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The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment

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THE “ROUTINE TRAFFIC STOP” FROM START TO FINISH: TOO MUCH “ROUTINE,” NOT ENOUGH FOURTH AMENDMENT

Wayne R. LaFave*

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Yale Kamisar, about which I have said too much elsewhere in this issue of the *Review*,¹ could rightly be called “Mr. Confessions,” for he has not only authored books and a host of articles on the subject of police interrogation, but for years has been printing *Miranda* cards in his basement and selling them to police departments all across the nation.² Moreover, he may be the only law professor in the country

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Professor LaFave has advised us that his personal experience with traffic stops is limited, as he has been stopped but once, about thirty-five years ago. He was stopped *and* ticketed for speeding by a Madison, Wisconsin, officer while driving to the University of Wisconsin law school to give a lecture entitled “Discretionary Enforcement by the Police!” — Ed.

1. See Wayne R. LaFave, “*What is a Kamisar?*”, 102 MICH. L. REV. 1732 (2004) [hereinafter LaFave, *What is a Kamisar?*].

2. Some skeptics out there might not believe this, so I will cite a reliable source. See Wayne R. LaFave, *Random Thoughts by a Distant Collaborator*, 94 MICH. L. REV. 2431, 2435 n.11 (1996).

who has both personally coerced a confession and had a confession coerced out of him.³

As Kamisar has himself noted,⁴ my own “intellectual sandbox” has been the field of search and seizure, which has occupied much of my attention for virtually all of my professional life. Among my endeavors in that regard is a treatise on the subject, now in its five-volume third edition,⁵ in which I have “created” (in the Frankensteinian sense) a 1,687,149-word exceptionally execrable excrescence⁶ upon the 54-word Fourth Amendment. Such efforts notwithstanding, I have understandably not had this “sandbox” to myself; there is no way I could claim exclusive rights to an *entire* amendment to the Constitution. Indeed, there were footprints in the sandbox upon my very first visit, most prominently those of Yale Kamisar, and he has often revisited since my arrival, all to my benefit. I have read and re-read Yale’s many contributions to this area, and have profited greatly from the insights I have gained from them. That being the case, when the *Review* asked if I would do a Fourth Amendment piece for this issue honoring Yale Kamisar, I accepted immediately.

The subject of this Article is an exceedingly important one, as is reflected by the fact that in recent years more Fourth Amendment battles have been fought about police activities incident to what the courts call a “routine traffic stop”⁷ than in any other context. There is a reason why this is so, and it is *not* that police have taken an intense interest in such matters as burned-out taillights and unsignaled lane changes per se. Rather, as anyone not on a trip to Mars over the past decade or so is surely aware, the renewed interest of the police in traffic enforcement is attributable to a federally sponsored initiative related to the “war on drugs.”⁸ Both in urban areas and on the

3. Simultaneously at that. See LaFave, *What is a Kamisar?*, *supra* note 1, at 1736.

4. Jerold H. Israel & Yale Kamisar, *Wayne R. LaFave: Search and Seizure Commentator at Work and Play*, 1993 U. ILL. L. REV. 187, 188 (1993).

5. 1-5 WAYNE R. LAFAYE, SEARCH AND SEIZURE (3d ed. 1996) [hereinafter LAFAYE, SEARCH AND SEIZURE (1996)].

6. To the astonishment of some. See Israel & Kamisar, *supra* note 4, at 188-89.

7. See *Knowles v. Iowa*, 525 U.S. 113, 117 (1998); *United States v. Lofton*, 333 F.3d 874 (8th Cir. 2003); *State v. Green*, 826 A.2d 486, 489 (Md. 2003); *Fender v. State*, 74 P.3d 1220, 1225 (Wyo. 2003).

8. Albert Alschuler has written that:

The federal government has strongly encouraged state and local law enforcement officers to view the highway as a battleground in the war on drugs. It has trained patrol officers to use traffic stops to investigate suspected drug offenses. See the Drug Enforcement Administration’s description of “Operation Pipeline,” available online at <http://www.usdoj.gov/dea/programs/pipecon.htm>, and see also the Department of Transportation’s description of the training courses offered by the Drug Interdiction Assistance Program of the Federal Motor Carrier Safety Administration, available online at <http://www.fmcsa.dot.gov/ntc/pages/set.html>. The federal government also has provided financial incentives for state and local drug interdiction. See 21 U.S.C.A. §§ 881(e)(1)(A) & (e)(3) (West 2002). States have established programs like “Operation Valkyrie,” a program designed to “enhance [the]

interstates, police are on the watch for "suspicious" travelers, and when a modicum of supposedly suspicious circumstances are observed — or, perhaps, even on a hunch or pursuant to such arbitrary considerations as the color of the driver's skin⁹ — it is only a matter of time before some technical or trivial offense produces the necessary excuse for a traffic stop.¹⁰ Perhaps because the offenses are often so insignificant,¹¹ the driver may be told at the outset that he will merely be given a warning. But then things get ugly. As a part of the "routine," a criminal-history and outstanding-warrants records check is run on the driver and passengers; they are closely questioned about their identities, the reason for their travels, their intended destinations, and the like, and may be quizzed as to whether they have drugs on their persons or in the vehicle. The driver may be induced to submit to a full search of the vehicle, or a drug-sniffing dog may appear on the scene and "do his thing."

capability [of the Illinois State Police] to detect and apprehend drug couriers . . . while focusing on the enforcement of highway safety regulations." *Operation Valkyrie: An Officer's Guide to Drug Interdiction Techniques*, quoted in *Chavez v Illinois State Police*, 251 F.3d 612, 62[1] (7th Cir. 2001) (first and second alterations in original).

Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 170 n.25 (some citations omitted).

9. As one distinguished black educator has wryly noted, "[t]here's a moving violation that many African-Americans know as D.W.B.: Driving While Black." Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 59. There is now a significant body of literature on the subject of racial profiling, most of which occurs in the context of traffic stops. See 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.4 n.77.36 (Supp. 2004) [hereinafter LAFAVE, SEARCH AND SEIZURE (Supp.)].

10. As Markus Dubber writes:

Every day, millions of cars are stopped for one of the myriad of regulations governing our use of public streets. As soon as you get into your car, even before you turn the ignition key, you have subjected yourself to intense police scrutiny. So dense is the modern web of motor vehicle regulations that every motorist is likely to get caught in it every time he drives to the grocery store.

Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 874 (2001).

11. Indeed, sometimes bordering on the nonexistent. See *United States v. Akram*, 165 F.3d 452, 455 (6th Cir. 1999) (characterizing case as "an example of the very questionable police conduct that is permitted by *Whren*," see *infra* text accompanying note 48); *id.* at 457 (Guy, J., dissenting) (explaining police conduct was questionable because police ordinarily "do not stop vehicles on interstate highways for speeding when they are only exceeding the speed limit by two miles per hour"); *United States v. Lee*, 73 F.3d 1034 (10th Cir. 1996) (holding that when Utah deputy patrolling Interstate 70 saw an automobile driven by a black man straddle the center line for about one second before proceeding to the other lane of traffic, officer had sufficient suspicion the operator was driving while impaired to support stop); *United States v. Roberson*, 6 F.3d 1088 (5th Cir. 1993), (discussed in the text accompanying note 12 *infra*); *State v. Waters*, 780 So. 2d 1053, 1056 (La. 2001) (finding driver's one-time "contact" with fog line without crossing it sufficient basis for stop for improper lane use; dismissing defendant's claim "that this 'almost violation' marks the *de minimis* point at which *Whren*'s objective approach no longer provides a workable rule for determining the reasonableness of vehicular stops").

My favorite illustration of this tactic is *United States v. Roberson*.¹² A Texas state trooper on patrol at night passed a van and noted it had out-of-state plates and four black occupants, so he pulled off onto the shoulder after cresting a hill, turned his lights off, and then observed the van change lanes to provide more distance between it and the vehicle parked on the shoulder. The lane change was unaccompanied by a signal, which hardly seems remarkable in view of the fact that the van was “the only moving vehicle on that stretch of road,” but the trooper “obviously regarded this as a serious traffic offense,” for he pulled the van over.¹³ He then questioned the van’s occupants on unrelated matters and finally exacted consent to search the vehicle, which resulted in the discovery of drugs. Despite the court’s familiarity with this trooper’s “propensity for patrolling the fourth amendment’s outer frontier” and his “remarkable record” of turning traffic stops into drug arrests on 250 prior occasions, the defendants in *Roberson* were deemed to be without any basis to challenge the stop because, after all, the trooper had “observed a traffic infraction before stopping the vehicle”!¹⁴

Cases of this genre raise a number of important issues concerning the Fourth Amendment legalities of the “routine traffic stop” from start to finish. As to the start, there are various questions concerning the limitations upon when such a stop may be initiated. As to the finish, there are questions concerning what is necessary to constitute a termination of custody and what official actions thereafter will or will not constitute a new seizure. And then there is the in-between, that critical period between start and finish; as to it, there is another set of questions concerning how long the seizure may continue and what investigative techniques and tactics are permissible during that interval.

I. THE START: LAWFULNESS OF THE TRAFFIC STOP

A. *Quantum of Evidence*

The primary (indeed, virtually exclusive) inquiry appropriate to determining the lawfulness of a traffic stop is whether there was a pre-existing sufficient quantum of evidence to justify the stop. In the run-of-the-mill case, this presents no significant problem, for most traffic stops are made based upon the direct observations of unambiguous conduct or circumstances by the stopping officer. That is, in most of the cases the stopping will have been made on full probable cause.

12. 6 F.3d 1088 (5th Cir. 1993).

13. *Id.* at 1089.

14. *Id.* at 1092.

Because the Supreme Court has recently told us, in the roundly criticized¹⁵ case of *Atwater v. City of Lago Vista*,¹⁶ that probable cause alone suffices to justify a *custodial* arrest for the slightest traffic offense, it is apparent that the same is true for the lesser intrusion of a traffic stop.¹⁷

Probable cause, of course, is the well-established constitutional standard for arrest where more serious criminal conduct has apparently occurred, and in such a context has worked rather well as a basis for determining which suspected offenders should and should not be apprehended. With respect to traffic offenses, however, even though "the establishment of probable cause based on the word of the officer is practically a given,"¹⁸ there is good reason to be less sanguine. At least since the police have co-opted our traffic codes as a weapon to be used in the "war on drugs," police make stops for the most insignificant conduct lying at (or perhaps just beyond) the outer boundaries of the defined prohibited conduct, and courts uphold those tactics by broad interpretation of the definitions of the traffic offenses involved.¹⁹ Although the matter is seldom put this way, it is as if the courts were saying that at the probable-cause level (as compared to the beyond-a-reasonable-doubt level), a reasonable but perhaps erroneous interpretation of the substantive statute relied upon by the officer is good enough. But that simply is not the case, for it is well-established Fourth Amendment doctrine that the sufficiency of the claimed probable cause must be determined by considering the conduct and circumstances deemed relevant within the context of the

15. I have taken a dim view of *Atwater*, see 3 LAFAVE, SEARCH AND SEIZURE (Supp.), *supra* note 9, § 5.1 (citing text at notes 314.3 ff.), as has Ross Perot, see Wayne R. LaFave, *The Fourth Amendment as a "Big Time" TV Fad*, 53 HASTINGS L.J. 265, 267-71 (2001), and the Court's reasoning in that case has been effectively demolished by such distinguished commentators as Thomas Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239 (2002), and Richard Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 FORDHAM L. REV. 329 (2002).

16. 532 U.S. 318 (2001).

17. If the offense is only a parking violation, however, then it may be that probable cause alone will not suffice, or at least a few courts have so held. See *United States v. Copeland*, 321 F.3d 582, 594 (6th Cir. 2003) (parking violation was a violation of the traffic laws and thus justified a stop on probable cause, but "[b]ecause a parking violation necessarily takes place only when a vehicle is stopped or standing, the time in which a moving vehicle can reasonably be stopped for a parking violation is relatively limited"); *State v. Holmes*, 569 N.W.2d 181, 185 (Minn. 1997) ("A police officer who has probable cause to believe that a person has committed a parking violation can stop the person only if the stop is necessary to enforce the violation, for example, if a person is attempting to drive off with an illegally parked car before the officer can issue the ticket.").

18. Robert H. Whorf, *Consent Searches Following Routine Traffic Stops — The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1, 4 (2001) [hereinafter Whorf, *Consent Searches*].

19. See cases cited *supra* note 11.

actual meaning of the applicable substantive provision, rather than the officer's claimed interpretation of that statute.²⁰

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*²¹ 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,²² as well as in the decisions of most states.²³ 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.²⁴ A few state decisions are to be found *not* permitting stopping for all traffic violations; some are grounded in a state statutory provision so limiting the police authority to make stops,²⁵ but on other occasions courts, whether or not mentioning the Fourth Amendment, have engaged in analyses one would expect to be employed in determining the issue under the Fourth Amendment.²⁶

20. See, e.g., *United States v. Granado*, 302 F.3d 421 (5th Cir. 2002); *United States v. Freeman*, 209 F.3d 464, 466 (6th Cir. 2000); *United States v. Ozbirn*, 189 F.3d 1194, 1198 (10th Cir. 1999). The same rule applies even if a "reasonable-suspicion" standard is applicable. See *infra* note 28.

On the other hand, if the officer's interpretation of the statute is unduly broad but the perceived conduct or circumstances fit within the statute as properly construed, then probable cause is not defeated. See *United States v. Wallace*, 213 F.3d 1216, 1220 (9th Cir. 2000).

21. 392 U.S. 1 (1968).

22. E.g., *United States v. Chanthasouvat*, 342 F.3d 1271 (11th Cir. 2003); *Haynie v. County of Los Angeles*, 339 F.3d 1071 (9th Cir. 2003); *United States v. Sanchez-Pena*, 336 F.3d 431 (5th Cir. 2003).

23. E.g., *State v. Bohannon*, 74 P.3d 980 (Haw. 2003); *State v. Crawford*, 67 P.3d 115 (Kan. 2003); *State v. Chavez*, 668 N.W.2d 89 (S.D. 2003).

24. E.g., *United States v. Callarman*, 273 F.3d 1284 (10th Cir. 2001); *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000).

25. E.g., *State v. Painter*, 676 P.2d 309, 313 (Or. 1984) ("Traffic infractions are not among the category of offenses to which the stop and frisk statute applies.").

26. See, e.g., *Ebona v. State*, 577 P.2d 698, 700 (Alaska 1978) (holding police suspicion was sufficient here only because suspicion was of driving under the influence, since court previously required that for a *Terry* stop the officer must have "a reasonable suspicion that imminent public danger exists, or serious harm to persons or property has recently occurred"); *State v. Holmes*, 569 N.W.2d 181, 185 (Minn. 1997) (stating that, because in *Terry* "the Supreme Court necessarily has limited such seizures to those situations where the suspected violation is serious," "we hold that a police officer who merely has reasonable suspicion that a *parking* violation has occurred cannot seize an individual for the purpose of investigation"); *Commonwealth v. Gleason*, 785 A.2d 983, 989 (Pa. 2001) (following a prior ruling that took an interest-balancing approach, court held that notwithstanding statute purporting to authorize stops upon "articulable and reasonable grounds to suspect a violation" of the vehicle code, the officer must have facts "which would provide probable

Illustrative of the few cases expressly rejecting a defendant's claim that probable cause is required for some traffic violations is *United States v. Callarman*, where the district court had upheld the stop on the ground that the officer either had probable cause or reasonable suspicion (without specifying which) of violation of the statute making it a traffic infraction to drive with windshield damage so severe that it "substantially obstructs the driver's clear view" of the road, where the officer saw a twelve-inch crack just above where the windshield met the hood.²⁷ The court of appeals affirmed, but failed to address the defendant's contention that under *Terry* a seizure on reasonable suspicion requires a higher public interest than the enforcement of minor traffic offenses. As one commentator has cogently elaborated:

The *Callarman* court's analysis did not consider the seriousness of the suspected offense in determining whether the reasonable suspicion standard was applicable, thus rendering its analysis contrary to Supreme Court precedent. Two aspects of the *Callarman* opinion suggest this lack of consideration. First, the court heavily relied on cases in which the suspected offenses were distinguishable from that in *Callarman*. In both *Botero-Ospina* and *Ozbirn* the police officers suspected that the defendants were driving drunk; in *Brignoni-Ponce* the Court held that stopping an automobile would be constitutional where the police officer has reasonable suspicion that the car is transporting illegal aliens. The hazard created by a windshield crack infraction does not appear to be nearly as grave as drunk driving, and transporting illegal aliens is an offense different in both degree and kind from the one in *Callarman*. That the Tenth Circuit did not even attempt to explain away these distinctions indicates that the court either overlooked them or viewed them as irrelevant. The precedential value of the cited cases for the court's purposes thus appears to have rested on the one factual similarity between them and *Callarman*: they all involved stops of vehicles. Second, the court's failure to engage directly *Callarman*'s serious offense argument suggests that the court did not accept it. Had the court accepted the argument, it could have at least reasoned — perhaps somewhat tenuously — that the windshield crack infraction created a substantial risk of immediate danger to the public and warranted a departure from the probable cause requirement. That the court did not go this route suggests that it justified its application of the reasonable suspicion standard solely on the basis of the less intrusive nature of a temporary seizure. The court's reasoning would seem to allow a

cause to believe" there was such a violation (quoting *Commonwealth v. Whitmyer*, 668 A.2d 1113, 1116-17 (quoting 75 PA. CONS. STAT. § 6308(b) (1996))). For more on the Alaska and Pennsylvania positions, respectively, see David A. Greene, *Investigative Stops in Alaska: Can Coleman Survive a Multifaceted Balance?*, 7 ALASKA L. REV. 381 (1990), and Joseph E. Vogrin, *DUI Traffic Stops in Pennsylvania*, 3 No. 5 LAW. J., at 6 (2003).

27. 273 F.3d 1284, 1287 (10th Cir. 2001) (quoting KAN. STAT. ANN. § 8-1741(b) (1991)).

temporary seizure upon reasonable suspicion of, for example, curfew violation or littering.²⁸

The issue that *Callarman* and other cases of that genre fail to meet head-on — whether under *Terry* a stop is permissible upon less than probable cause merely because of the lesser intrusion or because of both a lesser intrusion and a strong government-enforcement interest — has never been specifically decided by the Supreme Court, although language in some of the Court's decisions might lead one to conclude otherwise. On the one hand, there is the statement in *Whren v. United States* that, “[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred,”²⁹ which has been echoed in subsequent decisions.³⁰ But it may quite properly be said of these decisions that while they “indicate that probable cause is a *sufficient* ground for a stop, none of them indicates that it is *necessary* for a stop.”³¹ On the other hand, there is the statement in *Berkemer v. McCarty*,³² later relied upon in *Knowles v. Iowa*,³³ that a routine traffic stop “is more analogous to a so-called ‘*Terry* stop’ . . . than to a formal arrest.”³⁴ But in neither case was the quantum of evidence needed for a traffic stop at issue, and the context of the above-quoted language from *Berkemer* makes it apparent that the Court was *only* saying that a traffic stop, like a *Terry* stop, is temporary and brief in nature.

Somewhat more on point than any of those cases is *Delaware v. Prouse*, for the actual holding of the case is:

except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and

28. Recent Cases, *Tenth Circuit Applies Reasonable Suspicion Standard to Stops for Minor Traffic Infractions*: *United States v. Callarman*, 116 HARV. L. REV. 697, 700-01 (2002) (citations omitted).

Similar criticisms could be made of the Ninth Circuit's earlier holding to the same effect in *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000). The defendant, however, prevailed in *Lopez-Soto* because the police did not have a reasonable suspicion. Applying the same rule that obtains when the test is probable cause, *see* cases cited *supra* note 20, the court concluded that the officer's suspicion based on the absence of a vehicle-registration sticker visible from the rear could not constitute reasonable suspicion because it reflected a mistake of law by the officer, i.e., failure to understand that the applicable law called for the sticker to be affixed to the windshield.

29. 517 U.S. 806, 810 (1996).

30. *E.g.*, *Arkansas v. Sullivan*, 532 U.S. 769, 770 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000).

31. *United States v. Callarman*, 273 F.3d 1284, 1286 (10th Cir. 2001).

32. 468 U.S. 420 (1984).

33. 525 U.S. 113, 117 (1998).

34. *Berkemer*, 468 U.S. at 439.

detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.³⁵

But it is to be doubted whether even *Prouse* settles the matter here at issue, for (i) the case involved traffic stops made purely at random, so that the emphasis was upon the impropriety of such stops rather than the relative merits of the probable-cause and reasonable-suspicion tests in traffic-law enforcement; (ii) the Court actually *accepted* the notion that under a balancing approach (such as was used in *Terry*) "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests,"³⁶ so that the nature of the offense *would* be relevant; and (iii) the particular purpose of the stopping addressed in *Prouse* may involve an interest much stronger than is true of traffic enforcement generally, i.e., "the danger to life and property posed by" an unlicensed driver not "physically qualified to operate a motor vehicle."³⁷

If the Supreme Court were to address the issue here under discussion, it might well be that the Court would conclude that *Terry* stops upon less than probable cause cannot be made with respect to all offenses, so that a goodly number of traffic offenses would not be encompassed within the *Terry* reasonable-suspicion standard. Such a holding certainly would be faithful to the *Terry* decision, for there the Court emphasized the nature of the crime there suspected, stating it "would have been poor police work indeed" for the officer "to have failed to investigate" behavior suggesting the defendant was casing a store in preparation for an armed robbery.³⁸ Later, the Court characterized the *Terry* rationale as "warrant[ing] temporary detention for questioning on less than probable cause where the public interest involved is the suppression of . . . serious crime,"³⁹ and has said that under *Terry*, seizures made "on less than probable cause" draw their justification from both the "limited intrusions on the personal security of those detained" and the "substantial law enforcement

35. 440 U.S. 648, 663 (1979).

36. *Prouse*, 440 U.S. at 654.

37. *Id.* at 658 (citations omitted); *see also* cases cited *supra* note 26. In *Smith v. State* the court held that where

there are grounds to believe that the license of a driver has been suspended, and there is no information to rule out the possibility that the suspension was directly related to the driver's actual inability to drive safely, there is, at a minimum, reasonable suspicion to believe that imminent public danger exists.

756 P.2d 913, 916 (Alaska Ct. App. 1988).

38. *Terry v. Ohio*, 392 U.S. 1, 23 (1968).

39. *Florida v. Royer*, 460 U.S. 491, 498-99 (1983) (plurality opinion).

interests” being served.⁴⁰ As several of the Court’s other Fourth Amendment decisions illustrate, the seriousness of the offense thought to be involved bears directly upon the substantiality of the law-enforcement interest⁴¹; as one member of the Court put it, the Supreme Court has “never suggested that all law enforcement objectives . . . outweigh the individual interests infringed upon” so as to support a stop on reasonable suspicion.⁴²

An express prohibition upon *Terry* stops on reasonable suspicion when the suspected offense does not involve “danger of forcible injury to persons or of appropriation of or damage to property,”⁴³ so that probable cause would be required for most traffic stops,⁴⁴ would be one significant step toward enhancing the Fourth Amendment rights of suspected traffic violators — especially in light of the now well-established police practice of using traffic stops to seek out drugs. The point is simply this: any extraordinary grant of police authority ought to be circumscribed in such a way as to “remove the temptation for the police to go on fishing expeditions for contraband.”⁴⁵

B. *Protection Against Arbitrariness and Pretext*

When it comes to such common criminal offenses as burglary, theft, and assault, the quantum-of-evidence requirement for making a seizure itself serves as a reasonably effective means of ensuring that only those who should be apprehended are seized. But this is not the case when it comes to traffic violations, considering (i) that stops purportedly for such violations are often made for purposes of drug interdiction; (ii) that this can result in stops for extremely minor and

40. *Michigan v. Summers*, 452 U.S. 692, 698-99 (1981).

41. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (explaining that for the use of force to be consistent with the Fourth Amendment, an important consideration is “the severity of the crime at issue”); *United States v. Hensley*, 469 U.S. 221, 228-29 (1985) (noting that factors in the balancing test when *Terry* applied to “stops to investigate past crimes . . . may be somewhat different,” such that the Court limits its approval to such stops for “felonies or crimes involving a threat to public safety”); *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (an important factor to be considered when determining whether any exigency exists for making a warrantless arrest within premises is the gravity of the underlying offense for which the arrest is being made).

Atwater v. City of Lago Vista, 532 U.S. 318 (2001), is not to the contrary, although the Court there refused to create an exception to the custodial-arrest power for minor traffic offenses, for the Court reasoned that because such arrests may be made only upon probable cause there would be no necessity for any balancing of interests.

42. *United States v. Sharpe*, 470 U.S. 675, 689 n.1 (1985) (Marshall, J., concurring).

43. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(1)(a)(i) (1975).

44. Except, e.g., driving under the influence. See *Ebona v. State*, 577 P.2d 698, 700 (Alaska 1978).

45. Wayne R. LaFave, “*Street Encounters*” and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 65 (1968).

technical violations; and (iii) that, in any event, "[v]ery few drivers can traverse any appreciable distance without violating some traffic regulation."⁴⁶ This means that virtually anyone (even a Supreme Court Justice⁴⁷) can readily be stopped, suggesting a need for some additional limitation upon the authority to stop that might help prevent pretextual or arbitrary seizures. But the Supreme Court slammed the door on such an avenue of reform in *Whren*, where, upon the petitioner's claim of a pretextual stop (resulting in a plain view of drugs) by plainclothes vice-squad officers patrolling a "high drug area" in an unmarked car, the Court answered in the negative the question

whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.⁴⁸

Much of the Court's analysis in *Whren* is expended in attempting to show that the Court's prior decisions do not lend support to a pretext-type argument in the instant case. For example, the Court begins by attempting to distinguish away statements in *Florida v. Wells*,⁴⁹ *Colorado v. Bertine*,⁵⁰ and *New York v. Burger*⁵¹ seemingly recognizing that pretextual activity sometimes violates the Fourth Amendment. In these cases, the *Whren* Court now says,

we were addressing the validity of a search conducted in the *absence* of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.⁵²

But that hardly explains why it is essential that the purported purpose be the real purpose only in the case of inventories and administrative searches, given that well-established Fourth Amendment doctrine requires a "substitute," if you will, for traditional probable cause in

46. B. JAMES GEORGE, JR., CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 65 (1969).

47. *Rehnquist Is Given Ticket for Speeding*, N.Y. TIMES, Sept. 13, 1986, § 1, at 10.

48. 517 U.S. 806, 808 (1996).

49. 495 U.S. 1 (1990). In *Wells*, the Court states that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." *Id.* at 4.

50. 479 U.S. 367 (1987). In *Bertine*, the Court thought it significant that there had been "no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation." *Id.* at 372.

51. 482 U.S. 691 (1987). In *Burger*, the Court noted that the warrantless administrative inspection upheld did not appear to be "a 'pretext' for obtaining evidence of . . . violation of . . . penal laws." *Id.* at 717 n.27.

52. *Whren*, 517 U.S. at 811-12.

both of those situations. Significantly, this substitute is stated in terms of regularity and not motive in both instances; vehicle inventories require “standardized procedures,”⁵³ while administrative searches of buildings must conform to “reasonable legislative or administrative standards.”⁵⁴

Indeed, the Court’s basis for distinguishing *Wells*, *Bertine*, and *Burger* virtually overlooks the very core of the petitioner’s argument in *Whren*, earlier stated quite accurately by the Court as being that

“in the unique context of civil traffic regulations” probable cause is not enough. Since . . . the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. . . . To avoid this danger . . . the Fourth Amendment test for traffic stops should be, not the normal one . . . of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.⁵⁵

The fundamental point in that argument, of course, is that probable cause as to a minor traffic violation can be so easily come by that its existence provides no general assurance against arbitrary police action. Because that is so, the situation addressed by the petitioners in *Whren* is more like that in *Wells*, *Bertine*, and *Burger* than it is like seizures and searches on probable cause for more substantial criminal conduct. Indeed, it is likely true that the probable-cause requirement in the context of minor traffic offenses provides considerably less protection against arbitrariness than do the “standardized procedures” and “reasonable legislative or administrative standards” requirements for inventories and administrative inspections, respectively.

The Court in *Whren* then goes on to say that it has “repeatedly held and asserted the contrary” of the petitioners’ “position,” said to be that “an officer’s motive invalidates objectively justifiable behavior.”⁵⁶ But that characterization is false, for the petitioners’ position is grounded in the officer’s deviation from usual practice; improper motivation unaccompanied by such deviation is not asserted to be “unreasonable” under the Fourth Amendment. Once that is understood, it is apparent that the four cases the *Whren* Court relies upon to show that “we have repeatedly held and asserted the contrary” are readily distinguishable. In *United States v. Villamonte-*

53. *Bertine*, 479 U.S. at 377.

54. *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

55. *Whren*, 517 U.S. at 810.

56. *Id.* at 812.

Marquez,⁵⁷ where, the Court says in *Whren*, "[w]e flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification,"⁵⁸ the facts did not present the kind of issue raised by the *Whren* petitioners: the point of the Court's discussion in *Villamonte-Marquez* was that the Coast Guard's power to stop vessels without *any* suspicion to check the manifest and other documents certainly may be used against a vessel even more likely to have insufficient documents because it is suspected of involvement in smuggling. In the second case, *United States v. Robinson*,⁵⁹ where, as the Court put it in *Whren*, "we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search,'"⁶⁰ that in fact was not the holding of the Court but only a paraphrasing of the respondent's argument in the lower court. Rather, what *Robinson* says on this subject is that respondent has no complaint because the custodial arrest "was not a departure from established police department practice,"⁶¹ which is in no sense inconsistent with the petitioners' claim in *Whren* that they should prevail because the arrest was such a departure. The third case cited in *Whren* as "contrary" to the petitioner's argument is the companion case to *Robinson*, *Gustafson v. Florida*.⁶² However, the truth of the matter is that the majority opinion in *Gustafson* never discusses the significance of either ulterior motive or departure from usual practice, which is hardly surprising in light of the fact (as noted by Justice Stewart in his concurrence) that "the petitioner ha[d] fully conceded the constitutional validity of his custodial arrest."⁶³ The fourth case, of course, is *Scott v. United States*,⁶⁴ where, the Court reminds us in *Whren*, it was said that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."⁶⁵ But that language too is hardly contrary to the stance of the *Whren* petitioners, who grounded their claim not in bad thoughts but in disparate treatment. And the quoted language in *Scott* would appear

57. 462 U.S. 579 (1983).

58. *Whren*, 517 U.S. at 812.

59. 414 U.S. 218 (1973).

60. *Whren*, 517 U.S. at 812-13.

61. *Robinson*, 414 U.S. at 221 n.1. The *Whren* Court later acknowledged that this is what the Court said earlier in *Robinson*. It is interesting to note that while the Court's misstatement about what *Robinson* has to say on the subject of pretext is called a holding, what the Court actually said there is characterized as "not even a dictum that purports to provide an answer, but merely one that leaves the question open." *Whren*, 517 U.S. at 816.

62. 414 U.S. 260 (1973).

63. *Id.* at 267 (Stewart, J., concurring).

64. 436 U.S. 128 (1978).

65. *Scott*, 436 U.S. at 136.

not even to settle the issue whether bad motive is at all relevant in a pretext context, for *Scott* itself was not a pretext case.⁶⁶

By this reckless use of its own precedents, the Court in *Whren* makes it appear that the issue raised by the petitioners was already settled, while in fact it was very much an open question. The fact that the Court created this false appearance perhaps explains why the Court in *Whren* had so little to say about the merits of the petitioners' claim. And what is said is less than satisfying. For example, while the petitioners reasoned that their test was an "objective" one and thus did not conflict with the *Scott* rule, the *Whren* Court answers that the test "is plainly and indisputably driven by subjective considerations" because it asks "whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind."⁶⁷ But surely this is not the case, as the petitioners' test would only identify arbitrariness in the disparate-treatment sense, which can occur with or without bad thoughts, just as bad thoughts might (but do not inevitably) produce disparity.

The Court in *Whren* next asserts that the petitioners' reliance upon material deviation from usual police practices instead of actual police motivation "might make sense" if *Scott* et al. "were based only upon the evidentiary difficulty of establishing subjective intent."⁶⁸ But, says the Court, those cases "were not based only upon that, or indeed even principally upon that," for their "principal basis" is "simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."⁶⁹ In other words, the reason we ordinarily bar inquiry into subjective intent is not because it is too difficult to ascertain,⁷⁰ but rather because it is simply irrelevant. But why is it irrelevant? All the Court has to offer on that point is the following quotation from *Robinson*: "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not

66. The question in *Scott* was whether the agents had made reasonable efforts at minimizing the calls they intercepted, but significantly the agents did not exceed the statutory minimization constraints even though they apparently intended to do so. *Scott*, therefore, "merely held that improper intent that is not acted upon does not render unconstitutional an otherwise constitutional search." John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 83-84 (1982).

67. *Whren*, 517 U.S. at 814.

68. *Id.*

69. *Id.*

70. And thus *Whren* applies even in those cases where no such difficulty exists because the officers "frankly stated" that they did not rely on the traffic violation now used as a justification for the stop. See *United States v. Harrell*, 268 F.3d 141 (2d Cir. 2001); *United States v. Dhinsa*, 171 F.3d 721 (2d Cir. 1998).

indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed."⁷¹

But this is mixing apples and oranges. The context of the just-quoted excerpt from *Robinson* makes it apparent that the question there was not whether subjective intent should be taken into account, but rather whether the right to search incident to arrest depends upon "the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."⁷² The Court in *Robinson* answered that in the negative, and thus opted for the pragmatic, bright-line rule that "a lawful custodial arrest" carries with it a right to make "a full search of the person."⁷³ That is a different matter entirely! The fact that "a lawful custodial arrest" permits such a full search without a case-by-case showing of need or the officer's thoughts about that need says nothing about whether the taking of custody should itself be deemed lawful even when it is pretextual (a matter not even at issue in *Robinson*). To put it another way, the search in *Robinson* is like the plain view in *Whren*: neither requires any justification apart from the custodial arrest (in *Robinson*) or detention (in *Whren*) that made them possible. But that fact hardly dictates the result as to the quite different question of whether the seizure in each case is itself conclusively reasonable if grounded in probable cause.

The Court in *Whren* next asserts that even if the concern underlying the *Scott* rule "had been only an evidentiary one," it would exist in spades under the approach of the petitioners, for "it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act upon the traffic violation."⁷⁴ But, while it cannot be denied that the *Whren* petitioners' approach does present some difficulties of this kind, the Court makes the situation appear much worse than it actually is. The Court acknowledges that "police manuals and standard procedures may sometimes provide objective assistance,"⁷⁵ but then appears to dismiss these manuals and procedures because they "vary from place to place and from time to time."⁷⁶ Specifically, the Court declares that it could not "accept that

71. *Whren*, 517 U.S. at 814 (quoting *United States v. Robinson*, 414 U.S. 218, 236 (1973)).

72. *Robinson*, 414 U.S. at 235.

73. *Id.*

74. *Whren*, 517 U.S. at 814-15.

75. *Id.* I have elsewhere argued that greater reliance upon police regulations is desirable in Fourth Amendment adjudication. See Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990).

76. *Whren*, 517 U.S. at 815.

the search and seizure protections of the Fourth Amendment are so variable” that the “basis of invalidation [in one jurisdiction] would not apply in jurisdictions that had a different practice.”⁷⁷ But because pretext claims are grounded in a concern about arbitrariness — the lack of substantial consistency within a particular law-enforcement agency — it would seem that it is this consistency, rather than complete consistency from jurisdiction to jurisdiction, which counts the most. Nor can it be said that the Fourth Amendment means exactly the same thing in all jurisdictions; for example, an inventory search or administrative search which violates the Fourth Amendment because it does not conform to “standard procedures” or existing “reasonable legislative or administrative standards” in one jurisdiction may readily pass muster in another jurisdiction precisely because those procedures or standards exist or are different there.

In the concluding portion of its opinion in *Whren*, the Court takes on the petitioners’ argument “that the balancing inherent in any Fourth Amendment inquiry requires us to weigh the governmental and individual interests implicated in a traffic stop such as we have here.”⁷⁸ The Court responds that while it is “true that in principle every Fourth Amendment case, since it turns upon a ‘reasonableness’ determination, involves a balancing of all relevant factors,” it is nonetheless the case that with “rare exceptions . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause.”⁷⁹ As for those exceptions, the Court elaborated:

Where probable cause has existed, the only cases in which we have found it necessary actually to perform the “balancing” analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual’s privacy or even physical interests — such as, for example, seizure by means of deadly force,⁸⁰ unannounced entry into a home,⁸¹ entry into a home without a warrant,⁸² or physical penetration of the body.⁸³ The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken “outbalances” private interest in avoiding police contact.⁸⁴

Such characterization substantially misrepresents the essence of the problem presented to the Court in *Whren*. True, making an arrest

77. *Id.*

78. *Id.* at 816.

79. *Id.* at 817.

80. *Id.* at 818 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

81. *Id.* (citing *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

82. *Id.* (citing *Welsh v. Wisconsin*, 466 U.S. 740 (1984)).

83. *Id.* (citing *Winston v. Lee*, 470 U.S. 753 (1985)).

84. *Id.*

while out of uniform is not an "extreme practice" per se, and thus that fact standing alone hardly can make a traffic stop unreasonable. But that is not what was at issue. The fact the traffic stop was by plainclothes officers in an unmarked car is relevant because a police-department regulation prohibited such stops except in circumstances apparently not present in *Whren*,⁸⁵ so that the petitioners' real complaint was about the arbitrariness in subjecting them to a traffic stop contrary to general practice. And surely arbitrary intrusions upon liberty are just as "extreme" as those actions mentioned by the Court in *Whren*; indeed, it would seem ludicrous to contend otherwise given the Court's frequent assertions that the "core,"⁸⁶ "basic purpose,"⁸⁷ and "central concern"⁸⁸ of the Fourth Amendment has to do with protecting liberty and privacy against arbitrary governmental interference.

The totality of the Court's analysis in *Whren* is, to put it mildly, quite disappointing. By misstating its own precedents and mischaracterizing the petitioners' central claim, the Court managed to trivialize what in fact is an exceedingly important issue regarding a pervasive law-enforcement practice. Certainly one would have expected more from an opinion which drew neither a dissent nor a cautionary concurrence from any member of the Court. I am not suggesting that the issue raised by petitioners is an easy one, but it certainly deserved a much more honest and forthright treatment than it received.

Two final comments about *Whren* are in order. The first, related to the earlier discussion of the common assumption that stops for all traffic violations need only be based on reasonable suspicion, involves the intriguing question whether *Whren* would have come out differently if the traffic stop in that case had merely been on reasonable suspicion, so that *Terry v. Ohio*⁸⁹ provides would have provided the sole justification for the stop. Taking literally the distinction drawn in *Whren* — police action "based upon probable cause" versus such action "without the probable cause that is its traditional justification"⁹⁰ — the case would then appear to fall on the other side of the line drawn by the Court. The analysis in *Terry* also

85. Metropolitan Police Dep't — Washington, D.C., General Order 303, pt. 1, Objectives and Policies (A)(2)(a)(4) (Apr. 30, 1992), permits plainclothes officers in unmarked vehicles 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."

86. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

87. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

88. *United States v. Ortiz*, 422 U.S. 891, 895 (1975).

89. 392 U.S. 1 (1968).

90. *Whren*, 517 U.S. at 817 (emphasis omitted).

lends support to this view, for while the Court in *Whren* says the stop was on probable cause and thus there is no occasion for balancing, *Terry* asserts that stops when probable cause is lacking are to be “tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures”⁹¹ and that consequently a balancing of interests is necessary. It is nonetheless to be doubted that the boundaries of the *Whren* decision will ultimately be drawn short of *Terry* stops and other Fourth Amendment activities permitted on individualized suspicion. Rather, the Court can be counted upon to say that arbitrariness inquiries are likewise foreclosed in those instances as well because (as intimated at one point in *Whren*) the existence of reasonable suspicion likewise “ensure[s] that police discretion is sufficiently constrained.”⁹² The Court quietly asserted the contrary in *Atwater v. City of Lago Vista*,⁹³ but seems to have moved at least partly in the other direction in *United States v. Knights*.⁹⁴

Lastly, there is the matter of an equal-protection challenge in this context. The petitioners in *Whren* were black, and they put before the Court the fact that selective traffic enforcement of the type described above not infrequently is influenced by the race of the vehicle’s occupants. To this, the Court responded that it “agree[d] with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race,” though “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”⁹⁵ But it is difficult to believe that an equal-protection challenge would be effective in this context,⁹⁶ especially if existing law regarding selective-

91. *Terry*, 392 U.S. at 20.

92. *Whren*, 517 U.S. at 817-18.

93. 532 U.S. 318 (2001). The Court appeared to say that *Whren* does not extend to stops on reasonable suspicion, asserting:

Terry v. Ohio . . . upon which the dissent relies . . . is not to the contrary. *Terry* certainly supports a more finely tuned approach to the Fourth Amendment when police act without the traditional justification that either a warrant (in the case of a search) or probable cause (in the case of arrest) provides; but at least in the absence of “extraordinary” circumstances, *Whren v. United States* . . . there is no comparable cause for finicking when police act with such justification.

Atwater, 532 U.S. at 347 n.16.

94. 534 U.S. 112 (2001). The Court in *Knights* held that a probation search could be justified not merely on a “special needs” analysis, as in the past, but also through a balancing process “under our general Fourth Amendment approach.” *Id.* at 118. The Court thus upheld a search of a probationer’s premises grounded in reasonable suspicion, though made by a police officer as part of a regular criminal investigation, adding that because “our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search,” *id.* at 122, the motivation of the officer was, per *Whren*, not relevant. Justice Souter, concurring, would have “reserve[d] the question whether *Whren*’s holding . . . should extend to searches based only upon reasonable suspicion.” *Id.* at 123 (Souter, J., concurring).

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

96. As one commentator has put it:

prosecution challenges is followed here.⁹⁷ Police agencies take considerable pains to keep secret all training materials, directives, and instructions that might reflect the basis upon which selective traffic stops for drug-enforcement purposes are undertaken.⁹⁸ And under the requirements announced by the Supreme Court just weeks before *Whren* was decided, the defendant's chances of even obtaining discovery are slight, for it is necessary that he first "produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not."⁹⁹ Moreover, "[o]nly in rare cases will a statistical pattern of discriminatory impact conclusively demonstrate a constitutional violation."¹⁰⁰ Even if a defendant were to clear those hurdles, it is still less than certain that meaningful relief would be forthcoming, for absent recognition of an equal protection exclusionary rule,¹⁰¹ the defendant's only relief is likely to be dismissal of the traffic charge.

In theory there is no problem with relying on the Equal Protection Clause to protect against racial unfairness in law enforcement. The problem is that equal protection doctrine, precisely because it attempts to address all constitutional claims of inequity, has developed in ways that poorly equip it to address the problems of discriminatory police conduct. Equal protection doctrine treats claims of inequitable policing the same as any other claim of inequity; it gives no recognition to the special reasons to insist on evenhanded law enforcement, or to the distinctive concerns with arbitrariness underlying the Fourth Amendment. As a result, challenges to discriminatory police practices will fail without proof of conscious racial animus on the part of the police. For reasons discussed earlier, this amounts to saying that they will almost always fail.

David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 326.

97. Thus it has been suggested that *Whren* makes necessary a different approach as to equal protection claims, at least in this context. See Christopher Hall, Note, *Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v. United States, United States v. Armstrong, and the Evolution of Police Discretion*, 76 TEX. L. REV. 1083, 1086-87 (1998); Jennifer A. Larrabee, Note, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & POL'Y 291, 295-96 (1997); Lisa Walter, Comment, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 289 (2000).

98. See, e.g., *People v. Perez*, 631 N.E.2d 240 (Ill. App. Ct. 1994).

99. *United States v. Armstrong*, 517 U.S. 456, 469 (1996); see also, e.g., *United States v. Bullock*, 94 F.3d 896, 899 (4th Cir. 1996) (finding against black defendant who claimed his traffic stop "was motivated by a race-based drug courier profile" because he "has failed to meet the rigorous standard for proving such a violation" imposed by *Armstrong*); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996) (finding that black bicyclist stopped for lack of headlamp who "showed the only people arrested for violating the statute during a certain month were black" and that "there are no lights on 98% of all bicycles in the Des Moines area, which is populated predominantly by white people" did not meet his *Armstrong* burden, as he "presented no evidence about the number of white bicyclists who ride their bicycles between sunset and sunrise," though police admitted they had "targeted" a high-crime area "populated primarily by minorities").

100. *United States v. Avery*, 137 F.3d 343, 356 (6th Cir. 1997).

101. As noted by Alschuler:

Police violations of the Equal Protection Clause warrant an effective remedy no less than police violations of the Fourth Amendment. To say that the Supreme Court would have no

II. THE IN-BETWEEN: DIMENSIONS OF A LAWFUL TRAFFIC STOP

Given that police can easily come by a factual basis for a traffic stop, that such stops are often motivated by drug-enforcement purposes, and that there exists virtually no basis for questioning the initiation of such a stop because of its pretextual or arbitrary nature, it is apparent that the permissible dimensions of a lawful traffic stop are matters of some importance. How long may the traffic violator be detained, and exactly what activities of an investigative nature not strictly related to the infraction serving as the basis of the stop are permissible? To explore this question, it is necessary initially to determine what standards do or should govern such cases — in particular, to assess the extent to which limits on *Terry* investigative stops are appropriate in a traffic stop context. Then a closer look can be taken at the various investigative techniques now “routinely” employed during a “routine traffic stop.”

A. *The Applicability of the Terry Limitations*

In *Berkemer v. McCarty*, holding that “the roadside questioning of a motorist detained pursuant to a routine traffic stop” does not amount to “‘custodial interrogation’” for purposes of *Miranda*,¹⁰² the Court placed considerable reliance upon its judgment that “the usual traffic stop is more analogous to a so-called ‘*Terry* stop’ than to a formal arrest.”¹⁰³ In lower-court cases involving instead the Fourth Amendment question of what temporal and scope limitations apply during a traffic stop, that characterization from *Berkemer* has often been quoted with apparent approval.¹⁰⁴ This would lead one to believe that the limitations imposed in the *Terry* case itself and in its progeny would apply with equal force to the so-called “routine traffic stop.”

What are the *Terry* limitations? *Terry* itself recognized that “in determining whether the seizure and search were ‘unreasonable’ our inquiry is a dual one — whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”¹⁰⁵ The first *Terry* prong, of course, has to do with whether the stop was made on reasonable suspicion (or, as earlier discussed, perhaps on probable

principled basis for refusing to exclude evidence obtained in violation of the Equal Protection Clause, however, is not to predict that the Court would exclude it.

Alschuler, *supra* note 8, at 254.

102. *Berkemer v. McCarty*, 468 U.S. 420, 435 (1984).

103. *Id.* at 439 (citation omitted).

104. *E.g.*, *United States v. Rodriguez-Arreola*, 270 F.3d 611, 617 (8th Cir. 2001); *People v. Gonzalez*, 789 N.E.2d 260, 265 (Ill. 2003) (collecting cases from other jurisdictions).

105. *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).

cause in the case of minor traffic infractions); but it is less than immediately apparent what is encompassed within the second prong. The Court in *Terry* did remind us that the matter of "scope" requires that the Fourth Amendment activity "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible,"¹⁰⁶ as to which it nonetheless might be asked: "Does scope concern only the length of the detention . . . or does scope mean the type of questioning and investigating that occurs during the stop . . . ?"¹⁰⁷

The answer given in *Florida v. Royer* is "both," for the Court there deemed it "clear" (i) that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop," and also (ii) that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."¹⁰⁸ That is, as *Royer* goes on to conclude, the prosecution bears the burden of establishing that the stop was "sufficiently limited in scope and duration."¹⁰⁹ And thus, when called upon to apply *Terry* directly rather than by analogy (that is, in cases where the stop was on reasonable suspicion of serious criminality rather than on probable cause of a traffic offense), the courts have enforced both the temporal and intensity limits by, for example, insisting that any consent to search be obtained before the time has run out¹¹⁰ and that, even before the time expires, any interrogation concern an offense for which there was then reasonable suspicion.¹¹¹

When one turns to the traffic-stop cases, certainly many decisions can be found that are faithful to the *Terry* limits described above by

106. *Id.* at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

107. Amy L. Vazquez, Comment, "Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car?" *What Questions Can a Police Officer Ask During a Traffic Stop?*, 76 TUL. L. REV. 211, 226 (2001).

108. 460 U.S. 491, 500 (1983).

109. *Royer*, 460 U.S. at 500 (emphasis added); see Vazquez, *supra* note 107, at 226 ("By separating scope and duration, the Court here clearly suggested that scope is something more than the length of the detention. A reasonable inference can be made that the 'something more' should be, and is, the type of questioning and investigating."); see also *United States v. Hensley*, 469 U.S. 221, 235 (1985) (stating the question as being whether the circumstances "justified the length and intrusiveness of the stop and detention that actually occurred").

110. *E.g.*, *Commonwealth v. Helm*, 690 A.2d 739 (Pa. Super. Ct. 1997) (holding that where time ran out on lawful detention on reasonable suspicion of possessing stolen property because investigation alleviated the suspicion, consent to search thereafter was a suppressible fruit of illegal detention).

111. *E.g.*, *Medrano v. State*, 914 P.2d 804 (Wyo. 1996) (holding that officer did not exceed the scope of the stop by inquiring if defendant had drugs or weapons in his possession because, although the reasonable suspicion leading to the stop concerned a robbery, there then developed reasonable suspicion of drug possession).

adhering strictly to the time limits appropriate for a stop serving only traffic-enforcement purposes¹¹² and by proscribing investigative techniques unrelated to the traffic violation even when they are undertaken within the applicable time limit.¹¹³ But when it comes to traffic stops, as will be elaborated below in the discussion of specific investigative techniques,¹¹⁴ the *Terry* limitations are honored more often in the breach than in the observance. For one thing, the temporal limits are loosely observed, and courts even go so far as to state that such limits may be extended somewhat in the interest of permitting procedures only relevant to drug-law enforcement.¹¹⁵ For another, the intensity limitation is treated as if it did not exist at all, so that nonsearch investigative procedures undertaken to uncover drugs are deemed permissible so long as they actually or approximately occurred within whatever temporal limits are being observed.¹¹⁶

Many of the appellate decisions applying only a watered-down version of *Terry* say little or nothing by way of justifying such a departure, but recently there has been some attempt to construct a rationale in support of this deviation. There are two central points. One, principally directed at explaining why a range of drug-law-enforcement activities (especially interrogation) are unobjectionable so long as they do not significantly extend the time of the traffic stop, is essentially that those activities do not actually increase the intensity of the encounter in a significant way and thus need not be taken into account in determining whether the police have exceeded traffic-law-stop limitations. The other, directed mainly at showing why the notion of temporal limitations need not be seriously considered if at all, is that the *Terry* limitations reflect an effort to minimize the intrusion when a stop is grounded only upon reasonable suspicion and hence are not applicable (at least in the same way) to stops made on probable cause, as most traffic stops are. These contentions are developed most extensively in the recent en banc case of *United States v. Childs*,¹¹⁷ and

112. *E.g.*, *United States v. Lockett*, 484 F.2d 89 (9th Cir. 1973); *State v. Gutierrez*, 51 P.3d 461 (Idaho Ct. App. 2002); *People v. Cox*, 782 N.E.2d 275 (Ill. 2002).

113. *E.g.*, *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001); *People v. Caballes*, 802 N.E.2d 202 (Ill. 2003), *cert. granted*, 124 S. Ct. 1875 (2004); *State v. Wiegand*, 645 N.W.2d 125 (Minn. 2002).

114. *See infra* Section II.B.

115. *E.g.*, *State v. DeLaRosa*, 657 N.W.2d 683 (S.D. 2003); *State v. Lopez*, 831 P.2d 1040 (Utah Ct. App. 1992).

116. *E.g.*, *United States v. Purcell*, 236 F.3d 1274 (11th Cir. 2001); *United States v. Shabazz*, 993 F.2d 431 (5th Cir. 1993); *Lecorn v. State*, 832 So. 2d 818 (Fla. 2002); *Henderson v. State*, 551 S.E.2d 400 (Ga. Ct. App. 2002).

117. 277 F.3d 947 (7th Cir. 2002) (en banc). Also worth noting is an earlier case along the same lines, *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999), curiously never mentioned in *Childs*. *Childs* itself has been embraced by some other courts.

thus it is useful to focus upon that case in undertaking an assessment of these arguments.

The issue in *Childs* was whether the panel was correct in concluding that questioning during a traffic stop must be related to the reason for the custody,¹¹⁸ to which a majority of the full court responded with a resounding "no." In doing so, the court began with the Supreme Court's declaration in *Florida v. Bostick* that "mere police questioning does not constitute a seizure,"¹¹⁹ then noted that while most of the Court's decisions to that effect "concern questions asked of persons not under arrest," certainly it must be equally true that "a question asked of someone already in custody causes no delay and thus can't be a seizure."¹²⁰ Warming to the task, the *Childs* court thus declared:

If the police may ask (without suspicion) questions of persons who are in no custody (e.g., walking down the street), people who are in practical but not legal custody (e.g., passengers on busses and airplanes), and people who are in formal custody pending trial or following conviction (e.g., prisoners . . . a pretrial detainee), then why would the police need probable cause or reasonable suspicion to direct questions to persons such as *Childs* who are in legal custody but likely to be released soon? To say that questions asked of free persons and questions asked of prisoners are not "seizures" but that questions asked of suspects under arrest *are* seizures would have neither the text of the Constitution behind it nor any logical basis under it.¹²¹

If the point of *Childs* were *only* that the panel had been wrong in characterizing the questioning itself as a seizure, I would respond with nothing more than a hearty "Amen." But the court immediately inflated that sensible conclusion into a much broader proposition by stating that "the idea that the police could violate a prisoner's *fourth* amendment rights by asking questions in search of information about other offenses has no basis in the language of that amendment or the Supreme Court's cases."¹²² This assertion was apparently offered in support of the court's opening broadside:

The full court holds that, because questions are neither searches nor seizures, police need not demonstrate justification for each inquiry. Questions asked during detention may affect the reasonableness of that detention (which *is* a seizure) to the extent that they prolong custody, but

See *United States v. Burton*, 334 F.3d 514 (6th Cir. 2003); *Edmond v. State*, 116 S.W.3d 110 (Tex. Ct. App. 2002).

118. *United States v. Childs*, 256 F.3d 559 (7th Cir. 2001), *rev'd en banc*, 277 F.3d 947 (7th Cir. 2002).

119. *Childs*, 277 F.3d at 950 (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)).

120. *Id.*

121. *Id.* at 951.

122. *Id.*

questions that do not increase the length of detention (or that extend it by only a brief time) do not make the custody itself unreasonable or require suppression of evidence found as a result of the answers.¹²³

This is a much broader proposition — in effect, that because interrogation is not a seizure it can have no bearing upon the reasonableness of a seizure unless it significantly adds to its length. As one court rejecting the *Childs* approach aptly put it, that conclusion is hardly supported by the *Bostick* quote, for the Court in that case “did not address the issue” of “whether, in the context of a nonconsensual police-citizen encounter, police questioning on matters unrelated to the purposes of the initial stop can be so intrusive” as to affect the Fourth Amendment legality of the traffic stop.¹²⁴ As to that issue, the answer most certainly is yes, for a traffic stop that has been turned into a drug investigation via the techniques elaborated further below (questioning about drugs, grilling about the minute details of travel plans, seeking consent for a full roadside exploration of the motorist’s car, or parading a drug dog around the vehicle) is a far cry from a straightforward and unadorned traffic stop in which the officer merely checks the motorist’s license and registration and writes out the citation or warning for the observed infraction (which thus requires no investigation of *any* kind). Thus, as yet another court put it, “[a]llowing police to pose any question to the occupants of a stopped vehicle, even if such question is totally divorced from the purpose of the stop, effectively does away with any balancing of the competing interests involved.”¹²⁵ Such a consequence is not tolerable, at least so long as the teaching of *Delaware v. Prouse* that “the nature of the intrusion” must be weighed in judging Fourth Amendment activity remains extant.¹²⁶ Moreover, this conclusion does not depend upon how one comes out regarding the question discussed later herein of whether *Terry* itself applies to stops on probable cause, for the Court’s *Royer* decision makes it clear that “the Fourth Amendment constrains the scope of *all* searches and seizures.”¹²⁷

For all these reasons, it is the concurring opinion¹²⁸ in the *Childs* case that better understands the dynamics of a so-called “routine

123. *Id.* at 949.

124. *United States v. Holt*, 264 F.3d 1215, 1229 (10th Cir. 2001).

125. *People v. Gonzalez*, 789 N.E.2d 260, 269 (Ill. 2003).

126. *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002), *so characterizing* *Delaware v. Prouse*, 440 U.S. 648 (1979).

127. *Holt*, 264 F.3d at 1230 (emphasis added) (referring to the analysis in *Florida v. Royer*, 460 U.S. 491, 499-500 (1983)).

128. *Childs*, 277 F.3d at 954 (Cudahy, J., concurring) (concurring rather than dissenting only because of the view that there was reasonable suspicion of marijuana possession justifying the questioning).

traffic stop" and what this means in terms of Fourth Amendment doctrine:

In attempting to equate questioning without detention with questioning in the course of detention, the majority conveniently ignores the fact that detention involves official coercion and therefore concerns quite a different relationship of the police officer to the person questioned. Anyone who has been pulled over for a traffic offense faces the police officer as one currently exercising authority over the motorist to keep him or her in place. This exercise of official coercion is the reason the Supreme Court has limited questioning to matters within the scope of the stop. The majority does not explain why exceeding the scope of the stop is somehow less burdensome to the detainee's Fourth Amendment rights than exceeding a reasonable duration for the stop. To explore bank robberies or polygamy, as to which there is no reasonable suspicion, with Childs would be to abuse the rationale for the stop based on other matters and would be just as abusive as extending a ten-minute stop to an hour.

The majority comments blithely that the detainee can refuse to answer the questions posed by the police officer. How many times have you refused to answer questions asked by a police officer who has pulled your car over for a traffic offense?¹²⁹

In short, Fourth Amendment limitations upon "routine traffic stops" would be grossly inadequate if expressed solely in terms of the permissible duration of the stop.¹³⁰

The en banc opinion in *Childs* then turns to the duration limitation of *Terry*, invoked by passenger Childs because, after the vehicle was stopped because of a broken windshield and Childs was then seen to be violating the seat-belt law, Childs was questioned after what he claimed was delay in running the license and warrant checks. Noting the oft-quoted assertion that a typical traffic arrest resembles a *Terry* investigative stop more than a custodial arrest, the *Childs* court then reasoned:

We grant this as a factual matter, but it does not follow that the Constitution *requires* all traffic stops to be treated as if they were unsupported by probable cause. What is "typical" often differs from the constitutional minimum. *Atwater*¹³¹ makes this clear. A person arrested for an offense punishable only by a fine typically is given a citation (a "ticket") and released, but *Atwater* holds that the Constitution allows the police to place the person in custody and take him to be booked. Thus

129. *Id.* at 960 (Cudahy, J., concurring).

130. Especially considering that courts have upheld traffic stops lasting a half hour or more, *see, e.g.*, *United States v. Shareef*, 100 F.3d 1491 (10th Cir. 1996), or even approaching a full hour, *see, e.g.*, *United States v. Hardy*, 855 F.2d 753 (11th Cir. 1998).

131. The reference is to *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), which held that police have absolute and total discretion in deciding whether to make a custodial arrest of a minor traffic violator in lieu of issuing a citation.

although traffic stops usually proceed like *Terry* stops, the Constitution does not require this equation. Probable cause makes all the difference — and as *Whren v. United States*¹³² shows, traffic stops supported by probable cause are arrests, with all the implications that follow from probable cause to believe that an offense has been committed. . . .

Because probable cause supported this stop, neither the driver nor Childs had a right to be released the instant the steps to check license, registration, and outstanding warrants, and to write a ticket, had been completed. It is therefore not necessary to determine whether the officers' conduct added a minute or so to the minimum time in which these steps could have been accomplished. . . . The extra time, if any, was short — not nearly enough to make the seizure “unreasonable.”

Our point is not that, because Chiola could have taken Childs to a police station for booking, any less time-consuming steps are proper. The reasonableness of a seizure depends on what the police *do*, not on what they might have done. The point, rather, is that cases such as *Atwater* and *McLaughlin*¹³³ show that the fourth amendment does not require the release of a person arrested on probable cause at the earliest moment that step can be accomplished. What the Constitution requires is that the entire process remain reasonable. Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention.¹³⁴

While at first reading this all seems very logical, upon closer evaluation of this reasoning it is apparent that it is so seriously flawed that other courts would be well advised to reject it and hold instead that the *Terry* limitations apply without modification even to those traffic stops made upon probable cause.¹³⁵ The position taken in the above-quoted excerpt from *Childs* is objectionable for these reasons:

(1) The court asserts at one point that the “reasonableness of a seizure depends on what the police do, not on what they might have done,” but obviously doesn’t mean it. Looking at “what the police do” means that *Childs* involved only a traffic stop, for passenger Childs was guilty of nothing more than a failure to wear a seat belt, and the police had given no indication whatsoever that in dealing with this insignificant traffic infraction they were intending to make a custodial arrest or to take any step beyond that of possibly writing a citation. (Indeed, it is to be doubted whether the officer *could* have made a custodial arrest, for while *Atwater* tells us the Fourth Amendment

132. 517 U.S. 806 (1996).

133. The reference is to *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), which held that when an arrest is made without a warrant, a subsequent judicial determination of probable cause will usually be timely if made within forty-eight hours of the arrest.

134. *Childs*, 277 F.3d at 953-54 (citations omitted).

135. See, e.g., *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001); *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003).

would not be violated by such a step, the events of *Childs* occurred in Illinois, where a driver's license — which apparently *Childs* had¹³⁶ — may be posted in lieu of bail for such an offense,¹³⁷ in which case the "officer should issue a warning ticket or a citation, as appropriate, and allow the driver to leave."¹³⁸) Since under the "what-the-police-do" approach this was only a traffic stop, the court's reliance on *Atwater* and *McLaughlin* makes absolutely no sense, for those decisions only indicate the more substantial intrusions that could have followed under a "might-have-done" scenario.¹³⁹ Significantly, the Supreme Court declined to take any such might-have-done approach in *Knowles v. Iowa*,¹⁴⁰ which involved a full search of *Knowles*'s car incident to a traffic-stop/citation situation relating to his driving at an excessive speed. After noting that the state supreme court had upheld the search by "reasoning that so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest"¹⁴¹ (a straightforward "might-have-done" argument), a unanimous Supreme Court rejected that contention out of hand. Rather, the Court focused upon the stop/citation character of the events as they actually occurred, and then quite correctly noted that the need for search in such a setting is not at all equivalent to that existing when a custodial arrest is made: there is no need to search for evidence of the speeding violation, and the "threat to officer safety from issuing a traffic citation . . . is a good deal less than in the case of a custodial arrest,"¹⁴² so that the bright-line search rule of *United States v. Robinson*¹⁴³ makes no sense in a traffic-stop context. So what search power for his own protection does the officer need during a traffic stop? Precisely that permitted under *Terry*, the Court answered, thus providing yet another example of the wisdom of the *Terry*-stop/traffic-

136. The court noted that *Childs* had been stopped while driving the same vehicle three days earlier and then was arrested when a records check disclosed an outstanding warrant; there is no mention that the check revealed a lack of a driver's license. *Childs*, 277 F.3d at 949.

137. ILL. SUP. CT. R. 526(e).

138. *People v. Cox*, 782 N.E.2d 275, 279 (Ill. 2002).

139. As noted in a concurring opinion in *Childs*: "What the majority seems to be saying is that, because Officer Chiola *could* have gone on to a custodial arrest, he may instead (and without subjecting *Childs* to custodial arrest) elect to inquire into crimes for which there is neither probable cause nor reasonable suspicion." *Childs*, 277 F.3d at 959 (Cudahy, J., concurring).

140. 525 U.S. 113 (1998).

141. *Knowles*, 525 U.S. at 115-16.

142. *Id.* at 117.

143. 414 U.S. 218 (1973).

stop analogy rejected in *Childs*. *Childs* simply cannot be squared with the Supreme Court's *Knowles* decision.¹⁴⁴

(2) The court in *Childs* never gave the slightest suggestion that its watering down of the Fourth Amendment's application during "routine traffic stops" had anything at all to do with some public interest relating to the enforcement of states' traffic codes. While this is understandable, in that no plausible claim could be made that traffic-law enforcement is attended with unique difficulties necessitating a reduction in personal security and privacy beyond that tolerated in investigating honest-to-goodness criminal behavior, it is thus apparent that underlying the *Childs* decision is nothing more than a desire to assist the police in their efforts to use traffic stops as a means of seeking drugs. That is, *Childs* constitutes a positive encouragement to the police to engage in pretextual activity — making stops whose sole legal justification is traffic regulation in order to seek out drugs when grounds are lacking to detain for a narcotics investigation. If the Supreme Court previously had actually endorsed pretextual conduct by the police, then *Childs* might be at least understandable, but the Court did not, as can be seen by recalling the Court's reasoning in *Whren v. United States*.¹⁴⁵ *Whren* never says at any point that such pretextual activities by the police are desirable, but only that case-by-case litigation of the pretext issue is not permissible when the police action was grounded in probable cause. In part, that conclusion was based upon the fact that were the law otherwise courts would regularly be "reduced to speculating about the hypothetical reaction of a hypothetical constable."¹⁴⁶ Moreover, when the *Whren* Court got to the petitioner's claim that the usual probable-cause-is-sufficient rule should not obtain in the instant case because "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,"¹⁴⁷ the Court responded *solely* on pragmatic grounds. The difficulty, says the Court, is that no principled basis exists for deciding in which areas of law enforcement that problem has reached the point where "infraction itself can no longer be the ordinary measure of the lawfulness of enforcement," or — even assuming such specification was possible — of then deciding "which particular provisions are sufficiently important to merit enforcement."¹⁴⁸ The fact

144. See, e.g., *Ochana v. Flores*, 199 F. Supp. 2d 817 (N.D. Ill. 2002) (discussed *infra* note 153).

145. 517 U.S. 806 (1996) (discussed *supra* text accompanying note 48).

146. *Whren*, 517 U.S. at 815.

147. *Id.* at 818.

148. *Id.* at 818-19.

that *Whren* came out this way is hardly supportive of *Childs*; indeed, *Whren* actually shows rather clearly why *Childs* is so wrong-headed! Since the Court concluded that detecting pretext on a case-by-case basis was not worth the candle, this is all the more reason for ensuring that the procedures permitted incident to traffic stops are limited to those needed for traffic enforcement so as to diminish as much as possible any police incentive to go the subterfuge route. As one court put it, if the pretext issue cannot be raised under the first prong of *Terry*, then surely the second prong must be fully applied in order to protect "the traveling public" from arbitrary police action.¹⁴⁹

(3) With the *Terry* limits not applicable to traffic stops, there would nonetheless be a need for some sort of limits on traffic stops, as the *Childs* court admits, for it feels compelled to make a judgment that the amount of delay in that case beyond that needed to deal with the traffic infractions was "not nearly enough to make the seizure 'unreasonable.'"¹⁵⁰ But if "a minute or so"¹⁵¹ is not even close to the point of unreasonableness, what would be? Not even a clue to the answer to that question is to be found in *Childs*, which is hardly surprising. Once the rather clear *Terry* limit, tied to those activities defensible in terms of responding to the traffic infraction, is abandoned, there remains no other basis for making a judgment about the legal parameters of a "routine traffic stop" — unless it is simply a matter of applying the "horseshoes rule," i.e., that just being close counts. But any court believing that Fourth Amendment adjudication requires something a bit more principled than that is left in a sea of uncertainty by *Childs*. As one judge aptly put it, abandonment of the *Terry* limits "leaves courts speculating on the length of time after a

149. *United States v. Botero-Ospina*, 71 F.3d 783, 788 (10th Cir. 1995). The pre-*Whren* *Botero-Ospina* case clearly reflects this relationship between *Whren* and the present problem: in *Botero-Ospina*, the court abandoned its prior rule that a traffic stop is unconstitutionally pretextual if it would not have been made but for an ulterior purpose (e.g., drug-law investigation). While the court, essentially anticipating the *Whren* position, did so on the ground that experience had shown its earlier approach was "unworkable," the court felt compelled to add that by such rejection of an opportunity for drivers to make pretext claims:

we do not abandon the traveling public to "the arbitrary exercise of discretionary police power." Our holding in this case properly focuses on the very narrow question of whether the initial stop of the vehicle is objectively justified. We leave intact the vast body of law which addresses the second prong of the *Terry* analysis — whether the police officer's actions are reasonably related in scope to the circumstances that justified the interference in the first place. Our well-developed case law clearly circumscribes the permissible scope of an investigative detention. Therefore, if an officer's initial traffic stop, though objectively justified by the officer's observation of a minor traffic violation, is motivated by a desire to engage in an investigation of more serious criminal activity, his investigation nevertheless will be circumscribed by *Terry*'s scope requirement.

Id. (citations omitted).

150. *United States v. Childs*, 277 F.3d 947, 953 (7th Cir. 2002).

151. *Id.*

stop is over that an officer would be justified in detaining the motorist anew,” which is “a can of worms best left unopened.”¹⁵²

(4) The *Childs* analysis is nothing more than the beginning of a descent down the slippery slope. True, the court protests that it is not adopting some sort of greater-includes-the-lesser principle to the effect that because under *Atwater* *Childs* could have been arrested and detained a much longer time, any lesser imposition is unobjectionable. But as a practical matter the only difference between the result in *Childs* and such a greater-includes-the-lesser rule is that, on the facts presented, it was only necessary to recognize a small departure from the duration standard of *Terry* — just “a minute or so.” But the mere fact that the court on this particular occasion only had to take a small bite out of the Fourth Amendment is hardly reassuring (especially in light of the fact that the *Childs* decision has since been relied upon to justify a further slide down the slope so far as to effectively nullify *Knowles*¹⁵³). Indeed, the Supreme Court has cautioned against such incremental intrusions, warning that because “unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure,” it “is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”¹⁵⁴

(5) The only justification offered by the *Childs* court for abandoning *Terry* in traffic-stop situations is the rather cynical observation that the “potential for detecting crime” would be

152. *State v. DeLaRosa*, 657 N.W.2d 683, 691 (S.D. 2003) (Sabers, J., dissenting).

153. In *Ochana v. Flores*, 199 F. Supp. 2d 817 (N.D. Ill. 2002), police responding to a honking of horns at a stoplight found a car blocking traffic with the driver slumped over the wheel. An officer put the car into park and assisted the driver out of the vehicle. While one officer was examining the driver's credentials at the rear of the vehicle, a second officer searched a backpack inside the vehicle and found drugs. The driver (the plaintiff in this section 1983 action) moved to bar any reference to the search as being incident to arrest on the ground that he was not under arrest at the time. The court ruled that “a reasonable person in Ochana's position would have thought he was under arrest,” *id.* at 828, citing in support the facts that “Ochana consented to talk to the investigating officers . . . that Ochana did not depart the area without hindrance . . . [that] there is no evidence that the officers informed Ochana that he was not under arrest or that he was free to leave, that the officers physically touched Ochana other than to assist him from his car, or that the officers displayed weapons or otherwise threatened Ochana,” *id.* at 827. Perhaps appreciating that just such facts would, in an exclusionary-rule context, merely create some doubt as to whether there was a temporary stop or no seizure at all, the district court then went on to declare that “Ochana was under arrest when his car was searched,” *id.* at 828, for the officers “had probable cause to believe that Ochana had committed the traffic offense of obstruction of traffic,” *id.*, which it deemed sufficient in light of *Childs*' declaration that “traffic stops supported by probable cause are arrests, with all the implications that follow from probable cause to believe that an offense has been committed,” *id.* (quoting *Childs*, 277 F.3d at 953).

On appeal, however, the court of appeals cited *Knowles* but not *Childs* in holding that the search could not be deemed a valid search incident to arrest because there was insufficient evidence of a custodial arrest. *Ochana v. Flores*, 347 F.3d 266, 270 (7th Cir. 2003).

154. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

enhanced if those committing traffic infractions were given less constitutional protection than those persons stopped because suspected of burglary, robbery, and other serious criminal offenses. But if ever there was a bad reason for manipulating constitutional rights, this is it. Any other court contemplating a similar move would be well advised to reflect upon the oft-quoted words of Justice Frankfurter:

Violators should be detected, tried, convicted, and punished — but not at the cost of needlessly bringing into question constitutional rights and privileges. While law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated, the constitutional safeguards of the individual were not designed for short-cuts in the administration of criminal justice.¹⁵⁵

Lastly, note should be taken of two other straws grasped by the *Childs* majority. One is that the earlier-quoted¹⁵⁶ statement from *Berkemer* has appended to it a cautionary footnote reading: "We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop."¹⁵⁷ However, as the *Childs* concurrence¹⁵⁸ notes, this footnote, "besides being dictum, sheds little light on the present problem because the footnote appears in the context of a discussion whether *Miranda* warnings need to be administered to a detainee at a traffic stop."¹⁵⁹ Even more significant, as another court pointed out, is the fact that courts

have not read this cautionary statement . . . to imply that the existence of probable cause to believe that only a minor traffic violation was committed is sufficient to sanction a substantially more intrusive stop than would be justified under *Terry*, at least where the police officer is not undertaking to make an arrest based on the traffic violation.¹⁶⁰

Indeed, the Supreme Court itself, in *Knowles v. Iowa*, quoted the language from *Berkemer* to which that footnote was appended but ignored the footnote in holding, as to a traffic violator who had been stopped on probable cause but had not in fact been subjected to custodial arrest, that the search authority of the police did not exceed that granted in *Terry*.¹⁶¹

155. *Shapiro v. United States*, 335 U.S. 1, 69-70 (1948) (Frankfurter, J., dissenting).

156. See *supra* text accompanying note 102.

157. *Berkemer v. McCarty*, 468 U.S. 420, 439 n.29 (1984).

158. Based upon the conclusion that there was reasonable suspicion of a drug offense.

159. *United States v. Childs*, 277 F.3d 947, 959 (7th Cir. 2002) (Cudahy, J., concurring).

160. *Mitchell v. United States*, 746 A.2d 877, 887 (D.C. Cir. 2000).

161. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

The other straw is *Ohio v. Robinette*.¹⁶² The *Childs* majority asserts that the Supreme Court, by deciding in *Robinette* that a valid consent to search, in the context of a traffic stop, does not require prior warnings that the violator was free to leave, “necessarily rejected the broader contention that unrelated questions may not be asked at all.”¹⁶³ Putting aside the doubts as to whether *Robinette* should be relied upon for much of anything given the Court’s inability to even understand the basis of the state court’s decision,¹⁶⁴ the fact of the matter is that the Court in that case “never addressed, let alone approved, questions asked *during* a routine traffic stop that do not concern the purpose of the stop or were not based upon reasonable suspicion.”¹⁶⁵

B. *Specific Investigative Techniques*

The bare essentials of a “routine traffic stop” consist of causing the vehicle to stop, explaining to the driver the reason for the stop, verifying the credentials of the driver and the vehicle, and then issuing a citation or a warning. But these days, manifesting the war-on-drugs motivation so often underlying these stops, there are various investigative activities unrelated to the infraction justifying the stop that themselves are so common as to now be a part of the routine. These activities, considered seriatim below, are: (1) a records check via radio or computer regarding the criminal history of those stopped and any outstanding arrest warrants for those individuals; (2) interrogation of those stopped directly on the subject of drugs or about the nature and purpose of their travels; (3) seeking (and often obtaining) consent to conduct a full search of the stopped vehicle; and (4) using a drug-sniffing dog to detect the presence of any drugs in the stopped vehicle.

1. *Records Check*

As one court has aptly put it, the “primary law enforcement purposes” for making a traffic stop are: “(1) to verify that a violation of the traffic laws has occurred or is occurring and, (2) to provide for the issuance of an appropriate ticket or citation charging such traffic violation or make an arrest of the driver based upon such violation.”¹⁶⁶ This being the case, it might be thought that a close application of the

162. 519 U.S. 33 (1996).

163. *Childs*, 277 F.3d at 954.

164. See *infra* text following note 333.

165. *Childs*, 277 F.3d at 960 (Cudahay, J., concurring).

166. *United States v. Brigham*, 343 F.3d 490, 498 (5th Cir. 2003).

Terry doctrine to traffic stops would mean that the police could not use the occasion to check, via radio or computer, various government records concerning the status of the driver and the vehicle; rather, the officer should merely investigate sufficiently to verify (where necessary) that his pre-stop suppositions about the violation are correct (sometimes they are not¹⁶⁷) and then simply proceed with citation or arrest. But the court responsible for the above-quoted pronouncement followed it with this postscript: "In furtherance of these purposes, the police officer is authorized to require the driver of the vehicle to produce a valid driver's license and documentation establishing the ownership of the vehicle and that required public liability insurance coverages are in effect on such vehicle," after which "the officer may run a computer check on the driver's license and registration."¹⁶⁸ This kind of checking of government records incident to a "routine traffic stop," which usually takes a matter of minutes,¹⁶⁹ is well established as a part of the "routine,"¹⁷⁰ and has consistently been approved and upheld by both federal¹⁷¹ and state¹⁷² courts.

There is certainly no basis to question that conclusion, which is not really inconsistent with rather strict application of the *Terry* standard to traffic stops. For one thing, as a constitutional matter, thanks to the Supreme Court's *Atwater* decision, the officer making the traffic stop has, even in the most insignificant cases, the power to choose between making a custodial arrest and giving a citation. Citation will be the choice in most instances, but computer verification of the credentials produced by the driver "is crucial to the successful operation of any citation system."¹⁷³ Moreover, whenever a stop is made of a person who has violated the traffic laws, it is appropriate in those circumstances to "run such computer verifications" because they are "necessary to determine that the driver has a valid license and is

167. See, e.g., *United States v. Valadez*, 267 F.3d 395 (5th Cir. 2001) (concerning vehicle stopped on suspicion of an expired vehicle sticker and illegal windshield tinting where immediately following the initial stop, the officer determined that the sticker was valid and that the tinting was not too dark).

168. *United States v. Brigham*, 343 F.3d 490, 498-99 (5th Cir. 2003).

169. The time is generally brief, but can vary some from case to case. See, e.g., *United States v. Shabazz*, 993 F.2d 431, 438 (5th Cir. 1993) (noting officer testified that a "check can take anywhere from two to three to ten to fifteen minutes").

170. *People v. Grove*, 792 N.E.2d 819, 821 (Ill. 2003) (holding that "an officer may properly run a computer check on a motorist's license as a routine part of a traffic stop" even when, as here, it was already determined that the vehicle registration was valid).

171. E.g., *United States v. Caro*, 248 F.3d 1240 (10th Cir. 2001).

172. E.g., *State v. Lee*, 658 N.W.2d 669 (Neb. 2003); *Fender v. State*, 74 P.3d 1220 (Wyo. 2003).

173. Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 268 (1989).

entitled to operate the vehicle.”¹⁷⁴ As the Supreme Court concluded in *Delaware v. Prouse*, “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,” so that police, “acting upon observed violations”¹⁷⁵ of the traffic laws,¹⁷⁶ may “stop[] an automobile and detain[] the driver in order to check his driver’s license and the registration of the automobile.”¹⁷⁷

However, the checking of government records via radio or computer is not limited to merely verifying the driver’s license and the vehicle’s registration. For one thing, is it common for the officer also to run a check for any outstanding arrest warrants on the driver. Indeed, it may fairly be said that such a warrant check has itself become a “routine” part of the so-called “routine traffic stop”¹⁷⁸ that is undertaken without regard to whether there is any reason to believe that such a warrant exists or that the driver is engaged in other criminality.¹⁷⁹ Warrant checks are run even when the traffic violation is nothing more than an unsignaled lane change¹⁸⁰ or failure to maintain proper distance¹⁸¹ (and pedestrians are not immune, as warrant checks are likewise run incident to stops for jaywalking¹⁸²). There is

174. *United States v. Wood*, 106 F.3d 942, 945 (10th Cir. 1997).

175. *Delaware v. Prouse*, 440 U.S. 648, 658-59 (1979).

176. The importance of the violation of law to the authority to run a check on a license and registration is illustrated by those cases holding that if there is a stopping on either reasonable suspicion or probable cause of a traffic violation that is determined immediately after the stop not to have been a violation at all, the officer may not continue the detention for a license/registration check. *See, e.g.*, *United States v. McSwain*, 29 F.3d 558 (10th Cir. 1994); *People v. Redinger*, 906 P.2d 81 (Colo. 1995).

The principle is also illustrated by the holding that if a vehicle is stopped because of a traffic violation by the passenger for which the driver is not also legally accountable, then there may be no checking of the driver’s license incident to that stop. *City of Fairborn v. Orrick*, 550 N.E.2d 488 (Ohio Ct. App. 1988). There exists some questionable authority, however, to the effect that if an officer makes a nonseizure encounter with a parked car, e.g., to see if the motorist needs assistance, then this may be followed by a brief seizure to check the validity of the defendant’s driver’s license. *State v. Godwin*, 826 P.2d 452 (Idaho 1992).

177. *Prouse*, 440 U.S. at 663.

178. *See, e.g.*, *State v. Johnson*, 645 N.W.2d 505 (Minn. Ct. App. 2002) (characterizing encounter as “routine traffic stop”); *State v. Mogen*, 52 P.3d 462 (Utah Ct. App. 2002) (same); *Wilson v. State*, 874 P.2d 215 (Wyo. 1994) (same).

179. Occasionally, however, when such suspicion has been present, courts have emphasized it as justification for the warrant check. *See, e.g.*, *United States v. Spencer*, 1 F.3d 742 (9th Cir. 1992).

180. *State v. DeMarco*, 952 P.2d 1276 (Kan. 1998).

181. *United States v. Lopez-Guzman*, 246 F. Supp. 2d 1155 (D. Kan. 2003).

182. *United States v. Lockett*, 484 F.2d 89 (9th Cir. 1973); *State v. Barros*, 48 P.3d 584 (Haw. 2002). Under the aggressive patrol tactics utilized in some high-crime locales, pedestrians are stopped for minor violations such as jaywalking and then detained as long as

considerable variation in the reports as to the time that a warrant check takes. For those police having computers in their patrol cars, as is increasingly common,¹⁸³ it is said that access to the data is "almost instantaneous,"¹⁸⁴ but other reports of the time actually consumed waiting for a response to a warrants query range from a few minutes¹⁸⁵ to ten minutes¹⁸⁶ to thirty minutes.¹⁸⁷ Of course, it sometimes will be uncertain whether the driver is actually the same person as is named in the warrant, in which case still more time will be taken resolving that question.¹⁸⁸

thirty minutes while a warrant check is conducted. See Adrienne L. Meiring, Note, *Walking the Constitutional Beat: Fourth Amendment Implications of Police Use of Saturation Patrols and Roadblocks*, 54 OHIO ST. L.J. 497, 528-30 (1993).

183. "Police officers throughout the United States increasingly use computer consoles in their patrol cars to request immediate information about outstanding arrest warrants, traffic records, and other matters relevant to their discretionary decisions about whether to investigate, cite, or arrest the citizens with whom they interact." Christopher E. Smith & Madhavi McCall, *Constitutional Rights and Technological Innovation in Criminal Justice*, 27 S. ILL. U. L.J. 103, 114 n.63 (2002).

184. *People v. McGaughan*, 601 P.2d 207, 216 n.2 (Cal. 1979) (Bird, C.J., concurring and dissenting); see also *infra* note 186.

Even if the response is very quick, dealing with the data received may take some time as well. Files that are called up on the patrol-car computer contain "a significant amount of information, including: name, age, sex, race, driving record, traffic violations, warrants, insurance information, et cetera," but "the information is presented in an extremely hard-to-read format and is normally provided in separate files that force the officer to scan through several records." Lisa Napoli, *Speeding Up Police Traffic Stops*, MSNBC, at <http://www.aps.us/news/Speeding.htm> (last visited Sept. 1, 2004).

185. *Piggott v. Commonwealth*, 537 S.E.2d 618 (Va. Ct. App. 2000).

186. *People v. McGaughan*, 601 P.2d 207 n.6 (Cal. 1979). This was the time actually taken in this particular case. The Attorney General claimed that "because of modern communications systems and advances in computer technology the usual response time to a warrant check is now from a few seconds to less than four minutes, depending on the method used and the number of inquiries being processed," while the defendant claimed the ten minutes taken in his case was more typical; the court concluded "that reality lies somewhere between these two extremes: i.e., that under ideal conditions warrant checks can now be swiftly completed, but that in a still significant number of places in the state — presumably diminishing with the spread of the new technology — the ideal is not yet attained." *Id.* at 211.

187. Meiring, *supra* note 182, at 528-30.

188. *U.S. v. Simmons*, 172 F.3d 775, 775-76 (11th Cir. 1999) (holding that additional seventeen to twenty-six minutes consumed by a police officer's attempts to verify whether the defendant was the subject of an outstanding arrest warrant did not render the duration of the initially valid traffic stop unconstitutional, although the warrant was from a county on other side of the state, date of birth on the warrant did not match the defendant's, police had run the defendant's name two and one-half months earlier, but had not detected any outstanding warrants, and warrant was for a worthless check, as opposed to a more "serious" crime, officer had specific and articulable suspicion that person named in the warrant was the defendant, method of investigation, a computer check and follow-up teletype was likely to confirm or dispel their suspicions quickly, and with a minimum of interference, and scope and intrusiveness of the detention was relatively minor).

With rare exception,¹⁸⁹ the courts have approved of the general practice of conducting warrant checks incident to a traffic stop. Sometimes the expression of approval appears unrestrained, in that it is made to appear that such a check is simply another proper procedure, along with the license and registration check, that may accompany any traffic stop.¹⁹⁰ Other courts have been somewhat more restrained, holding that a warrant check is permissible if it does not “significantly extend” the period of detention.¹⁹¹ While one case has been found in which the court actually held that this latter limitation had not been met,¹⁹² it has been cogently questioned whether as a practical matter this limitation can be enforced.¹⁹³

Earlier in this Article I have argued, as a general proposition, that courts should rather strictly adhere to the *Terry* standard for judging the lawful dimensions of a traffic stop, so as to remove the incentive for pretextual arrest and to minimize the intrusion upon the very substantial numbers of persons who find themselves by the side of the road after being signaled to stop by a traffic/drug-enforcement officer. Does this mean that the practice of making warrant checks incident to traffic stops ought to be abolished, at least absent “specific and articulable facts causing [the officer] to reasonably suspect that there may be an outstanding warrant for the driver’s arrest”?¹⁹⁴ Certainly a

189. In *State v. Rife*, 943 P.2d 266, 268 (Wash. 1997), the court ruled the warrant check there was illegal because “[n]either the [applicable] statute nor the Seattle Municipal Code grants authority for a police officer to run a warrant check after stopping a person for a routine traffic infraction.”

190. *E.g.*, *United States v. Jones*, 269 F.3d 919 (8th Cir. 2001); *United States v. Garcia*, 205 F.3d 1182 (9th Cir. 2000); *State v. Lee*, 658 N.W.2d 669 (Neb. 2003); *Walter v. State*, 28 S.W.3d 538 (Tex. Crim. App. 2000).

191. *E.g.*, *United States v. Contreras-Diaz*, 575 F.2d 740 (9th Cir. 1978); *State v. Barros*, 48 P.3d 584 (Haw. 2002); *Storm v. State*, 736 P.2d 1000 (Okla. Crim. App. 1987).

192. *United States v. Luckett*, 484 F.2d 89 (9th Cir. 1973).

193. As stated in *People v. McGaughran*, 601 P.2d 207, 216-17 (Cal. 1979) (Bird, C.J., concurring and dissenting):

This rule is unworkably vague. How is it possible to determine what amount of time would have been “reasonably necessary” for an officer to discharge the duties he or she had with respect to the traffic infraction itself? I submit, it is not possible. Further, the rule requires the officer and the judge to determine the duration of a past event *which never occurred*, i. e., the length of time the traffic detention *would* reasonably *have required* if the officer had not run the warrant check. Not only must past history be thus reorganized, but a determination must be made as to how many of the officer’s actions that never occurred would have been reasonably “necessary” to perform duties that may have been only partly performed.

In the court’s first opinion in *McGaughran*, a majority of the court expressed similar reservations: “For a court to decree at a later date precisely how much time ‘would have been’ necessary to perform the officer’s duties in any given case would be at best hindsight and at worst sheer speculation.” *People v. McGaughran*, 585 P.2d 206, 215 (Cal. 1978), *rev’d*, 601 P.2d 207 (Cal. 1979).

194. This was the test very, very briefly in California by virtue of *McGaughran*, 585 P.2d 206, 208 (1978), until rejected in the court’s second opinion in that case, 601 P.2d 207 (1979).

rather compelling argument can be made in favor of such a change. For one thing, the point has been made that "[i]nitiating a warrant check and awaiting the return are not activities that are directed at resolving the traffic offenses which authorized the stop in the first place," meaning that this is an obvious case for applying the limitations of *Terry* in order that the "scope of a lawful, routine traffic detention [may] be limited to what is necessary to investigate the traffic infraction itself" rather than "expanded to permit using a portion of the detention solely to investigate the separate question of whether there are unrelated arrest warrants in the name of the driver."¹⁹⁵

So the argument goes, if police are deprived of the windfall of the serendipitous discovery of persons wanted on outstanding warrants for a variety of crimes, then they may be less likely to make traffic stops for marginal conduct. Moreover, such a change would obviate another problem:

Since a warrant check during a traffic detention does not have to be justified on any factual basis, the decision as to whether or not to run a warrant check will turn not upon the driver's apparent involvement in crime but upon the unconstrained and standardless discretion of the officer.¹⁹⁶

While there is much to these arguments, I would not press as hard for a change in the warrant-check practice, as I would for the changes later recommended herein. This is because there are at least some rational arguments for retaining the warrant-check routine as to a person who apparently has committed a traffic offense.¹⁹⁷ For one thing, to the extent that the warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses, as happens in a small but perhaps significant number of cases,¹⁹⁸ it can be said that the warrant check

195. *People v. McGaughran*, 601 P.2d 207, 216 (Cal. 1979) (Bird, C.J., concurring and dissenting).

196. *Id.* at 217.

197. Here, as with the license/registration check, *see* cases cited *supra* note 176, there is the question of whether the warrant check may proceed even after it is determined that no violation occurred. The answer would seem to be no in this context as well. *But cf.* *People v. Safunwa*, 701 N.E.2d 1202 (Ill. App. Ct. 1998) (reasoning, curiously, that the fact that a number of jurisdictions have held that where the initial traffic stop is valid, police may request a driver's license and run a warrant check without any further probable cause supports the court's holding in this case of first impression that where the police were justified in stopping the defendant's car because they believed he was a fugitive wanted on a federal warrant, they could detain him to conduct a warrant check even after they realized that he was not the fugitive).

198. In *People v. McGaughran*, 585 P.2d 206, 213-14 (Cal. 1978), *rev'd*, 601 P.2d 207 (Cal. 1979), the court concluded that "2 percent of California drivers — at the very most — may be operating with suspended or revoked licenses" and "less than 2 percent" of the licensed drivers have traffic warrants outstanding. In the second opinion in that case, the concurring/dissenting opinion noted that "statistics based on all warrant checks run by the

serves objectives sufficiently related to the initial reason for the stop, in much the same way as does the license/registration check. For another, my main argument is that those stopped for traffic infractions should not receive less Fourth Amendment protection than is afforded to those subjected to *Terry* stops because they are suspected of burglary, robbery, and other typical crimes. At least as to warrant checks, it can be said that this is likewise a standard practice as to those in the latter group, where again the check is not limited to a search for warrants regarding conduct similar to that suspected in the instant case.¹⁹⁹

Yet another type of information regularly acquired by a records check following a traffic stop is the driver's criminal history, that is, information regarding his prior convictions, prior arrests, and the like. This has likewise become a "part of [a] routine computer check" performed incident to a traffic stop,²⁰⁰ just one of the "routine . . . tasks related to the traffic violation."²⁰¹ Criminal-history information is readily available to law-enforcement agencies and officers through the National Crime Information Center,²⁰² and is said to be "instantly available nationally."²⁰³ The cases reflect, however, that obtaining a criminal-history check is one of several "somewhat time-consuming tasks related to the traffic violation"²⁰⁴; delays of five minutes in getting a response back to the officer in the field are not uncommon.²⁰⁵ The check can easily add to the total length of the stop, for "often criminal history checks take longer to process than the usual license and warrant requests."²⁰⁶ Moreover, the criminal-history inquiry may itself produce a substantial extension of the traffic violator's seizure without reasonable grounds to suspect more serious criminal activity. A criminal record, even if previously denied by the violator, counts for

Los Angeles County Sheriff suggest the figures may be somewhat higher. In addition to disclosing traffic warrants, a warrant check may also reveal felony and misdemeanor warrants. The information supplied by the Los Angeles Sheriff suggests that felony warrants are discovered in 1 percent of all warrant checks and nontraffic misdemeanor warrants in 5 percent." 601 P.2d 207, 217-18 n.6 (Cal. 1979) (Bird, C.J., concurring and dissenting).

199. See, e.g., *State v. Holman*, 380 N.W.2d 304 (Neb. 1986); *State v. McFarland*, 446 N.E.2d 1168 (Ohio Ct. App. 1982); *State v. DeMasi*, 448 A.2d 1210 (R.I. 1982), *order confirmed*, 452 A.2d 1150; *State v. Chapman*, 921 P.2d 446 (Utah 1996).

200. *United States v. Purcell*, 236 F.3d 1274, 1278 (11th Cir. 2001).

201. *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643, 647 (8th Cir. 1999); see also *Laime v. State*, 60 S.W.3d 464, 474-75 (Ark. 2001).

202. *United States v. McManus*, 70 F.3d 990, 991 n.2 (8th Cir. 1995).

203. *Penn. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 373 (1998) (Souter, J., dissenting).

204. *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643, 647 (8th Cir. 1999).

205. See, e.g., *United States v. Gregory*, 302 F.3d 805 (8th Cir. 2002); *United States v. Finke*, 85 F.3d 1275 (7th Cir. 1996).

206. *Finke*, 85 F.3d at 1280.

very little,²⁰⁷ but yet may lead to interrogation that is "intense, very invasive and extremely protracted."²⁰⁸

Most courts confronted with the issue have concluded that a criminal-history check is a valid part of a traffic stop. Sometimes it is stated flat-out that "a police officer, incident to investigating a lawful traffic stop, may . . . conduct computer searches to investigate the driver's criminal history."²⁰⁹ To the same effect are those cases that "demonstrate an implied acceptance of criminal history checks as generally reasonable, by beginning their unconstitutional detention analysis only after the point at which a criminal history report has been obtained."²¹⁰ Other cases are a bit more cautious, indicating that a criminal-history check is proper provided it is "almost simultaneous" with the license/registration check,²¹¹ or if it does not unduly prolong the length of the traffic-stop seizure,²¹² although here (just as with warrant checks²¹³) it is to be doubted whether in practice this is a meaningful limitation. Criminal-history checks are run even in the case of traffic offenses as innocuous as an unsignaled lane change,²¹⁴ and courts forthrightly acknowledge that they are approving such checks or even added detention to facilitate such checks "even though the purpose of the stop had nothing to do with such prior criminal

207. As stated in *United States v. Jones*, 269 F.3d 919, 928 (8th Cir. 2001):

There are numerous reasons why an innocent traveler initially would be reluctant to reveal to law enforcement authorities his criminal history; primarily for fear that it would have the exact effect that it had here, i.e., casting unwarranted suspicion upon that person. Also, an inconsistent answer regarding past conduct is less suspicious than an inconsistent answer regarding present destination or purpose. An inconsistent answer as to the former might cast a shadow of dishonesty upon the character of the motorist, but an inconsistent answer regarding the latter casts suspicion and doubt on the nature and legitimacy of the activity being investigated.

208. Based upon data accumulated under a 1995 Maryland court order from January 1995 through June 2000 (including a total of 8027 searches, and focusing upon a subset of 2146 searches that occurred on the northern portion of I-95, from Baltimore to the Delaware border), it is reported in Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 685 (2002) (alterations in original) (quoting CAL. STATE ASSEMBLY DEMOCRATIC CAUCUS TASK FORCE ON GOV'T OVERSIGHT, OPERATION PIPELINE: CALIFORNIA JOINT LEGISLATIVE TASK FORCE REPORT, at 13-15, available at <http://www.aclunc.org/discrimination/webb-report.html> (Sept. 29, 1999) [hereinafter OPERATION PIPELINE]), that in " 'approximately 30 hours of [actual] videotaped stops . . . [t]he questioning that was done was intense, very invasive and extremely protracted. It was not uncommon to see travelers spending 30 minutes or more standing on the side of the road, fielding repeated questions about . . . their criminal histories' " and other matters.

209. *E.g.*, *United States v. Jones*, 269 F.3d 919, 924 (8th Cir. 2001).

210. *Finke*, 85 F.3d at 1279 (7th Cir. 1996) (citing illustrations).

211. *United States v. McRae*, 81 F.3d 1528, 1536 n.6 (10th Cir. 1996).

212. *E.g.*, *United States v. Purcell*, 236 F.3d 1274 (11th Cir. 2001).

213. *See supra* note 193.

214. *State v. DeMarco*, 952 P.2d 1276 (Kan. 1998).

history”²¹⁵ and even though there had not yet developed any reasonable suspicion of more serious criminal activity.²¹⁶

Especially in light of that, it would appear, consistent with the thesis developed earlier in this Article, that there should be a total prohibition (without regard to whether the check increases the time of detention significantly or at all) on use of criminal-history checks incident to traffic stops except when there also exists a reasonable suspicion of more serious criminal conduct.²¹⁷ Because in this “war on drugs” via traffic stops the criminal-history check serves to identify drivers who deserve (at least in the officer’s mind) more intense scrutiny,²¹⁸ a prohibition on such checks could contribute in a meaningful way to reducing the number of pretextual stops as well as the number of stops in which the motorist is subjected to excessive scrutiny and detention.

But there is one wrinkle here that makes this issue a bit more complex: while most courts approving of these criminal-history checks deem it unnecessary to say even a word by way of justification for such a conclusion, occasionally a claim is made that criminal-history checks are legitimate in connection with traffic stops in order to aid in ensuring the officer’s safety.²¹⁹ This claim can hardly be dismissed out of hand, for certainly legitimate concerns about officer safety may warrant some action that would be inappropriate if it were simply a matter of acquiring evidence of criminal activity.²²⁰ But, while it is doubtless true that “[b]y determining whether a detained motorist has a criminal record or outstanding warrants, an officer will be better appri[s]ed of whether the detained motorist might engage in violent activity during the stop,”²²¹ it is at least debatable whether routinely obtaining this information is necessary in light of the various other

215. *United States v. Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001).

216. *United States v. Gregory*, 302 F.3d 805 (8th Cir. 2002).

217. In some cases the court has approved the criminal-history check at issue because there did exist a reasonable suspicion of more serious criminality, *e.g.*, *United States v. Finke*, 85 F.3d 1275 (7th Cir. 1996); *People v. Easley*, 680 N.E.2d 776 (Ill. App. Ct. 1997), an unobjectionable result.

218. Even though the existence of the criminal history may be attributable to prior arbitrary traffic stops of the driver! *Cf. United States v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998) (holding that Criminal History Category V over-represented defendant’s criminal record because defendant’s driving convictions were the result of pretextual traffic stops or racial profiling).

219. *E.g.*, *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001); *United States v. Purcell*, 236 F.3d 1274 (11th Cir. 2001).

220. Perhaps the best illustration of this point is that it quite properly takes less to justify a frisk of a person already lawfully stopped by the police than it would to justify a stop in the first instance on suspicion of carrying a concealed weapon. *See* 4 LAFAYE, SEARCH AND SEIZURE (1996), *supra* note 5, § 9.5(a).

221. *Holt*, 264 F.3d at 1221-22.

rules that exist with respect to what an officer may do in the interest of his own protection during a stop.²²² Given these many other avenues of self-protection, it would seem that they suffice to ensure the officer's protection during what should be a brief face-to-face encounter,²²³ so that the added authority to run a criminal-history check (which has no conceivable other legitimate basis during a traffic stop) need not be granted. If there is doubt on that point, however, this would *not* mean that a bright-line rule allowing a criminal-history check incident to *all* traffic stops would be necessary,²²⁴ rather, this otherwise undesirable step would be permitted only upon a showing of reasonable apprehension approaching that needed for a frisk.

Before leaving this general subject of records checking as an incident of a traffic stop, something should be said about such checks regarding a passenger in the stopped vehicle. Although it is sometimes suggested that both the driver and any passengers might be required to display their driver's licenses incident to a traffic stop,²²⁵ this would not seem to be the case, for applicable statutes do not require "a passenger in a vehicle to carry his driver's license or any other type of identification" and do not "attribute liability to a passenger for a traffic violation committed by the driver, such as 'following too close.'"²²⁶ Of course, if the driver's offense makes him unable to continue driving and the passenger agrees to take over, then it is

222. These rules permit frisking the driver on reasonable suspicion he has a weapon, e.g., *Knowles v. Iowa*, 525 U.S. 113 (1998), searching the vehicle on reasonable suspicion there is a weapon within (even if the driver is not himself in the car!), e.g., *Michigan v. Long*, 463 U.S. 1032 (1983), and even absent reasonable suspicion of a weapon ordering the driver, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), or passengers, e.g., *Maryland v. Wilson*, 519 U.S. 408 (1997), out of the vehicle, ordering the occupants to remain within the vehicle, e.g., *Rogala v. District of Columbia*, 161 F.3d 44 (D.C. Cir. 1998); *United States v. Moorefield*, 111 F.3d 10 (3d Cir. 1997); *State v. Roberts*, 943 P.2d 1249 (Mont. 1997); *State v. Hodges*, 631 N.W.2d 206 (S.D. 2001), ordering the occupants within to show their hands, e.g., *United States v. Enslin*, 327 F.3d 788 (9th Cir. 2003); *Cousart v. United States*, 618 A.2d 96 (D.C. App. 1992), or directing the driver to be seated with the police officer in the patrol car during the stop, e.g., *United States v. Barlow*, 308 F.3d 895 (8th Cir. 2002); *State v. England*, 92 S.W.3d 335 (Mo. Ct. App. 2002); *State v. Lee*, 658 N.W.2d 669 (Neb. 2003); *State v. Lozado*, 748 N.E.2d 520 (Ohio 2001).

223. It is interesting to note that in *United States v. McRae*, the danger prompting a frisk in light of what was learned by the criminal-history check came into being only because the officer had obtained the driver's consent to a full search of the vehicle; the court emphasized that "a search of the car might compel Officer Colyar to turn his back on Mr. McRae," and that because the driver needed to exit the car to facilitate the search "Officer Colyar permitted Mr. McRae to put on his jacket before getting out of the car, and a jacket is a likely place in which to store a weapon." 81 F.3d 1528, 1536 (10th Cir. 1996). If consent to search a vehicle gives rise to a need for a frisk of the person that otherwise would not exist, one wonders why the frisk should not be expressly included in the requested consent.

224. See *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir. 1996) (finding "such a bright line rule troubling" after noting the officer-safety argument in other decisions).

225. *State v. Gutierrez*, 611 N.W.2d 853 (Neb. Ct. App. 2000).

226. *United States v. Brigham*, 343 F.3d 490, 503 n.7 (5th Cir. 2003).

proper for the officer to require the passenger to display his license,²²⁷ but otherwise requiring display of a driver's license by the passenger may not be required and, indeed, may in some circumstances amount to an illegal seizure.²²⁸ While an officer making a traffic stop, "[i]n order to do his or her job correctly," should attempt to "determine the identity of the witnesses to the incident," meaning that "the securing of names of witnesses" thereto, i.e., passengers, "is part of the scope of a traffic stop,"²²⁹ "[p]assengers are free to refuse to provide identifying information,"²³⁰ and thus the officer should request rather than demand such information and should not insist upon a driver's license to the exclusion of other forms of identification.

It is not uncommon for appellate courts to declare that incident to a traffic stop it is permissible for the officer to run a warrant check on the passengers specifically²³¹ or on all occupants of the vehicle,²³² although it is sometimes said that detention for this purpose after the traffic stop is otherwise over is not permissible.²³³ Putting aside those cases where the warrant check was upheld because connected with a driver's license check on a passenger who was to assume the driving duties,²³⁴ it is to be doubted whether there is any valid reason for automatic warrant checks on mere passengers. If, as suggested earlier, the best that can be said for requiring a warrant check on the driver is

227. *Duncan v. State*, 686 So. 2d 1279 (Ala. Crim. App.1996); *State v. Higgins*, 884 P.2d 1242 (Utah 1994); *State v. Mennegar*, 787 P.2d 1347 (Wash. 1990).

228. This is certainly the case when, as in *Piggott v. Commonwealth*, 537 S.E.2d 618 (Va. Ct. App. 2000), the traffic stop of the driver was completed by citation or warning after which the passenger is required to surrender his credentials. It is less apparent that this is the case when, in the course of the traffic stop, the officer stands at the passenger door and asks the passenger for his license, though such was the holding in *People v. Spicer*, 203 Cal.Rptr. 599 (Cal. Ct. App. 1984).

229. *State v. Jones*, 5 P.3d 1012, 1018 (Kan. Ct. App. 2000). As stated in *State v. Griffith*:

[T]here is a general public interest in attempting to obtain identifying information from witnesses to police-citizen encounters. If witnesses are willing to identify themselves, they may later be able to assist police in locating the person who violated the law. If questions later arise about police conduct during the stop, passengers may be able to provide information about what occurred during the stop.

613 N.W.2d 72, 81-82 (Wis. 2000).

230. *Griffith*, 613 N.W.2d at 82.

231. *State v. Ybarra*, 751 P.2d 591 (Ariz. Ct. App. 1988); *United States v. Morris*, 910 F. Supp. 1428 (N.D. Iowa 1995); *State v. DeMarco*, 952 P.2d 1276 (Kan. 1998).

232. *United States v. White*, 81 F.3d 775 (8th Cir. 1996); *State v. Anderson*, 605 N.W.2d 124 (Neb. 2000).

233. *State v. Damm*, 787 P.2d 1185 (Kan. 1990); *State v. Johnson*, 805 P.2d 761 (Utah 1991); *Piggott v. Commonwealth*, 537 S.E.2d 618 (Va. Ct. App. 2000).

234. *State v. Higgins*, 884 P.2d 1242 (Utah 1994); *State v. Mennegar*, 787 P.2d 1347 (Wash. 1990). The state relied upon this exception in *People v. Harris*, but without success, as at "no time during the traffic stop" did the officer ask the passenger whether he "was able to drive the car." 802 N.E.2d 219, 222 (Ill. 2003).

that this is an appropriate step for all those seized, even temporarily, for violating the law, it hardly follows that companions of the offender (especially when the offense is only a traffic violation) should be treated in the same fashion. And thus the correct result as to this issue is that reached in *People v. Harris*:²³⁵ except when (1) the police "have a reasonable, articulable suspicion that the passenger has committed a crime," (2) "the passenger has violated a traffic law," or (3) "the driver and passenger, knowing that the driver is being arrested or is otherwise incapable of driving, agree that the passenger should drive the vehicle," a warrant check on a passenger is impermissible because it would change "the fundamental nature of the traffic stop" by "convert[ing] the stop from a routine traffic stop into an investigation of past wrongdoing by" the passenger.²³⁶ As for the intimation in some of the cases that a criminal-history check of a passenger is proper,²³⁷ here again a contrary conclusion is supported by the need to obviate the possibility of a "windfall" that would make a pretextual stop worthwhile to the police, especially since any police-safety claim is relatively weak vis-à-vis a passenger.

2. Questioning Vehicle Occupants

Once a lawful traffic stop has been made, it is certainly proper for the officer then to engage in "questioning the driver about the traffic violation,"²³⁸ although often the officer's prior observations will have obviated the need for any interrogation to establish the existence of the traffic infraction. Given the frequent use of traffic stops for the purpose of uncovering drugs, it may be just as likely that the officer will question the driver about the presence of any drugs on his person or in the vehicle. Such questioning is often "intense, very invasive and extremely protracted,"²³⁹ and the driver may be confronted with a virtual barrage of questions about drugs and related matters.²⁴⁰ The

235. 802 N.E.2d 219 (Ill. 2003)

236. *Id.* at 228-230.

237. *United States v. Purcell*, 236 F.3d 1274 (11th Cir. 2001) (finding stop to be proper if not thereby unreasonably prolonged); *State v. DeMarco*, 952 P.2d 1276 (Kan. 1998).

238. *United States v. Simmons*, 172 F.3d 775, 778 (11th Cir. 1999).

239. *Gross & Barnes*, *supra* note 208, at 685 (quoting OPERATION PIPELINE).

240. *E.g.*, *Maxwell v. State*, 785 So. 2d 1277 (Fla. Dist. Ct. App. 2001). In *Maxwell*, during what the court termed "a fishing expedition," officer King

asked Maxwell about matters which had nothing to do with the citation. . . . Deputy King asked over 50 questions during this traffic stop. Many of the questions involved drugs or weapons: Do you have any drugs in the car? When was the last time you used marijuana? Have you ever been arrested for drugs? Has anyone been in your car recently with drugs? Do you object to a search of your car? Is there any reason a drug dog would alert to drugs if it walked around your car? Do you have any objection to the drug dog walking around your car? Do you have any guns in your car? Have you had any firearms violations?

questioning is sometimes profitable; the interrogatee may actually admit to the possession of drugs,²⁴¹ or his staunch denial may produce what is deemed consent to a search when the officer responds that then the driver will not mind if the officer looks in the vehicle.²⁴²

Such questioning has been upheld where a reasonable suspicion of drug transportation had already been lawfully developed,²⁴³ which is hardly objectionable, and where the questioning occurred in a post-stop “consensual encounter,”²⁴⁴ which would be likewise unobjectionable but for the unrealistic fashion in which courts typically go about determining that a traffic-stop seizure has ended (discussed in Part III below). As for those cases where the questioning about drugs was during the stop and without a reasonable suspicion about drugs, one view is that such questioning is permissible provided that it occurs before the valid purposes of the traffic stop (license/registration check, ticketing, or warning) have been concluded.²⁴⁵ That is, under those cases the single issue is whether the seizure had become unlawful in a temporal sense. This may be easy to determine if the questioning comes after all the above-mentioned steps have been taken but before release from custody,²⁴⁶ but if the questioning comes earlier it may be a matter of some uncertainty. This is because it is often difficult to determine whether the officer was “stalling” the completion of these other steps in order to facilitate the questioning.²⁴⁷

Because of the “slippage” possible under this approach, it probably does not vary from that taken by some other courts, namely, that the questioning about drugs is permissible so long as it does not “unreasonably prolong” the detention.²⁴⁸ In the cases taking this view, typically no explanation is offered as to why it is proper to hold someone longer than would otherwise be required because some of the time was taken up questioning the driver about matters totally unrelated to the traffic stop. But one court, with uncharacteristic

Id. at 1279 (citation omitted).

241. *E.g.*, *State v. Toevs*, 964 P.2d 1007 (Or. 1998).

242. *E.g.*, *United States v. Erwin*, 71 F.3d 218 (6th Cir. 1995).

243. *E.g.*, *United States v. Hunnicutt*, 135 F.3d 1345 (10th Cir. 1998); *United States v. Jones*, 44 F.3d 860 (10th Cir. 1995); *United States v. Perez*, 37 F.3d 510 (9th Cir. 1994).

244. *E.g.*, *United States v. Sanchez-Pena*, 336 F.3d 431 (5th Cir. 2003); *People v. Thomas*, 839 P.2d 1174 (Colo. 1992); *State v. Ready*, 565 N.W.2d 728 (Neb. 1997).

245. *E.g.*, *United States v. Mesa*, 62 F.3d 159 (6th Cir. 1995); *United States v. Fernandez*, 18 F.3d 874 (10th Cir. 1994); *State v. Gutierrez*, 51 P.3d 461 (Idaho Ct. App. 2002); *State v. Hight*, 781 A.2d 11 (N.H. 2001); *State v. Hansen*, 63 P.3d 650 (Utah 2002).

246. As in, for example, *State v. Gutierrez*, 51 P.3d 461 (Idaho Ct. App. 2002).

247. When the stalling is quite apparent, it may be taken into account by the court, as in *Maxwell v. State*, 785 So. 2d 1277 (Fla. Dist. Ct. App. 2001).

248. *E.g.*, *Henderson v. State*, 551 S.E.2d 400 (Ga. Ct. App. 2001); *State v. Parkinson*, 17 P.3d 301 (Idaho Ct. App. 2000); *State v. Wallace*, 642 N.W.2d 549 (Wis. Ct. App. 2002).

honesty, stated flat out that the explanation was that a policy of regularly making such traffic-stop extensions "promotes the public interest in quelling the drug trade."²⁴⁹

These positions are dead wrong! They are totally at odds with the *Terry* line of Supreme Court decisions on the limits applicable to temporary detentions, and amount to nothing more than an encouragement to police to engage in pretextual traffic stops so that they may engage in interrogation about drugs in a custodial setting (albeit not custodial enough to bring even the protections of *Miranda* into play²⁵⁰). The correct rule is that followed by some other courts: that in strict accordance with *Terry* and its progeny, questioning during a traffic stop must be limited to the purpose of the traffic stop and thus may not be extended to the subject of drugs.²⁵¹

Nor is a different result called for on this issue merely because a different rule might obtain were the questioning about weapons, a matter deserving brief exploration here. What the rule should be about such questioning is a close call, as is reflected by the fact that in the en banc case of *United States v. Holt*,²⁵² the court split 5-4 on the issue. The majority's bright-line rule to allow such an inquiry because of "the dangers inherent in all traffic stops"²⁵³ is grounded in the notion that ensuring the safety of the police and bystanders is a more compelling interest than acquiring information of criminality and thus justifies a variety of minimal intrusions in service of that particular interest:

In addition to information about loaded weapons that the officer may obtain from visually looking in the car, shining a light around the interior of the car, or asking the motorist and occupants to step out of the car or to keep their hands raised — all procedures authorized by the courts in the name of officer safety — an officer may also obtain information about the existence of a loaded weapon by simply asking the motorist if there is a loaded weapon in the vehicle. Indeed, straightforwardly asking

249. *State v. Robinette*, 685 N.E.2d 762, 768 (Ohio 1997), *rev'd*, *Ohio v. Robinette*, 519 U.S. 33 (1996). The court's legal analysis in support of the lawfulness of such a position is truly astounding, as by some curious merger of the holdings in *Florida v. Royer*, 460 U.S. 491 (1983), and *Brown v. Texas*, 443 U.S. 47 (1979), the court concluded that these two decisions "set out a standard whereby police officers, under certain circumstances, may briefly detain an individual without reasonably articulable facts giving rise to suspicion of criminal activity, if the detention promotes a legitimate public concern, e.g., removing drunk drivers from public roadways or reducing drug trade." *Robinette*, 685 N.E.2d at 768.

250. *Berkemer v. McCarty*, 468 U.S. 420 (1984).

251. E.g., *United States v. Jones*, 44 F.3d 860 (10th Cir. 1995); *State v. Syhavong*, 661 N.W.2d 278 (Minn. Ct. App. 2003); see also Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117, 164-88 (2001) [hereinafter Maclin, *Freeway*].

252. 264 F.3d 1215 (10th Cir. 2001).

253. *Holt*, 264 F.3d at 1226.

this question is often less intrusive than many of the procedures authorized by our sister circuits.²⁵⁴

The majority went on to emphasize the utility of such inquiry: if the suspect answers in the affirmative, or even if the suspect either answers in the negative or refuses to answer in a certain way, the officer would be provided with “an important piece of information causing [him] to proceed with greater caution.”²⁵⁵ But, as the dissenters pointed out in objecting to allowing such questioning “in all future cases,”²⁵⁶ it is precisely because there are many other means available for ensuring officer safety, including requiring the traffic violator to exit his vehicle and remain outside during the entire period of the detention, that such questioning is unnecessary. In an apparent effort to counter that contention, the majority declares that once the traffic stop is over and the detainee is free to leave, he will at that point of necessity be allowed to reenter his vehicle and might at that point choose to attack the officer. That claim seems just as fanciful here as it did when made by the Supreme Court in *Michigan v. Long*.²⁵⁷

Nor is a different result called for regarding questioning about drugs simply because many courts have allowed police to inquire into the driver’s travel plans during a stop, for, as one court aptly put it,

even assuming for purposes of argument that these cases allow an officer conducting a *Terry* stop to ask a detainee a limited number of questions unrelated to the purpose of the stop, we are not convinced they allow for questions . . . which would require the detainee to give[] an incriminatory answer or which would directly lead to a search of the detainee’s vehicle.²⁵⁸

But these travel-plans cases themselves also require a closer look. What they say is that inquiry into the driver’s travel plans (or, as it is often put, into the driver’s destination and purpose, which, however, can include quite detailed questioning about precisely where the driver has been, where he is going, and whom he has seen or will be

254. *Id.* at 1223.

255. *Id.* at 1224.

256. *Id.* at 1239 (Lucero, C.J., concurring and dissenting) (noting also that the “average American citizen stopped for speeding while hurrying to drop children off at school will not only find it bizarre, but more than minimally intrusive, to be confronted with questions about loaded weapons”).

257. 463 U.S. 1032 (1983). For criticism of that position in *Long*, see 4 LAFAYETTE, SEARCH AND SEIZURE (1996), *supra* note 5, § 9.5(e), at 291 n.233.

258. *United States v. Holt*, 229 F.3d 931, 937 (10th Cir. 2000), *vacated en banc*, 264 F.3d 1215 (10th Cir. 2001) (reaching majority agreement on the rule regarding interrogation about drugs).

seeing, etc.) is "routine"²⁵⁹ and that such questions may be asked "as a matter of course"²⁶⁰ because they are "reasonably related"²⁶¹ to the circumstances justifying the traffic stop. The essence of these cases is that calling upon the driver to fully explain the past and forthcoming aspects of his travels is a regular part of the officers' duties whenever they make a traffic stop.²⁶²

Only occasionally do the cases attempt to spell out why under the "reasonably related" test the questioning about travel plans is permissible. In *State v. Chapman*, for example, where the concern was with "the trooper's initial questions . . . concerning where the defendants had been and where they were going," the court explained that "[t]hese inquiries had a substantial nexus to ascertaining the reasons for Chapman's erratic driving," especially (since intoxication had been already eliminated) "the possibility of fatigue."²⁶³ But that won't wash, as all the officer needed to know on the fatigue issue, at best, was how long Chapman had been driving. And even if there is doubt about that, a case like *Chapman* hardly supports the broadside that "[t]ravel plans typically are related to the purpose of a traffic stop because the motorist is traveling at the time of the stop."²⁶⁴ For example, *Chapman* hardly explains why the supposed police right of inquiry into travel plans has been upheld even when the stop was made for a loud muffler²⁶⁵ or a just-ended parking violation.²⁶⁶

259. *United States v. Long*, 320 F.3d 795, 799 (8th Cir. 2003); *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000); *Miller v. State*, 102 S.W.3d 896, 902 (Ark. Ct. App. 2003) (quoting *Laime v. State*, 60 S.W.3d 464, 474 (Ark. 2000)).

260. *West*, 219 F.3d at 1176 (quoting *United States v. Hernandez*, 93 F.3d 1493, 1499 (10th Cir. 1996)).

261. *United States v. Lyton*, 161 F.3d 1168, 1170 (8th Cir. 1998); *State v. Lee*, 658 N.W.2d 669, 676 (Neb. 2003) (quoting *State v. Anderson*, 605 N.W.2d 124, 131 (Neb. 2000) (quoting *U.S. v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994))).

262. *See also* *United States v. Gregory*, 302 F.3d 805 (8th Cir. 2002); *State v. Fields*, 662 N.W.2d 242 (N.D. 2003); *cf.* *United States v. Givan*, 320 F.3d 452, 459 (3d Cir. 2003) (stating that "questions relating to a driver's travel plans ordinarily fall within the scope of a traffic stop," thus suggesting something short of a bright-line rule).

Of course, in this area as well it is sometimes said that questions about travel plans may not be asked if they extend the time of detention beyond that otherwise permissible. *United States v. Brigham*, 343 F.3d 490 (5th Cir. 2003); *Mitchell v. United States*, 746 A.2d 877 (D.C. 2000). While, as previously discussed, such a test is not easy to administer where the questioning did not actually follow completion of all the lawful tasks pursuant to the traffic stop, *Brigham* emphasized that in the instant case the officer's "methodology, questioning unrelated to the traffic violation for eight minutes before commencing the computer check, is merely an impermissible variation" from the post-completion questioning scenario. *Brigham*, 343 F.3d at 501.

263. *State v. Chapman*, 753 A.2d 1179, 1185 (N.J. Super. Ct. App. Div. 2000); *see also* *United States v. Holt*, 264 F.3d 1215 (10th Cir. 2001); *United States v. Bloomfield*, 40 F.3d 910 (8th Cir. 1994).

264. *Holt*, 264 F.3d at 1221 (emphasis added).

265. *See* *United States v. Hephner*, 260 F. Supp. 2d 763 (N.D. Iowa 2003).

266. *See* *Caldwell v. State*, 780 A.2d 1037 (Del. 2001).

Permitting travel-plans inquiries across the board has been defended on the ground that the “scope doctrine does not . . . prevent officers from engaging in facially innocuous dialog which a detained motorist would not reasonably perceive as altering the fundamental nature of the stop.”²⁶⁷ But this is a gross misrepresentation of the situation at issue. The interrogations challenged without success in the cases have not been social one-liners like “hey, where you headed?” or “so, where you from?”; rather, they are multi-question extended inquiries of vehicle occupants into the most minute details regarding the parts of the journey completed and lying ahead.²⁶⁸ The officers are “trained to subtly ask questions about . . . their destination, their itinerary, the purpose of their visit, the names and addresses of whomever they are going to see,” “to make this conversation appear as natural and routine a part of the collection of information incident to a citation or warning,” and “to interrogate the passengers separately, so their stories can be compared.”²⁶⁹ The objective is not to gain some insight into the traffic infraction that provided the legal basis for the stop, but to uncover inconsistent, evasive, or false assertions that could contribute to reasonable suspicion or probable cause regarding drugs. Thus, “[n]ot only are questions about travel plans investigatory rather than merely conversational, the ordinary traveler cannot reasonably be expected to decline to answer such questions, particularly if they are posed while an officer is holding the driver’s license and other essential documents.”²⁷⁰

As an impressionable lad growing up in the ‘40s in a sleepy Wisconsin burg where the local cinema was the principal source of amusement, I consumed a steady diet of World War II movies, where I saw essentially the same scene time and again: in some area under the Nazi thumb, some hapless traveler would be stopped by the authorities, at which point the man in charge would inevitably say, “Ve vant to zee your papers.” The traveler would produce his credentials and then would be subjected to a thorough grilling about

267. *Holt*, 264 F.3d at 1240 (Murphy, C.J., concurring and dissenting).

268. For a striking illustration, see the facts in *United States v. Brigham*, 343 F.3d 490, 494-96 (5th Cir. 2003), where, after Trooper Conklin stopped Brigham for not maintaining sufficient distance from the car preceding him, the officer subjected all the occupants of the vehicle to an intense grilling about all aspects of their travels.

269. Gross & Barnes, *supra* note 208, at 685 (quoting OPERATION PIPELINE, *supra* note 208, at 13).

Passengers are no more immune from interrogation than they are from the other investigative techniques previously discussed. Passengers may merely be asked their name, e.g., *People v. Gonzalez*, 789 N.E.2d 260 (Ill. 2003), may be asked about travel, e.g., *People v. Bunch*, 796 N.E.2d 1024 (Ill. 2003), or may be directly questioned about drug possession, e.g., *United States v. Childs*, 277 F.3d 947 (7th Cir. 2002).

270. *Petition for Writ of Certiorari* at 8, *Williams v. United States*, 535 U.S. 1019 (2002) (No. 01-1422).

where he was going, where he had been, why he was about, etc. Each time I watched such a scene, shivers went down my spine, and it was then that I concluded that one of the most striking differences between a free and a totalitarian society was that in the former scenes like that could not happen. We certainly have come a long way, unfortunately in the wrong direction!

3. *Obtaining Consent to Search*

Yet another technique commonly employed in connection with drug stops disguised as traffic stops is seeking consent to make a search. Usually the officer attempts to get the driver to consent to a search of the vehicle, but sometimes the requested consent will be for search of the person.²⁷¹ Requesting consent has apparently become yet another part of the "routine" of "routine traffic stops,"²⁷² and it is thus not surprising that the cases contain acknowledgments by police about the frequency of this tactic.²⁷³ These requests result in affirmative responses in the overwhelming majority of cases.²⁷⁴ Guilty or innocent, "most motorists stopped and asked by police for consent to search their vehicles will expressly give *permission* to search their vehicles," resulting in "thousands upon thousands of motor vehicle searches of innocent travelers each year."²⁷⁵ This is apparently attributable to the training police have received in the art of acquiring what will pass for consent,²⁷⁶ plus the fact that many factors often present in this setting produce an affirmative response.²⁷⁷

271. A request for search of the person may also be directed at a passenger. *See, e.g., State v. Hardyway*, 958 P.2d 618 (Kan. 1998).

272. *See State v. Ready*, 565 N.W.2d 728, 731 (Neb. 1997) (quoting an officer's testimony that he "routinely" seeks consent to search following traffic stops).

273. *See, e.g., United States v. Lattimore*, 87 F.3d 647, 649 (4th Cir. 1996) (discussing officer's recorded statement that he searches "97 percent of the cars I stop"); *State v. Retherford*, 639 N.E.2d 498, 503 n.3 (Ohio Ct. App. 1994) (noting 786 requests to search vehicles made by testifying officer in one year and expressing concern over the "staggering" numbers of Ohio citizens affected).

274. One study showed that consent was given in about ninety percent of the cases. *See Daniel J. Steinbock, The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 533-35 (2001) (discussing Illya D. Lichtenberg, Voluntary Consent or Obedience to Authority: An Inquiry Into the "Consensual" Police-Citizen Encounter (1999) (unpublished Ph.D. dissertation, Rutgers University)).

275. Whorf, *Consent Searches*, *supra* note 18, at 2. This article and its companion piece, Robert H. Whorf, "Coercive Ambiguity" in the Routine Traffic Stop Turned Consent Search, 30 SUFFOLK U. L. REV. 379 (1997), examine in detail the traffic stop/consent search phenomenon.

276. In the words of Professor Whorf:

The "right" technique is by now well-established and is likely a frequent subject of law enforcement training in "drug interdiction." It goes like this: A police officer stops a vehicle for a routine traffic violation such as speeding; the police officer asks the driver to get out of the vehicle; the police officer chats in a friendly way with the driver and, sometimes, with

When the resulting search turns up drugs, the courts deal with the validity of the police action in seeking the consent in much the same way as they do with the other techniques previously discussed. Consent requests made during the course of the traffic stop are generally deemed proper,²⁷⁸ at least if the request itself did not unjustifiably delay the conclusion of the stop²⁷⁹ and was not preceded by “stalling”²⁸⁰ or earlier investigative efforts (e.g., interrogation about drugs) that caused improper delay.²⁸¹ On the other hand, any consent obtained will not be valid if the request came after the traffic stop had or should have run its course,²⁸² unless by the time of the request there was reasonable suspicion of drug activity²⁸³ or circumstances changing the situation to that of a “consensual encounter.”²⁸⁴ Because it typically takes little time to obtain consent, courts are inclined to validate consent requests that immediately follow completion of all other traffic-stop activities.²⁸⁵ If the officer legitimately sought the

passengers as well; the police officer issues a warning rather than a citation for the traffic offense; the police officer asks if the vehicle contains anything illegal; and then, right on the heels of the inevitable denial, the police officer asks for permission to search the vehicle.

Whorf, *Consent Searches*, *supra* note 18, at 2-3 (citations omitted).

277. Again, as Whorf puts it:

There are plausible explanations for the ready acquiescence to search by the “guilty”: 1) the overall coercive nature of the routine traffic stop turned consent search; 2) the technique of catching the motorist off-guard by the quick transition from traffic stop to contraband investigation; 3) the possible belief by consentors that well-concealed contraband will not be found; 4) the possible belief by consentors that if they readily acquiesce, police suspicion will be dispelled resulting in a cursory search or in no search at all; and 5) the likely belief by consentors that, if they refuse consent, police suspicion will be heightened resulting in a forcible search.

Id. at 22 n.121.

278. *E.g.*, *United States v. Purcell*, 236 F.3d 1274 (11th Cir. 2001); *People v. Reddersen*, 992 P.2d 1176 (Colo. 2000).

279. *See State v. Johnson*, 51 P.3d 1112, 1116-17 (Idaho App. 2002).

280. *See, e.g.*, *United States v. Jones*, 234 F.3d 234, 241 (5th Cir. 2000) (finding search illegal and consent invalid where officer employed “dilatory tactic” of delaying handing over of warning ticket).

281. *See, e.g.*, *United States v. Brigham*, 343 F.3d 490, 501 (5th Cir. 2003) (finding search illegal earlier where officer engaged in “questioning unrelated to the traffic violation for eight minutes *before* commencing the computer check”). This panel decision, however, has been set for rehearing en banc. *United States v. Brigham*, 350 F.3d 1297 (5th Cir. 2003).

282. *United States v. Santiago*, 310 F.3d 336 (5th Cir. 2002); *Harris v. Commonwealth*, 581 S.E.2d 206 (Va. 2003).

283. *See, e.g.*, *United States v. Carrate*, 122 F.3d 666 (8th Cir. 1997); *Heincelman v. State*, 56 S.W.3d 799 (Tex. App. 2001).

284. *See, e.g.*, *United States v. West*, 219 F.3d 1171 (10th Cir. 2000); *United States v. Chan*, 136 F.3d 1158 (7th Cir. 1998); *State v. Hardyway*, 958 P.2d 618 (Kan. 1998); *State v. Williams*, 646 N.W.2d 834 (Wis. 2002).

285. *See, e.g.*, *United States v. Carrasco*, 91 F.3d 65, 66 (8th Cir. 1996) (validating request that came three seconds after delivering warning ticket); *State v. Kremen*, 754 A.2d

consent, chances are the consent itself will be upheld as being voluntary.²⁸⁶

Here again, the failure of most courts, when dealing with traffic-stop consent searches, to adhere to the *Terry* limits on what constitutes a reasonable temporary detention has produced very distressing results. Consent searches are no longer an occasional event by which a crime suspect may "advise the police of his or her wishes and for the police to act in reliance on that understanding,"²⁸⁷ but are now a wholesale activity accompanying a great many traffic stops, submitted to by most drivers, guilty or innocent, and resulting in continued interruption of their travels for a substantial period of time²⁸⁸ while they wait by the roadside as their vehicles are ransacked, a process which beyond question "is highly invasive of the dignitary interests of individuals."²⁸⁹ Certainly the best way to deal with this problem is as in *State v. Fort*,²⁹⁰ which involved a traffic stop for speeding and a cracked windshield. The court quite correctly held that the officer's "consent inquiry . . . went beyond the scope of the traffic stop and was unsupported by any reasonable articulable suspicion,"²⁹¹ meaning the evidence obtained via the consent must be suppressed, without regard to whether the inquiry and subsequent search "may also have extended the duration of the traffic stop."²⁹²

964, 968 (Me. 2000) (holding that officer, after writing ticket, may still pursue "a simple request for permission to search a vehicle").

286. Courts holding these consents valid are sometimes inclined to overlook rather convincing evidence of coercion, such as that the defendant was threatened that if he did not consent, a drug dog would be summoned to sniff the vehicle. *See, e.g., United States v. Lattimore*, 87 F.3d 647 (4th Cir. 1996); *Cole v. State*, 562 S.E.2d 720 (Ga. Ct. App. 2002). This would suggest that *State v. George*, 557 N.W.2d 575, 580 (Minn. 1997), is correct in concluding that the nature of traffic-stop consents is such that appellate courts should give those consents more "careful review." Indeed, it may be that the concept of voluntariness should be looked at differently in this context. One commentator has asserted that in the common case of a police-citizen encounter followed by a purported consent to search upon a police "request," the "question should be whether the officer's behavior was too coercive given the reason for the encounter," e.g., "the reasonableness of treating [the citizen] like he was a probable drug courier." William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064-65 (1995). Another has argued that this wholesale seeking of consents that are almost always given and then almost always upheld by the courts means it is time for the "drastic solution" of eliminating consent searches entirely. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 271 (2001).

287. *United States v. Drayton*, 536 U.S. 194, 207 (2002).

288. "A typical vehicle search for drugs is likely to last twenty to forty minutes or more." Whorf, *Consent Searches*, *supra* note 18, at 19.

289. *Id.*

290. 660 N.W.2d 415 (Minn. 2003).

291. *Fort*, 660 N.W.2d at 419.

292. *Id.* at 419 n.1. A slightly different approach, with essentially the same benefits, is that taken in *State v. Carty*, 790 A.2d 903, 905 (N.J. 2002), namely, "that, in order for a consent to search a motor vehicle and its occupants to be valid, law enforcement personnel

4. Sniffing by Drug Dogs

Especially in recent years, it seems that a good many of the officers making a traffic stop either have a drug dog with them initially²⁹³ or else are able to summon one to the scene in short order.²⁹⁴ That being the case, a not uncommon tactic these days in police efforts to use traffic stops as a means of drug interdiction is to lead a drug dog around the detained vehicle to see if the dog will “alert.”²⁹⁵ This process can be carried out rather quickly — in “no more than two minutes,”²⁹⁶ and in some instances in “20, 30 seconds at the most.”²⁹⁷ If the dog should alert, this is deemed to establish probable cause that the vehicle contains drugs, justifying an immediate full search of it.²⁹⁸

The courts have responded to the use of drug-sniffing dogs in connection with traffic stops much as courts have responded to the other investigative techniques previously discussed. First of all, if the detention was continuing²⁹⁹ or had been resumed³⁰⁰ when the sniff occurred but the time had run out on the traffic-stop detention either

must have a reasonable and articulable suspicion of criminal wrongdoing prior to seeking consent to search a lawfully stopped motor vehicle.”

293. See, e.g., *State v. Box*, 73 P.3d 623 (Ariz. Ct. App. 2003); *State v. DeLaRosa*, 657 N.W.2d 683 (S.D. 2003).

294. See, e.g., *Lecorn v. State*, 832 So. 2d 818 (Fla. Ct. App. 2002). The mere act of summoning a drug dog to the scene is within the total discretion of the officer, and this step is not subject to a reasonable-suspicion limitation or any other such requirement. *State v. Carlson*, 657 N.E.2d 591, 594 (Ohio Ct. App. 1995).

295. Ordinarily the drug dog remains outside the vehicle, though occasionally the dog enters it. Compare *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989) (“[T]he dog’s instinctive actions did not violate the Fourth Amendment” as there was “no evidence . . . that the police asked Stone to open the hatchback so the dog could jump in. Nor is there any evidence the police handler encouraged the dog to jump in the car.”), with *United States v. Winningham*, 140 F.3d 1328, 1330-31 (10th Cir. 1998) (finding a search where a drug dog jumped through an open door and alerted to a vent inside the car and deeming *Stone* “inapposite” because here, unlike in *Stone*, “the officers themselves opened the door,” making apparent a “desire to facilitate a dog sniff of the van’s interior”).

296. *Box*, 73 P.3d at 629.

297. *Bradshaw v. State*, 759 N.E.2d 271, 274 (Ind. Ct. App. 2001) (quoting an officer’s testimony).

298. *United States v. \$404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999); *State v. Tucker*, 979 P.2d 1199, 1201 (Idaho 1999).

299. Cf. *Box*, 73 P.3d at 629 (holding that a traffic-stop detention had ended, and a post-detention consensual encounter had begun, when the officer “returned appellant’s documents to him and handed him the written warning, [and] appellant was free to leave”).

300. Even if the events otherwise clearly indicate a termination of custody (e.g., the officer tells the driver he is “free to go”), if the officer then announces that a drug dog has been summoned to do a sniff of the vehicle, this amounts to a new and illegal seizure, for anyone who was “present when a canine unit had been summoned to the scene and was then told by [the officer] that he was going to have a canine unit conduct a drug sniff of [the] car” would not “reasonably have felt free to leave.” *United States v. Beck*, 140 F.3d 1129, 1135-36 (8th Cir. 1998).

because its immediate lawful objectives had been accomplished³⁰¹ or because they had not been accomplished only because of stalling (a likely tactic when a drug dog has been summoned from some distance and has not yet arrived³⁰²), then the dog sniff and its fruits are all suppressible consequences of the illegal detention,³⁰³ unless of course the continuation of the detention beyond its otherwise lawful limits was justified by the existence of reasonable suspicion of drug possession.³⁰⁴ But precisely because the dog sniff itself takes so little time, courts in this context have been especially willing to employ a "fudge factor" regarding the temporal limits of the traffic stop; if the dog sniff is conducted immediately after completion of those tasks actually connected with the traffic violation, the resulting additional custody is deemed so de minimis as to be of no consequence.³⁰⁵ Such cases are thus treated like those in which the use of a dog on the vehicle is upheld because it occurs within the proper time of the traffic stop, that is, before the citation has been issued³⁰⁶ or before a return has been received on the radio or computer check regarding the license, registration, and outstanding warrants.³⁰⁷

Here as well, it may be concluded that the appellate courts have, for the most part, missed the mark completely on the matter of drug-sniffing dogs used in connection with traffic stops. There should be no need for the complex and often nearly impossible task of calculating just when the time should be deemed to have expired in the case of a particular traffic stop and, often, the equally bedeviling task of heading down the slippery slope to determine just how much extra time after the proper ending of the traffic stop should be excused on some de minimis theory. Rather, the central point is that use of a drug-sniffing dog has *absolutely nothing* to do with the traffic infraction that served as the sole justification for the stop in the first place,³⁰⁸ and for

301. See, e.g., *Dukes v. State*, 753 So. 2d 780 (Fla. Dist. Ct. App. 2000); *Damato v. State*, 64 P.3d 700 (Wyo. 2003).

302. *Maxwell v. State*, 785 So. 2d 1277 (Fla. Dist. Ct. App. 2001); *People v. Cox*, 782 N.E.2d 275, 280 (Ill. 2002).

303. *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997); *State v. Fields*, 662 N.W.2d 242 (N.D. 2003).

304. *United States v. Bailey*, 302 F.3d 652 (6th Cir. 2002); *Wilson v. State*, 822 A.2d 1247 (Md. Ct. Spec. App. 2003).

305. See, e.g., *United States v. Gregory*, 302 F.3d 805 (8th Cir. 2002); *State v. Box*, 73 P.3d 623 (Ariz. 2003).

306. *Lecorn v. State*, 832 So. 2d 818 (Fla. 2002); *State v. Parkinson*, 17 P.3d 301 (Idaho Ct. App. 2000).

307. *Rogers v. State*, 560 S.E.2d 742 (Ga. Ct. App. 2002); *Wilkes v. State*, 774 A.2d 420 (Md. 2001).

308. With the arguable exception of those instances in which the stop is grounded in a reasonable suspicion that the driver is operating the vehicle under the influence of some controlled substance.

that reason alone should not be permitted at all. Allowing the dogs to be used serves only as a positive encouragement for police to engage in pretext and subterfuge, hardly a defensible move given the common knowledge that traffic-law enforcement has been diverted from its justified objectives to serve as a means for seeking out drugs.³⁰⁹ Allowing use of the drug dogs at all in conjunction with traffic stops can only encourage the making of stops for insignificant and technical violations on the basis of unarticulated suspicions and mere hunches or, at worst, on totally arbitrary and discriminatory bases. Moreover, allowing use of the dogs at all adds to the process another decision, whether to summon a drug dog, that the cases indicate requires no reasonable suspicion nor, for that matter, any justification whatsoever,³¹⁰ but that the practice indicates is also likely to be made on an arbitrary basis.³¹¹

In justification for the status quo, it is stated that these drug-dog sniffs of vehicles do not constitute Fourth Amendment searches³¹² and that “the presence of a single drug detection dog does not necessarily intensify the level of detention.”³¹³ It is true that such use of a drug dog is no search; the Supreme Court so held in *City of Indianapolis v. Edmond*,³¹⁴ but that did not stop the Court from concluding that use of drug dogs in a checkpoint context violated the Fourth Amendment when incident to a stopping of vehicles having the sole lawful basis of enforcing the traffic laws.³¹⁵ In the case of individualized traffic stops,

309. By like reasoning, it has been cogently argued that “the only way to assure that a [traffic-law-enforcement] roadblock is adopted for permissible reasons is to deny the use of drug sniffing dogs or any similar devices whose only purpose is to search for drugs.” Stephen Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 154 (2003).

310. See *supra* note 294. But see *People v. Cox*, 782 N.E.2d 275, 280 (Ill. 2002) (indicating that one court was greatly troubled by the summoning of a drug dog in the absence of any suspicion whatsoever).

311. When the *Orlando Sentinel* studied the operations of the Criminal Patrol Unit of the Orange County Sheriff’s Office, “a special patrol squad that uses routine traffic stops to search for narcotics,” it found upon reviewing the “records of more than 3,800 stops by the Unit” that “black drivers represented 16.3% of the drivers stopped,” but accounted for “more than 70% of the canine searches.” Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 352-53 (1998) (discussing Roger Roy & Henry Pierson Curtis, *When Cops Stop Blacks, Drug Search Often Follows: Orange County Deputies Deny Race Plays a Role in Stops on the Turnpike, But Some Police Officials Agree Blacks Have a Right to Be Unhappy*, ORLANDO SENTINEL, June 8, 1997, at A1).

312. *United States v. Gregory*, 302 F.3d 805, 810 (8th Cir. 2002); *State v. Box*, 73 P.3d 623 (Ariz. 2003).

313. *State v. Parkinson*, 17 P.3d 301, 307 (Idaho Ct. App. 2000).

314. 531 U.S. 32 (2000).

315. The only difference between *Edmond* and the situation here under discussion is that there the stoppings were without probable cause or reasonable suspicion of any traffic-law offense, albeit pursuant to the operation of a checkpoint assuring against any of the arbitrariness that is possible in case-by-case traffic stops. Given that distinction, it might well be argued that the use of drug dogs incident to individualized stops is worse than incident to

the question again is not whether any of the drug-seeking tactics are themselves Fourth Amendment searches, for the point is that they taint the stop purportedly made only for a traffic violation because they have absolutely no relationship to traffic-law enforcement. Moreover, even if it is true that the use of drug dogs in this context is not a search, surely such conduct is close to the line, considering that it is quite different from "the sniffing of inanimate and unattended objects"³¹⁶ that courts have typically approved, as in the Supreme Court's initial embrace of dog sniffing in *United States v. Place*, where the absence of "embarrassment" was emphasized.³¹⁷ In short, the presence of the dog at a traffic stop does intensify the level of the detention.³¹⁸ Yet another relevant consideration is that drug dogs are not infallible, so that their employment in instances where there is not a prior reasonable suspicion that drugs are present will result in a much higher number of false positives and, in turn, total ransacking of vehicles containing no contraband.³¹⁹

For all these reasons, the correct result is that reached in *State v. Wiegand*,³²⁰ where, after a defendant's vehicle was stopped for a burned-out headlight, one officer walked a drug dog around the vehicle while another officer was writing out the ticket. The court concluded that this did not constitute a search under either the federal or state constitution, and also noted that the defendant did not argue that the stop in this case lasted too long, but nonetheless ruled in the defendant's favor. Proceeding step by step, the court reasoned (1) that "the *Terry* principles are appropriately applied in this case"; (2) that "*Terry* authorizes us to balance the nature and quality of the intrusion into the individual's Fourth Amendment interests against the importance of the governmental interests as stake"; (3) that "there is some intrusion into privacy interests by a dog sniff"; and (4) that consequently the Fourth Amendment requires "a reasonable,

a checkpoint operation, especially since targeting a particular vehicle for a publicly conducted sniff on the roadside is accusatory in nature.

316. *Doe v. Renfrow*, 451 U.S. 1022, 1026 n.4 (1981) (Brennan, J., dissenting from denial of certiorari).

317. 462 U.S. 696, 707 (1983).

318. Which explains why a state court might conclude that a drug dog's sniffing of an automobile stopped for a traffic infraction constitutes a search under the state constitution, as in *People v. Haley*, 41 P.3d 666 (Colo. 2001). Also noteworthy is that other states have found sniffing by drug dogs to be a search under their state constitutions in a broader set of circumstances. *See, e.g., State v. Pellicci*, 580 A.2d 710 (N.H. 1990); *People v. Dunn*, 564 N.E.2d 1054 (N.Y. 1990).

319. "The judiciary should be most skeptical of sniffs conducted in a random, unfocused manner. All but the most carefully planned random sniffs using highly-trained dog teams will likely result in many false detections." Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L. J. 405, 432-33 (1997).

320. 645 N.W.2d 125 (Minn. 2002).

articulable suspicion of drug-related criminal activity before law enforcement may conduct a dog sniff around a motor vehicle stopped for a routine equipment violation in an attempt to detect the presence of narcotics.”³²¹

III. THE FINISH: FROM SEIZURE TO “CONSENSUAL ENCOUNTER”

Whether or not limitations of the kind proposed in Part II are in place, it sometimes happens that the police are unable to complete their drug investigation by the time that the traffic stop has reached the point where all the steps properly taken into account in determining how long it may go on have been completed. This running of the time often does not represent a substantial obstacle to continuing the investigation because of the availability of yet another “routine” (used this time to mean *both* “a regular course of procedure” and “a carefully rehearsed act”³²²). All the officer has to do to obviate any and all time and scope limitations is to perform in such a manner that courts are likely to treat as manifesting a termination of the seizure even though any person who has been detained for a traffic violation is unlikely to so perceive the situation. In many jurisdictions, this is rather easy to bring off; all it calls for is the well-known Lt. Columbo gambit (“one more thing . . .”).³²³

Illustrative is *United States v. Lattimore*,³²⁴ where a trooper stopped Lattimore for speeding and then had him sit with the officer in the patrol car during ticketing. After issuing citations and returning Lattimore’s driver’s license, and while Lattimore was still in the patrol vehicle, the trooper began questioning Lattimore about the presence of narcotics or any contraband in his vehicle, which Lattimore denied. The officer then requested and obtained Lattimore’s oral consent to search the vehicle. In rejecting Lattimore’s claim that his consent was obtained during an illegal extension of the traffic stop, the appellate court stated:

Trooper Frock did not question Lattimore concerning the presence of narcotics or contraband in his automobile, or request permission to search it, until after the officer had issued the citations and returned Lattimore’s driver’s license, indicating that all business with Lattimore was completed and that he was free to leave. During the subsequent conversation between Trooper Frock and Lattimore, “a reasonable

321. *Id.* at 133-35. A more recent decision in accord with *Weigand*, *People v. Caballes*, 802 N.E.2d 202 (Ill. 2003), is headed for the Supreme Court. *Illinois v. Caballes*, 124 S. Ct. 1875 (2004) (granting cert.).

322. 14 OXFORD ENGLISH DICTIONARY 172 (2d ed. 1989).

323. See Columbo, Nostalgia Central.com, at <http://www.nostalgiacentral.com/tv/cops/columbo.htm> (last visited June 2, 2004).

324. 87 F.3d 647 (4th Cir. 1996).

person would have felt free to decline the officer[']s requests or otherwise terminate the encounter."³²⁵

Various other federal and state courts have taken essentially the same approach,³²⁶ grounded in the common assumption that there is a "clear line . . . between police-citizen encounters which occur before and after an officer returns a person's driver's license, car registration, or other documentation."³²⁷ But, while it is true that mere interrogation does not bring about a seizure that otherwise did not exist,³²⁸ it is hard to swallow the conclusion in *Lattimore* that returning one's credentials with a citation or warning ticket sufficiently manifests a change in status when immediately followed by interrogation.³²⁹

Rather, the realities of the situation were appreciated much more clearly in *State v. Robinette*,³³⁰ a case that involved quite similar facts. Robinette was stopped for speeding, after which the deputy asked for his driver's license and took it back to the squad car to check it; the deputy then had Robinette exit his car and stand between the two vehicles, where his reactions could be taped by the video camera in the squad car, which the deputy then activated. The deputy then returned Robinette's license and gave him a verbal warning, following which he delivered an ungrammatical version of the Lt. Columbo gambit, saying: "One question before you get gone [*sic*]: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"³³¹ When Robinette denied having any such items, the deputy then sought and obtained Robinette's consent to a search of his car, which uncovered drugs. In concluding that the consent had been obtained during an illegal seizure rather than during a post-seizure consensual encounter, the Ohio Supreme Court reasoned:

The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow. . . .

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

325. *Id.* at 653 (quoting the test in *Florida v. Bostick*, 501 U.S. 429, 438 (1991)).

326. *E.g.*, *United States v. West*, 219 F.3d 1171 (10th Cir. 2000); *State v. Williams*, 646 N.W.2d 834 (Wis. 2002).

327. *United States v. McKneely*, 6 F.3d 1447, 1451 (10th Cir. 1993).

328. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Florida v. Royer*, 460 U.S. 491, 497 (1983).

329. For a more detailed criticism of that conclusion, see Maclin, *Freeway*, *supra* note 251, at 131-64.

330. 653 N.E.2d 695 (Ohio 1995), *rev'd*, *Ohio v. Robinette*, 519 U.S. 33 (1996).

331. *State v. Robinette*, 653 N.E.2d at 696 (alteration in original).

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. . . .

Therefore, we are convinced that the right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.³³²

While the Ohio court's judgment was thereafter reversed in *Ohio v. Robinette*,³³³ this should not be taken to mean that the United States Supreme Court has embraced the *Lattimore* approach, as compared to that in the middle paragraph in the above quotation, on what it takes to transform what was admittedly a seizure into nothing more than a consensual encounter. This is because the Court was snookered by the state of Ohio into considering only the issue set out in the state's certiorari petition — as the Court phrased it, "whether the Fourth Amendment requires that a lawfully seized defendant must be advised that he is 'free to go' before his consent to search will be recognized as voluntary."³³⁴ That is, the Supreme Court remarkably proceeded to decide a question which was really not in the *Robinette* case at all and had not even been mentioned by the state court,³³⁵ and in the process managed to avoid entirely the important issue the state court had taken on: whether a traffic offender somehow becomes "unseized" upon return of his license notwithstanding a continuation (albeit on a different subject) of police discussion with the stopped driver.³³⁶

On the voluntary-search issue, all members of the Court in *Robinette* expressed agreement that the Fourth Amendment does not require that a lawfully seized person be advised he is "free to go"

332. *Id.* at 698-99.

333. 519 U.S. 33 (1996).

334. *Ohio v. Robinette*, 519 U.S. at 35.

335. Actually, the lower court did assert at one point that "[t]he burden is on the state to prove that the consent to search was voluntarily given," *State v. Robinette*, 653 N.E.2d at 698 (citing *Florida v. Royer*, 460 U.S. 491, 497 (1983)), but it is readily apparent that this was not intended as a characterization of the matter at issue, for in both the preceding and following sentences the court makes clear that the matter under consideration in the instant case was not whether the consent was voluntary or not but rather whether, even if voluntary, it was the fruit of an illegal seizure.

336. As aptly stated by Dery, "[t]he crucial issue missed in *Robinette* dealt not with the resulting consent, but with the continuing seizure. By failing to target the correct question, the Court missed the opportunity to clarify an area of the law suffering from uncertainty." George M. Dery III, "When Will This Traffic Stop End": *The United States Supreme Court's Dodge of Every Detained Motorist's Central Concern* — *Ohio v. Robinette*, 25 FLA. ST. U. L. REV. 519, 565 (1998).

before his consent to search will be recognized as voluntary. This is hardly surprising. As the majority in *Robinette* pointed out, the state court had adopted a per se rule, an approach generally disfavored by the Supreme Court, which has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry" (except, of course, when the bright line favors the prosecution rather than the defendant³³⁷). Moreover, in the seminal case on the consent-search voluntariness test, *Schneckloth v. Bustamonte*, the Court had rejected as "impractical" a proposal of another kind of warning as a prerequisite to a voluntary consent, namely, a caution that defendant had a right to refuse the request.³³⁸ This made it easy for the Court to say in *Robinette* that it would likewise be "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."³³⁹

The most perverse aspect of the misdirection in *Robinette* is that lower courts have tended to read the case as embracing the *Lattimore* approach,³⁴⁰ when in fact the analysis summarized above speaks only to the voluntariness issue and says nothing whatsoever about the more significant issue presented by the *Lattimore* genre of cases: whether the prior, lawfully commenced seizure did not end when it should have, so that the consent to search, albeit voluntary, is an inadmissible fruit of an illegal seizure. Only Justice Stevens thought it appropriate to talk about the latter issue, and his analysis deserves careful attention, for he correctly states how the *Lattimore* line of cases ought to be handled. As Stevens notes in his dissent, under the Court's decisions the seizure issue is to be resolved by asking whether "a reasonable person would have believed that he was not free to leave."³⁴¹ A reasonable motorist in the defendant's shoes in *Robinette* would have so believed, Stevens points out, considering the fact that the officer never told defendant he was free to leave, the additional

337. *Ohio v. Robinette*, 519 U.S. at 39. For example, just two months after *Robinette* the Court endorsed a pro-prosecution bright-line rule on requiring passengers to exit stopped vehicles in *Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

338. *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973).

339. *Ohio v. Robinette*, 519 U.S. at 40.

340. See, e.g., *United States v. Chan*, 136 F.3d 1158, 1159 (7th Cir. 1998) (contending that under *Robinette*, whether the "lack of a clear break in the process . . . made the consent involuntary" or "converted the traffic stop, initially lawful, into an unlawful arrest . . . are just two ways of making the same argument, and should not affect either analysis or outcome"); *State v. Ready*, 565 N.W.2d 728, 732-33 (Neb. 1997).

Some courts have been more perceptive, as in *People v. Brownlee*, 713 N.E.2d 556, 563 (Ill. 1999) (observing correctly that the "continued-detention issue" in the instant case "requires consideration independent from *Robinette*," which "does not speak to the issue of taint").

341. *Ohio v. Robinette*, 519 U.S. at 46 (Stevens, J., dissenting) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

questioning and request for consent was sought, in the officer's language, "before you get gone," and defendant was at that time standing in front of a video camera in response to an official command. Indeed, it would take less than that to give rise to such a reasonable belief; as the Supreme Court put it earlier in *Berkemer v. McCarty*, "few motorists would feel free . . . to leave the scene of a traffic stop without being told they might do so."³⁴² Indeed, one of the facts that emerged in *Robinette* strongly reinforces that conclusion, as Stevens explained:

The fact that this particular officer successfully used a similar method of obtaining consent to search roughly 786 times in one year . . . indicates that motorists generally respond in a manner that is contrary to their self-interest. Repeated decisions by ordinary citizens to surrender that interest cannot satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so.³⁴³

It is thus nonsensical for courts to continue their embrace of the *Lattimore* position that a reasonable motorist, having been seized, would conclude he was free to leave (even though not told so) in the face of ongoing police interrogation. The police know this is not so, which is why materials prepared by the police for public consumption³⁴⁴ and for use nationally in driver's education training³⁴⁵ state unequivocally that a motorist subjected to a traffic stop is not free to leave until expressly told so by the officer. And thus, as some courts have learned, judges should instead ask when not even a notice from the officer that the motorist is free to leave can carry the day because circumstances suggesting otherwise are also present.³⁴⁶

IV. SOME FINAL REFLECTIONS

What we have seen in this look at "routine traffic stops" from start to finish is that in terms of what may start the process, what is deemed

342. 468 U.S. 420, 436 (1984).

343. *Ohio v. Robinette*, 519 U.S. at 48 (citations omitted).

344. For example, on one website a police department maintains to inform the public about traffic stops, the question, "when is the stop over?" is answered as follows: "The traffic stop is over, when the Officer tells you that you are free to go." WEST UNION POLICE DEP'T, TRAFFIC STOPS, at http://www.wupd.com/traffic_stops.htm (Dec. 9, 2002).

345. For example, a police-prepared lesson plan for driver's education students, distributed nationally by the National Association of School Resource Officers, includes this point under the heading: "During the Stop/Contact with the officer": "Can not leave until officer tells you that you are free to go." Officer Ken Teppel, Bolingbrook Police Dep't, Lesson Plan for Conducting a Unit of Instruction in "What is Going to Happen If You Are Stopped for a Traffic Violation" 4-5, at <http://www.nasro.org/members/lessons/stoppedforatrafficviolation.doc> (June 23, 2000).

346. See, e.g., *State v. Robinette*, 685 N.E.2d 762 (Ohio 1997); *Commonwealth v. Freeman*, A.2d 903 (Pa. 2000); *State v. Ballard*, 617 N.W.2d 837 (S.D. 2000).

to end the process, and virtually everything in between, most state and federal courts have applied Fourth Amendment principles in a loose and illogical fashion, thus facilitating use of the traffic stop by law enforcement as a readily available mechanism for at least appearing to win³⁴⁷ some battles in the war on drugs. Stops are permitted across the board on nothing more than reasonable suspicion and without regard to the pretextual or arbitrary nature of the process by which traffic violators are selected for "the treatment." That treatment is one that permits police to engage in many investigative activities incident to the stop that serve no purpose other than as an attempt to uncover drugs, contrary to the *Terry* limits on stops that obtain in other areas of law enforcement. And then there is the end of the stops, the fact that a traffic stop is deemed to have morphed into a mere "consensual encounter" in circumstances where any reasonable traveler would believe he was still under the control of the police. And all this has been allowed to occur notwithstanding the common knowledge that law enforcement has co-opted the traffic stop and transmogrified it into a mechanism for random and often overbearing quests for drugs, a fact that would seem to call for strict rather than loose application of Fourth Amendment standards.

In a recent lecture to federal judges, Professor Stephen Saltzburg commented upon "a combination of disturbing trends" he saw in the Supreme Court's Fourth Amendment decisions:

First, there is the tendency of the Supreme Court to pretend that the world we all know is not the world in which law enforcement operates. To be blunt, I contend that the Supreme Court has offered opinions that strain to describe human nature and typical behavior and rely upon beliefs and reactions of ordinary people to fit the world that law enforcement wishes the Court to believe is real. Whether the Court is out of touch with the world in which most people live or is blinking and winking to aid law enforcement probably does not matter. Decisions that do not correspond to the world in which most people live threaten to undermine the integrity of the judicial system.

347. It is open to serious discussion, however, whether drug enforcement via traffic stops is having any real effect:

The entire war on drugs is fraught with ambiguity and ambivalence, and many commentators have concluded that the effort to reduce drug consumption by limiting supply is doomed to failure. We need not reach this question, however, because the specific program at issue is ineffective by any standard. Fishing for drug couriers in the immense stream of cars on interstate highways is a hopeless strategy for eliminating drug trafficking; it probably has no impact whatsoever on drug markets.

Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1431 (2002) (citations omitted).

Moreover, whatever impact it does have is probably offset by the costs in terms of damaged police-citizen relations, considering that "[f]or many law-abiding citizens their only contact with the criminal justice system is via interaction with the police, predominantly during traffic stops." *Martinez v. Village of Mount Prospect*, 92 F. Supp. 2d 780, 783 (N.D. Ill. 2000).

Second, the Court has been too quick to adopt “bright line” rules in an effort, supposedly, to provide more guidance to law enforcement. There are two principal problems with these rules. One is that bright line rules that are divorced from the rationale for action never provide as good guidance as the rationale itself. The other problem is that the Fourth Amendment’s place in the Bill of Rights strongly suggests that, if bright line rules are to be adopted, they should protect the constitutional rights of citizens rather than promote police efficiency.

Third, there are recent signs that the Court is hinting to law enforcement that it can escape the Fourth Amendment’s restrictions if it offers phony explanations for actions. In other words, if law enforcement is honest about its intentions, the Fourth Amendment may inhibit actions; but, if law enforcement is willing to offer a false defense of its actions, it may escape the limitations of the Fourth Amendment. These signs are troubling because the Court ought never to be encouraging governmental subterfuge.

Fourth, the Supreme Court’s tolerance of pretext searches and seizures may well provide more deference to law enforcement than any civilized system should. The result may be to provide too much discretion to law enforcement and to intrude unnecessarily upon the privacy of less powerful members of society.

These four trends are related to one another. They suggest a judicial straining to aid law enforcement and an undervaluing of the Fourth Amendment protection of privacy and freedom from government intrusion.³⁴⁸

I not only share that view, but would say in addition that this is also a fair description of the actions of most of the state and federal judiciary with respect to the so-called “routine traffic stop.” The courts’ views of how little it takes to produce a post-stop consensual encounter are grounded in nothing else than a very distorted view of the “reactions of ordinary people” caught up in a traffic stop. The rules on traffic stops as laid down (or at least as enforced) by the courts are nothing more than a series of “bright lines” giving police authority to do certain things in connection with all traffic stops that, at best, might be reasonable under very unique circumstances. Moreover, allowing prohibited drug stops to be sanitized by calling them traffic stops is a prime example of the judiciary assuring police that “phony explanations” are the way around the Fourth Amendment. And certainly the “tolerance of pretext searches and seizures” that lies at the heart of the traffic-stop-for-drugs phenomenon “does provide more deference to law enforcement than any civilized system should.”

348. Saltzburg, *supra* note 309, at 133-34 (citations omitted) (originally presented as a lecture to the National Symposium for United States Court of Appeals Judges, in Washington, D.C. on October 21, 2002.).

While police are sworn to uphold the Constitution, they are, after all, "engaged in the often competitive enterprise of ferreting out crime."³⁴⁹ It is thus perhaps not too surprising that, in the course of their attempts to stem the drug traffic, the police have been so relentless in pushing their claimed authority relating to traffic stops to the absolute limits.³⁵⁰ But it is sad, to say the least, that so many judges have served as ready and willing accomplices in these excesses, thereby treating the Fourth Amendment as largely an irrelevancy in the context of "routine traffic stops." Surely the one hundred ninety million licensed drivers in this country,³⁵¹ subjected to the millions upon millions of traffic stops made annually,³⁵² are entitled to more than this.

349. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

350. As Justice Jackson noted in his dissent in *Brinegar v. United States*, "the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

351. "There were 190,625,023 licensed drivers in the United States in 2000." OFFICE OF HIGHWAY POLICY INFORMATION, U.S. DEP'T OF TRANSP., LICENSED DRIVERS, at <http://www.fhwa.dot.gov/ohim/onh00/onh2p4.htm> (last modified Feb. 14, 2003).

352. There are apparently no national figures on the number of traffic stops. In *Maryland v. Wilson*, Justice Stevens noted that over one million traffic stops were made in Maryland alone in a single year. 519 U.S. 408, 419 (1997) (Stevens, J., dissenting).