Cops, Cars, and Citizens: Fixing the Broken Balance

Arnold H. Loewy

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COPS, CARS, AND CITIZENS: FIXING THE BROKEN BALANCE

ARNOLD H. LOEWY[†]

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*"'Fidelity' to the commands of the Constitution suggests balanced judgment rather than exhortation. The highest 'fidelity' is not achieved by the judge who instinctively goes furthest in upholding even the most bizarre claim of individual constitutional rights, any more than it is achieved by a judge who goes furthest in accepting the most restrictive claims of governmental authorities. The task of this Court, as of other courts, is to 'hold the balance true.'"*¹

I. THE NIGHTMARE

Imagine that you are a law student driving home to see your spouse and children after a hard day at school. As you drive down Oak Street towards your home, you see and wave to a police officer, glad that he is patrolling your street because of the frequency of people driving over forty-five mph on your twenty-five mph street. Shortly thereafter, you see his blue light behind you pulling you over. You pull over and engage in the following conversation:

You: I'm glad you're here. We've had a real problem with speeders in the neighborhood. But why did you stop me?

Police officer: You were going twenty-nine mph in a twenty-five mph zone.

You: The problem has been drivers driving over forty-five mph. That's why we asked you to step up neighborhood patrol. You aren't going to ticket me for going four miles over the speed limit, are you?

Police officer: Oh no, nothing like that, but I would like to search your car.

You: Sorry, I've got too many private items in my car. I can't let you do that.

Police officer: Sorry you feel that way. In that case, I'm going to have to arrest you.

You: Now why would you want to do a thing like that?!

Police officer: Because I can search your car incident to the arrest. Then I can have it towed to the impound lot where pursuant to our normal procedures, your car, including its

¹ Illinois v. Gates, 462 U.S. 213, 241 (1983).

trunk can be inventoried.² And, of course, I'll have to handcuff you to take you to the police station where you'll be held in a cell and fingerprinted before you are released. Then maybe the next time I ask to search your car, you won't be so uncooperative.

The police officer then carries out his threat, leaving your private items haphazardly thrown in a plastic garbage bag. As you leave the jail, the police officer hands you the bag, and the dialogue continues:

Police officer: Real sorry that I messed up your article on abusive police practices. Were you writing that for the law review?

You: As a matter of fact, I was.

Police officer: And that magazine on cross-dressing sure was interesting. Do your friends know that you're into that?

You (exasperated): I'm not into that! I have a cousin in Nebraska that's into that, and I got the magazine so I could understand it better.

Police officer: Sure, that's what they all say.

You: OK buster, that does it! I'm filing suit against you tomorrow.

Police officer: Don't bother. Everything I did is perfectly constitutional.

Just then you wake up and exclaim: "Thank God I live in America and this can't happen." You then breathe a sigh of relief, drink your morning coffee, and start reading your assignment for Criminal Procedure: *Atwater v. City of Lago Vista*³ and *Arkansas v. Sullivan*.⁴ As you finish your assignment, you slam down the casebook in disgust and exclaim: "My God! The nightmare is real."

II. HOW THE BALANCE GOT BROKEN

The balance has not always been askew. Much of the Supreme Court's jurisprudence reflects a careful effort to balance the factors that make automobile searches different from other kinds of searches. While one might not always agree with the

² See *Colorado v. Bertine*, 479 U.S. 367, 371 (1987); discussion *infra* Part II.B.

³ 532 U.S. 318 (2001); see discussion *infra* Part III.B.

⁴ 532 U.S. 769 (2001); see discussion *infra* Part III.C.

Court's balance, the effort to balance was almost always there. From a police perspective, the balance was constantly improving. Occasional backward steps were generally countered by two positive ones. Of course, from a libertarian perspective, the balance was moving in the other direction. Yet just months before the *coup de grace* that made the nightmare a reality, the Court invalidated an automobile checkpoint scheme designed to interdict drugs.⁵

I will now examine the various lines of cases that have brought us to the current unacceptable state of the law.

A. *Automobiles and Warrants*

The first major Supreme Court case upholding warrantless searches of automobiles was *Carroll v. United States*.⁶ Relying on common sense and history, the Court held that the Constitution permits a police officer to stop and search a vehicle moving on the highway if, and only if, the officer has probable cause to believe that the car contains contraband or other material that the officer has the right to seize.⁷ The Court emphasized both the impracticality of obtaining a warrant before the moving vehicle left the jurisdiction and the unreasonableness of allowing the police to search any vehicle on the officer's whim.⁸ Thus, the Court held the balance true by insisting on probable cause, but not insisting on a warrant.

In 1970, forty-five years after *Carroll*, the Court added a police-favoring wrinkle to the calculus. *Chambers v. Maroney*,⁹ like *Carroll*, involved the stoppage of an automobile on the highway with probable cause and without a warrant. Unlike *Carroll*, the police did not search the car on the spot. Instead, they arrested Chambers and the other occupants of the car, brought them and the car to the police station, and subsequently searched the car without a warrant.¹⁰

⁵ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) ("Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."); discussion *infra* Part II.C.

⁶ 267 U.S. 132 (1925).

⁷ See *id.* at 155-56.

⁸ See *id.* at 153-54.

⁹ 399 U.S. 42 (1970).

¹⁰ *Id.* at 44.

Although eschewing the principle that a car for which there is probable cause to search may *always* be searched without a warrant,¹¹ the Court held, unsurprisingly, that the police could have searched the car when and where it was stopped.¹² More surprisingly, the Court added: "The probable-cause factor still obtained at the station house *and so did the mobility of the car* unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured."¹³ Precisely to whom the Court thought it was denying automotive access is not at all clear. Certainly it was not Chambers or his cohorts, who were residing in jail courtesy of the Commonwealth of Pennsylvania.

Although it would not have been difficult for the police to obtain a warrant, the Court upheld the search without a warrant on a rationale so transparently flimsy, that it is hard to take seriously. Perhaps the Court's real rationale was divulged in a footnote that suggested that both the safety of the officers and the car would be better served by a search in the secure confines of the police station, rather than the potentially hazardous dark parking lot where the defendants were arrested.¹⁴ Left unsaid is that a decision requiring a warrant would possibly encourage future police to attempt the hazardous warrantless search, rather than the safer search that required the inconvenience of a warrant. So while *Chambers* tips the balance towards police and away from citizens for no good articulated reason, the Court may have had a plausible unarticulated justification for its decision.

Just a year later, in *Coolidge v. New Hampshire*,¹⁵ the Court¹⁶ held that an automobile, seized contemporaneously with the arrest of a suspect, could be neither seized nor subsequently searched, in the absence of a warrant. Emphasizing the non-mobile character of the automobile, the Court noted that Coolidge had been arrested, his wife had been removed from their home, and two police officers stood guarding the home and the driveway, where the car was parked. Concluding that "[t]he word 'automobile' is not a talisman in whose presence the Fourth

¹¹ See *id.* at 50.

¹² See *id.* at 51 (requiring only a simple citation to *Carroll*).

¹³ *Id.* at 52 (emphasis added).

¹⁴ See *id.* at n.10.

¹⁵ 403 U.S. 443 (1971).

¹⁶ Technically a plurality, Justice Harlan cast the decisive fifth vote in favor of the plurality's result. See *id.* at 491 (Harlan, J., concurring).

Amendment fades away and disappears,"¹⁷ the Court refused to be beguiled by the theoretical mobility of the car. Furthermore, since the original seizure was unlawful, the subsequent search at the police station would not be sustainable under *Chambers*.

The key question following *Chambers* and *Coolidge* was ascertaining which was the rule and which the exception. That is, are automobiles subject to a warrantless search except when they are found in the curtilage of the owner's home, or is a warrant required unless automobiles are stopped while moving on a highway? That question was answered rather definitively by the Court in the 1985 case of *California v. Carney*,¹⁸ when it upheld the search of a motor home that was parked in a public parking lot with its curtains drawn.¹⁹

Because mobility is such an important factor in allowing warrantless automobile searches, the Court rightly refused to draw a distinction between motor homes and other motor vehicles. Less rightly, it refused to even cite *Coolidge* in holding that a vehicle "found stationary in a place not regularly used for residential purposes"²⁰ is subject to a warrantless search. In so holding, the Court emphasized the lesser expectation of privacy that one has in a vehicle on or capable of going onto a highway. Unfortunately, the Court never explained why, despite this lesser expectation, it was necessary to subject this vehicle to a warrantless search. Nor did it feel the need to address Justice Stevens' unquestionably correct observation that "the motor home was parked in an off-the-street lot only a few blocks from the courthouse in downtown San Diego where dozens of magistrates were available to entertain a warrant application."²¹

Thus, we are left with the conclusion that any warrantless search of an automobile, based on probable cause, will be sustained unless the vehicle is parked in the curtilage of the owner's home.²² On the other hand, so long as probable cause is required, the balance arguably is not all that askew.²³ In the

¹⁷ *Id.* at 461-62.

¹⁸ 471 U.S. 386 (1985).

¹⁹ *See id.* at 395, 404.

²⁰ *Id.* at 392.

²¹ *Id.* at 404 (Stevens, J., dissenting).

²² It remains to be seen whether this exception will be extended to private parking places in apartment complexes or offices. With the short shrift the Court gave *Coolidge* in *Carney*, I frankly doubt it.

²³ Obviously this depends on the importance one attaches to a warrant. To put

next two sections, I will focus on automobile searches or seizures that have been permitted without probable cause or a warrant.

B. Inventory Searches

The concept of an inventory search is that there are certain caretaking functions, as opposed to evidence-seeking functions, that the police must perform on impounded automobiles. Because the police, at least in theory, are not seeking and do not expect to find evidence, the concept of probable cause, by definition, cannot be relevant to an inventory search. Furthermore, because probable cause is not relevant to an inventory search, neither is the requirement of a warrant to the extent that it is predicated upon probable cause.²⁴ Thus, if inventory searches are to be allowed at all, some standard other than the traditional probable cause/warrant standard is necessary to ascertain permissibility.

As with warrantless probable cause searches, the Court began cautiously²⁵ and then significantly expanded police power.²⁶ Despite a subsequent mild correction,²⁷ the power of

it mildly, neither the Court nor its critics have agreed on this question. It is not my purpose to debate that issue in this Article. It is, however, worth mentioning that some of the values of a warrant include having a neutral third party make the probable cause determination *before* the search takes place, preventing a *post hoc* rationalization of probable cause that didn't actually exist, giving both the officer and searchee notice of the authority to search along with its scope and limitations, and ensuring that the search will not take place unless the officer believes that it is important enough to take the trouble to prepare an affidavit.

²⁴ Of course, the Fourth Amendment provides: "[N]o Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. Although administrative warrants have expanded the concept of probable cause beyond that which a criminal evidence warrant would recognize, see *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), that expansion is likely to be tightly cabined. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987). In any event, it is hard to see any utility to a warrant where it is conceded that the officer lacks a probable cause to believe that any particular thing would be found. Indeed, any warrant that might be granted would be of the "general" variety that were so odious to the Framers of the Constitution.

²⁵ See *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976) (discussing the reasonableness of inventories pursuant to standard police procedures).

²⁶ See *Colorado v. Bertine*, 479 U.S. 367, 374 (1987) (giving great leeway under the Fourth Amendment to reasonable inventory procedures administered in "good faith").

²⁷ See *Florida v. Wells*, 495 U.S. 1, 4-5 (1990) (finding a search conducted in the absence of a policy regarding the opening of closed containers during an inventory search failed to satisfy the Fourth Amendment).

inventory searches contributes significantly to the nightmare described in Part I of this Article.²⁸

In 1976, for the first time, the Court upheld inventory searches conducted pursuant to standard police procedures.²⁹ In *South Dakota v. Opperman*,³⁰ it upheld the inventory search of a car towed to the impound lot for extended overtime parking.³¹ The Court relied on the need to protect: (1) the car owner from having his property stolen;³² (2) the police from false claims of stolen property; and (3) the police (and presumably the public) from injury.³³

The narrowness of the decision was underscored by Justice Powell's concurrence, which emphasized the non-amenability to the warrant process, the lack of an evidence-seeking motive, the absence of and inability to locate the owner, and the virtual absence of discretion of the police officer.³⁴ Indeed, the entire Court seemed to emphasize the inability of the police to find the owner. This narrow focus was nowhere to be found eleven years later when the Court decided *Colorado v. Bertine*.³⁵

Whether *Bertine* is characterized an unmitigated disaster or merely as an unfortunate decision depends on whether one focuses on what the Court in fact allowed or on what it purported to allow. In fact, the Court allowed an "inventory"³⁶ search of a

²⁸ See, e.g., *Arkansas v. Sullivan*, 532 U.S. 769 (2001), discussed *infra* Part III.C.

²⁹ On three prior occasions, the Court upheld inventory searches in special circumstances. In *Cooper v. California*, 386 U.S. 58 (1967), the Court upheld the inventory search of a car that had been seized pursuant to the commencement of forfeiture proceedings. In *Harris v. United States*, 390 U.S. 234 (1968), the Court upheld the inventory search of a car that had been seized because it was used in a robbery. Finally, in *Cady v. Dombrowski*, 413 U.S. 433 (1973), the Court upheld the inventory search of the rented car of an unconscious off-duty Chicago police officer in a rural Wisconsin town because the police believed that the police officer had a service revolver in the car that they were unable to locate.

³⁰ 428 U.S. 364 (1976).

³¹ The car had already received two tickets and remained in the same unlawful spot. See *id.* at 365-66.

³² The impound lot was encircled by a dilapidated and easy to enter fence, and there had been instances of larceny from cars impounded there. *Id.* at 366 n.1.

³³ See *id.* at 369.

³⁴ See *id.* at 376-84. Justice Powell's concurrence was necessary to make a five-to-four majority.

³⁵ 479 U.S. 367 (1987).

³⁶ I put the term "inventory" in quotes because, as Justice Marshall's dissenting opinion clearly demonstrates, this was not an inventory search at all. See *id.* at 377 (Marshall, J., dissenting).

van whose driver was arrested for driving under the influence. The officer conducting the inventory testified that he had the option of parking the van in an adjoining park-and-lock parking lot or impounding the car and conducting an inventory search.³⁷ The arresting officer testified that the scope of an inventory is “very individualistic” and is dependent on “whatever arouses his suspicious [sic].”³⁸ The “inventory” was in fact conducted in a manner totally consistent with an evidence search, finding cocaine and \$700 in a backpack, and totally inconsistent with a bona fide inventory search.³⁹ Ironically, this search could have been sustained incident to Bertine’s arrest if it had been conducted substantially contemporaneously therewith.⁴⁰

In form, the Court’s opinion does not appear to countenance the unbridled discretion exercised here. The Court purports to require standardized criteria to guide the officer’s discretion on whether to impound or not to impound. Unfortunately, the criteria, the safety and convenience of the park-and-lock lot and the consent of the owner, both militate *against* the decision to inventory; however, that did not bother the Court. Even more pointed was Justice Blackmun’s concurrence, emphasizing the importance of allowing “police officers to open closed containers in an inventory search *only* if they are following standardized police procedures that *mandate* the opening of such containers in

³⁷ *Id.* at 379–80 (Marshall, J., dissenting).

³⁸ *Id.* at 381 (Marshall, J., dissenting).

³⁹

Officer Reichenbach’s inventory in this case would not have protected the police against claims lodged by respondent, false or otherwise. Indeed, the trial court’s characterization of the inventory as ‘slip-shod’ is the height of understatement. For example, Officer Reichenbach failed to list \$150 in cash found in respondent’s wallet or the contents of a sealed envelope marked ‘rent,’ \$210, in the relevant section of the property form. His reports make no reference to other items of value, including respondent’s credit cards, a converter, a hydraulic jack, and a set of tire chains, worth a total of \$125. The \$700 in cash found in respondent’s backpack, along with the contraband, appeared only on a property form completed later by someone other than Officer Reichenbach. The interior of the vehicle was left in disarray, and the officer ‘inadvertently’ retained respondent’s keys—including his house keys—for two days following his arrest.

Id. at 383 (Marshall, J., dissenting) (citations omitted).

⁴⁰ See *New York v. Belton*, 453 U.S. 454, 457 (1981); discussion *infra* Part II.D. It is not clear why Colorado did not rely on this rationale. One possibility is that the inventory search was not sufficiently contemporaneous with the arrest to qualify. Another is that the scope of a *Belton* search in the interior of a van may have been sufficiently problematic to discourage such reliance.

every impounded vehicle.”⁴¹ Given that Justice Blackmun’s opinion was necessary to make a majority,⁴² there appears to be a major disconnect between what the Court said it would allow and what the Court did allow.

Finally, in *Florida v. Wells*,⁴³ the Court split the difference between the legal and factual holdings in *Bertine*. Rejecting the Florida Supreme Court’s holding that a police officer could never exercise discretion in conducting an inventory search, the Court nevertheless upheld Florida’s reversal of Wells’ conviction because Florida had absolutely no policy on inventory searches, thus granting Florida police officers complete unchanneled discretion.⁴⁴

Wells is one of those cases with something for everyone. From the libertarian perspective, the Court laid the worst fears from *Bertine* to rest. The Court clearly held that unchanneled discretion is not permitted. From the police perspective, the Court gave assurances that some discretion is permitted.⁴⁵ In practical terms, the effect of *Bertine* and *Wells* is that so long as a police department has a policy of opening all containers in an impounded car, such action will be upheld no matter how unreasonable. For example, in *Wells*, two police officers spent ten minutes prying open a locked suitcase, admittedly looking for drugs.⁴⁶ If the police department’s official policy called for opening all containers in an impounded vehicle, it is highly unlikely that a court would invalidate such a search. Of course, where the officer does not think that he will find contraband, nobody is likely to challenge his failure to “inventory” the containers in the vehicle.

The amount of discretion actually available to the police to conduct inventory searches strongly contributes to the potential nightmare scenario described in the introduction to this article. When coupled with an unchanneled power to arrest for traffic offenses,⁴⁷ it powerfully contributes to the broken balance

⁴¹ *Bertine*, 479 U.S. at 377 (Blackmun, J., concurring) (emphasis added).

⁴² He was joined by Justices Powell and O'Connor. Justices Marshall and Brennan dissented. Thus, there were only four Justices that did not join either the concurrence or the dissent.

⁴³ 495 U.S. 1 (1990).

⁴⁴ The Court called it “uncanalized.” *Id.* at 4.

⁴⁵ *See id.* at 4–5.

⁴⁶ *Id.* at 7 (Brennan, J., concurring).

⁴⁷ *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Arkansas v. Sullivan*,

between police and citizens in regard to encounters on the highway.

C. Roadblocks

To the extent that the police are free to stop all traffic at a roadblock, the police/citizen balance is obviously affected. Certain types of stops have never been deemed problematic. Weigh stations for trucks and border stops for all vehicles have always been in this category. Fixed checkpoints near the border are more questionable, but have been upheld on the theory that they are closely akin to border stops. Additionally, the populace is aware of their existence and unlikely to be unduly alarmed or inconvenienced by them.⁴⁸

Surprise stops present a different problem. An unsuspecting traveler who is stopped by a police officer and, for no particular reason, is asked to display a license, submit to a sobriety test, or submit to a drug search, may feel frightened, offended, or worse. The police, on the other hand, may claim that such stops are necessary to control unlicensed driving, drunk driving, and drug trafficking. The Supreme Court has permitted some, but not all, of these roadblocks, with the center of the Court at least trying to hold the balance true.

In 1979, the Court examined the constitutionality of random stops in *Delaware v. Prouse*.⁴⁹ Taking the libertarian interest in automobiles more seriously than at any time since *Coolidge*,⁵⁰ the Court held that a random stop of an automobile, not apparently violating any traffic law, was insufficiently likely to produce evidence of lack of licensure to justify the Fourth Amendment cost to the driver.⁵¹ With a level of seriousness that would have rendered this Article unnecessary had it been consistently followed, the Court observed:

532 U.S. 769 (2001); discussion *infra* Part III.

⁴⁸ See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (emphasizing the limitations on the scope of checkpoint stops). But see Justice Thomas's dissent in *City of Indianapolis v. Edmond*, 531 U.S. 32, 56 (2000) (suggesting that *Martinez-Fuerte* should be rethought).

⁴⁹ 440 U.S. 648 (1979).

⁵⁰ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); see discussion *supra* Part II.A.

⁵¹ See *Prouse*, 440 U.S. at 663 (holding that there must be "at least [an] articulable and reasonable suspicion" for the stop to be proper).

An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. . . . [P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.⁵²

Though invalidating the random stop in *Prouse*, the Court went out of its way to suggest the constitutionality of a roadblock at which all traffic is stopped in order to check for licensure.⁵³ Obviously, the Court thought that if everybody were stopped, then the harm done to each stopped individual would be less. Additionally, the Court seemed impressed with the absence of discretion inherent in such a stop.⁵⁴ Thus, a parallel between inventory searches and roadblocks—unchanneled discretion forbidden, but subjecting everyone to the same search (inventory) or seizure (roadblock)—is allowed. Although Justice Rehnquist, in his dissent, referred to this as the “misery loves company”⁵⁵ rule, it does represent an effort to honor his admonition of “hold[ing] the balance true.”

The wisdom and constitutionality of roadblocks were hotly debated eleven years later in *Michigan v. Sitz*.⁵⁶ The Court, with now Chief Justice Rehnquist writing the opinion, held that the

⁵² *Id.* at 662–63 (citations omitted).

⁵³ *See id.* at 663.

⁵⁴ *See id.* (suggesting the alternative of stopping all oncoming traffic as a method that does not involve the “unconstrained exercise of discretion”); *see also id.* at 661 (noting that spot checks involve the “[k]ind of standardless and unconstrained discretion [that] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed at least to some extent”).

⁵⁵ *Id.* at 664.

⁵⁶ 496 U.S. 444 (1990).

constitutionality of a sobriety roadblock should be measured by "balancing the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints."⁵⁷

Justice Stevens, while not seriously quarreling with the test,⁵⁸ had a great deal of justified criticisms for the Court's application thereof. He noted that the element of surprise clearly distinguishes a secret checkpoint from a known one. By emphasizing the adverse psychological impact that such an encounter can have on an innocent driver, he demonstrated that the Court clearly undervalued the harm done to an unsuspecting driver.⁵⁹ Moreover, he demonstrated that the Court overvalued the benefits of sobriety checkpoints by crediting the arrests made during the checkpoint, but failing to debit the arrests not made while the officers were manning the checkpoint.⁶⁰

Finally, in *City of Indianapolis v. Edmond*,⁶¹ the Court held that the propriety of a *Sitz*-type roadblock was the exception and not the rule. Emphasizing that the rule is that there are to be no stops on less than reasonable suspicion, the Court held that a

⁵⁷ *Id.* at 449 (quoting the Michigan Court of Appeals, which was describing the three-prong balancing test of *Brown v. Texas*, 443 U.S. 47 (1979)).

⁵⁸ Justice Brennan did quarrel with the test, suggesting that balancing should not be the norm. *See id.* at 459 (Brennan, J., dissenting) ("I am inclined to agree with the Court and Justice Stevens in applying the test. If one is to hold the balance true, the Court's test seems to identify the relevant factors in assessing reasonableness").

⁵⁹

These fears are not, as the Court would have it, solely the lot of the guilty. To be law abiding is not necessarily to be spotless, and even the most virtuous can be unlucky. Unwanted attention from the local police need not be less discomfiting simply because one's secrets are not the stuff of criminal prosecutions. Moreover, those who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior. Being stopped by the police is distressing even when it should not be terrifying, and what begins mildly may by happenstance turn severe.

Id. at 465 (Stevens, J., dissenting) (citation omitted).

⁶⁰ There were nineteen officers present at the checkpoint for about an hour, resulting in the arrest of two drivers and the detention of about 125 others. Ordinarily, at least eight officers were scheduled to man the checkpoints. *Id.* at 460 n.1 (Stevens, J., dissenting). Presumably had they been patrolling and not at the checkpoint, those officers would have arrested some unknown number of people caught in the act of drunk driving.

⁶¹ 531 U.S. 32 (2000).

roadblock designed primarily to interdict drugs was unconstitutional.⁶² Arguably *Edmond* was more about form than substance; the basis of the roadblock's invalidation was its primary purpose of interdicting drugs, which is generally related to law enforcement as opposed to specifically related to highway safety. Presumably, a roadblock designed to check licensure or sobriety, at which drug sniffing dogs were stationed,⁶³ would be controlled by *Sitz* rather than *Edmond*.

Notwithstanding this limitation, *Edmond* demonstrated an important commitment to holding the balance true. By emphasizing the general need for at least reasonable suspicion, the rights of the motoring public were at least given the appearance of being taken seriously. Unfortunately, just four months later, the Court gave us *Atwater*.⁶⁴

D. Search Incident to an Arrest

The scope of a search incident to arrest for a traffic offense was first litigated in the Supreme Court in companion 1973 cases: *United States v. Robinson*⁶⁵ and *Gustafson v. Florida*.⁶⁶ The officer who arrested Robinson unquestionably had probable cause to believe that he was driving with a revoked license.⁶⁷ Inasmuch as District of Columbia police regulations required a full custody arrest for this offense,⁶⁸ one cannot fault the officer for effectuating one.⁶⁹ The issue was the propriety of searching Robinson incident to his valid arrest. The Government conceded that Robinson could have no evidence of crime on his person.⁷⁰

⁶² *Id.* at 48 (observing that "the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control").

⁶³ Drug sniffing dogs do not constitute a Fourth Amendment "search." See *United States v. Place*, 462 U.S. 696, 707 (1983); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1272 (1983) (commenting that such searches are permissible because they do not intrude upon the rights of the innocent).

⁶⁴ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); see discussion *infra* Part III.B.

⁶⁵ 414 U.S. 218 (1973).

⁶⁶ 414 U.S. 260 (1973).

⁶⁷ See *Robinson*, 414 U.S. at 220 (noting that the officer had previously checked Robinson's license just four days earlier).

⁶⁸ *Id.* at 222-23 n.2.

⁶⁹ Even without such a regulation, it would be difficult to fault the officer. He surely could not send the driver home, knowing that he used a phony license in place of the one that had been revoked.

⁷⁰ See *Robinson*, 414 U.S. at 233. Arguably, the Government was incorrect. It is

Thus, Robinson argued that he could only be subject to *Terry* frisk,⁷¹ as opposed to a search incident to an arrest.⁷²

The Supreme Court, correctly in my view, rejected this argument, holding instead that an arrest creates a bright line rule allowing a search of the arrestee and the immediately surrounding area without any additional justification. The Court recognized the need for an officer in close proximity to a suspect to be assured that the suspect will not be armed. Beyond that, at least two other values justify the result. One is the bright line rule that makes it unnecessary for a police officer to have to exercise too much individual judgment.⁷³ The other is the possibility that evidence could be secreted on the suspect when nobody suspects it.⁷⁴

Gustafson involved an arrest for driving without possession of a driver's license. Although Gustafson might have challenged the legality of his arrest because he had explained that he was a college student who left his driver's license in his dorm room, and the officer never claimed that he believed that Gustafson was in fact unlicensed, Gustafson never made such a challenge.⁷⁵ Instead the case played out simply as *Robinson* redux, holding that given the legality of the arrest, the search incident was also

at least theoretically possible that Robinson could have had other false driver's licenses on his person.

⁷¹ See *id.*; *Terry v. Ohio*, 392 U.S. 1 (1968). A *Terry* frisk consists of a pat down for weapons. The police are permitted to look for anything that feels like a weapon, but may not look for anything beyond that. Further, in *Sibron v. New York*, 392 U.S. 40, 64 (1968), the Court noted that a *Terry* frisk is limited to when an officer can reasonably infer that the individual is armed and dangerous.

⁷² A search incident to an arrest entitles the police officer to search the person and his immediate surroundings for any weapons or evidence of crime. See *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

⁷³ I sometimes call this the “poor dumb cop” rule. This rule basically suggests that if Supreme Court Justices with all of their time, law clerks, and education cannot agree on a course of action, how can a police officer with a relatively limited education be expected to make a quick balance on the spur of the moment with too many rules. Wayne LaFave puts it this way: “[Ensuring that] lawyers and judges ‘in the peace of a quiet chamber’ would agree with the spur of the moment decision of the cop on the beat . . . can only be achieved if the courts continue with the challenging task of articulating reasonable and understandable limits upon police authority, using carefully conceived ‘bright lines’ whenever feasible.” Wayne LaFave, *The Fourth Amendment in an Imperfect World: On Drawing ‘Bright Lines’ and ‘Good Faith’*, 43 U. PITT. L. REV. 307, 360–61 (1982) (citation omitted).

⁷⁴ See *supra* note 62.

⁷⁵ See *Gustafson v. Florida*, 414 U.S. 260, 262 (1973); see also *id.* at 266–67 (Stewart, J., concurring).

legal.⁷⁶ Thus, the Court missed an early opportunity to limit unchanneled police discretion in effectuating arrests.⁷⁷

Eight years later the Court decided its final (to date) significant search incident to arrest in an automobile case. *New York v. Belton*⁷⁸ was an easy case to justify the arrest. Belton was stopped for speeding on the highway. The officer then smelled marijuana, saw a package labeled "supergold," and observed marijuana butts in the ashtray. Thus, Belton and his passengers were arrested for possession of marijuana.⁷⁹

The hard question in *Belton* was the scope of the subsequent search. An earlier decision, *Chimel v. California*,⁸⁰ had held that a search incident to an arrest could encompass only the area within immediate grabbing distance of the suspect.⁸¹ In order to create a bright line rule for the police,⁸² the *Belton* Court held that anything found in the passenger compartment of the car qualified as within the grabbing distance authorized by *Chimel*.

Belton was an unfortunate decision for at least three reasons. First, it failed on its own terms to create a true bright line decision. Its enigmatic footnote four suggested that any container found in the car, but not the trunk, was covered by the scope of its decision:

"Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the

⁷⁶ *Id.* at 266.

⁷⁷ The Court may well have been willing to do this. In addition to there being three dissenting Justices, Justice Stewart opined: "It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendment. *Id.* at 266-267 (Stewart, J., concurring). As Justice Powell observed in *Robinson*: "*Gustafson* would have presented a different question if the petitioner could have proved that he was taken into custody only to afford a pretext for a search actually undertaken for collateral objectives." 414 U.S. 218, 238 n.2 (Powell, J., concurring). As Anthony Amsterdam observed, shortly after *Robinson* and *Gustafson*: "If the Court had distinguished the two cases on this ground, it would, in my judgment, have made by far the greatest contribution to the jurisprudence of the fourth amendment since James Otis argued against the writs of assistance in 1761 and 'the child Independence was born.'" Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974) (citation omitted) (quoting LEGAL PAPERS OF JOHN ADAMS 107 (1965)).

⁷⁸ 453 U.S. 454 (1981).

⁷⁹ *Id.* at 455-56.

⁸⁰ 395 U.S. 752 (1969).

⁸¹ *See id.* at 763.

⁸² *See supra* note 65 and accompanying text.

passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.⁸³

Hence, the question of whether it includes *locked* as well as closed glove compartments and containers remains.⁸⁴ Similarly unsettled is the status of trunks on hatchbacks that can be accessed from the car, the interior of motor homes,⁸⁵ and the interior of vans.⁸⁶ While one cannot and should not demand perfection from Supreme Court opinions, one would think that a decision whose whole *raison d'être* is creating a bright line would do better than this.

The second unfortunate aspect of *Belton* was the lack of necessity to predicate a lawful search on such an expansive view of a search incident to an arrest. Justice Stevens convincingly demonstrated that classic automobile search law would permit a search of the jacket pockets upheld in *Belton*.⁸⁷ It was only because of an extravagant pro-citizen/anti-police view of the right to search containers found in cars,⁸⁸ later overruled,⁸⁹ that

⁸³ *Belton*, 453 U.S. at 460 n.4.

⁸⁴ Cf. *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (emphasizing the expectation of privacy in a double-locked foot locker).

⁸⁵ Cf. *California v. Carney*, 471 U.S. 386, 393–94 (1985), discussed *supra* Part II.A.

⁸⁶ Cf. *Colorado v. Bertine*, 479 U.S. 367, 371 (1987), discussed *supra* Part II.B.

⁸⁷ See *Robbins v. California*, 453 U.S. 420, 444 (1981) (Stevens, J., dissenting). This dissenting opinion included his concurrence in *Belton*. Of course, *Carroll* and *Chambers* would have upheld this search.

⁸⁸ In *Arkansas v. Sanders*, the Court invalidated the search of a suitcase found in the trunk of a cab. 442 U.S. 753, 766 (1979). The Court reasoned that while the search of the cab was a valid *Carroll* search, the search of the container (suitcase) was governed by *United States v. Chadwick*, 443 U.S. 1 (1977), which had disallowed the warrantless search of a double locked foot locker removed from a train and placed in the trunk of a car. Neither *Chadwick* nor *Sanders* directly threatened *Carroll* because, in both *Chadwick* and *Sanders*, the probable cause for the container was obtained before the container was placed in the car and independent of the car. In *Robbins v. California*, a companion case to *Belton*, the Court held that a closed container, found in the recessed luggage compartment of a station wagon, could not be searched even with probable cause. The Court reasoned that closed containers were controlled by *Chadwick/Sanders* rather than *Carroll*. See *Robbins*, 453 U.S. at 424–25.

⁸⁹ *Robbins* was overruled the next year in *United States v. Ross*, 456 U.S. 798, 824 (1982), which held that probable cause to look in the trunk of a car for drugs also justified looking in a paper bag found in the trunk of that car even though the police had not obtained a warrant. *Id.* at 822. Eventually, *Sanders* was also overruled. See *California v. Acevedo*, 500 U.S. 565, 579 (1991).

compelled the Court to rely on search incident to uphold the search in *Belton*.⁹⁰ Unfortunately, even though the search in *Belton* could now be sustained on the basis of probable cause, there has been no suggestion that the expansive search incident to arrest rationale be reconsidered.

The most significant failing of *Belton*, especially for purposes of this Article, is that it put no limitation on the types of crime for which an arrest could be made. The Court unfortunately did not hold that minor traffic offenders were free from arrest.⁹¹ Thus, *Belton* created the potential for that portion of the nightmare scenario that allows a police officer to search the entire passenger compartment of the car of an arrestee for a minor traffic offense.⁹² Of course that potential did not eventuate until *Atwater v. Lago Vista*, when the *coup de grace* was delivered.⁹³

E. Consent

The concept of a consent search sounds salutary. The conflict between police officer and citizen is gone, and the two are working together for the common goal of creating a better society. Perhaps, instead of the nightmare scenario suggested at the beginning of this Article,⁹⁴ it might look something like this:

Police officer: You were going thirty-five mph in a twenty-five mph zone. We really can't have that.

You: I understand officer. Thanks for calling it to my attention.

Police officer: While I have you stopped do you mind if I look in the trunk of your car? You don't have to, but it would be helpful to me if you would consent.

You: I don't have anything in there, but if you want to look, it's fine with me.

Police officer (after viewing empty trunk): Thanks for your help. Now remember no more speeding.

⁹⁰ *Robbins* and *Belton* taken together worked something of a compromise. An arrest rendered the containers in the passenger compartment fair game. Containers found in the trunk, however, could be searched only with a warrant.

⁹¹ See Justice Stevens' dissent in *Robbins*, 453 U.S. at 450 n.11 and accompanying text, which includes his concurrence in *Belton*, emphasizing this point.

⁹² See *supra* Part I.

⁹³ See *infra* Part III.B.

⁹⁴ See *supra* Part I.

The problem is that the hypothesized scenario is not what typically happens. Instead, a truly voluntary consent, while perhaps not oxymoronic, certainly does not seem to be the rule, at least according to the defendants in the litigated cases.⁹⁵

The current law of consent searches skews the balance against the citizen in three ways. First, the police are not required to tell the citizen that he is free to say "no."⁹⁶ Second, the police are not required to tell the suspect that she is free to leave even when the law permits no further detention.⁹⁷ Third, the question of whether consent was freely given is a factual question whose resolution is usually stacked in a way to ensure a win for the police.⁹⁸

Let us first examine *Schneckloth v. Bustamonte*,⁹⁹ a case holding that a suspect need not be told that he has a right to say no. The Court described the facts as follows:

While on routine patrol in Sunnyvale, California, at approximately 2:40 in the morning, Police Officer James Rand stopped an automobile when he observed that one headlight and its license plate light were burned out. Six men were in the vehicle. Joe Alcala and the respondent, Robert Bustamonte, were in the front seat with Joe Gonzales, the driver. Three older men were seated in the rear. When, in response to the policeman's question, Gonzales could not produce a driver's license, Officer Rand asked if any of the other five had any evidence of identification. Only Alcala produced a license, and he explained that the car was his brother's. After the six

⁹⁵ See *United States v. Drayton*, 122 S. Ct. 2105, 2114 (2002) (finding consent voluntary based on the totality of the circumstances even though the suspects were not told they had a right to refuse the search); *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (holding that "[v]oluntariness is a question of fact to be determined from all the circumstances" (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973))); *Florida v. Bostick*, 501 U.S. 429, 437-38 (1991) (rejecting defendant's argument that he was seized because a reasonable person would not consent to a search of luggage that they know contains drugs); *United States v. Mendenhall*, 446 U.S. 544, 558-59 (1980) (finding no coercion where the defendant was twice informed that she could withhold her consent, after which she explicitly gave her consent); *Schneckloth v. Bustamonte*, 412 U.S. 218, 230 (1973) (noting that the Court has not adopted a "litmus-paper test" for voluntariness because it will impose too high of a burden on prosecutors).

⁹⁶ *Schneckloth*, 412 U.S. at 227 ("While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.").

⁹⁷ See *Robinette*, 519 U.S. at 35 (1996).

⁹⁸ See *Robinette*, 519 U.S. at 39-40; *Schneckloth*, 412 U.S. at 230-31.

⁹⁹ 412 U.S. 218 (1973).

occupants had stepped out of the car at the officer's request *and after two additional policemen had arrived*, Officer Rand asked Alcala if he could search the car. Alcala replied, "Sure, go ahead." Prior to the search no one was threatened with arrest and, according to Officer Rand's uncontradicted testimony, it "was all very congenial at this time." Gonzales testified that Alcala actually helped in the search of the car, by opening the trunk and glove compartment. In Gonzales' words: "[T]he police officer asked Joe [Alcala], he goes, 'Does the trunk open?' And Joe said, 'Yes.' He went to the car and got the keys and opened up the trunk." Wadded up under the left rear seat, the police officers found three checks that had previously been stolen from a car wash.¹⁰⁰

From the detainees' perspective, there was little that appeared voluntary. They were stopped at 2:40 in the morning, asked (ordered?) to exit the car, and witnessed the arrival of two reinforcement police officers. They were then asked to search the car without being told that "no" was an option. Can anyone not thoroughly steeped in legal fiction really believe that they thought "no" was one of their options? Surely they must have believed that "yes" was the only acceptable answer.¹⁰¹

Obviously much of this sense of inevitability could have been overcome by a simple admonition that the detainee need not consent. The Court's suggestion that such an admonition would destroy the informality of the interchange and be thoroughly impractical¹⁰² is so palpably false as to be laughable. A simple "I'd like you to let me search your car Joe, but you don't have to" would add to the informality, while minimizing the show of force. Of course, it would also decrease the number of consent searches, which is a result that the Court seemed to fear when it emphasized: "Consent searches are part of the standard investigatory techniques of law enforcement agencies."¹⁰³

Not knowing of the right to say "no" is bad enough, but the Court has also held that one need not be told that he is free to go even if he is. In *Ohio v. Robinette*,¹⁰⁴ the Court held that after a

¹⁰⁰ *Id.* at 220 (emphasis added).

¹⁰¹ This conclusion would certainly be buttressed by their apparent ethnicity. Assuming that they were Hispanic, as their surnames suggest, and that Officer Rand was Anglo, the conclusion hypothesized in the text would be even more irresistible.

¹⁰² See *Schenckloth*, 412 U.S. at 231.

¹⁰³ *Id.* at 231-32.

¹⁰⁴ 519 U.S. 33 (1996).

suspect had been given a traffic ticket,¹⁰⁵ the police officer was free to ask him for consent to search his vehicle. The Court did not hold that a police officer has a right to detain a suspect after he was ticketed. Rather, it objected to what it perceived as Ohio's per se rule that a detainee must be told that he is free to go before he can be asked for consent to search.¹⁰⁶ Justice Stevens dissented on the ground that the detainee was not in fact free to go at the time that he was asked for consent to search.¹⁰⁷ Thus, Justice Stevens viewed the case as one in which the consent to search was the product of an illegal detention. In such a case, the consent to search is per se invalid.¹⁰⁸

Justice Stevens was clearly correct. Before the police officer asked for consent, he said: "[B]efore you get gone."¹⁰⁹ Surely, a reasonable person would have thought that he was not free to leave at that point. Yet the Court's holding assumed that a person would know that he was free to leave without being told, even though most people who have been stopped understand that they are not free to leave until the police officer tells them so. Thus, the Court upheld this consent, not on the theory that Robinette was lawfully detained, but on the theory that he was not being detained at all. The only problem with that rationale is that it was not true.

A final problem with consent searches is the manner in which the underlying question of consent is determined. The court must decide from frequently conflicting accounts whether consent was given. Rarely, if ever, does the question arise outside of the criminal context. To illustrate why this is so, consider the experience of a former law student. While in college, this student was driving with some friends through a bad neighborhood in Chicago. When his car stalled, he turned into a cul-de-sac and asked a police officer to call AAA. Instead of calling for assistance, the police officer looked through his car, including the glove compartment, and asked: "Is there anything in here that shouldn't be?" Though tempted to answer: "Yes,

¹⁰⁵ In this case the suspect was given a warning. *Id.* at 35.

¹⁰⁶ *See id.* at 39.

¹⁰⁷ *See id.* at 46-47 (Stevens, J., dissenting).

¹⁰⁸ *See, e.g.,* Florida v. Royer, 460 U.S. 491, 507-08 (1983) (noting that consent tainted by illegality is an ineffective justification for a search).

¹⁰⁹ *Robinette*, 519 U.S. at 35.

you," the student prudently answered: "No sir," whereupon the police officer left.¹¹⁰

The student, eager to leave the area, fortunately was able to start his car and drive away. He expressed no desire to sue the police officer but even if he had, the likelihood of finding an attorney to litigate the case on a contingent-fee basis would have been very small. Consequently, a case like this would only reach court if the police officer had found drugs. In that case, it is highly likely that the police officer would claim that the student had consented. The student would deny giving consent. The trial judge would have to assess the credibility of the parties, knowing that if he chooses to believe the defendant, a criminal would go free. Of course, the very fact that he was found in possession of drugs diminishes his credibility. Because police officers know this, they are free to behave in the manner described, secure in the knowledge that if they find nothing, the searchee will go away, but if they find drugs, the court will believe that the driver consented.¹¹¹

I do not mean to suggest that the officer is always, or even usually, lying. Those caught with drugs have a great deal of incentive to lie, and their credibility should be at least as suspect as the police officer's. My concern is the potential impact consent searches can have on innocent drivers.¹¹² Videotaping would help, but it is rarely done.¹¹³ If the Court would require a signed consent form, the problem would be ameliorated.¹¹⁴ Unfortunately, such a requirement is unlikely for the reasons

¹¹⁰ The police officer, who happened to be black, explained his suspicions to the student by stating: "The only time white boys ever come into this neighborhood is for drugs or sex."

¹¹¹ Cf. *State v. Kremen*, 754 A.2d 964 (Me. 2000). In *Kremen*, the defendant testified that she had been threatened with arrest if she did not consent to a search, while the officer testified that no such threat was made. *Id.* at 967. To no one's surprise, the trial judge believed the police officer. The court found the officer's testimony sufficient to support the finding that the defendant voluntarily consented to a search of her vehicle. *Id.* at 968.

¹¹² Although only criminal defendants can take advantage of the exclusionary rule, the ultimate beneficiary of the rule is the innocent driver who will not be searched by a police officer who knows that any evidence she finds will not be admissible. See *Loewy*, *supra* note 63, at 1272 (noting that the Fourth Amendment is designed to protect the innocent).

¹¹³ Note, however, that the incident was videotaped in *Robinette*. See 519 U.S. at 46 n.2 (Stevens, J., dissenting).

¹¹⁴ But it would not be completely cured because there would still be the issue of coerced signatures.

that permeate *Schneckloth* and *Robinette*, namely the desirability of consent and the concomitant reduction of “consent” searches caused by additional predicates to their propriety.

F. Whren v. United States

*Whren v. United States*¹¹⁵ held that a pretextual stop, even contrary to department policy, did not violate the Fourth Amendment. With surprising unanimity, the Court seemed either oblivious to, or unconcerned with, its implicit sanctioning of unbridled arbitrariness or racial profiling¹¹⁶ in upholding the constitutionality of a stop by plain clothes vice squad officers to issue a traffic warning to individuals whom they suspected of drug dealing.¹¹⁷

The stop in *Whren* could have been upheld without creating such a window of arbitrariness. The defendants were stopped at a stop sign for twenty seconds as the driver looked at the passenger’s lap. When the unmarked police car made a u-turn to investigate further, the petitioners’ vehicle suddenly turned right without signaling and sped away.¹¹⁸ The Court has found similar furtive gestures to constitute reasonable suspicion for an investigatory stop¹¹⁹ and could have done so here. Alternatively, it could have conceivably held that Brown, the driver in *Whren*, was driving in such a manner as to pose “an immediate threat,” in which case the stop would not have been in violation of the D.C. police directive.¹²⁰

¹¹⁵ 517 U.S. 806 (1996).

¹¹⁶ It is unlikely that the Court was oblivious to the potential for racial profiling in light of the arguments of petitioner and its own acknowledgment of the possibility. *See id.* at 810. The Court was more likely unconcerned with the issue.

¹¹⁷ *See id.* at 818 (finding that a traffic stop made by an out of uniform officer does not constitute an extreme practice justifying a “balancing” analysis, but rather is governed by “the usual rule that probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police contact”).

¹¹⁸ *Id.* at 808.

¹¹⁹ *See, e.g.,* *United States v. Sharpe*, 470 U.S. 675, 687–88 (1985) (commenting on the evasive maneuvers of a defendant in evaluating the reasonableness of an investigative stop).

¹²⁰ *See Whren*, 517 U.S. at 815 (quoting Metropolitan Police Department, Washington, D.C., General Order 303.1 pt. 1 Objectives and Policies (A)(2)(4) (Apr. 30, 1992) (emphasis omitted)).

By holding instead that any police officer can stop any suspect at any time for any traffic offense, the Court, quite unnecessarily, set the stage for the ultimate *coup de grace*.

III. THE COUP DE GRACE

While *Whren* set the stage for the ultimate *coup de grace*, it did not guarantee it. The balanced roadblock cases¹²¹ require, *at least*, uniformity.¹²² Even the inventory cases, which created such a significant piece of the nightmare, require *channeled* discretion.¹²³ Consequently, the *coup de grace*, while plausible, was hardly inevitable. Indeed, in the first case that posed an opportunity to create an open season on motorists, the Court unanimously and forthrightly refused to do so.

A. *The Benign Prequel*

Knowles v. Iowa,¹²⁴ a unanimous opinion written by Chief Justice Rehnquist, involved an Iowa statute that permitted arrests for traffic offenses and permitted full searches incident to a traffic citation where the officer chose not to make an arrest. The Iowa Supreme Court reasoned that because the police officer was authorized to make an arrest and free to search the suspect and car incident thereto,¹²⁵ the lesser intrusion of a search incident to a citation was not constitutionally problematic.¹²⁶

A court wishing to overturn this decision could have done so on one of two grounds. It could have held that the Iowa statute permitting arrest for a minor traffic offense in the unfettered discretion of the police officer was unconstitutional. Thus, there would have been no basis for a trickle down search incident to a citation. Alternatively, it could have held that whatever the power to arrest or search incident thereto may be, there was no power to search when the officer does not in fact arrest. Consistent with its time-honored practice of deciding no more

¹²¹ These cases are not necessarily perfectly balanced. See *supra* Part II.C.

¹²² Even uniformity, however, might not suffice. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42, 47 (2000); *supra* Part II.C.

¹²³ See *supra* Part II.B.

¹²⁴ 525 U.S. 113 (1998).

¹²⁵ The Iowa court cited *New York v. Belton*, 453 U.S. 454 (1981), and *United States v. Robinson*, 414 U.S. 218 (1973).

¹²⁶ *State v. Knowles*, 569 N.W.2d 601, 602–03 (Iowa 1997), *rev'd*, *Knowles v. Iowa*, 525 U.S. 113 (1998).

than is necessary to resolve the case before it,¹²⁷ it opted for the latter alternative, leaving open the question of the constitutionality of unbridled discretion to arrest for a traffic offense.

Notwithstanding the narrowness of the opinion, *Knowles* was one case in which the Court in general, and Chief Justice Rehnquist in particular, took seriously the admonition of holding the balance true. Emphasizing the lack of need to search either for the protection of the officer or for the discovery of evidence, the Court forthrightly held that the balance favored the citizen.¹²⁸ Thus, there was good reason to believe that the Fourth Amendment would continue to meaningfully limit police control over motorists. But, alas, the *coup de grace* lay just beyond the horizon. Less than three years after *Knowles*, it reared its ugly head.

B. *Atwater v. City of Lago Vista*

*Atwater v. City of Lago Vista*¹²⁹ involved a real life nightmare that dwarfed the hypothesized one imagined at the beginning of this Article.¹³⁰ Gail Atwater and her two small children lost a toy that was attached to the outside of her truck while driving home from soccer practice. While retracing her route in an effort to find it, she permitted her children to unbuckle their seatbelts—a move that did not sit well with Officer Bart Turek of the Lago Vista police.¹³¹ Turek, who was unqualified to don the uniform of the neighboring Austin police force,¹³² stopped Ms. Atwater, yelled at her, frightened her

¹²⁷ This principle arguably necessitated by the logic of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), has been (at least in theory) part of the Supreme Court's practice since at least Justice Brandeis' famous concurring opinion in *Ashwander v. Tennessee Valley Authority*. See 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).

¹²⁸ "Here we are asked to extend the 'bright-line rule' to a situation where the concern for officer safety is not present to the same extent [as in *Robinson*] and the concern for destruction or loss of evidence is not present at all. We decline to do so." *Knowles*, 525 U.S. at 118–19.

¹²⁹ 532 U.S. 318 (2001).

¹³⁰ See *supra* Part I.

¹³¹ See *Atwater v. City of Lago Vista*, 195 F.3d 242, 248 (5th Cir.1999) (Weiner, J., dissenting), *aff'd*, 532 U.S. 318 (2001).

¹³² At least according to the affidavit of Keith Campbell, a recruiter for the Austin police, who was given a copy of Turek's file for this litigation. See *id.* at 247

children, informed her that she would be arrested, and denied her the opportunity to leave her children with a neighbor.¹³³ Turek then placed the handcuffed Atwater in the back of his cruiser, *failed to fasten her seatbelt*, drove her to the police station where she was fingerprinted, required to remove her shoes and glasses, and placed in a cell for an hour before she was released on bond.¹³⁴ Believing this treatment to be a tad unreasonable, she sued. The Supreme Court, by a five-to-four vote, found nothing constitutionally unreasonable in the above scenario.

Speaking for the majority, Justice Souter saw the case as presenting a conflict between the desire for a bright line rule on the one hand and justice for Ms. Atwater on the other. After concluding that "Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case,"¹³⁵ he added that "we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."¹³⁶ Thus, the Court held that as a *per se* rule, a police officer may arrest a driver for a misdemeanor that he has probable cause to believe was committed in his presence. Consequently, the arrest of Ms. Atwater, though considered individually unreasonable, was held to be constitutionally reasonable.¹³⁷

Essentially, the Court's argument boils down to the unassailable argument that, all other things being equal, rules are better than standards.¹³⁸ The difficulty with the argument is that it requires all other things to be equal. For example, although the Court has adopted the *Miranda* rule for assessing

(Garza, J., dissenting).

¹³³ Fortuitously, one of the neighborhood children was able to get the neighbor who was able to take the children before Ms. Atwater was handcuffed and driven to the police station. *Atwater*, 532 U.S. at 368-69 (O'Connor, J., dissenting).

¹³⁴ *Id.* at 369 (O'Connor, J., dissenting).

¹³⁵ *Id.* at 347.

¹³⁶ *Id.*

¹³⁷ *See id.* at 354.

¹³⁸ *See generally* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing constitutional rules and standards and presenting arguments for each).

the admissibility of confessions,¹³⁹ it has created an emergency exception that is so amorphous that the police officer taking advantage of the emergency need not even know or believe that there is an emergency.¹⁴⁰ Similarly, the rule that a police officer can use all necessary force to effectuate an arrest for a felony is subject to an exception in derogation of the common law when deadly force is employed to catch a burglar even though the alternative is probably to allow the burglar to escape justice.¹⁴¹ Consequently, the question to ask in every case is whether the benefits from maintaining a clear rule exceed its costs.

The primary benefit the Court saw was the need to avoid "a systematic disincentive to arrest in situations where even Atwater concedes that arresting would serve an important societal interest."¹⁴² Undoubtedly this is a serious interest, but it is no different from the interest compromised whenever a bright line rule is fudged. For example, a police officer in a non-emergency situation may refrain from giving *Miranda* warnings in the mistaken belief that there is an emergency. Thus, a potentially valuable confession may be tainted forever because of the Court's decision to jettison a bright line rule. Similarly, a police officer unsure of the dangerousness of a suspect may refrain from using deadly force, thereby allowing the suspect to escape and perpetrate an unspeakable act of terror. Therefore, something more than a necessary systematic disincentive should be necessary to justify a result that legitimates a concededly unreasonable arrest.

Recognizing this, the Court referred to "a dearth of horrors demanding redress."¹⁴³ By this, the Court meant the absence of evidence that *Atwater*-type nightmares are happening with any degree of regularity. As the Court put it: "[S]urely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests."¹⁴⁴ I have three problems with this line of

¹³⁹ See *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).

¹⁴⁰ See *New York v. Quarles*, 467 U.S. 649, 656-57 (1984) (commenting that the availability of the exception does not depend on the subjective motivation of the officer involved considering the spontaneity of the situation and the reasonable concern for public safety).

¹⁴¹ See *Tennessee v. Garner*, 471 U.S. 1, 3, 21 (1985).

¹⁴² *Atwater*, 532 U.S. at 351.

¹⁴³ *Id.* at 353.

¹⁴⁴ *Id.*

reasoning; its relevance; its accuracy before this decision; and its accuracy after this decision.

As to its relevance, one would have thought that the absence of comparable abuses would be an argument buttressing unreasonableness. If all over the country soccer moms were regularly hauled off to jail every time they allowed a child to temporarily unbuckle a seatbelt, eased through a stop sign, or exceeded the speed limit by five miles per hour, Atwater's arrest would have seemed par for the course, and perhaps not unreasonable. But precisely because these things do not generally happen in this nation, the unreasonableness of the arrest is apparent to most people who do not wear black robes and get lost in abstractions.

As to the accuracy of the observation before the decision, the data is inconclusive. I suppose that arrests as extremely unreasonable and counterproductive as Atwater's are relatively rare. At least I certainly hope so. But arrests made for the purpose of harassment or as a subterfuge to create a search opportunity are not strangers to the Court. Indeed, it had just such a case, *Arkansas v. Sullivan*,¹⁴⁵ awaiting decision later that term.

Atwater's attorneys did file a supplemental brief, detailing a study of California and Oregon that indicated that slightly more than one out of a thousand detected traffic offenses resulted in arrest.¹⁴⁶ Although these figures were small on a relative scale, they were not de minimis, averaging between 35,000 and 40,000 arrests per year in the two states. Unfortunately the study does not tell us the circumstances of the arrests. Although the study excluded vehicular manslaughter, DUI, and hit and run,¹⁴⁷ it does not tell us how many of these cases involved circumstances that *should* have led to an arrest, such as the driver with a revoked driver's license.¹⁴⁸ Thus, we are left in the dark with no real sense of the frequency of improper arrests.

Most importantly, however minuscule, the number of outrageously improper arrests may have been before *Atwater*, it

¹⁴⁵ 532 U.S. 769 (2001); see discussion *infra* Part III.C.

¹⁴⁶ Pet. for Reh'g at 3-4, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408).

¹⁴⁷ *Id.*

¹⁴⁸ See *supra* Part II.D for a discussion of *United States v. Robinson* 414 U.S. 218 (1973).

is sure to rise in the wake of *Atwater*. Prior thereto, most police officers in Officer Turek's position would not have assumed that they were constitutionally free to impose gratuitous humiliation on a citizen who had merely committed a minor traffic offense. Now the police know that they can. While one can hope that the Court has not created an incipient "epidemic" of such searches, it would be naive in the extreme to assume that they will not significantly increase.

Before leaving *Atwater*, it would be remiss to overlook the nature of this case. Gail Atwater is not a criminal. In a very real sense, she is Ms. Everyperson. There is hardly a driver in the country who has not at one time or another violated one of the myriad of traffic offenses.¹⁴⁹ For years, we have been told that the Fourth Amendment has been retarded by the exclusionary rule. The argument goes that the Court, unwilling to let criminals go, is likely to contract the scope of the Fourth Amendment's substantive provision.¹⁵⁰ *Atwater* raises considerable doubts about that. A person who could have been one of us is unnecessarily subject to abject humiliation. Even though no criminal evidence is found, she is told not only that she cannot have the wrong redressed, but also that the police officer who perpetrated the indignity upon her was acting within his constitutional power. So much for the exclusionary rule as scapegoat for the Court's parsimonious view of the Fourth Amendment.

¹⁴⁹ At oral argument, Justice Scalia suggested, perhaps in jest, that he has never committed such a misdemeanor himself. Oral Argument at 13, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408). So perhaps the text should exclude him and those extremely few others who have achieved his level of perfection. It should be noted, however, that one need not in fact commit a traffic offense to be subjected to the *Atwater* indignity. It is only necessary for the police to have probable cause that the "crime" has been committed.

¹⁵⁰ See, e.g., Francis A. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 U. ILL. L. REV. 1, 252 (1950); see also Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 63, 436-37 (1999). Slobogin states:

It might be added that, as an empirical matter, the rule probably does more damage to public respect for the courts than virtually any other single judicial mechanism, because it makes courts look oblivious to violations of the criminal law and involves prosecutors, defense attorneys and judges in charade trials in which they all know the defendant is guilty.

Id.

C. Arkansas v. Sullivan

*Arkansas v. Sullivan*¹⁵¹ is a logical, though regrettable, extension of *Atwater*¹⁵² and *Whren*.¹⁵³ Joe Taylor, a Conway, Arkansas police officer, made a routine stop to ticket Kenneth Sullivan for driving forty mph in a thirty-five mph zone and for having an excessively tinted windshield.¹⁵⁴ Upon seeing Sullivan's license, the police officer realized that there was "intelligence on [him] regarding narcotics."¹⁵⁵ Based on this realization, the officer decided to arrest Sullivan for the traffic offenses. Although the police officer added some other traffic charges¹⁵⁶ and a bogus weapons charge,¹⁵⁷ all of the Arkansas courts found that the arrest was effectuated as a pretext to search Sullivan's car for drugs.¹⁵⁸

Officer Taylor stopped Sullivan in a service station and then called for back up. The back up police officer took Sullivan to the police station. Thereafter, while the car was still at the service station, Officer Taylor conducted an "inventory" search of Sullivan's car which turned up drugs. This "inventory search" was in complete accord with Conway police regulations;¹⁵⁹ literally "by the book," if you will. Thus, if the pretextual arrest was valid, so was the inventory search.¹⁶⁰

For the Supreme Court, this was an easy case, decided per curiam. Obviously if a pillar of the community soccer mom can

¹⁵¹ 532 U.S. 769 (2001).

¹⁵² See discussion *supra* Part III.B.

¹⁵³ *Whren v. United States*, 517 U.S. 806 (1996); see discussion *supra* Part II.F.

¹⁵⁴ *Sullivan*, 532 U.S. at 769. Whether the excessively tinted windshield charge is itself a Fourth Amendment violation is an interesting question. To the extent that a state is concerned with excessive tinting blocking a driver's vision, there is no Fourth Amendment problem. See, e.g., *United States v. Fong*, 662 F. Supp. 1319, 1322 (D. Del. 1987) (citing to statutes that govern window obstructions for safety reasons). But to the extent that such statutes are concerned with restricting police officers' ability to peer inside cars, the statute could arguably be thought to have an anti-Fourth Amendment animus and be unconstitutional for that reason. The resolution of this question is beyond the scope of this Article.

¹⁵⁵ *Sullivan*, 532 U.S. at 770 (quoting *State v. Sullivan*, 16 S.W.3d 551, 552 (Ark. 2000), *rev'd*, 532 U.S. 769 (2001)).

¹⁵⁶ The charges added were for not possessing his registration card, not possessing proof of insurance, and operating an unsafe vehicle due to improper window tinting. *Id.*

¹⁵⁷ The "weapon" was a rusted roofing hatchet on the floor of his car. *Id.* Sullivan was a professional roofer.

¹⁵⁸ See *id.* at 771.

¹⁵⁹ *Id.* at 770.

¹⁶⁰ See discussion *supra* Part II.B.

be arrested for a traffic offense so can a suspected drug possessor. A simple citation to *Whren* defeated the pretext claim.¹⁶¹ Therefore, Arkansas is free to use the narcotics finding at Sullivan's trial insofar as the Federal Constitution is concerned.¹⁶²

The four Justices that dissented in *Atwater* concurred in *Sullivan*, feeling bound by precedent to do so.¹⁶³ Importantly, Justice Ginsburg observed that "if experience demonstrates 'anything like an epidemic of unnecessary minor-offense arrests,' I hope the Court will reconsider its recent precedent."¹⁶⁴

As a result, we are left with a Fourth Amendment jurisprudence that seriously undervalues the security of citizens traveling the highways.

IV. BUILDING A BETTER BALANCE

It is incumbent upon one who challenges the balance drawn by the Supreme Court to develop a better one. In this part, I will attempt to construct a better balance and chart the possible ways to achieve it. The key to a proper balance is that it must be just that: a balance. It cannot disregard legitimate police needs any more than it can disregard legitimate citizen needs. The balancer cannot forget that the text of the Fourth Amendment does not forbid all search and seizures, only *unreasonable* ones. As such, the Fourth Amendment is one of the few with a textual commitment to balancing.¹⁶⁵

¹⁶¹ *Sullivan*, 532 U.S. at 771–72 (quoting the unanimous holding of *Whren* that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis").

¹⁶² Of course, Arkansas is still free to invalidate a pretextual arrest on state constitutional or statutory grounds, which is precisely what it did do. See *State v. Sullivan*, 74 S.W.3d 215 (Ark. 2002); discussion *infra* Part V.C.

¹⁶³ *Sullivan*, 532 U.S. at 772 (Ginsburg, Stevens, O'Connor, Breyer, JJ., concurring).

¹⁶⁴ *Id.* at 773 (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001)).

¹⁶⁵ Even Justice Black, perhaps the most absolutist rule-oriented Justice to ever sit on the Court, understood that the Fourth Amendment requires balancing. In his concurrence in *Rochin v. California*, 342 U.S. 165 (1952), Justice Black differentiated the Fourth Amendment from other amendments:

Some constitutional provisions are stated in absolute and unqualified language such, for illustration, as the First Amendment stating that no law shall be passed prohibiting the free exercise of religion or abridging the freedom of speech or press. Other constitutional provisions do require courts to choose between competing policies, such as the Fourth Amendment which, by its terms, necessitates a judicial decision as to what

A. *Automobiles and Warrants*

The best balance for automobiles and warrants would be to take both *Carroll*¹⁶⁶ and *Coolidge*¹⁶⁷ seriously. *Carroll* makes a powerful case, both historically and pragmatically, for allowing moving vehicles, be it car or horse and buggy, to be searched before it leaves the jurisdiction. While in theory a car could be immobilized pending the issuing of a warrant, that seems impractical at best, and probably inconsistent with the best interest of most drivers.¹⁶⁸ Consequently, any reconstructed balance should retain *Carroll*.

The *Coolidge* admonition that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears,"¹⁶⁹ on the other hand, needs to be taken seriously as a balancing bookend to *Carroll*. A properly constructed balance should allow a warrantless search of an automobile when, and only when, obtaining a warrant would be impractical.

A serious application of the proposed *Carroll*/*Coolidge* principles would yield a different result in both *Chambers*¹⁷⁰ and *Carney*.¹⁷¹ In *Chambers*, the car was immobilized at the police station. Presumably the magistrate was close by. Consequently, there was no need under *Carroll* to search without a warrant and the *Coolidge* admonition should have prevailed.¹⁷²

is an 'unreasonable' search or seizure.

Id. at 176 (Black, J., concurring). *But cf.* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 557-60 (1999) (discussing the "warrant preference" construction of the Fourth Amendment as compared to the "generalized-reasonableness" construction).

¹⁶⁶ *Carroll v. United States*, 267 U.S. 132 (1925); see discussion *supra* Part II.A.

¹⁶⁷ *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); see discussion *supra* Part II.A.

¹⁶⁸ If the search reveals evidence of crime and the officer in fact lacked probable cause, it will be excluded. If the search does not reveal evidence of crime and the officer lacked probable cause, she will be subject to a civil suit. If the question of probable cause is close, at least in theory, the searchee will be more likely to prevail if the officer does not have a warrant. *Cf.* *United States v. Leon*, 468 U.S. 897, 926 (1984) (holding that a search with a warrant made in the good faith belief that it was predicated on probable cause will be sustained). Therefore, the only potential searchee who would be hurt by the rule is one who would rather be detained during the warrant application process and avoid having his car searched as opposed to suffering through the immediate search and seek redress afterwards.

¹⁶⁹ 403 U.S. at 461-62.

¹⁷⁰ *Chambers v. Maroney*, 399 U.S. 42 (1970); see discussion *supra* Part II.A.

¹⁷¹ *California v. Carney*, 471 U.S. 386 (1985); see discussion *supra* Part II.A.

¹⁷² Of course, *Coolidge* was not decided until a year after *Chambers*.

Similarly, in *Carney*, the police could have obtained a warrant while the motor home was parked with its curtains drawn. Obviously, if the motor home attempted to leave, a *Carroll*-type contingency would have occurred and the warrant would be unnecessary. As long as the vehicle remained immobile, however, a proper application of the *Carroll*/*Coolidge* balance would have invalidated the search.

B. Inventory Searches

The problem with inventory searches is their subterfuge, *vis-a-vis* bona fide use. For example, in *Sullivan*,¹⁷³ when Officer Taylor determined that the man that he stopped for speeding was a drug suspect for whom he lacked probable cause to search, Taylor could hardly wait to arrest him and let another officer take him to the police station while he personally conducted the "inventory" search. Similarly, in *Bertine*¹⁷⁴ and in *Wells*,¹⁷⁵ the searches were clearly inventory in form and evidence-seeking in substance.¹⁷⁶ If this type of inventory search could be eliminated, much of the balance would be restored.

I would hold that inventory searches would be permissible where they are pursuant to a police directive, and the directive is reasonably related to the justification for inventory searches. By conducting searches pursuant to a directive, as opposed to "canalized discretion,"¹⁷⁷ the officer is less likely to allow an evidence-seeking animus to motivate his decision. Similarly, the requirement that the inventory policy be reasonably related to the justification for inventory searches can eliminate many of the worst abuses. In *Sullivan*, for example, the vehicle had not even been impounded. In *Bertine*, the arrestee could have been asked how he wanted his valuables and van protected. In neither case was the procedure consistent with the need to protect valuables, to protect the police from false claims, or to protect the police from hidden danger. By insisting on these things, the Court could "hold the balance true."

Nevertheless, its admonition was hardly unknown to the Court even if never expressed in precisely those terms.

¹⁷³ *Arkansas v. Sullivan*, 532 U.S. 769 (2001); see discussion *supra* Part III.C.

¹⁷⁴ *Colorado v. Bertine*, 479 U.S. 367 (1987); see discussion *supra* Part II.B.

¹⁷⁵ *Florida v. Wells*, 495 U.S. 1 (1990); see discussion *supra* Part II.B.

¹⁷⁶ See *supra* Part II.B.

¹⁷⁷ *Wells*, 495 U.S. at 4; see *supra* note 45 and accompanying text.

C. Roadblocks

Weigh stations for trucks are clearly necessary, other fixed roadblocks such as permanent border checkpoints are probably necessary.¹⁷⁸ Temporary roadblocks for such things as license and drunk driving checks, however, differ from fixed roadblocks in that they are unexpected and hence more frightening to the average citizen.¹⁷⁹ They are also more inconvenient in that a person, by hypothesis, does not know of their existence. Consequently, he cannot build in the time delay. For example, I know that the commuting time from my home to the law school is eight minutes. If I am stopped at a roadblock to check for my license, sobriety, or seatbelt usage, I may be delayed five minutes. Thus I may be late for a meeting or class.

This might be a cost worth charging the citizenry if enough concomitant gain to our safety could be achieved. Unfortunately, this is probably not the case. The large number of police officers that man a typical roadblock¹⁸⁰ are too busy frightening and delaying innocent motorists to be out catching the dangerous ones. Consequently, temporary roadblocks, while not as constitutionally problematic as singling out individual drivers,¹⁸¹ are sufficiently harmful and unproductive to warrant their invalidation.

An alternative that a state might consider would be to require the showing of a driver's license to enter certain roads. Such a requirement would be fixed, thus preventing unanticipated delays. It would be like obtaining a ticket to travel on a turnpike, a feature not uncommon in some states. Indeed, it would be perfectly appropriate to have a breathalyzer at such entrances.¹⁸² The point of eliminating roadblocks is not

¹⁷⁸ Note, however, that Justice Thomas has recently suggested that perhaps this question should be rethought. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting); *supra* note 48.

¹⁷⁹ The fear caused by these roadblocks is not unlike the feeling one must get in a totalitarian country where the police might be expected to conduct surprise roadblocks.

¹⁸⁰ See *supra* note 60 and accompanying text.

¹⁸¹ See *Delaware v. Prouse*, 440 U.S. 648 (1979); *supra* discussion Part II.C.

¹⁸² As Justice Stevens wrote in his dissent in *Sitz*:

Likewise, I would suppose that a State could condition access to its toll roads upon not only paying the toll but also taking a uniformly administered breathalyzer test. That requirement might well keep all drunken drivers off the highways that serve the fastest and most dangerous traffic. This procedure would not be subject to the constitutional

to make it easier for unqualified drivers to remain on the highway, but rather to make life less oppressive for the qualified driver.¹⁸³

D. Search Incident to Arrest

The Court's *Robinson* decision was clearly correct.¹⁸⁴ In addition to the bright line value of the rule, it is simply not reasonable to expect a police officer to transport a suspect to the police station without first conducting a thorough search. Certainly, a small weapon, such as a razor blade, *could* be hidden in even a crumpled cigarette pack, such as the one in *Robinson*. Of course, part of the reason for allowing the search incident to an arrest is that the arrest itself is such a serious intrusion on personal liberty that the search can truly be called merely "incident." Consequently, arrests, and searches incident thereto, should occur sparingly. *Gustafson*, for example, may not have warranted an arrest.¹⁸⁵ But, *Robinson*, which involved a driver operating with a revoked license, clearly did warrant an arrest and the consequent search incident thereto.

Belton, on the other hand, clearly needs to be rethought.¹⁸⁶ Most non-traffic arrests will furnish their own probable cause to search. In *Belton* itself, the defendants were stopped, but not arrested, for speeding. The smell and sight of marijuana in the car, however, did furnish probable cause, and thus should have justified the search. Contrariwise, an arrest for a traffic offense, even if otherwise lawful,¹⁸⁷ should not justify a search of the passenger compartment of the car. So, even if *Atwater* remains good law, it is unlikely that the nightmare scenario posited at the beginning of the Article would occur with any frequency if

objections that control this case.

Michigan v. Sitz, 496 U.S. 444, 474 (1990) (Stevens, J., dissenting).

¹⁸³ See generally Loewy, *supra* note 63 (exploring the proposition that the Fourth Amendment exists as a protection for the innocent that should only be invoked by the guilty when it is necessary to protect the innocent).

¹⁸⁴ See *United States v. Robinson*, 414 U.S. 218 (1973); discussion *supra* Part II.D.

¹⁸⁵ As Justice Stewart suggested in *Gustafson*: "It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973); see *supra* note 68 and *infra* Part IV.H.

¹⁸⁶ *New York v. Belton*, 453 U.S. 454 (1981); see *supra* discussion Part II.D.

¹⁸⁷ See *supra* Part III.B; *infra* Part IV.G.

the police were forbidden to search the vehicle incident to the arrest.¹⁸⁸

E. Consent

As long as judges or juries decide consent questions in criminal cases, the fact finder will nearly always believe the police, even though the police will not always be telling the truth.¹⁸⁹ The only way to ensure that consent was in fact given is to have the searchee sign a document prior to the search indicating his consent. Because the consent should be voluntary, the document should also include a statement that the searchee was aware of his right to refuse.

This analysis assumes that it is not in society's interest to obtain consent from individuals who do not wish to give it. Although an occasional judge has intimated to the contrary,¹⁹⁰ I believe that most jurists would concur. Nevertheless, the rules that they have laid down practically ensure that some people who do not wish to be searched will consent, oblivious to the fact that they had a choice. The Court's most recent foray into the area, *United States v. Drayton*,¹⁹¹ reaffirms *Schneckloth*¹⁹² and *Robinette*,¹⁹³ thereby continuing the police/citizen imbalance.

F. *Whren v. United States*

*Whren*¹⁹⁴ involved two issues: the stop without authority and the subterfuge stop. The easier of the two questions, which the

¹⁸⁸ Of course, this also assumes that the Court adheres to my suggestions in regard to inventory searches. See *supra* Part IV.B.

¹⁸⁹ See *supra* Part II.E.

¹⁹⁰ See, e.g., *Martinez v. United States*, 333 F.2d 405, 407 (9th Cir. 1964), *vacated*, 380 U.S. 260 (1965). The court stated:

Happily, not all criminals are highly intelligent and use the most effective tactics in their contacts with the police. Again happily, sometimes their contacts with the police confuse them, and they say and do things which, after deliberation, they regret. To whatever extent stupidity or confusion on the part of the guilty person contributes to the prompt acquisition by the police of evidence of crime, so that the police can get back to work on the numerous cases which may remain unsolved, society is the gainer and nobody is the loser of anything to which he is constitutionally entitled.

Id.

¹⁹¹ 122 S. Ct. 2105 (2002).

¹⁹² *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); see discussion *supra* Part II.E.

¹⁹³ *Ohio v. Robinette*, 519 U.S. 33 (1996); see discussion *supra* Part II.E.

¹⁹⁴ *Whren v. United States*, 517 U.S. 806 (1996); see discussion *supra* Part II.F.

Court unfortunately answered wrongly, was the stop without authority. If the local police regulations forbid a plainclothes police officer to make a traffic stop unless certain specified special circumstances are present, it is hard to construct an argument that the stop, in the absence of such circumstances, was reasonable. That is, however, precisely what the *Whren* Court held.¹⁹⁵

Where a police officer has authority under local law to stop for traffic offenses and, motivated by a suspicion of wrongdoing, undertakes such a stop where the driver has, in fact, violated a traffic law, the question is much closer. If the officer could do nothing more than ticket or warn the driver and look at what is in plain view in the car, as was the case in *Whren*, I would be inclined to allow the stop. Unfortunately, the officer may also ask for consent, without telling the driver she may refuse.¹⁹⁶ Furthermore, the officer can make an arrest for the traffic offense¹⁹⁷ and search the car incident thereto¹⁹⁸ or inventory the car.¹⁹⁹ So long as this remains the law, subterfuge stops should not be allowed. But, if those other abuses are corrected, a uniformed police officer should be able to stop a traffic offender and look into the car while giving a ticket or warning, whatever the officer's subjective motive.²⁰⁰

G. Traffic Arrests

Unquestionably there are times when a traffic arrest is appropriate. Drunk driving or driving with a revoked license²⁰¹ are clear examples. Only an incompetent police officer would allow a drunk or unlicensed driver to drive his vehicle home. Even lesser offenses might have aggravating circumstances. For

¹⁹⁵ See *id.* at 815, 818–19.

¹⁹⁶ See *supra* Parts II.E, IV.E.

¹⁹⁷ See *supra* Part III.B.

¹⁹⁸ See *supra* Part II.D.

¹⁹⁹ See *supra* Part III.C.

²⁰⁰ Were the rule otherwise, every speeder could potentially defend himself on the ground that the police officer wanted to look into his car. While such defenses would rarely be successful, I am loath to create such a potential argument unless it is necessary to prevent real abuses. *Whren* was a real abuse because the policemen were not traffic cops, but vice-squad officers. *Whren v. United States*, 517 U.S. 806, 808 (1996).

²⁰¹ See, e.g., *United States v. Robinson*, 414 U.S. 218 (1973); see also discussion *supra* Parts II.D, IV.D.

example, in *Atwater*,²⁰² suppose that Ms. Atwater, when stopped, told Officer Turek: "I don't believe in seatbelts and no matter how many times you stop me, I'm not putting them on." Under those circumstances, Officer Turek would have been justified in arresting Atwater.

To be sure, requiring something more than a traffic offense *simpliciter* for an arrest makes the officer's job somewhat harder and has the potential to create more litigation. But that is a very small cost to pay for the security of the people, which is the backbone of the Fourth Amendment. I do not mean to suggest that every time a person hits the highway, the fear of arrest is a front burner issue. I do, however, mean to suggest that my hypothesized nightmare²⁰³ and Gail Atwater's real nightmare experience have no place in a country that purports to secure people from unreasonable searches and seizures.²⁰⁴

H. Subterfuge Traffic Arrests

Were we to disallow *Atwater*-type arrests, there would be no need for a special rule to prevent subterfuge arrests. But so long as we permit such arrests, we must be careful that they are not used as an excuse to search. A search incident to a real arrest is one thing, but a search incident to an arrest that is made for the sole purpose of searching is something totally different. *Sullivan*²⁰⁵ is a good example. The facts could not be clearer. The arrest was made solely to search. The Arkansas Supreme Court recognized that both before²⁰⁶ and after²⁰⁷ the Supreme Court's decision. The Supreme Court knew it too. It just did not care.

²⁰² *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); see discussion *supra* Part III.B.

²⁰³ See *supra* Part I.

²⁰⁴ The Fourth Amendment reads in pertinent part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

²⁰⁵ *Arkansas v. Sullivan*, 532 U.S. 769 (2001); see discussion *supra* Part III.C.

²⁰⁶ See *State v. Sullivan*, 11 S.W.3d 526, 528 (Ark. 2000), *rev'd*, *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

²⁰⁷ See *State v. Sullivan*, 74 S.W.3d 215, 222 (Ark. 2002) (relying on independent state grounds to find that pretextual arrest constituted unreasonable police conduct and a basis for suppression); see *supra* note 63; discussion *infra* Part V.C.

To be sure, there will be difficult cases. *Gustafson* arguably was a close case.²⁰⁸ *Gustafson* claimed to be a student from a nearby community, who had left his driver's license in the dorm. The officer might have been able to check *Gustafson*'s licensure by phone, but given that the stop occurred in 1969²⁰⁹ and that *Gustafson* claimed to have an out of state license, it is a factual question as to whether such a check would have been possible. Beyond that he had no way of knowing that the person before him was actually James *Gustafson*. Thus, it might have been reasonable for the officer to arrest him.

Unquestionably there is an element of discretion in a case like *Gustafson*. The officer admitted to arresting only three or four of every ten persons stopped for driving without a license. He indicated that local residents were less likely to be arrested. Given that *Gustafson* drove an out of state car, lived in a city a few miles away, and appeared bleary-eyed, it is plausible that the arrest should have been upheld. Unfortunately *Gustafson* did not argue the point. Even more unfortunately, it would be irrelevant if he argued it today.

V. GETTING THERE FROM HERE

The distance between where we are and where we ought to be is such that it would take an optimist of extraordinarily Pollyannic proportions to believe that we can get all the way from here to there anytime soon. Understanding that neither Rome nor a sound Fourth Amendment jurisprudence can be built in a day, and candidly recognizing that reasonable people may differ as to the precise parameters of a true balance, I will examine how far we can reasonably hope to move and how we can get there.

A. *The Supreme Court*

For the long term, the Supreme Court, as the final arbiter of the Constitution, is the best hope to fix the imbalance that it created. In the short term, much repair is unlikely. Certainly there is no reason to believe that the Court will allow factual immobility to negate a police officer's power to search without a warrant except in the narrow confines of the *Coolidge* fact

²⁰⁸ See *Gustafson v. Florida*, 414 U.S. 260 (1973); see discussion *supra* Part II.D.

²⁰⁹ This time was considerably less computer-sophisticated than the present.

pattern.²¹⁰ And even *Coolidge* was technically a plurality opinion,²¹¹ which may make it vulnerable to eventual overruling.²¹² Similarly, the Court's willingness to blink at subterfuge inventory searches²¹³ was reaffirmed when it upheld the mockingly phony inventory search in *Sullivan*.²¹⁴

There is more reason for optimism in regard to roadblocks. Not only did six Justices vote to invalidate Indianapolis's drug checkpoint in the most recent case before the Court,²¹⁵ but a seventh Justice, Justice Thomas, who dissented in the case based on precedent, indicated a willingness to reconsider and possibly overrule such cases as *Michigan v. Sitz*.²¹⁶ Justice Thomas is only one of four new Justices to join the Court since *Sitz*. None of the other three, Justices Souter, Ginsburg, or Breyer, has ever voted to uphold a roadblock.²¹⁷ Plausibly, these four Justices could join Justice Stevens, who dissented in *Sitz*,²¹⁸ in overruling that decision.²¹⁹ Thus, there is at least some reason to believe that the future of temporary license or sobriety checkpoints may not be so secure as the right to conduct warrantless and inventory searches of cars.

The future of *Belton*²²⁰ searches is also uncertain. While nobody has suggested rethinking the scope of a search incident to an arrest in an automobile, the question does not frequently arise. In most cases of an appropriate arrest in an automobile,

²¹⁰ See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *supra* Parts II.A, IV.A.

²¹¹ I say technically because Justice Harlan, whose fifth vote was necessary for a majority, did not appear to disagree in any significant way. See *id.* at 491; *supra* note 17.

²¹² Cf. *Horton v. California*, 496 U.S. 128, 137 (1990) (overruling the "plain view" analysis of the *Coolidge* plurality).

²¹³ See *Colorado v. Bertine*, 479 U.S. 367 (1987); see also discussion *supra* Parts II.B, IV.B; cf. *Florida v. Wells*, 495 U.S. 1 (1990).

²¹⁴ See *Arkansas v. Sullivan*, 532 U.S. 769 (2001); discussion *supra* Parts III.C, IV.B.

²¹⁵ See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); discussion *supra* Parts II.C, IV.C.

²¹⁶ *Edmond*, 531 U.S. at 56; see *supra* Part II.C (discussing *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 460 (1990)).

²¹⁷ All three Justices were in the majority in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). See discussion *supra* Parts II.C, IV.C.

²¹⁸ 496 U.S. at 460; see also *supra* note 182.

²¹⁹ I do not mean to suggest anything more than a possibility of the Court reaching such a result. Justice O'Connor, who wrote the opinion in *Edmond*, took pains to distinguish *Sitz*. See *Edmond*, 531 U.S. at 43.

²²⁰ *New York v. Belton*, 453 U.S. 454 (1981); see discussion *supra* Parts II.D, IV.D.

the circumstances of the arrest will give rise to probable cause to search, thereby obviating the need to search incident to the arrest.²²¹ Where the justification for the arrest does not give rise to probable cause, the police seem more predisposed to rely on an inventory search than on a search incident to an arrest.²²² An alternative solution available in cases of apparent danger is to “frisk” the car, i.e. briefly search the interior of the car for weapons.²²³ Thus, I believe that the future of *Belton* remains uncertain.²²⁴

While the future of roadblocks and *Belton* searches may be uncertain, there is nothing uncertain about consent searches. As recently as June 17, 2002, in *United States v. Drayton*,²²⁵ the Court emphasized the continuing vitality of *Schneckloth* and *Robinette*. The Court upheld the “consent” search of bus passengers who were approached by police officers who announced their mission to interdict drugs, and refrained from informing the passengers of either their right to leave or their right to say “no.”²²⁶ After the consensual search of their bags, which proved negative, the police “asked” to frisk the passengers, a procedure that the Court has described as a serious indignity.²²⁷ Although the passengers possessed drugs in a hard packet under their clothing, they “consented” to the frisk.²²⁸

One positive from *Drayton* is that Justice Souter, who joined Justices Stevens and Ginsburg in dissent, suggested that a warning should be necessary before consent under those circumstances is valid.²²⁹ Given that Justice Souter wrote *Atwater*, it is significant that he recognized the need to “hold the

²²¹ *Belton* itself is a good example. See 453 U.S. at 455–56 (noting that the police officer smelled burned marijuana and saw on the floor an envelope suspected of containing the drug).

²²² See, e.g., *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Colorado v. Bertine*, 479 U.S. 367 (1987); discussion *supra* Parts II.B, IV.B.

²²³ See *Michigan v. Long*, 463 U.S. 1032, 1034–35 (1983) (noting that even though the frisk of the automobile is theoretically for weapons, any drugs found thereby are also admissible).

²²⁴ The Supreme Court granted certiorari in *Florida v. Thomas*, 531 U.S. 1069 (2001), to consider the current scope of *Belton*, but ultimately dismissed the case as unripe for adjudication, expressing no opinion on the merits. See 532 U.S. 774 (2001).

²²⁵ 122 S. Ct. 2105 (2002).

²²⁶ *Id.* at 2113–14.

²²⁷ See *Terry v. Ohio*, 392 U.S. 1, 17 n.14 (1968).

²²⁸ *Drayton*, 122 S. Ct. at 2113.

²²⁹ See *id.* at 2115.

balance true" in *Drayton*. In view of Justice Souter's demonstrated ability to learn from past mistakes,²³⁰ his concern for the plight of the passengers in *Drayton* may suggest a more balanced approach to a future *Atwater*, should one arise.

Despite *Schneckloth*, *Robinette*, and *Drayton*, there is some reason to believe that consent given pursuant to a threat to arrest will be held invalid. *Schneckloth* emphasized that no threat to arrest had been made.²³¹ Thus, if one consents pursuant to an arrest threat,²³² the consent plausibly would not be valid. Of course, such a holding would not necessarily benefit drivers because the police could just arrest the driver *after* consent was denied, search the car, and release the driver after nothing was found. So, regardless of the ultimate resolution of the validity of a consent search obtained under threat of arrest, the balance will continue to be heavily weighted against the citizen.

The Court is obviously not concerned with subterfuge. Not only was *Whren*²³³ a unanimous decision, but also the entire Court in *Sullivan*²³⁴ condoned the subterfuge aspects of the case.²³⁵ There is, however, some hope that the Court will rethink *Atwater*.²³⁶ *Atwater* is partly predicated on the assumption that

²³⁰ For example, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991), Justice Souter would have upheld restrictions on nude dancing because of its deleterious secondary effects. Nine years later, in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 316 (2000), Justice Souter partially dissented based "on a demand for an evidentiary basis that I failed to make when I concurred in *Barnes*." Souter rejected his earlier decision, lamenting that "I should have demanded the evidence then, too." *Id.* (Souter, J., dissenting). He explained this change of heart as a result of his earlier ignorance, "but after many subsequent occasions to think further about the needs of the First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted." *Id.* at 317 (Souter, J., dissenting).

²³¹ Justice Stewart, writing for the Court, based his conclusions on the finding that "the prosecution met the necessary burden of showing consent . . . since there were clearly circumstances from which the trial court could ascertain that consent had been freely given without coercion or submission to authority. . . ." *Schneckloth v. Bustamonte*, 412 U.S. 218, 221 (1973) (quoting *People v. Bustamonte*, 76 Cal. Rptr. 17, 20 (Cal. Ct. App. 1969)).

²³² A variant possibility of the nightmare scenario imagined at the start of this Article. See *supra* Part I.

²³³ *Whren v. United States*, 517 U.S. 806 (1996); see *supra* Part II.F.

²³⁴ *Sullivan v. Arkansas*, 532 U.S. 769 (2001) (per curiam); see *supra* Part III.C.

²³⁵ The four Justices that concurred believed that an arrest should not be allowed at all. But given that the Court had held otherwise in *Atwater*, they upheld the search, unconcerned with the subterfuge character of either the arrest or the subsequent search. See *Sullivan*, 532 U.S. at 773.

²³⁶ See discussion *supra* Part III.B.

behavior such as that exhibited by Officer Turek is sufficiently rare that we need not constitutionally worry about it. To the extent that this assumption either was always false or becomes false as officers avail themselves of the open season on automobiles declared by the Court, perhaps the Court will rethink its decision.

Unfortunately, though it seems inevitable that the number of traffic arrests will rise, perhaps overwhelmingly, they are likely to stay beneath the Court's radar screen. It is highly unlikely that another *Atwater* will come to the Court. What lawyer would bring such a case? She would have a better chance of being hit with Rule 11 sanctions²³⁷ than she would of winning. Even in the criminal context, *Sullivan* seems to be an absolute bar to even noticing these concerns. Perhaps if enough traffic arrests get to the Court on such issues as search incident to arrest,²³⁸ inventory search, or consent, the Court, particularly Justice Souter,²³⁹ will take notice and grant certiorari in a traffic case to reconsider *Atwater*. Candidly, however, I am not holding my breath.

B. State Legislation

Ordinarily, the state legislature is not a reliable source for reigning in police excesses. The average citizen, who, of course, employs the legislators, does not tend to see the Fourth Amendment as a balance between the police and himself. Rather, he sees it as a conflict between the police and criminals.²⁴⁰ As such, he roots for the cops. Consequently, a

²³⁷ Rule 11 of the Federal Rules of Civil Procedure imposes on all lawyers who sign or file motions, pleadings or other paper, the obligation to engage in "an inquiry reasonable under the circumstances" or face sanctions. FED. R. CIV. P. 11(b). This rule is designed to prevent unreasonable, frivolous, or harassing legal action by unscrupulous lawyers. *Id.* at 11(b)(1)–(2).

²³⁸ For example, while *Belton* made it clear that some automobile searches incident to arrest are permissible, a host of questions including whether a locked glove compartment or the trunk of a hatchback accessible from the passenger compartment may be searched were left ambiguous and remain unresolved. See *supra* Part II.D.

²³⁹ Justice Souter was probably the Justice in the majority most concerned about the infrequency of such arrests. He noted the question asked at oral argument that inquired as to "how bad the problem is out there." *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001). I frankly doubt that Justice Scalia would be terribly concerned with the frequency of such arrests.

²⁴⁰ See Slobogin, *supra* note 150, at 416 (predicting that the public will support "highly questionable" police tactics).

legislator desirous of holding her seat is not likely to support measures that the citizen would see as "handcuffing the police." Because of this distorted view of the Fourth Amendment,²⁴¹ the legislature is generally not helpful in ameliorating the Supreme Court's Fourth Amendment imbalance.

Remedying the *Atwater* situation legislatively is another matter. Many, perhaps most, citizens have had traffic contacts with the police that they would just as soon forget. When the issue is police power in that context, a legislator can expect to gain, not lose, votes by seeking to reign in the Bart Tureks²⁴² of the world. Even the hardest nosed law and order zealot is not likely to support such wanton arbitrariness. Thus, unlike almost every other Supreme Court decision upholding police arbitrariness, *Atwater* is amenable to legislative correction.

Whether such legislation would in fact limit police may depend on whether the legislation includes an exclusionary rule. If it does not, it is plausible that the Supreme Court would still allow evidence obtained from an unlawful, but not constitutionally unreasonable, arrest to be admitted. To illustrate, in *Whren*,²⁴³ the Court upheld the admission of evidence obtained from a seizure forbidden by District of Columbia Police regulations. Similarly, in *California v. Greenwood*,²⁴⁴ the Court allowed evidence to be introduced that was obtained in violation of the California Constitution.²⁴⁵ Because California did not have an exclusionary rule for state constitutional violations, and because the evidence was not obtained in violation of the Federal Constitution—which, of course, does have an exclusionary rule—the evidence was admissible under the Federal Constitution. Thus, to ensure that police will not be tempted to harass hundreds of innocent citizens in the hope of catching one guilty one, it would be best

²⁴¹ A more accurate view would recognize that the Fourth Amendment measure should focus on the innocent citizen. I have developed this at length elsewhere. See generally Arnold H. Loewy, *Protecting Citizens from Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C. L. REV. 329 (1984); Loewy, *supra* note 63.

²⁴² Bart Turek was the police officer in *Atwater*. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); discussion *supra* Part III.B.

²⁴³ *Whren v. United States*, 517 U.S. 806 (1996); see discussion *supra* Parts II.F, IV.F.

²⁴⁴ 486 U.S. 35 (1988); see also discussion *supra* Part IV.H.

²⁴⁵ *Greenwood*, 486 U.S. at 42–43. Under the California Constitution, searching a person's trash is forbidden. See *People v. Krivda*, 486 P.2d 1262 (Cal. 1971).

for the legislature to include an exclusionary rule.²⁴⁶

C. *State Constitutional Law*

State constitutional law can fix much of the broken balance. While lacking nationwide impact, a state supreme court can ensure that, at least in its jurisdiction, an appropriate police citizen balance is maintained. Sometimes the fix comes in the very case that created the problem. For example, in *Sullivan*,²⁴⁷ the Arkansas Supreme Court, after being told that it could not expand the Federal Constitution, construed its own constitution to forbid subterfuge arrests.²⁴⁸ In addition to *Sullivan*, examples of states refusing to accept the Supreme Court's conception of balance abound.²⁴⁹ Thus, a state does not have to accept an unreasonable search as reasonable.

D. *(Substantial) B + (Substantial) C (Could) = A*

At the risk of appearing overly algebraic, this heading simply suggests that if enough legislation and enough state constitutional decisions are rendered condemning *Atwater*, the Supreme Court might rethink its position. The Fourth Amendment, whose most important phrase is "unreasonable" surely is sensitive to, if not driven by, evolving standards of decency. For example, after refusing to adopt the exclusionary rule in 1949,²⁵⁰ the Court reversed its course in 1961²⁵¹ largely because a significant number of additional states had adopted the exclusionary rule between 1949 and 1961.²⁵²

²⁴⁶ I do not mean to suggest that it would be impossible for the Court to find that an arrest effectuated in contravention of state law is constitutionally unreasonable. Indeed, it seemed to suggest as much in *Atwater*, 532 U.S. at 347. I only suggest that such a conclusion is far from irresistible and that a prudent legislature wishing to stop *Atwater* type police behavior totally ought to include an exclusionary rule.

²⁴⁷ *Arkansas v. Sullivan*, 532 U.S. 769 (2001); see discussion *supra* Part II.C.

²⁴⁸ 74 S.W.3d 215 (Ark. 2002).

²⁴⁹ See, e.g., *Sitz v. Dep't of State Police*, 506 N.W.2d 209 (Mich. 1993) (reevaluating *Michigan v. Sitz*, 496 U.S. 444 (1990)); *Ohio v. Robinette*, 685 N.E.2d 762 (Ohio 1997) (reevaluating *Ohio v. Robinette*, 519 U.S. 33 (1996)); *South Dakota v. Opperman*, 247 N.W.2d 673 (S.D. 1976) (reevaluating *South Dakota v. Opperman*, 428 U.S. 364 (1976)).

²⁵⁰ See *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

²⁵¹ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

²⁵² In *Mapp*, Justice Clark, for the majority, stressed that "[w]hile in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing

The center of the Court continues to be influenced by "evolving standards of decency." For example, as recently as June 20, 2002, the Court overturned a prior decision and held that mentally deficient people could not be executed.²⁵³ The core of its rationale was that standards of decency had changed in the intervening years between the two decisions. This rationale was predicated almost entirely on changes in state law between the two cases.²⁵⁴ While not all of the Court was persuaded by, or even amenable to this rationale,²⁵⁵ Justices Souter and Kennedy, both part of the *Atwater* majority, were persuaded.

For now, state rejections on a massive scale, followed by the Supreme Court's recognizing the demands of "evolving standards of decency," seem to be the best method to rectify the *Atwater* imbalance: Such an ending would be a magnificent tribute to the grace and dignity exhibited by Gail Atwater throughout her ordeal. It would also remove a serious blot from the Supreme Court's jurisprudence. Too bad it cannot remove the nightmares that Atwater's young son has about the police.²⁵⁶

CONCLUSION

For several years, the Supreme Court has strayed from a balanced Fourth Amendment jurisprudence in regard to automobiles. Despite occasional nods in support of citizens' rights, the Court's overwhelming predilection has been to support police claims of greater and greater authority. This predilection culminated in the 2001 *Atwater* and *Sullivan* cases,

upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule." *Id.* at 651.

²⁵³ See *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) (overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

²⁵⁴ See *id.* at 2252.

²⁵⁵ Chief Justice Rehnquist, Justice Scalia, and Justice Thomas all strongly dissented. The Chief Justice acerbically suggested that "the Court's assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a post hoc rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency." *Id.* at 2252. Justice Scalia was equally dubious of the Court's ability to "miraculously" extract a national consensus and distill it into good constitutional law. *Id.* at 2261.

²⁵⁶ Indeed, her children were so traumatized that they are both "terrified at the sight of any police car." *Atwater v. City of Lago Vista*, 532 U.S. 318, 370 (2001) (O'Connor, J., dissenting) (citing Respondent's Brief at 393-95). Her three-year old son "had to see a child psychologist regularly" and continues to have recurring nightmares about the incident. *Id.* (citing Respondent's Brief at 396).

giving the police power to arrest anybody reasonably believed to be committing a traffic offense and the concomitant right to search their cars.

Because the Supreme Court is unlikely to remedy this wrong on its own, it is incumbent upon state legislatures and courts to forthrightly reject it. When that happens in sufficient numbers, there is a good probability that the Supreme Court will rethink its position, overrule *Atwater* and *Sullivan*, and thereby move in the direction of restoring a proper police/citizen balance.