, in many cases, is inexplicable, leading to conclusions unrelated to the seriousness of the motorist's conduct. A custodial arrest for a minor traffic offense is an irrational and counterproductive employment of police resources. It takes the arresting officer off the street and away from traffic control for several hours while the arrestee is processed. Forty years ago, Justice Stewart suggested that "a persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments."<sup>167</sup> Long after Justice Stewart left, the Court unsatisfactorily resolved that issue in 2001.<sup>168</sup>

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166. Sakura Mizuno, *Justice Is Blind, Deaf, Dumb and Dumber*, 43 S. TEX. L. REV. 805, 824–25 (2002) ("As a consequence, a detainee arrested for a minor offense may be confined with those accused of committing murder, rape, and other violent crimes, in addition to the mentally unstable and those with communicable disease such as AIDS, tuberculosis, and hepatitis. Further, conditions in jails are sometimes highly unsanitary. When taking into consideration all of the above-mentioned factors, it is highly possible for an arrestee charged with a minor offense to be assaulted or exposed to an infectious disease while confined in a jail cell. Furthermore, studies have shown the first twenty-four hours in jail to be the most deadly. Many inmates arrive as a suicide risk, with the possibility of the suicide taking place within the first few hours of custody."); see also Brief of the Inst. on Criminal Justice at the Univ. of Minn. Law Sch. et al. as Amici Curiae in Support of Petitioners at 3–6, *Atwater v. Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408), 2000 WL 1341293, at \*4–8.

167. *Gustafson v. Florida*, 414 U.S. 260, 266–67 (1973); see also *United States v. Ames*, 94 F. App'x. 353, 354 (7th Cir. 2004) (upholding the district court's decision "that Indiana officers have the authority to make custodial arrests for minor traffic violations"); *Brooks v. City of Seattle*, 599 F.3d 1018 (9th Cir. 2010) (ruling that the argument also failed in a case where the circuit court granted immunity to arresting officers in a 1983 action, finding tasing a pregnant woman three-times for her failure to sign a speeding ticket did not amount to excessive force). But see *Brooks*, 599 F.3d at 1032 (Berzon, J., dissenting) ("I fail utterly to comprehend how my colleagues are able to conclude that it was objectively reasonable to use any force against Brooks, let alone three activations of a Taser, in response to such a trivial offense." (emphasis in original)); *State v. Martin*, 253 N.W.2d 404, 406 (Minn. 1977) ("In other words, under the rules of the state constitution, an officer ordinarily may not arrest a person without a warrant for a petty misdemeanor. Therefore, the arrest of defendant for the petty misdemeanor offense of possessing a small amount of marijuana was illegal."); *State v. Hehman*, 578 P.2d 527, 528 (Wash. 1978) ("We hold as a matter of public policy that custodial arrest for minor traffic violations is unjustified, unwarranted, and impermissible if the defendant signs the promise to appear.").

168. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

In *Atwater v. City of Lago Vista*,<sup>169</sup> the Supreme Court rejected Justice Stewart's view of the Fourth Amendment and held that a custodial arrest for an offense that carries only a fine does not violate the Fourth Amendment. Mrs. Atwater was driving with her two young children in the front seat; neither Mrs. Atwater nor her children were wearing seat belts. Police stopped her and arrested her for the violation, which carried a maximum \$50 fine. Texas law authorized arrest for such offenses, but also authorized police officers to issue citations for the offense in lieu of arrest. The officer approached the vehicle and yelled "something to the effect '[w]e've met before' and 'you're going to jail.'" <sup>170</sup> The officer had previously stopped Mrs. Atwater for a seatbelt violation but issued a warning when he observed that her child was wearing a seatbelt but was in an unsafe seating position.<sup>171</sup> This time, when stopped, Mrs. Atwater did not have her driver's license or insurance documentation with her. The officer charged her with driving without wearing a seatbelt, failing to have her children in seatbelts, driving without her license, and failing to provide proof of insurance. The officer handcuffed Mrs. Atwater, placed her in the police car, drove her to the police station,<sup>172</sup> and booked her—compelling her to remove her shoes, jewelry, and eyeglasses, and empty her pockets.<sup>173</sup> After placing her in a jail cell for an hour, police then took her to a magistrate where she posted bond. She pleaded no contest to the seatbelt offense and paid a fifty-dollar fine. The other charges were dismissed. Mrs. Atwater brought a § 1983 suit in a Texas state court claiming that the officer and the municipality violated her Fourth Amendment right to be free from unreasonable seizure.<sup>174</sup>

The Supreme Court disparaged the officer's decision to arrest Mrs. Atwater: "In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment."<sup>175</sup> With regard to justification for the arrest in this case, the Court said, "Atwater's claim to live free of pointless

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169. *Id. But see* State v. Askerooth, 681 N.W.2d 353 (Minn. 2004) ("Therefore, simply because Atwater has most likely foreclosed any Fourth Amendment protection for Askerooth, this does not mean that article I, section 10 [of the Minnesota State Constitution] does not afford him protection."); *see also* State v. Bauer, 36 P.3d 892 (Mont. 2001); State v. Bayard, 71 P.3d 498 (Nev. 2003); State v. Brown, 792 N.E.2d 175 (Ohio 2003).

170. *Atwater*, 532 U.S. at 324.

171. *Id.* at 324 n.1.

172. *See id.* at 324; *see also id.* at 368–69 (O'Connor, J., dissenting) ("Only the intervention of neighborhood children who had witnessed the scene and summoned one of Atwater's friends saved the children from being hauled to jail with their mother.").

173. *Id.* at 354–55.

174. *Id.* at 324–25.

175. *Id.* at 346–47.

indignity and confinement clearly outweighs anything the City can raise against it specific to her case.”<sup>176</sup>

Nonetheless, the Supreme Court held that this stupid, unnecessary arrest did not violate the Fourth Amendment. Justice Souter’s analysis was purely historical: he rejected the argument that, at common law, a warrantless arrest for a minor offense was limited to offenses that involved or tended to violence. Justice Souter’s disappointing majority opinion focused only on the perceived original intent of the framers of the Constitution, and Professor Maclin claims it is poor history at that.<sup>177</sup> Justice Souter concluded that neither English law nor U.S. law at the time of the adoption of the Constitution prohibited custodial arrests for any offenses.<sup>178</sup> The Court rejected the petitioner’s request to create a “modern arrest rule . . . forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention.”<sup>179</sup> But Justice Souter, claiming the proposed rule was “not ultimately so

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176. *Id.*

177. Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 951–52 (2002) (“Justice Souter’s initial reason for rejecting Atwater’s historical argument focused on the lack of unanimity among common-law commentators and jurists regarding an officer’s warrantless misdemeanor arrest power. . . . To the extent that precedent matters, however, unanimity among common-law sources regarding the authority of a search or seizure privilege has never been an essential cornerstone for a successful Fourth Amendment argument.”); *id.* at 953–55 (“As noted, most modern Fourth Amendment disputes do not have roots in the common law. For the few cases that do, Payton and Steagald indicate that litigants need not prove unanimity among common-law sources to prevail on their constitutional claims. Without acknowledging the change in direction it represents, Atwater marks a departure from these cases. The reasoning employed in Atwater signals that when a challenged police practice has roots in the common law, disagreement among common-law sources—though not necessarily fatal to a Fourth Amendment claim—certainly undermines the strength of an argument that a challenged police practice is constitutionally unreasonable. Although Justice Souter did not elaborate on the point, his reliance on the divergence among common-law scholars and jurists raises the question why unanimity, or even substantial agreement, among common-law sources matters when judging the legitimacy of a Fourth Amendment privilege. Generally speaking, disagreement among common-law scholars on the authority of a particular legal norm should be expected. Despite its conservative reputation, “at various periods in its history the common law has shown a great capacity for innovation, and some of the greatest common-law judges—Coke, Hale, and Mansfield in Britain, and Shaw in this country—are famous for the changes they brought about in the common law. Further, if one accepts the view that common-law norms do not derive from merely ‘a few exceptional lawgivers (or one lawgiving generation), but [from] many generations of lawyers and judges,’ then divergence among common-law scholars on the strength of a particular legal claim may not be especially significant, or even relevant, when determining the meaning of the Constitution. Common-law rules, like constitutional principles, do evolve with time. More specifically, disagreement, or even unanimity, among common-law scholars is a curious criterion for defining the scope of the Fourth Amendment.”).

178. *Atwater*, 532 U.S. at 332.

179. *Id.* at 346. Compare *id.*, with *Easton v. Hurita*, 625 P.2d 1290, 1296 (Or. 1981) (“[P]olice officers only have authority to ‘place the individual in jail’ for a minor traffic offense when he can point to ‘specific articulable facts justifying his being lodged in jail.’” (quoting state statutes)).

simple”<sup>180</sup> and could lead to complications, elected an outcome that divorces a state’s decision to give an officer unlimited discretion to make a custodial arrest, even when it is unjustifiable as in *Atwater*, from the Fourth Amendment reasonableness command and analysis. Instead, the Court adopted a bright-line rule: “If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”<sup>181</sup>

Although the Supreme Court decided to allow police to make warrantless arrests for minor offenses, the opposite rule would protect citizens from petty indignities and uneven enforcement of the law, valued principles in a free society. Requiring an officer to justify a custodial arrest for a minor, trivial offense is consistent with our Fourth Amendment values. Applying the Fourth Amendment standard of reasonableness would not always be simple, and it would be fact-specific. Courts use reasonableness standards every day in all sorts of civil and criminal law cases, not just in Fourth Amendment contexts, and those courts do not throw their hands up in the air. The Supreme Court’s rejection of fact-specific adjudication of reasonableness under the Fourth Amendment, in favor of bright-line rules, creates an artifice that inevitably favors police discretion at the expense of a citizen’s right to be left alone or to be treated reasonably and with common sense. Worse, the Court failed to explain why such an arrest fell within with the reasonableness command of the Fourth Amendment, leaving at best an eighteenth-century view of the issue irretrievably locked in place.

Justice O’Connor, writing for the four dissenting justices, argued that “[w]hen a full custodial arrest is effected without a warrant, the plain language of the Fourth Amendment requires that the arrest be reasonable.”<sup>182</sup> In determining reasonableness, she said, “[E]ach case is to be decided on its own facts and circumstances.”<sup>183</sup> The rule adopted by the majority, Justice O’Connor said, “is not only unsupported by our precedent, but runs contrary to the principles that lie at the core of the Fourth Amendment.”<sup>184</sup> She wrote:

I cannot concur in a rule which deems a full custodial arrest to be reasonable in every circumstance. Giving police officers constitutional carte blanche to effect an arrest whenever there is probable

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180. *Atwater*, 532 U.S. at 348.

181. *Id.* at 354.

182. *Id.* at 360–61 (O’Connor, J., dissenting).

183. *Id.* (O’Connor, J., dissenting).

184. *Id.* at 365–66 (O’Connor, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)) (alteration in original).

cause to believe a fine-only misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable. Instead, I would require that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion" of a full custodial arrest.<sup>185</sup>

Justice O'Connor got it right. The operation of the bright-line rule enshrines police discretion and beggars uneven enforcement. The existence of a statute authorizing the arrest should be the first step in the inquiry, not the only step. Fourth Amendment reasonableness requires that the state justify placing a simple traffic offender under custodial arrest and demonstrate that the arrest was not a ploy to expand an investigation and search a motorist. The *Atwater* decision was wrong and the Court should correct it. It is immaterial to this inquiry whether or not in 1791 government officials could arrest for every offense committed in their presence without a public breach of the peace. Post-colonial society did not envision millions of traffic offenses each year. Absent specific justification, a custodial arrest for such an offense should be unreasonable under the Fourth Amendment. The *Atwater* rule leaves too much room for unsupervised police discretion.

Even in its current form, *Atwater* does not limit states,<sup>186</sup> although many states prohibit custodial arrests for minor traffic offenses.<sup>187</sup> New

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185. *Id.* (O'Connor, J., dissenting).

186. Adam J. Breeden, *Atwater v. City of Lago Vista: How Should States Respond to the Supreme Court's Latest Expansion of Automobile Search & Seizure Law?*, 70 U. CIN. L. REV. 1395, 1407-08 (2002) ("Atwater's arrest was only allowed to take place because Texas state law allowed for it. By declining to adopt the per se rule put forth by *Atwater*, the Court preserved the states' rights to govern their own police and arrest procedures. Under the majority decision, states will still be free to alter their own state laws.").

187. *See, e.g.*, OR. REV. STAT. § 810.410 (2011) (authorizing police to arrest or issue a citation for commission of a traffic crime, but directing officers not to make an arrest for a traffic violation); S.D. CODIFIED LAWS § 23A-3-2 (2011) (stating arrests may not be made "[f]or a public offense, other than a petty offense, committed or attempted in [the officer's] presence"); *see also* State v. Ludemann, 778 N.W.2d 618 (S.D. 2010) (describing petty offenses as those with no risk of jail time, a relatively insignificant fine, and no right to a jury trial); KAN. STAT. ANN. § 22-2401 (West 2010) (authorizing police officers to make warrantless arrests for "[a]ny crime, except a traffic infraction or a cigarette or tobacco infraction" committed in the officer's view); KY. REV. STAT. ANN. § 431.015(2) (West 2011) (allowing officers to issue a citation instead of making an arrest for a violation committed in his presence rather than making a custodial arrest unless there are reasonable grounds to believe offender will not appear at the designated time, or if one of enumerated specific violations are charged); OHIO REV. CODE ANN. § 2935.26 (West 2011) (prohibits arrests for minor misdemeanors in favor of a citation, except when defendant cannot properly care for himself, fails to offer appropriate identification, refuses to sign the citation, has a warrant out for a similar offense, or escalates criminal conduct by resisting following officer's warnings and raising offense to a fourth-

York law favors citations over arrests for traffic infractions.<sup>188</sup> Similarly, an Ohio statute prohibits arrests for minor misdemeanors except for specified exceptions.<sup>189</sup> The Ohio Supreme Court ruled that “the Ohio Constitution provides greater protection than the Fourth Amendment to the United States Constitution against warrantless arrests for minor misdemeanors.”<sup>190</sup>

Some states statutorily authorize arrests but impose a general rule that arrestees be given a citation or summons to appear in court.<sup>191</sup> However, in *Virginia v. Moore*, the Court held that an illegal arrest under state law, where probable cause exists, does not violate the Fourth Amendment and that evidence seized as a result of an illegal arrest under state law need not be suppressed.<sup>192</sup> *Moore* differed from *Atwater* because Virginia, unlike Texas in the earlier case, prohibited custodial arrests for traffic offenses. The Virginia Supreme Court thought that difference was essential and ruled that the search incident to the illegal custodial arrest for driving under a suspended license violated the Fourth Amendment. The Supreme Court dismissed that distinction and held that, under the Fourth Amendment, it would not enforce the stricter state rule.

#### *D. Search of Motorist Incident to a Custodial Arrest*

A custodial arrest of a motorist for a traffic law violation raises exponentially different issues than the intrusion following a traffic citation

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degree misdemeanor); R.I. GEN. LAWS ANN. § 12-7-3 (West 2010) (authorizing warrantless arrest for misdemeanor or petty misdemeanor if the officer has reasonable cause to believe that person cannot be arrested later or may cause injury to himself or herself or others or loss or damage to property unless immediately arrested).

188. See *supra* note 164.

189. OHIO REV. CODE ANN. § 2935.26 (West 2011) (prohibiting arrests for minor misdemeanors in favor of a citation, except when defendant cannot properly care for himself, fails to offer appropriate identification, refuses to sign the citation, has a warrant out for a similar offense, or escalates criminal conduct by resisting following officer’s warnings and raising offense to a fourth-degree misdemeanor).

190. *State v. Brown*, 792 N.E.2d 175, 177 (Ohio 2003).

191. S.D. CODIFIED LAWS § 23A-3-2 (2011) (stating arrests may not be made “[f]or a public offense, other than a petty offense, committed or attempted in [the officer’s] presence”); *State v. Ludemann*, 778 N.W.2d 618 (S.D. 2010) (describing petty offenses as those with no risk of jail time, a relatively insignificant fine, and no right to a jury trial); TENN. CODE ANN. § 40-7-118 (2)(B) (West 2000) (directing officers to write a citation in lieu of arrest for any misdemeanor offense that does not require the offender to go before a judge or magistrate); see also *People v. Watkins*, 166 N.E.2d 433, 437 (Ill. 1960) (“A uniform rule permitting a search in every case of a valid arrest, even for minor traffic violations, would greatly simplify our task and that of law enforcement officers. But such an approach would preclude consideration of the reasonableness of any particular search, and so would take away the protection that the constitution is designed to provide. Other courts are in accord. They have refused to establish a uniform rule to govern all searches accompanying valid arrests, but rather have examined the nature of the offense and the surrounding circumstances to determine whether the search was warranted.”).

192. *Virginia v. Moore*, 553 U.S. 164 (2008).

issued to a motorist. Police may not search a motorist incident to issuance of a traffic citation.<sup>193</sup> Even if the offense could result in a custodial arrest, once a police officer decides to issue a citation instead of making an arrest, no search is permissible.<sup>194</sup> Ordinarily, police briefly detain the motorist, and the motorist may leave immediately after receiving the ticket, absent facts and circumstances giving rise to a reasonable belief that the motorist is armed or dangerous that would justify a pat down search of outer clothing for weapons.<sup>195</sup> However, police may subject every arrested motorist to a full search of the person,<sup>196</sup> even if the underlying reasons justifying warrantless searches incident to arrest, protecting the arresting officer and preventing the arrestee from destroying evidence,<sup>197</sup> do not exist following a custodial traffic offense. There is no evidence of a traffic offense to be destroyed, and a pat down of the arrestee's outer clothing for weapons would provide adequate protection for the police officer.

The real world application of the search incident to arrest can be seen in *United States v. Robinson*, in which police arrested the defendant for driving following revocation of his license.<sup>198</sup> The arresting officer, who knew the defendant from a prior encounter, did not indicate any subjective fear of the defendant, nor suspect that the suspect was armed.<sup>199</sup> District of Columbia police rules required a custodial arrest for the offense and a full search of an arrestee prior to entering the squad car.<sup>200</sup> Pursuant to those written police procedures, the officer did a full

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193. *Knowles v. Iowa*, 525 U.S. 113 (1998).

194. *Id.* at 114 (“An Iowa police officer stopped petitioner Knowles for speeding, but issued him a citation rather than arresting him. The question presented is whether such a procedure authorizes the officer, consistently with the Fourth Amendment, to conduct a full search of the car. We answer this question ‘no.’”).

195. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *see also Arizona v. Johnson*, 555 U.S. 323 (2009) (a passenger in a legally stopped vehicle may be frisked if there is reasonable suspicion that the passenger is armed or dangerous); *United States v. Jackson*, No. CR406-258, 2006 WL 3479063, at \*3 (S.D. Ga. Nov. 30, 2006) (“Whenever an individual has been lawfully seized by the police . . . for purposes of a traffic stop, he may be subjected to a frisk where officers reasonably believe that he poses a danger to the officers or others nearby.” (citations omitted)).

196. *United States v. Robinson*, 414 U.S. 218, 236 (1973) (“[I]t is the fact of custodial arrest which gives rise to the authority to search . . .”).

197. *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.”), *abrogated on other grounds by Arizona v. Gant*, 556 U.S. 332 (2009), *as recognized in Davis v. United States*, 131 S. Ct. 2419 (2011).

198. *Robinson*, 414 U.S. at 236.

199. *Id.* at 220, 236.

200. *Id.* at 221 n.2.



field-type search including an examination of the contents of all pockets.<sup>201</sup> The officer retrieved a crumpled cigarette package from the defendant's shirt pocket.<sup>202</sup> Once the officer had the cigarette package, there was no longer any remote danger that the defendant could retrieve the package and threaten the officer with a small weapon that might be hidden in the package or destroy evidence that might be hidden in the crumpled packet.<sup>203</sup> The officer opened the pack and found gelatin capsules containing heroin.<sup>204</sup> The Supreme Court held, as a bright-line rule, that police may conduct a full search of an arrestee's person incident to any lawful custodial arrest.<sup>205</sup>

Justice Rehnquist, writing for the majority, said "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."<sup>206</sup> The authority to conduct the warrantless search flows automatically from a lawful custodial arrest; no individualized justification is required for the search. Evidence of other crimes found during the search incident to arrest is admissible.<sup>207</sup>

The *Robinson* rule is alternatively justifiable because the arrestee will be transported in the squad car to the police station, and the arrestee may gain access to the weapon or evidence on his person, however unlikely, while riding in the police car. Some Supreme Court Justices have also rationalized the search on the theory that an arrestee no longer has a protected privacy interest in his person following the arrest.<sup>208</sup>

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201. *Id.* at 221–22.

202. *Id.* at 223.

203. *Id.* at 256 (Marshall, J. dissenting).

204. *Id.* at 223.

205. *Id.* at 235.

206. *Id.*; *see also id.* at 259 (Marshall, J., dissenting) ("The search conducted by Officer Jenks in this case went far beyond what was reasonably necessary to protect him from harm or to ensure that respondent would not effect an escape from custody. In my view, it therefore fell outside the scope of a properly drawn 'search incident to arrest' exception to the Fourth Amendment's warrant requirement.").

207. *Id.* at 233–34.

208. *Id.* at 236–37 (Powell, J., concurring) ("The Fourth Amendment safeguards the right of 'the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .' These are areas of an individual's life about which he entertains legitimate expectations of privacy. I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person. Under this view, the custodial arrest is the significant intrusion of state power into the privacy of one's person. If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern. No reason then exists to frustrate law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest. This seems to me the reason that a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee."); *see also* *Thornton v. United States*, 541 U.S. 615, 633 (2004) (Stevens, J., dissenting) ("[T]he lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.").

The problem with the bright-line rule established in *Robinson* arose in its companion case, *Gustafson v. State*,<sup>209</sup> where local police arrested the defendant for not having his driver's license on his person. While local police procedure required the officer in *Robinson* to make a custodial arrest for the offense, the officer in *Gustafson* had discretion to arrest or issue a traffic ticket.<sup>210</sup> The Supreme Court majority did not find these differences "determinative of the constitutional issue" and failed to address the issue of discretion.<sup>211</sup> Incident to the arrest, the officer searched the defendant at the scene and removed a box of Benson and Hedges from the arrestee's pocket. After the officer placed the motorist into the police car, he opened the box of cigarettes and found hand-rolled marijuana cigarettes. The decision to make an arrest for the driving offense was in the officer's discretion, creating a double dose of discretion, since the officer decides both whom to stop and whom to arrest. That discretion could play out in several ways: How does the officer exercise that discretion? Does he decide to make a custodial arrest before he confronts the motorist, or does the decision on custody depend on what turns up during the search? If the latter, then the arrest really becomes incident to the search rather than a search incident to an arrest, which is not only constitutionally flawed but also problematic for a society based on the rule of law.<sup>212</sup>

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209. *Gustafson v. State*, 243 So. 2d 615, 619 (Fla. Ct. App. 1971).

210. *Gustafson v. Florida*, 414 U.S. 260, 266 n.3 (stating in majority opinion that officer testified he takes three or four out of ten stopped for the offense into custody); see also *Gustafson*, 243 So. 2d at 619 ("Section 186.51(1) of the Model Traffic Ordinance adopted by the City of Eau Gallie provides that a violator of a traffic ordinance *may* be kept in custody or released on bail where it appears doubtful that he will appear pursuant to a written citation." (emphasis added)).

211. *Gustafson*, 414 U.S. at 265 ("Though the officer here was not required to take the petitioner into custody by police regulations as he was in *Robinson*, and there did not exist a departmental policy establishing the conditions under which a full-scale body search should be conducted, we do not find these differences determinative of the constitutional issue."); see also *United States v. Garcia*, 376 F.3d 648, 650 (7th Cir. 2004) ("Garcia was not among those covered by a catch-and-release regimen, however. He could not produce a driver's license, and *Gustafson* holds that a driver who lacks a license is subject to full custodial arrest and thorough search."). But see *State v. Ladson*, 979 P.2d 833, 840 (Wash. 1999) ("But in *State v. Hehman*, our first postincorporation divergence from federal precedent, we rejected *Robinson* and *Gustafson* and the Supreme Court's abandonment of the no-pretext rule. In *Hehman* the issue was whether a search incident-to-an-arrest for a minor traffic stop was valid. *Hehman* not only rejected the recent federal cases but reaffirmed the pretext rule in Washington and further held under state public policy minor traffic stops could not support an arrest at all because the risk of pretext arrests is heightened." (citations omitted)); Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1107 (2000) ("In perhaps no setting does law enforcement possess greater discretion than in the decision to conduct a traffic stop . . .").

212. Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1416 (2000) ("The Fourth Amendment's historical background clearly demonstrates a fear of the discretion of the official in the field,

*E. Expanding a Traffic Stop: Inquiries into Other Crimes, Canine Sniff, Consensual Searches*

1. Inquiries About Unrelated Crimes

A motorist lawfully stopped for a traffic violation can become the target of police inquiry about unrelated, more serious crimes.<sup>213</sup> During a lawful traffic stop, police may ask the motorist about unrelated crimes without later having to justify their questions. The motorist's automobile may be the object of a police drug dog's attention without any reason to believe that the particular motorist is involved in drug use or trafficking. The decisions to ask about other crimes or to run the drug dog around the car are completely within the police officer's discretion, not subject to later reasonableness review under the Fourth Amendment, even if these inquiries result in non-traffic related criminal charges.

In a free society, it would be reasonable to expect that a police stop of a motorist for a noncustodial arrest traffic offense would be brief and limited to issuance of the ticket or warning once it is established that the motorist has a valid driver's license and the car is properly registered. Even though the officer has probable cause or reasonable suspicion to believe the motorist has committed a minor traffic offense, the ramifications of such a stop are, and should be, very different from those associated with a custodial arrest for a more serious criminal offense. The motorist may not be searched as a matter of routine incident to the traffic stop,<sup>214</sup> nor should the car be searched absent the motorist's consent or the car's lawful impoundment and inventory.<sup>215</sup> That is exactly how a

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at that time embodied in general warrants that empowered an officer to search wherever he chose for evidence of a crime.”).

213. *Compare* Ohio v. Robinette, 519 U.S. 33 (1996) (“And there is no question that, in light of the admitted probable cause to stop Robinette for speeding, Deputy Newsome was objectively justified in asking Robinette to get out of the car, subjective thoughts notwithstanding.”), with *People v. Brownlee*, 713 N.E.2d 556 (Ill. 1999) (“Certainly *Robinette* does not stand for the proposition that, following the conclusion of a lawful traffic stop, officers may detain a vehicle without reasonable suspicion of any illegal activity and for any amount of time, so long as they ultimately request and obtain permission to search the car.”).

214. *Knowles v. Iowa*, 525 U.S. 113, 114 (1998) (“An Iowa police officer stopped petitioner Knowles for speeding, but issued him a citation rather than arresting him. The question presented is whether such a procedure authorizes the officer, consistently with the Fourth Amendment, to conduct a full search of the car. We answer this question ‘no.’”).

215. *See* *Colorado v. Bertine*, 479 U.S. 367, 374 (1987) (“We conclude that here, as in *Lafayette*, reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.”); *United States v. Hughes*, 420 F. App'x 533, 541 (6th Cir. 2011) (“Because police had probable cause to arrest Hughes for driving under suspension, and did effect an arrest for that offense; and because they conducted an inventory search in accordance with the standardized tow policy of the Cleveland police department, the requirements of

traffic stop plays out when most of us are stopped for committing minor traffic offenses. We are issued the ticket, as well as a summons to appear in court, and we are then permitted to drive off, grumbling about our poor luck. Some motorists have much worse luck.

However, the Fourth Amendment does not dictate the speediest and simplest intrusion, and some persons stopped for such offenses may end up feeling like a public enemy. The police officer may order the motorist to remain in her vehicle or may order the motorist out of her vehicle. The law considers that decision totally within the police officer's discretion: a "minor intrusion" premised upon ensuring the safety of the officer, a decision an officer never needs to justify.<sup>216</sup> If the officer sees a firearm in plain view in the car during the lawful traffic stop, the officer may seize it during the traffic stop even if it is lawfully carried.<sup>217</sup> The officer may not order the motorist to sit in the squad car simply for the officer's convenience while processing the ticket. A safety rationale must exist to underlie the order to sit in the police car. Most jurisdictions allow a pat down of the motorist's outer clothing for weapons before placing the motorist in the police car to ensure officer safety.<sup>218</sup> It is the pat down that escalates the stop from a minor traffic offense and reintroduces the Fourth Amendment to the equation.

Some jurisdictions analogize a traffic stop for a minor traffic offense, even if based upon probable cause, to a temporary seizure allowed under *Terry v. Ohio*<sup>219</sup> to investigate possible criminal activity. The theo-

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the Fourth Amendment are satisfied."); *People v. Nash*, 947 N.E.2d 350 (Ill. App. Ct. 2011) (holding that a search after a lawful impound does not require a warrant).

216. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (extending the ability to pull occupant out of a car if he suspects the presence of a weapon because the Court has "specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile"); *Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997) ("[D]anger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.").

217. *See, e.g., Megesi v. State*, 627 S.E.2d 814, 818 (Ga. Ct. App. 2006) ("Therefore, we hold that when an officer is informed during a traffic stop that a weapon, licensed or otherwise, is in the vehicle, the officer may secure the weapon for his protection."); *State v. Wilson*, No. 41333-3-I, 1998 WL 847110, at \*2 (Wash. Ct. App. Dec. 7, 1998) ("A legally possessed weapon represents just as great a danger to his safety as an illegal one."). *But see State v. Ketelson*, 257 P.3d 957, 959 (N.M. 2011) (determining that retrieving a gun from a convicted felon during a traffic stop is valid for the officer's safety).

218. *United States v. Smith*, 322 F. App'x. 876, 877 (11th Cir. 2009) ("The Fourth Amendment permitted the officers to search Smith and his car to look for weapons that could be used to injure police officers and to collect and preserve evidence.").

219. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *cf. United States v. Digiovanni*, 650 F.3d 498, 506 (4th Cir. 2011) ("Because a traffic stop is more analogous to an investigative detention than a custodial arrest, we treat a traffic stop, whether based on probable cause or reasonable suspicion, under the standard set forth in *Terry v. Ohio* . . . Pursuant to *Terry*, we analyze the propriety of a traffic

ry is that a traffic violation, even one based upon probable cause, is so qualitatively different from an arrest for a more serious offense that it should be treated more like a Terry stop. *Terry* requires the shortest and least intrusive means to confirm or dispel the suspicious activity; a traffic stop should not expose the motorist to more serious interference than a *Terry* stop allows when there is reasonable suspicion of a more serious criminal offense. In those states, the officer may focus only on the legitimate reason for the stop and not expand the inquiry to more serious crimes absent the emergence of reasonable suspicion to believe that other crimes merit inquiry and action. Thus, a stop for a minor traffic offense cannot be expanded beyond the issuance of a traffic ticket without additional cause giving rise to reasonable suspicion to justify the greater intrusion.<sup>220</sup>

However, the Supreme Court has held that the Fourth Amendment is not so limiting and does not restrict the subjects that a police officer may discuss with a motorist lawfully stopped for a traffic violation. The Court's interpretation of the Fourth Amendment allows police to engage in a fishing expedition for other crimes.<sup>221</sup> The officer may ask the motorist about other more serious offenses without greater cause that always would justify additional inquiries.<sup>222</sup> Even the shortest allowed traffic stop provides enough time to ask about unrelated crimes.

In *Arizona v. Johnson*, the Court reaffirmed that an expanded inquiry of a lawfully stopped motorist about other crimes does not violate

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stop on two fronts. First, we analyze whether the police officer's action was justified at its inception. Second, we analyze whether the police officer's subsequent actions were reasonably related in scope to the circumstances that justified the stop." (citations omitted)).

220. See, e.g., *United States v. Smith*, 263 F.3d 571, 588 (6th Cir. 2001) ("[O]nce the purpose of the traffic stop is completed, a motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable, articulable suspicion that criminal activity was afoot."); *Whitehead v. State*, 698 A.2d 1115, 1120 (Md. Ct. Spec. App. 1997) ("We think it would be a mistake to read *Whren* as allowing law enforcement officers to detain on the pretext of issuing a traffic citation or warning, and then deliberately to engage in activities not related to the enforcement of the traffic code in order to determine whether there are sufficient indicia of some illegal activity. Stopping a car for speeding does not confer the right to abandon or never begin to take action related to the traffic laws and, instead, to attempt to secure a waiver of Fourth Amendment rights from a citizen whose only offense to that point is to have been selected from among many who have been detected violating a traffic regulation. An interpretation of *Whren* that is consistent with *Snow* and *Munafò* requires the police to issue the citation or warning efficiently and expeditiously with a minimum of intrusion, only that which is required to carry forth the legitimate, although pretextual, purpose for the stop. We are condemning not the stop itself, but the detention after the pretextual stop that was for the purpose of determining whether the trooper could acquire sufficient probable cause or a waiver that would permit him to search the car for illegal narcotics."); *State v. Pearson*, 251 P.3d 152 (Mont. 2011) (holding that reasonable suspicion of drug activity allowed the officer to expand the scope of the traffic stop when officer found that the defendant has a history with drugs and observed the defendant acting nervously and gripping a wad of money).

221. *Arizona v. Johnson*, 555 U.S. 323 (2009).

222. See *infra* text accompanying note 273.

the Fourth Amendment. In *Johnson*, an Arizona gangs task force pulled over an automobile after a license plate check revealed an insurance-related suspension on the vehicle's registration, a civil infraction warranting only a citation.<sup>223</sup> Three officers approached the vehicle and began asking Johnson, a passenger, about his clothing with gang-associated colors, a matter obviously unrelated to the traffic stop. The number of officers, at the outset, indicates that the stop was pretextual, an excuse to question the motorist about other matters, not an effort to address a traffic infraction. The Court condoned the officer's behavior:

An 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>224</sup>

Even Ohio, which championed limiting the scope of a traffic stop to the original offense, took note of the Supreme Court's disapproving attitude on this issue and relented, allowing an officer during a traffic stop to ask the motorist if she has guns or drugs in the car.<sup>225</sup> Federal courts, prior to *Johnson*, were divided as to whether questions unrelated to the purpose of the stop required reasonable suspicion.<sup>226</sup>

The only limitation, imposed half-heartedly and as a matter of rote by the Supreme Court, is that the extended inquiry may not unreasonably extend the duration of the traffic stop.<sup>227</sup> The detention, solely for the

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223. *Johnson*, 555 U.S. at 327.

224. *Id.* at 333.

225. *State v. Robinette*, 685 N.E.2d 762, 768 (Ohio 1997) ("Officer Newsome was justified in briefly detaining Robinette in order to ask him whether he was carrying any illegal drugs or weapons pursuant to the drug interdiction policy, because such a policy promotes the public interest in quelling the drug trade.").

226. Compare *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001), modified by *United States v. Stewart*, 473 F.3d 1265 (10th Cir. 2007), with *United States v. Mendez*, 467 F.3d 1162 (9th Cir. 2006), withdrawn and superseded by 476 F.3d 1077 (9th Cir. 2007) (finding one officer's questioning of defendant while another ran check of defendant's identification did not extend duration of lawful traffic stop, and therefore, expanded questioning need not have been supported by separate reasonable suspicion); see also *United States v. Valenzuela*, 494 F.3d 886 (10th Cir. 2007) (police officer, before writing up traffic ticket, asked motorist whether he had any weapons or other illegal items in the car). States agree that an officer can ask unrelated questions as long as they do not prolong the stop. See, e.g., *Arroyo v. State*, 711 S.E.2d 60, 63 (Ga. Ct. App. 2011); *State v. Hogan*, 252 P.3d 627, 636 (Kan. Ct. App. 2011); *State v. Schroeder*, 330 S.W.3d 468, 474 (Mo. 2011); *State v. Leyva*, 250 P.3d 861, 868 (N.M. 2011); *State v. Provet*, 706 S.E.2d 513, 516 (S.C. Ct. App. 2011); *Branch v. State*, 335 S.W.3d 893, 900 (Tex. Crim. App. 2011).

227. See, e.g., *United States v. Stewart*, 473 F.3d 1265 (10th Cir. 2007) (ruling police did not violate motorist's Fourth Amendment rights by asking him during a traffic stop if there were any weapons or contraband in his vehicle, providing the questioning does not overly prolong the stop); *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002) (reversing panel holding that questioning during a traffic stop is unrelated to the purpose of the stop).

traffic stop, transforms into an illegal seizure if it is unreasonably long.<sup>228</sup> The Court has not determined how long a traffic stop may last before it becomes an unreasonable detention. *Terry* envisioned a brief stop, allowing police to freeze the situation, lasting only a few moments while police confirm or dispel suspicious circumstances.<sup>229</sup> The Supreme Court addressed the length of a *Terry* stop in *United States v. Sharpe*,<sup>230</sup> where the detention on a back road lasted for twenty minutes. In an opinion by Chief Justice Burger, the Court held that a twenty-minute detention based on reasonable and articulable suspicion of criminal activity is not unreasonable where the amount of time is reasonably needed to achieve the purpose of the stop, and where police diligently pursue a means of investigation that is likely to confirm or dispel their suspicion quickly. Some state courts have held that processing an ordinary traffic stop should last only about fifteen minutes,<sup>231</sup> which is probably the short end of that duration; other courts have indicated that a detention of twenty to twenty-five minutes during a traffic stop is reasonable.<sup>232</sup> One federal court held that even a short, ten-minute stop to issue a warning was unreasonable where the officer “failed to diligently pursue the purposes of the stop and embarked on a sustained course of investigation into the presence of drugs in the car that constituted the bulk of the encounter” between the officer and the defendant.<sup>233</sup> If the inquiries about unrelated

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228. *Johnson*, 555 U.S. at 333.

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

230. *United States v. Sharpe*, 470 U.S. 675 (1985).

231. *See State v. Brown*, 916 N.E.2d 1138, 1143 (Ohio Ct. App. 2009) (“Here, Gazarek did not initiate the checks on the driver or appellant until five to ten minutes after the stop. A review of this court’s prior cases indicates that an officer should, on average, have completed the necessary checks and be ready to issue a traffic citation in approximately 15 minutes. We are convinced that by impermissibly questioning both the driver and appellant, the length of the stop was prolonged. We find that the tactics used in this case impermissibly expanded the length and the scope of the investigative stop and violated the Fourth Amendment to the Constitution of the United States and Section 14, Article I of the Ohio Constitution.” (citations omitted)). *But see United States v. Aispuro-Medina*, 256 F. App’x. 215 (10th Cir. 2007) (calling to Immigration and Customs Enforcement did not impermissibly extend the traffic stop); *United States v. Long*, 532 F.3d 791, 795 (8th Cir. 2008) (“A stop may be extended for a length of time sufficient to enable the apprehending officer to ask the driver to step out of the vehicle or wait in the patrol car, to ask about the motorist’s destination and purpose, to check the validity of the driver’s license and registration, and to check the driver’s criminal history for outstanding warrants.”); *State v. Jenkins*, 3 A.3d 806, 829 (Conn. 2010) (“[R]easonableness is not measured solely by the temporal duration of the stop alone but, rather, requires scrupulous consideration of the reasonableness of the officers’ actions during the time of the stop.”).

232. *See, e.g., United States v. Kitchell*, 653 F.3d 1206 (10th Cir. 2011) (holding 22 minute traffic stop not unreasonable); *United States v. Geboyan*, 367 F. App’x. 99 (11th Cir. 2010) (holding 20 minute traffic stop reasonable); *Ward v. Commonwealth*, 345 S.W.3d 249 (Ky. Ct. App. 2011) (holding 15–20 minute traffic stop not unreasonable).

233. *United States v. Digiovanni*, 650 F.3d 498, 511 (4th Cir. 2011) (“[T]he government’s argument fails to recognize that investigative stops must be limited both in scope and duration. Cre-

matters extend the stop beyond the ordinary time it takes to process a traffic ticket, the stop transforms into an illegal seizure of the motorist unless there are facts and circumstances giving rise to reasonable suspicion to support the additional inquiries.<sup>234</sup>

Police discretion in choosing which stopped cars to target remains an issue that has not been subject to the scrutiny it merits. Targeting young black males as well as young men in old, run-down cars raises the same specter of racial profiling that runs through any discussion of traffic stops.<sup>235</sup> Moreover, the emphasis on run-down cars also signals the disproportionate impact upon the poor in our society.<sup>236</sup> Limiting Fourth Amendment review only to the objective reason for the stop and the duration of the stop neglects enormous, unchecked and unreviewed discretion vested in police to determine which traffic offenders they stop and subject to enhanced scrutiny.<sup>237</sup>

## 2. Canine Sniff of Stopped Car

In *Illinois v. Caballes*,<sup>238</sup> the Supreme Court held that using a drug sniffing dog to inspect a car stopped for a traffic violation did not intrude

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ating a rule that allows a police officer fifteen minutes to do as he pleases reduces the duration component to a bright-line rule and eliminates the scope inquiry altogether. In its reasonableness jurisprudence, the Supreme Court has ‘consistently eschewed bright-line rules,’ and the scope of a police officer’s actions remains relevant in the Fourth Amendment traffic stop inquiry.” (emphasis in original)).

234. See *United States v. Mesa*, 62 F.3d 159, 162 (6th Cir. 1995) (“Once the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention.”); *United States v. Briasco*, 640 F.3d 857, 860 (8th Cir. 2011) (holding that objective factors—sagging rear of the car, nervous driver, and vague details of cross-country travel plans—led to a reasonable suspicion that the defendants were transporting marijuana); *State v. Batchili*, 865 N.E.2d 1282, 1286 (Ohio 2007) (“Moreover, assuming the detention was actually prolonged by the request for a dog search, ‘the detention of a stopped driver may continue beyond [the normal] time frame when additional facts are encountered that give rise to a reasonable, articulable suspicion of criminal activity beyond that which prompted the initial stop.’”).

235. Kathleen M. O’Day, *Pretextual Traffic Stops: Protecting Our Streets or Racist Police Tactics?*, 23 U. DAYTON L. REV. 313 (stating that police officer in *United States v. Harvey* admitted that he targeted old cars driven by black men when trying to locate drug dealers (citing *United States v. Harvey*, 16 F.3d 109 (6th Cir. 1994))).

236. Cf. Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1474 (2010) (“[A study of New York City stops and frisks by police] found that poor persons of color were more likely than white individuals to be stopped, searched, questioned, and arrested by police.” (citation omitted)).

237. See, e.g., *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) (“The citing of an area as ‘high-crime’ requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity.”).

238. *Illinois v. Caballes*, 543 U.S. 405 (2005).



upon “legitimate privacy interests” since the traffic stop was lawful.<sup>239</sup> Any lawfully stopped vehicle may be subjected to inspection by a drug dog. The keys are the lawfulness and the duration of the stop.<sup>240</sup> The rule also extends to cars not stopped by the police but legally parked or stopped at traffic lights.<sup>241</sup>

The *Caballes* majority relied entirely upon *United States v. Place*.<sup>242</sup> In *Place*, the Supreme Court pronounced in dicta that a dog sniff in a public place alerting police to the presence of drugs does not constitute a search under the Fourth Amendment.<sup>243</sup> Consequently, the prosecution need not establish reasonableness for the decision to use a drug dog on a particular car. Justice O’Connor, who wrote the majority opinion in *Place*, went beyond the issues necessary to decide the case—the length of time that police seized the suitcase—unilaterally issuing a general approval of the use of drug dogs to sniff out contraband.<sup>244</sup> The Court anchored *Place* to three general assumptions: (1) that a dog sniff is a minor intrusion; (2) that a dog sniff discloses no other fact than wheth-

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239. *Id.* at 409.

240. *United States v. Alexander*, 448 F.3d 1014, 1016 (8th Cir. 2006) (“Such a dog sniff may be the product of an unconstitutional seizure, however, if the traffic stop is unreasonably prolonged before the dog is employed. Once an officer has decided to permit a routine traffic offender to depart with a ticket, a warning, or an all clear, the Fourth Amendment applies to limit any subsequent detention or search. We recognize, however, that this dividing line is artificial and that dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only de minimis intrusions on the defendant’s Fourth Amendment rights.” (citations omitted)).

241. *Hill v. Sharber*, 544 F. Supp. 2d 670, 679 (D. Tenn. 2008) (“[T]he Sixth Circuit has held that law enforcement officers may sweep a parking lot with drug dogs without implicating the Fourth Amendment, as individuals do not have a reasonable expectation of privacy in a parking lot that is accessible to the public.”); *see also United States v. Gooch*, 499 F.3d 596 (6th Cir. 2007). *But see Caballes*, 543 U.S. at 411 (Souter, J., dissenting) (“[A]n uncritical adherence to *Place* would render the Fourth Amendment indifferent to suspicionless and indiscriminate sweeps of cars in parking garages and pedestrians on sidewalks; if a sniff is not preceded by a seizure subject to Fourth Amendment notice, it escapes Fourth Amendment review entirely unless it is treated as a search.” (citing *United States v. Place*, 462 U.S. 696 (1983)); *id.* at 422 (Ginsburg, J., dissenting) (reiterating these concerns, and stating that “motorists [would] have [no] constitutional grounds for complaint should police with dogs, stationed at long traffic lights, circle cars waiting for the red signal to turn green”).

242. *United States v. Place*, 462 U.S. 696 (1983).

243. *See id.* at 707.

244. *Id.* (“A ‘canine sniff’ by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer’s rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. . . . We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent’s luggage, which was located in a public place, to a trained canine—did not constitute a ‘search’ within the meaning of the Fourth Amendment.”).

er the object sniffed contains contraband; and (3) that dogs are highly accurate.<sup>245</sup> All three assertions are myth,<sup>246</sup> but myth that has served as the underlying basis of thousands of court decisions since 1983.<sup>247</sup> Justice O'Connor offered no empirical data to support these three critical assertions. Justice Stevens, for the *Caballes* majority, mimicked the *Place* conclusions and wrote:

Accordingly, the use of a well-trained narcotics-detection dog—one that “does not expose noncontraband items that otherwise would remain hidden from public view”—during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent’s car while he was lawfully seized for a traffic violation. Any intrusion on respondent’s privacy expectations does not rise to the level of a constitutionally cognizable infringement.<sup>248</sup>

Justice Souter dissented in *Caballes* and challenged the unsupported framework on which the *Place* and *Caballes* decisions are based, saying that the accuracy of the drug dog is a myth, and argued that it should be treated as any other search.<sup>249</sup> But the only issue the *Caballes* majority

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245. *Id.*

246. Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735 (2007) (describing numerous instances where these three assertions are false); *id.* at 752–53 (“The dog’s habit of sniffing often causes its nose to come into contact with its target, a disturbing result when the subject is a person. Moreover, there is a danger that the drug dog may bite the subject of the drug sniff.”); *id.* at 754 (“[T]he legitimacy of the Court’s approach depends upon whether in fact the dog is able to distinguish between contraband and noncontraband. The Court in *Place* offered no support for its conclusion that the dog could be so discerning, and it is not at all clear that such support exists.”); *id.* at 757 (“Existing case law demonstrates that the false-alert rate among certified drug dogs varies greatly. Further, the assertion in *Place* that drug dogs are highly accurate was not supported by any authority or empirical studies . . . .”); *id.* at 760–62 (“Thus the individual dog’s track record and an examination of its certification are essential to determine the credibility of the dog’s alert when deciding whether the dog’s signal should constitute probable cause. However, courts generally are disinterested in discovering the individual dog’s error rate. . . . Often, courts are willing to accept assertions of the dog’s training and certification as prima facie evidence of a dog’s accuracy. . . . Handler error affects the accuracy of a dog. . . . Dogs are animals, replete with animal tendencies and instincts which the handler seeks to understand and control. Even the best training cannot entirely control these instincts.”).

247. For example, as of early 2013, *United States v. Place* had been cited in 2,574 case decisions; but only 111 of those case decisions treated it negatively. 462 U.S. 696 (1983) (citing references as of Feb. 10, 2013).

248. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (citation omitted).

249. *Id.* at 417 (Souter, J., dissenting) (“The Court today does not go so far as to say explicitly that sniff searches by dogs trained to sense contraband always get a free pass under the Fourth Amendment, since it reserves judgment on the constitutional significance of sniffs assumed to be more intrusive than a dog’s walk around a stopped car . . . . For this reason, I do not take the Court’s reliance on *Jacobsen* as actually signaling recognition of a broad authority to conduct suspicionless sniffs for drugs in any parked car, about which Justice Ginsburg is rightly concerned . . . or on the person of any pedestrian minding his own business on a sidewalk. But the Court’s stated reasoning

considered still open was the duration of the stop in order to bring the canine unit to the scene.<sup>250</sup> If the detention of the motorist lasts longer than it ordinarily takes to process a traffic ticket, the extended time it takes to await the arrival of the dog and walk the dog around the car must be supported by reasonable suspicion.<sup>251</sup> While the length of time police detain a motorist during a traffic stop marginally controls the expanded inquiry that a motorist faces, it is hardly the only important issue left to be considered.

The inescapable question is why a citizen in a free society who commits a minor driving offense should be subject to a drug dog's scrutiny without having given the police cause to believe that there might be

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provides no apparent stopping point short of such excesses. For the sake of providing a workable framework to analyze cases on facts like these, which are certain to come along, I would treat the dog sniff as the familiar search it is in fact, subject to scrutiny under the Fourth Amendment." (citing *United States v. Jacobsen*, 466 U.S. 109 (1984)).

250. *Id.*; see also *id.* at 411–14 ("The infallible dog, however, is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine. . . . Indeed, a study cited by Illinois in this case for the proposition that dog sniffs are 'generally reliable' shows that dogs in artificial testing situations return false positives anywhere from 12.5% to 60% of the time, depending on the length of the search. . . . Once the dog's fallibility is recognized, however, that ends the justification claimed in *Place* for treating the sniff as *sui generis* under the Fourth Amendment: the sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has sensed will not necessarily reveal contraband or any other evidence of crime."); *id.* at 423–25 (Ginsburg, J., dissenting) ("The dog sniff in this case, it bears emphasis, was for drug detection only. A dog sniff for explosives, involving security interests not presented here, would be an entirely different matter. Detector dogs are ordinarily trained not as all-purpose sniffers, but for discrete purposes. For example, they may be trained for narcotics detection or for explosives detection or for agricultural products detection. . . . This Court has distinguished between the general interest in crime control and more immediate threats to public safety. . . . Even if the Court were to change course and characterize a dog sniff as an independent Fourth Amendment search . . . the immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine." (citations omitted)).

251. *Id.* at 407–08 ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. In an earlier case involving a dog sniff that occurred during an unreasonably prolonged traffic stop, the Illinois Supreme Court held that use of the dog and the subsequent discovery of contraband were the product of an unconstitutional seizure. We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained." (citation omitted)); see also *United States v. Branch*, 537 F.3d 328 (4th Cir. 2008) (upholding district court's finding that police possessed sufficient constitutional justification to authorize Branch's 30-minute detention and subsequent denial of Branch's motion to suppress); *United States v. Mason*, 628 F.3d 123, 132–33 (4th Cir. 2010) (finding officer's questioning unrelated to the traffic stop only caused a brief delay to the otherwise efficient, eleven-minute traffic stop); *United States v. White*, 584 F.3d 935 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1721 (2010) (determining that once traffic stop was converted to investigatory stop based on reasonable suspicion that motorists were engaged in drug trafficking, state trooper did not illegally extend duration of stop by requiring motorist to drive to police department for canine drug sniff).

drugs in the car. The Supreme Court's conclusion that no search takes place in this situation, an unsupported conclusion, hardly provides a reasoned explanation for allowing the additional intrusion into a detained motorist's privacy. Perhaps the real inquiry should be whether subjecting a motorist who has committed a minor traffic violation to a drug dog inquiry without cause is consistent with the expectations of a free people.<sup>252</sup> Once the Supreme Court decided that a dog sniff is not a search, the Court concluded that it had completed the job and need not subject the police activity to the Fourth Amendment's standard of reasonableness. However, the Court has never completed that task. Obviously, states and municipalities cannot subject every motorist stopped for a traffic violation to a drug dog sniff. They lack both the manpower and trained dog power.<sup>253</sup> Moreover, if police subjected every stopped car to such scrutiny, it would unreasonably extend the duration of a traffic stop while the officer on the scene awaited the arrival of the canine unit, running afoul of the remaining Fourth Amendment standard applicable to traffic stops.

### 3. Consensual Searches Following a Traffic Stop

A consensual search of an automobile stopped for a minor traffic offense is the gold standard from the perspective of law enforcement. Police may not search an automobile stopped for a traffic offense without the motorist's consent, unless probable cause develops during the stop to arrest the driver or to search the vehicle.<sup>254</sup> As discussed earlier, in the past sixteen years, many states have instituted procedures to track police activities in traffic stops to identify race biases.<sup>255</sup> Raw data from states that collect this information demonstrates a marked difference in numbers between searches of white and black drivers.<sup>256</sup> However, with the exception of New Jersey, this data does not help a criminal defendant build a defense.<sup>257</sup> The data is generally used only as an internal check

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252. See *United States v. White*, 401 U.S. 745, 786 (Harlan, J., dissenting) ("Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.").

253. Cf. *Explosive- and Drug-Sniffing Dogs' Performance is Affected by Their Handlers' Beliefs*, U.C. DAVIS HEALTH SYS. (Feb. 1, 2011), available at <http://www.sciencedaily.com/releases/2011/01/110131153526.htm> (last visited Feb. 17, 2013) ("[A] study . . . found that detection-dog/handler teams erroneously 'alerted,' or identified a scent, when there was no scent present more than 200 times—particularly when the handler believed that there was scent present.").

254. See *United States v. Robinson*, 414 U.S. 218 (1973). But see *Michigan v. Long*, 463 U.S. 1032 (1983) (allowing "frisk" of interior to search for weapons in nonarrest situations).

255. See DUNN & REED, *supra* note 64.

256. But see *id.* (describing data from Texas and North Carolina that shows minorities are not pulled over disproportionately).

257. See *supra* notes 69–79 and accompanying text.

for police departments and as a way to build transparency between police departments and citizens.<sup>258</sup> In 2001, Congress considered four bills<sup>259</sup> to require all states to track this data at the urging of President Clinton.<sup>260</sup> But those initiatives failed, presumably because by then, the Supreme Court had foreclosed the issue in *Whren*<sup>261</sup> and *Robinette*.<sup>262</sup>

Often the very traffic stop forms a part of an aggressive effort to stop as many traffic offenders as possible to inquire about drunk driving or drug trafficking.<sup>263</sup> The request to search the vehicle goes hand-in-hand with the additional inquiries. The federal project on drug interdiction encourages local law enforcement officials to seek permission to search.<sup>264</sup> Some police officers routinely request a motorist's permission to search the car during a traffic stop, and some traffic stops are motivated by the desire to search the car. The deputy sheriff in *Robinette*,<sup>265</sup> who was on drug-interdiction patrol at the time of the stop, testified in an earlier case that he successfully requested motorists to consent to a search of their cars in 786 stops in one year alone and boasted that he searched every car he stopped.<sup>266</sup> The very purpose of the stop is to investigate beyond the traffic offense and to try to get the motorist to consent to a search of the vehicle.

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258. Memorandum on Fairness in Law Enforcement from Bill Clinton, President of U.S., to the Sec'y of the Treasury, Att'y Gen., and Sec'y of Interior (June 9, 1999), available at <http://www.gpo.gov/fdsys/pkg/WCPD-1999-06-14/html/WCPD-1999-06-14-Pg1067.htm> ("We must work together to build the trust of all Americans in law enforcement. . . . The systematic collection of statistics and information regarding Federal law enforcement activities can increase the fairness of our law enforcement practices.").

259. End Racial Profiling Act of 2001, S. 989, 107th Cong. (2001); End Racial Profiling Act of 2001, H.R. 2074, 107th Cong. (2001); Racial Profiling Prohibition Act of 2001, H.R. 965, 107th Cong. (2001); Racial Profiling Prohibition Act of 2001, H.R. 1907, 107th Cong. (2001).

260. See Memorandum, *supra* note 258.

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

262. *Ohio v. Robinette*, 519 U.S. 33 (1996).

263. See, e.g., *Florida v. Bostick*, 501 U.S. 429, 441 (1991) (Marshall, J., dissenting) ("Often displaying badges, weapons or other indicia of authority, the officers identify themselves and announce their purpose to intercept drug traffickers. They proceed to approach individual passengers, requesting them to show identification, produce their tickets, and explain the purpose of their travels. Never do the officers advise the passengers that they are free not to speak with the officers. An 'interview' of this type ordinarily culminates in a request for consent to search the passenger's luggage.").

264. See LYMAN, *supra* note 60 (discussing protocol for Operation Pipeline: "law enforcement officers . . . ask key questions to help determine whether or not motorists they had stopped for traffic violations were also carrying drugs").

265. *Robinette*, 519 U.S. 33.

266. *State v. Retherford*, 639 N.E.2d 498, 591-92 (Ohio Ct. App. 1994) ("Deputy Newsome further testified that, in 1992 alone, he asked for consent to search a vehicle incident to a traffic stop 'approximately 786 times give or take a few.'").

The standard for consent sets a very low bar, as established by the Supreme Court in *Schneckloth v. Bustamonte*.<sup>267</sup> First, the Court said that whether consent is voluntary or the product of duress is to be determined from the totality of the circumstances.<sup>268</sup> Knowledge of the right to refuse is one factor to be considered, but it is not controlling,<sup>269</sup> and this factor has largely disappeared in lower courts' analyses of whether consent is voluntary. Consequently, police need not advise an individual of the right to refuse. A court reviewing the legality of a "consensual" search must determine whether the consent to search was an act of free will voluntarily given, and not the result of duress or coercion. Justice Brennan, in his dissenting opinion, raised the obvious objection, but to no avail: "It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence."<sup>270</sup>

Some state and federal courts, concerned that simple traffic stops were being routinely transformed into drug searches, held that the Fourth Amendment restricted police from requesting permission to search without reasonable suspicion to warrant further investigation, or without informing the motorist that he was free to leave, thereby ensuring that the motorist's submission to interrogation or a search was purely consensual.<sup>271</sup> The Supreme Court in *Ohio v. Robinette*<sup>272</sup> expressly rejected Ohio's bright-line rule that a police officer must inform a motorist that he is free to go before expanding the inquiry by asking about other crimes or seeking consent to search the car. Chief Justice Rehnquist, writing for the majority, said that the Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry," sticking with the totality of the circumstances test adopted in *Schneckloth* and pointing out again that, as in *Whren*, the officer's true motivation for the stop remains irrelevant.<sup>273</sup> The Court makes a disingenuous claim that it rejects bright-line rules; in reality, the Supreme Court rejects such rules only when the rules would protect a person's

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267. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

268. *Id.* at 227.

269. *Id.* ("While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they were not in and of themselves determinative.")

270. *Id.* at 277 (Brennan, J., dissenting).

271. *See, e.g., State v. Robinette*, 653 N.E.2d 695, 697 (Ohio 1995) ("We also use this case to establish a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation.")

272. *Ohio v. Robinette*, 519 U.S. 33 (1996).

273. *Id.* at 39.

Fourth Amendment rights, not when it expands police authority.<sup>274</sup> Again, Justice Stevens disagreed with the majority, pointing out that the officer's failure to tell Robinette that he was free to leave meant that a reasonable person in the same circumstances would continue to believe that he was not free to leave.<sup>275</sup> This belief impacts the motorist's freedom to refuse the search. The Court's body of law concerning consensual searches, like consensual stops,<sup>276</sup> predicates itself on the Court's belief that motorists know when they have the right to refuse a police officer's request. It is a belief based upon a misperception that Americans know their rights in these contexts and feel comfortable exercising them.

States may impose stricter limitations on police under their own state constitutions.<sup>277</sup> Ohio, which has not traditionally interpreted the state constitution more strictly than the Fourth Amendment,<sup>278</sup> held that the search of the car in *Robinette* was illegal because Deputy Newsome

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274. *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (“This Court . . . is not empowered to suspend constitutional guarantees so that the Government may more effectively wage a ‘war on drugs.’ If that war is to be fought, those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime. By the same token, this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful.” (citation omitted)).

275. *Robinette*, 519 U.S. at 47 (Stevens, J., dissenting) (“The Ohio Supreme Court was surely correct in stating: ‘Most people believe that they are validly in a police officer’s custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.’” (quoting *Robinette*, 653 N.E.2d at 698)).

276. See *supra* notes 131–143 and accompanying text.

277. See, e.g., *Brown v. State*, 182 P.3d 624, 626 (Alaska 2008) (holding that the state constitution requires greater restrictions on police authority than the restrictions imposed by the Fourth Amendment (construing ALASKA CONST. art. I, § 14)); *State v. Washington*, 898 N.E.2d 1200, 1206 (Ind. 2008) (“The Indiana Constitution may protect searches that the federal Constitution does not.” (discussing IND. CONST. art. I, § 11)); *Rainey v. Commonwealth*, 197 S.W.3d 89, 96 (Ky. 2006) (Roach, J., concurring) (“The issue could arise in a situation where the United States Supreme Court has interpreted the Fourth Amendment in such a way as to formulate a legal rule that is inconsistent with the original understanding of Section 10 of the Kentucky Constitution. In such a case, we should decline to defer to the United States Supreme Court’s interpretation of the Fourth Amendment when interpreting our own constitutional provision, which is an independent legal protection with a different, albeit related, history and origin. To do otherwise would violate our oath of office by which ‘we are bound to support the Constitution of the United States *and* the Constitution of this Commonwealth.’” (interpreting KY. CONST. § 10) (quoting KY. CONST. § 228)); *State v. Jackson*, 764 So.2d 64, 71 (La. 2000) (“[T]he Louisiana Constitution provides greater protection for individual rights than that provided by the Fourth Amendment in some circumstances.”); *State v. Levya*, 250 P.3d 861, 877 (N.M. 2011) (“[W]e need not be confined by Fourth Amendment law in determining whether [the defendant’s] rights were violated under the New Mexico Constitution.” (construing N.M. CONST. art. II, §10)).

278. *But see State v. Smith*, 920 N.E.2d 949, 956 (Ohio 2009) (“We hold that the warrantless search of data within a cell phone seized incident to a lawful arrest is prohibited by the Fourth Amendment when the search is unnecessary for the safety of law-enforcement officers and there are no exigent circumstances.”).

had already issued a warning for the traffic infraction, so the continuing detention was illegal under the Fourth Amendment; therefore, the marijuana found during the search was the fruit of an illegal detention.<sup>279</sup> The State did not appeal again to the U.S. Supreme Court, but that Court might have disagreed with the Ohio Supreme Court's strict definition of when the legal traffic stop ended and the illegal detention began.<sup>280</sup> The resulting practice in Ohio was predictable: if consent to search the car comes before issuing the traffic ticket or warning, a voluntary consent is not the product of an illegal detention.<sup>281</sup>

Justice Stevens got it right. Motorists consent to searches without the knowledge that they have the constitutional right to say no. Equally troubling is that motorists are held to have consented even when they did not know they were consenting because the officers' requests are verbalized as a statement rather than a question. It boggles the mind that Deputy Newsome secured consent from all 786 motorists that he stopped in one year while enforcing traffic laws for purposes of drug interdiction. A random selection of 786 people would surely result in at least a few who would say no, unless, as is likely, the deputy did not present the request as a choice. In that earlier case, the court of appeals characterized Deputy Newsome's questions about drugs and requests to search as "clearly not the stuff of casual conversation but . . . in the manner of an investigation."<sup>282</sup> Law student responses to these situations, even after having read the cases and knowing that they do not have to consent, have changed over the years. Students claim, even within the safety of a classroom, that they would agree to a police officer's request to search the car because they are more concerned about the ramifications of a refusal than they are about an officer rummaging in their belongings. If that is the case in a pristine classroom, imagine how it must seem to a motorist, who does not know his rights, alone with a police officer on a highway.

The Supreme Court's readiness to find valid consent in stressful situations makes me want to put the word *consensual* in quote marks. *United States v. Drayton* involved police "working the buses" along the I-95 "drug corridor."<sup>283</sup> Three police officers boarded the bus just before its departure from a rest stop. One officer moved to the back of the bus,

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279. *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997).

280. *But see State v. Jenkins*, 3 A.3d 806, 834 (Conn. 2010) ("In evaluating the voluntariness of the defendant's consent, we note that, 'while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.'" (quoting *Schneckloth v. Bustamonte*, 412 U.S. 226, 249 (1973))).

281. *Robinette*, 685 N.E.2d 762.

282. *State v. Retherford*, 639 N.E.2d 498, 508 (Ohio Ct. App. 1994).

283. *See United States v. Drayton*, 536 U.S. 194, 197 (2002).



the second stayed in front of the bus by the exit, and the third worked his way from the back of the bus to the front, asking passengers for their permission to search them and their luggage.<sup>284</sup> The officers did not tell passengers that they could refuse permission,<sup>285</sup> which officers had done in the first case before the Supreme Court, and which the Court had found so important in its determination that the search in that case was consensual.<sup>286</sup> The practice is designed clearly to pressure the passengers to allow police to search. When the officer reached Drayton and his companion, he asked if they had any luggage; both men pointed to the overhead rack.<sup>287</sup> The officer asked if he could check, but the search revealed no contraband. Then the officer asked Drayton's companion if he could search him, and the companion agreed. The pat-down search revealed hard objects similar to "drug packages" in both thighs.<sup>288</sup> Police arrested Drayton's companion and hauled him off the bus. Then the officer asked Drayton if he could search him, and Drayton agreed. The search revealed similar packages.<sup>289</sup>

The U.S. Court of Appeals for the Eleventh Circuit held that the police obtained consent as a product of duress because persons in that situation do not feel free to disregard an officer's request to search unless they are given some positive indication that consent may be refused.<sup>290</sup> The Supreme Court disagreed:

When Officer Lang approached respondents he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.<sup>291</sup>

Justice Kennedy conveniently ignored the officer at the front of the bus—whom a passenger would likely have seen—as an obstacle to leav-

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284. *Id.* at 198.

285. *See id.* at 198–99.

286. *See Florida v. Bostick*, 501 U.S. 429, 439 (1991) ("We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.").

287. *Drayton*, 536 U.S. at 199.

288. *Id.*

289. *Id.*

290. *United States v. Drayton*, 231 F.3d 787, 791 (11th Cir. 2000), *aff'd*, 536 U.S. 194 (2002) ("Seeing an officer stationed at the bus exit during a police interdiction might make a reasonable person feel less free to leave the bus.").

291. *Drayton*, 536 U.S. at 203–04.

ing.<sup>292</sup> As to the defendant's claim that no reasonable person would feel free to refuse to cooperate after his companion had been arrested, Justice Kennedy demurred:

And when Lang requested to search Brown and Drayton's persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse. Even after arresting Brown, Lang provided Drayton with no indication that he was required to consent to a search. To the contrary, Lang asked for Drayton's permission to search him ("Mind if I check you?"), and Drayton agreed.<sup>293</sup>

It has become increasingly difficult to take the Supreme Court's decisions on consensual searches and consensual encounters seriously. It is hard to determine whether the Court is so insulated that the Justices are naive or if they are disingenuously imposing constitutional doctrine based on assertions that they know do not exist on the streets or in the buses (police officers do not work the aisles of planes). I fully realize that neither is a flattering portrait of the Supreme Court. The Justices write as though they do not know who are the targets of these traffic stops. The worse alternative, which is more likely, is that they do not care, and they are imposing Fourth Amendment doctrine, which is totally skewed in favor of law enforcement, against the rights of individual citizens.<sup>294</sup>

#### IV. CONCLUSION

Just half a century ago, the Supreme Court attempted to counter police abuse and criminal justice injustice in the states by applying the Bill of Rights and its protections through the Fourteenth Amendment. The rights protected by the Fourth Amendment and its exclusionary rule formed a key aspect of the due process revolution.<sup>295</sup> The Warren Court's criminal justice cases made up just one element of that Court's attempt to

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292. *Id.* at 205.

293. *Id.* at 206. *But see id.* at 212 (Souter, J., dissenting) ("It is very hard to imagine that either Brown [the traveling companion] or Drayton would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ignore the police altogether. No reasonable passenger could have believed that, only an uncomprehending one.").

294. *See Florida v. Bostick*, 501 U.S. 429, 443 (1991) (Marshall, J., dissenting) ("The evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers—in short a *raison d'être*—is foreign to *any* fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains ('that time permits') and check identification [and] tickets, [and] ask to search luggage—all in the name of 'voluntary cooperation' with law enforcement." (quoting *Bostick v. State*, 554 So.2d 1153, 1158 (1989)) (citation and internal alterations omitted)).

295. *Mapp v. Ohio*, 367 U.S. 643 (1961).

address America's endemic racial injustice.<sup>296</sup> Each of these cases, while protecting all Americans, specifically addressed aspects of American life that perpetuated racial injustice.

The end of the Warren Court, marked by Chief Justice Earl Warren's retirement in 1969, also signaled the end of the Supreme Court's dedication to protecting Americans from police misconduct through the enforcement and enhancement of Fourth Amendment rights.<sup>297</sup> No area better illustrates the Court's abandoned commitment to these rights than police-motorist interactions. With two notable exceptions,<sup>298</sup> the Supreme Court has validated almost every police stop and search of a car since 1970. It is a shameful track record. In the earliest years of the retrenchment, the Court virtually eliminated the warrant requirement for searches of automobiles.<sup>299</sup> But at least those earlier cases retained probable cause for search under the automobile exception or a lawful arrest for a search incident to arrest.

The Supreme Court's greatest impact on drivers on America's streets and highways has been to make them fair game for the application of unrestrained police discretion. Over the past fifteen years, the Court virtually eliminated Fourth Amendment restraints on police when stopping and ticketing motorists. Under the fictional guise of an objective reasonableness standard, the Court's road cases have failed to restrain police power to stop and investigate almost any motorist on the street or highway who commits any trivial traffic violation, maximizing police discretion of who to stop and which motorists to subject to investigation for other crimes. Moreover, the Court has said that state laws that authorize a police officer to arrest a motorist for any trivial offense do not vio-

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296. See also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (declaring segregation in the schools unconstitutional); *Baker v. Carr*, 369 U.S. 186 (1962) (stating the rule of one man, one vote).

297. Expanded protection of Fourth Amendment rights in the following decades has been limited to home invasions by police. See *Payton v. New York*, 445 U.S. 573 (1980) (requiring an arrest warrant to enter a home, absent consent or exigent circumstances, to arrest a resident); *Steagald v. United States*, 451 U.S. 204 (1981) (requiring a search warrant to enter a home, absent consent or exigent circumstances, to arrest a nonresident); see also *Kyllo v. United States*, 533 U.S. 27, 28 (2001) (requiring a search warrant to scan a home from the outside with a thermal imager—a detector of escaping heat—“at least where (as here) the technology in question is not in general public use”). But see *Kentucky v. King*, 131 S. Ct. 1849 (2011) (holding that police may create exigent circumstances by their own conduct to justify a warrantless entry of a home so long as the police do not create that exigency through actual or threatened Fourth Amendment violation).

298. See *Arizona v. Gant*, 556 U.S. 332 (2009); see also *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). But see *Illinois v. Lidster*, 540 U.S. 419 (2004).

299. See *Chambers v. Maroney*, 399 U.S. 42 (1970) (allowing police to search an automobile with probable cause at the scene or at the police station); *Texas v. White*, 423 U.S. 67 (1975) (eliminating the exigency requirement, which was the underpinning of the exemption from the warrant requirement); *New York v. Belton*, 453 U.S. 454 (1981) (allowing police to search the interior compartment of a vehicle incident to the arrest of an occupant); *Gant*, 556 U.S. 332 (modifying *Belton* to bring it more into line with the search incident to arrest doctrine).

late the Fourth Amendment guarantee against unreasonable seizures, and the Court refuses to enforce state laws that prohibit arrests for minor offenses so long as there is probable cause to justify the arrest. Police may subject every legally stopped car to a drug dog investigation.

The burden of the Court's road case decisions falls most heavily on black and other minority drivers, who are most likely to be selected for these stops and who are most likely to be questioned about drug possession, trafficking, and other crimes. The Court turned a blind eye to the actual motivations for these stops and expanded investigations; the Court's claim to being colorblind validates traffic stops based on race and encourages the continuation of the practice. Even worse is the Court's doctrine on consensual searches, providing that reasonable persons feel free to deny such requests. In so doing, the Court denies the reality that most people are too afraid to say no to a police request or believe that to say no would be fruitless or would subject them to worse consequences.

The only Fourth Amendment protection for motorists today comes from state high courts, some of which have imposed greater restrictions on their police than the Supreme Court does through the Fourth Amendment. However, state courts imposing higher standards must do so under their state constitutions. The Supreme Court is hopeless at the present time, and it has transformed the Fourth Amendment criminal procedure course—as many of my colleagues like to say—into a history course. Motorists should drive right by the Supreme Court because, for the foreseeable future, the Court is committed to not restraining arbitrary police discretion on our streets and highways. The only way to reverse this dismal record is for the Supreme Court to limit police from stopping for trivial traffic offenses unrelated to highway safety, to forbid police to arrest for traffic offenses without a separate justification, to forbid police to inquire about other offenses during a traffic stop without reasonable suspicion, and to require police to demonstrate a justifiable reason to request to search a traffic offender's vehicle. Absent meaningful change, the Fourth Amendment imposes too little restraint upon police on the streets and highways of America.