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New York v. Class: A Little-Noticed Case with Disturbing Implications

Tracey Maclin

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CRIMINAL LAW

NEW YORK v. CLASS*: A LITTLE-NOTICED CASE WITH DISTURBING IMPLICATIONS

TRACEY MACLIN**

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I. INTRODUCTION

In the little-noticed decision of *New York v. Class*,¹ the United States Supreme Court has broken new ground in search and seizure law and has handed to police broad and unprecedented powers that will affect encounters between motorists and police officers. In a straightforward manner, the Court held that a police officer may, "in order to observe a Vehicle Identification Number (VIN) generally visible from outside an automobile, [enter] the passenger compartment of a vehicle to move papers obscuring the VIN after its driver has been stopped for a traffic violation and has exited the car."² As a result of this intrusion, the officer in *Class* observed "the handle of a gun protruding about one inch from underneath the driver's seat."³

¹ 106 S. Ct. 960 (1986). During the 1985-1986 Term, the number of fourth amendment cases meriting full opinion by the Court were relatively few in comparison to prior years. In addition to *Class*, the Court's other fourth amendment cases included: *Dow Chemical Co. v. United States*, 106 S. Ct. 1819 (1986)(holding the government's aerial photography of a manufacturer's 2,000 acre plant complex without a warrant was not a "search" under the fourth amendment); *California v. Ciraolo*, 106 S. Ct. 1809 (1986)(holding the fourth amendment is not violated by a police officer's aerial observation, without a warrant, of a fenced-in backyard within the curtilage of a private home); *New York v. P.J. Video, Inc.*, 106 S. Ct. 1610, 1615 (1986)(holding that "an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally.").

² *Class*, 106 S. Ct. at 962-63. The VIN is a set of digits which can be read "to reveal not only the place of the automobile in the manufacturer's production run, but the make, model, engine type and place of manufacture of the vehicle." *Id.* at 964.

³ *Id.* at 963.

Although the Court conceded that the officer's intrusion was a "search" within the meaning of the fourth amendment, a majority found this action constitutionally reasonable under the circumstances. Writing for five justices,⁴ Justice O'Connor explained that the "search was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed respondent commit two traffic violations."⁵ Noting that it was "undisputed that the police officers had no reason to suspect respondent's car was stolen, that it contained contraband, or that respondent had committed an offense other than the traffic violations,"⁶ Justice Brennan, in dissent, argued that the majority's analysis made "a mockery of the Fourth Amendment."⁷

The *Class* decision indicates that a majority of the Court is willing, at least in the context of routine traffic stops, to grant police the unfettered discretion to search a motorist's automobile where it is necessary to expedite law enforcement and administrative functions, even if the police lack any objective justification for such an intrusion. The concerns of this Article are three-fold. First, the result in *Class* is not supported by any of the Court's precedents, and it cannot be defended under traditional fourth amendment analysis. Second, the *Class* holding is at odds with the fourth amendment's guarantee to prohibit arbitrary governmental invasions of privacy. Third, the *Class* ruling reaffirms the willingness of the Court to follow a constitutional formula that provides little guidance to police officers operating in the field and exiguous substantive protection to citizens who have been subject to unreasonable police intrusions.

II. OVERVIEW

The *Class* ruling cannot be justified under any of the prior rulings of the Court.⁸ The Court was able to disregard its fourth amendment doctrine only by discussing impertinent issues and ignoring the central question before it. Justice O'Connor overlooked—or at least misstated—the relevant issue. According to Justice O'Connor, the issue in *Class* was whether, "[i]n order to ob-

⁴ Justice O'Connor wrote the Court's opinion, in which Chief Justice Burger and Justices Blackmun, Powell and Rehnquist joined. Justice Powell also filed a brief concurring opinion, which the Chief Justice joined. Justice Brennan, joined by Justices Marshall and Stevens, dissented. Justice White filed a separate dissenting opinion which Justice Stevens joined.

⁵ *Class*, 106 S. Ct. at 968-69.

⁶ *Id.* at 963.

⁷ *Id.* at 972 (Brennan, J., dissenting).

⁸ See *infra* notes 161-72, 234-98 and accompanying text.

serve a [VIN] generally visible from outside an automobile, a police officer may reach into the passenger compartment of a vehicle to move papers obscuring the VIN after its driver has been stopped for a traffic violation.”⁹ In finding such an intrusion permissible, the Court rested its holding on the conclusion that Class held no reasonable expectation of privacy in the VIN plate and the fact that the police intrusion to discover the VIN was necessary because Class had exited his vehicle.¹⁰

The majority’s presentation of the constitutional issue is extremely misleading. The conclusion that Class lacked a privacy interest in the VIN is irrelevant to a sound resolution of the constitutional question under review. Below, the New York Court of Appeals had stated expressly that motorists have “no legitimate expectation of privacy in locations in a car which are observable by passersby.”¹¹ That court never held and Class never argued that simply examining the VIN from outside a vehicle was constitutionally impermissible. Instead, the New York court based its ruling that Class’ constitutional rights were violated on the fact that the police intrusion—opening the door and entering the vehicle—exposed hidden areas and was undertaken without any objective justification.¹²

By emphasizing the object of the police search—the discovery of the VIN—Justice O’Connor avoided the constitutional issue decided below, namely, whether a police search of a vehicle to determine the VIN, based solely on a stop for a traffic violation, violates the fourth amendment. Justice O’Connor framed the issue in such a way that the police search appeared very routine. This characterization may explain the lack of notoriety surrounding the decision. The *Class* ruling, however, involved much more than an ordinary police practice. The police intrusion at issue was a search¹³ that lacked an objective justification. This point should have commanded the Court’s attention from the start.

Moreover, the fact that Class chose to exit his car on his own initiative is equally irrelevant to a logical resolution of the issue. The Court’s reference to this fact,¹⁴ as is its emphasis on Class’ lack of an expectation of privacy in the VIN, is another strawman. If the

⁹ *Class*, 106 S. Ct. at 962-63.

¹⁰ *Id.* at 966-68.

¹¹ *People v. Class*, 63 N.Y.2d 491, 494, 472 N.E.2d 1009, 1011, 483 N.Y.S.2d 181, 183 (1984), *rev’d*, 106 S. Ct. 960 (1986).

¹² *Id.* at 495, 472 N.E.2d at 1011-12, 483 N.Y.S.2d at 183-84.

¹³ The Court recognized that the intrusion into Class’ car constituted a “search” within the meaning of the fourth amendment. 106 S. Ct. at 966.

¹⁴ *Id.* at 966-67.

officer had examined the VIN from outside the car and had spotted the weapon, Class would have had no constitutional claim.¹⁵ Class also could have had no constitutional objection if he had remained in his car and moved the papers obscuring the VIN, and *then* the officer had with seen the weapon in plain view. In the actual case, however, an officer standing outside the vehicle could not have seen the gun, even if he had had an unobstructed view of the VIN from outside.

It is, furthermore, quite misleading for the Court to say that “the objective at issue is an identification number”¹⁶ or that the evidence Class “sought to have suppressed was not the VIN, however, but a gun.”¹⁷ What Class sought was constitutional protection for the interior space of his automobile—an area that was not visible from outside of the vehicle and that could not have been visible even if the VIN plate had been clearly conspicuous to the officer. The weaknesses of the Court’s opinion in *Class* are apparent in light of the Court’s failure to address these contentions. Thus, the opinion dramatizes the insight behind the late Judge Friendly’s observation that Justice Frankfurter “often adjured us to attend well to the question: ‘On the question you ask depends the answer you get.’”¹⁸

Another concern about the *Class* holding is that it undermines the central purpose of the fourth amendment: the prohibition of arbitrary and indiscriminate government invasions of constitutionally protected areas of privacy. Before *Class*, the Court had always required some demonstration of objective criteria or justification before sanctioning police searches in these areas of privacy.¹⁹ This requirement is necessary to prevent standardless or purely discretionary searches by officers operating in the field.

The reasoning of the Court in *Class*, however, permits an officer to search for the VIN whenever a motorist is lawfully stopped for a traffic violation. The majority opinion supports this result in its discussions of the importance of the VIN in the pervasive state regulation of automobiles and the lack of a reasonable expectation of privacy in the VIN plate itself.²⁰ This reasoning has serious implications for fourth amendment freedoms. If an officer is entitled to

¹⁵ See *Arizona v. Hicks*, 107 S. Ct. 1149 (1987); *Texas v. Brown*, 460 U.S. 730 (1983) (plurality opinion); *Cardwell v. Lewis*, 417 U.S. 583 (1974).

¹⁶ *Class*, 106 S. Ct. at 966.

¹⁷ *Id.*

¹⁸ H. FRIENDLY, BENCHMARKS 319 (1967); see also *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

¹⁹ See *infra* notes 298-311 and accompanying text.

²⁰ *Class*, 106 S. Ct. at 964-66.

search for the VIN, he or she is also entitled to search for a driver's license, a registration certificate or a license plate which may be located somewhere inside of the vehicle.²¹ Each of these items, like the VIN, plays an important role in the state's pervasive regulation of automobiles. Motorists are obligated to produce them upon demand during a valid police stop, and motorists possess no legitimate expectation of privacy in these items. If a motorist, after a police request for one of these items, is unable to produce the requested document, then, under the reasoning in *Class*, an officer is entitled to enter the vehicle to secure the documents. Furthermore, under the *Class* theory, an officer need not possess any objective criteria to justify his or her entry into the vehicle. As will be discussed below, granting police this amount of authority to search stopped vehicles raises serious concerns for constitutional liberties.

Finally, the result in *Class* signifies a continued willingness of the Court to uphold police intrusions, especially in the automobile setting and in the investigative search or detention contexts. The *Class* formula provides no guidance to police officers or lower courts and effectively weakens protection against unreasonable police invasions.²² The Burger Court, in the last few years, has undertaken a sustained effort to dilute the fourth amendment's substantive protection²³ and has justified its handiwork in the name of efficient law enforcement or police safety.²⁴ The clearest examples of the Court's rollback of fourth amendment freedoms have occurred in cases, like *Class*, that involve police investigative activities.²⁵

Investigative activity cases, as opposed to search or arrest situa-

²¹ See *infra* notes 147-55 and accompanying text.

²² See *infra* notes 371-426 and accompanying text.

²³ See Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AMER. CRIM. L. REV. 257 (1984); Yackle, *The Burger Court and the Fourth Amendment*, 26 U. KAN. L. REV. 335 (1978); see also Lafave, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291 (1986); Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REF. 551, 594-614 (1984).

²⁴ See, e.g., *United States v. Place*, 462 U.S. 696, 703-04 (1983) (A generalized interest in law enforcement is sufficient to justify an intrusion on an individual's fourth amendment interests even in the absence of probable cause. "The test is whether those interests are sufficiently 'substantial,' not whether they are independent of the interests in investigating crimes effectively and apprehending suspects."); *Michigan v. Summers*, 452 U.S. 692, 701-02 (1981) (police interests in preventing flight, minimizing the risk of harm to the officers, and the orderly completion of a search, justified detaining the occupant of a home while the police searched the premises). Cf. *United States v. Sharpe*, 470 U.S. 675, 685 (1985) (rejecting the imposition of rigid time limitations on the scope of investigative detentions; "[the Court has] emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.").

²⁵ See Wasserstrom, *supra* note 23, at 355-74; Mertens, *supra* note 23, at 597-614. See also *infra* notes 371-426 and accompanying text.

tions, require the Court to balance the interests and need for police searches or seizures against the interests of the individual to be free from unreasonable police invasions. According to the landmark case of *Terry v. Ohio*,²⁶ an essential element in this balancing equation is whether the police intrusion was justified at its inception. An officer must be able to point to specific and articulable facts, objective causes or criteria that support the intrusion; hunches or unsubstantiated suspicions are not enough.²⁷

The *Class* decision, however, illustrates the Court's new reasoning with respect to investigative intrusions. Under the traditional *Terry* test, the police search in *Class* would not have been sanctioned because there was no objective justification warranting the intrusion. As will be argued below, the *Class* Court effectively dodges this issue by distorting the facts and utilizing its new formula to uphold the search involved.

III. THE FACTS

On the afternoon of May 11, 1981, New York City Police Officers Lawrence Meyer and William McNamee, who were on routine patrol in the Bronx, observed Benigo Class driving a 1972 Dodge Charger with a "shattered" windshield 10 miles over the speed limit.²⁸ Driving with a broken windshield and speeding are traffic violations in New York²⁹ and can subject a motorist to arrest.³⁰ The officers turned on the siren in their unmarked vehicle and ordered Class to pull over. After complying with this order, Class emerged from his vehicle and approached Officer Meyer because he thought

²⁶ 392 U.S. 1 (1968).

²⁷ *Id.* at 19-22.

²⁸ In its briefs to the Appellate Division and the New York Court of Appeals, the state explained that the officers' observation of Class' "shattered" windshield "aroused their suspicions." Respondent's Brief at 3, *People v. Class*, 97 A.D.2d 741, 468 N.Y.S.2d 892 (N.Y. App. Div. 1983), *rev'd*, 63 N.Y.2d 491, 472 N.E.2d 1009, 483 N.Y.S.2d 181 (1984), *rev'd*, 106 S. Ct. 960 (1986) [hereinafter cited as Respondent's Brief in Appellate Division]; Respondent's Brief at 2, *People v. Class*, 63 N.Y.2d 491, 472 N.E.2d 1009, 483 N.Y.S.2d 181 (1984), *rev'd*, 106 S. Ct. 960 (1986) [hereinafter cited as Respondent's Brief in Court of Appeals]. Beside the fact that driving with a broken windshield is a traffic violation in New York, N.Y. VEH. & TRAF. LAW § 375(22) (McKinney 1984), why the officers' suspicions were aroused after observing a motorist driving with a "shattered" windshield is inexplicable from the record. Indeed, anyone who is the least bit familiar with the Bronx would not be surprised to see moving vehicles with cracked windshields, missing taillights, exposed engines and any number of other assorted items in disrepair without becoming suspicious that the drivers of those vehicles are engaged in criminal conduct.

²⁹ N.Y. Veh. & Traf. Law §§ 375(22), 1180(d) (McKinney 1984).

³⁰ N.Y. Veh. & Traf. Law § 155 (McKinney 1984); N.Y. CRIM. PRO. LAW § 140.10(2) (McKinney 1984).

it was the "logical thing to do."³¹ Class gave Officer Meyer the vehicle's registration certificate and proof of insurance.³² Because he was unlicensed, however, Class did not provide the officer with a driver's license.³³

Officer McNamee, without examining the documents provided by Class and unaware of his status as an unlicensed driver, went directly to Class' vehicle to inspect the VIN.³⁴ Officer McNamee first opened the door of the driver side because the VIN is often located on the door jamb of older vehicles; he did not, however, find the VIN there. Officer McNamee, while still outside of the vehicle, then proceeded to the left-hand corner of the front windshield. In post-1969 model vehicles, the VIN is normally located on the dashboard and is visible to a person standing outside the vehicle.³⁵ Officer McNamee, however, was unable to see the dashboard-mounted VIN because some paper obstructed the VIN plate.³⁶ At this point, while still standing outside of the automobile and looking through the windshield, Officer McNamee could not see the gun he would soon discover when he entered the car.³⁷

Officer McNamee entered Class' car to remove the paper that was obstructing his view of the VIN plate. Once inside,³⁸ Officer

³¹ Respondent's Brief in Appellate Division at 4.

³² The Charger which Class was driving was actually owned by Class' brother-in-law. Brief for the Petitioner at 2, *New York v. Class*, 106 S. Ct. 960 (1986).

³³ Driving without a license in New York is a traffic infraction which can subject the motorist to arrest. N.Y. VEH. & TRAF. LAW § 509 (McKinney 1984); N.Y. CRIM. PRO. LAW § 140.10(2) (McKinney 1984).

³⁴ The public VIN is normally located on the dashboard adjacent to the left windshield pillar or on the door jamb of the driver's door. The last six digits of the VIN "constitute the serial number of the car, known as the true vehicle identification number (TVIN). The TVIN is also stamped . . . in a number of locations, for instance just behind the radiator and on the rear axle." *United States v. Polk*, 433 F.2d 644, 645 (5th Cir. 1970); see also 1 W. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.5(d) at 453 (2d ed. 1987).

³⁵ *Class*, 106 S. Ct. at 963.

³⁶ Brief for Petitioner at 3, *New York v. Class*, 106 S. Ct. 960 (1986).

³⁷ *Id.*; Brief for Respondent at 2, *New York v. Class*, 106 S. Ct. 960 (1986).

³⁸ It is interesting to note the state's various factual descriptions of Officer McNamee's entrance into the car. In the Appellate Division, the state's brief read: "the VIN number was not the only thing he [Officer McNamee] found when he *poked his head* inside the car, because, while inadvertently looking down, he noticed the handle of a gun protruding from under the driver's seat." Respondent's Brief in Appellate Division at 3 (emphasis added).

In the court of appeals, New York's highest court, the state's brief omitted the earlier reference to McNamee having "poked his head inside the car" and stated simply that "the VIN number was not the only thing he found when he *looked at the dashboard*, because, while inadvertently looking down he noticed the handle of a gun protruding from under the driver's seat." Respondent's Brief in Court of Appeals at 3 (emphasis added).

In its petition for writ of certiorari, the state's "Statement of the Case" was taken

McNamee observed the handle of a .22 caliber pistol which was protruding from underneath the seat. The officer seized the gun,³⁹ and Class was arrested.⁴⁰ Class also was issued summonses for driving without a license and for driving a vehicle with a broken windshield.⁴¹

IV. THE STATE COURT PROCEEDINGS

Class was charged with criminal possession of a weapon in the third degree.⁴² Class moved to suppress the gun, and Justice William Holland of the Bronx County Supreme Court denied the motion, finding that the search for the VIN was reasonable. Justice Holland concluded that Officer McNamee's intrusion was "justified 'notwithstanding any lack of probable cause to believe the car had been stolen,' because 'the defendant's conduct, that is, immediately exiting the car and walking over to the police car, instead of waiting in his automobile, coupled with the fact that the defendant did not have a driver's license in his possession, made these officer's [sic]

from the opinion of the court of appeals. Petition for a Writ of Certiorari to the Court of Appeals of the State of New York at 2-3, *New York v. Class*, 106 S. Ct. 960 (1986) [hereinafter cited as Petition for Writ of Certiorari]. In its brief in the United States Supreme Court, the state's description of Officer McNamee's action not only further minimized the intrusiveness of his entry into the car, but also added a previously unasserted factual element regarding the gun's location—the claim that the gun's handle was in plain view: "Reaching inside the vehicle to move the piece of paper, Officer McNamee saw not only the VIN, but the handle of a gun in *plain view*, protruding from underneath the seat." Brief for Petitioner at 3, *New York v. Class*, 106 S. Ct. 960 (1986)(emphasis added).

The state had argued, in both the Appellate Division, Respondent's Brief in Appellate Division at 9, and the court of appeals, Respondent's Brief in Court of Appeals at 14, that the gun was in "plain view" prior to Officer McNamee's entry. This contention was rejected by the court of appeals. 63 N.Y.2d at 495, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183 ("The government intrusion here, Officer McNamee's opening the door and reaching inside, was undertaken to obtain information and it exposed these *hidden areas*. It therefore constituted a search.") (emphasis added). The Supreme Court agreed with the court of appeals that Officer McNamee's entry was a "search" within the meaning of the fourth amendment. 106 S. Ct. at 966; *id.* at 970 (Brennan, J., dissenting).

³⁹ Despite his earlier eagerness to discover the VIN "to ascertain whether the car was stolen," Respondent's Brief in Appellate Division at 3, Officer McNamee never bothered to copy down the VIN. The officers also did not conduct a radio check at the scene to determine the validity of Class' documents. *People v. Class*, 97 A.D.2d 741, 741, 468 N.Y.S.2d 892, 893 (N.Y. App. Div. 1983)(Carro, J.P., dissenting).

⁴⁰ A search of Class' person uncovered some ammunition. *People v. Class*, 97 A.D.2d at 741, 468 N.Y.S.2d at 893 (Carro, J.P., dissenting).

⁴¹ *Id.*, 468 N.Y.S.2d at 893 (Carro, J.P., dissenting). The officers apparently reassessed their earlier conclusions that Class had been speeding. Class testified at the suppression hearing that he could not have been speeding because it was raining that day. Respondent's Brief in Appellate Division at 4.

⁴² N.Y. PENAL LAW § 265.02(4) (McKinney 1984).

actions quite reasonable and prudent under the circumstances.’⁴³ Class was convicted of the weapons charge and was sentenced to a period of probation not to exceed five years.⁴⁴

On appeal, a four-justice majority of the Appellate Division affirmed the conviction without opinion. Justice Carro, in dissent, stated that the trial court’s reasoning “bends both logic and the law.”⁴⁵ Since the officers stopped Class on a sunny afternoon⁴⁶ while they were on routine patrol in a location not alleged to be a high crime area, Justice Carro found the trial court’s conclusion that Class’ actions constituted suspicious behavior preposterous. Justice Carro stated:

The conclusion that defendant’s act, of getting out of his car and going to the officers rather than awaiting their approach, constituted suspicious behavior, is absurd. I would do the same thing myself, if for no other reason than the recent tragedies of officers being fired upon as they approach stopped drivers might reasonably create an apprehension that would be dispelled by my exhibiting myself as clearly unarmed.⁴⁷

Justice Carro found the trial court’s second ground for upholding the search—Class’ status as an unlicensed driver—“even more illogical since, by the officer’s own testimony, the search of the car by one officer began before the other had yet discovered that defendant was not a licensed driver.”⁴⁸ Since the search was conducted without any indication of impropriety and without a preliminary radio run on the license plate, the police action, in Justice Carro’s view, was no more than a wrongful trespass which was not supported by the plain view doctrine.⁴⁹

The New York Court of Appeals, concluding that the police intrusion was without adequate objective justification, reversed.⁵⁰

⁴³ *People v. Class*, 97 A.D.2d at 742, 468 N.Y.S.2d at 893 (Carro, J.P., dissenting).

⁴⁴ Respondent’s Brief in Appellate Division at 5.

⁴⁵ 97 A.D.2d 741, 742, 468 N.Y.S.2d 892, 893 (1983)(Carro, J.P., dissenting).

⁴⁶ According to the state’s briefs, Class testified that it was raining on the day in question. Respondent’s Brief in Appellate Division at 4, Respondent’s Brief in Court of Appeals at 4.

⁴⁷ 97 A.D.2d at 742, 468 N.Y.S.2d at 893 (Carro, J.P., dissenting).

⁴⁸ *Id.*, 468 N.Y.S.2d at 893 (Carro, J.P., dissenting).

⁴⁹ Under the plain view doctrine, police may seize an object where three requirements are satisfied. First, the police must lawfully be in a position to view a particular area. Second, the discovery of the object must be inadvertent. Third, there must be probable cause to associate the object with criminal activity. *Arizona v. Hicks*, 107 S.Ct. 1149, 1152 (1987)(O’Connor, J., dissenting). *But cf. id.* at 1155 (White, J., concurring)(the “inadvertent discovery” prong has never been accepted by a judgment supported by a majority of the Court); *Texas v. Brown*, 460 U.S. 730, 737 (1983)(plurality opinion); *Coolidge v. New Hampshire*, 403 U.S. 443, 465-68 (1971)(plurality opinion).

⁵⁰ *People v. Class*, 63 N.Y.2d 491, 472 N.E.2d 1009, 483 N.Y.S.2d 181 (1984), *rev’d*, 106 S. Ct. 960 (1986).

Writing for the court, Judge Kaye acknowledged that one does not have a legitimate expectation of privacy in locations of a vehicle which are observable by passersby.⁵¹ She noted, however, that there are locations inside a car, including the area underneath the seats, "which cannot be viewed from the outside and which an individual legitimately expects will remain private."⁵² Officer McNamee's intrusion was "undertaken to obtain information and it exposed . . . hidden areas."⁵³ Consequently, his action constituted a "search" within the meaning of the fourth amendment.

Judge Kaye argued that the lack of a reasonable expectation of privacy in the VIN itself did not excuse or justify the challenged police intrusion. Citing Professor LaFave, she stated that "the existence of a VIN on every automobile cannot enable police, without any basis, to make 'wholesale entries of cars on nothing more than a hope that one of them might turn out to be stolen.'"⁵⁴ The officers had no objective justification for the intrusion prior to stopping Class; and neither Class' exiting the vehicle nor his failure to produce a license provided a legitimate reason for a search.⁵⁵ According to Judge Kaye, "a driver's emergence from a vehicle after being stopped by police is not indicative of criminal activity."⁵⁶ Furthermore, a reasonable suspicion could not be based on Class' status as an unlicensed driver because Officer McNamee "was not even aware of that fact when he entered the automobile."⁵⁷ Judge Kaye expressly concluded that the record revealed "no reason for [Officer McNamee] to suspect other criminal activity or to act to protect his own safety. The sole predicate for the officer's action here was defendant's commission of an ordinary traffic infraction, an offense which, standing alone, did not justify the search."⁵⁸

⁵¹ *Id.* at 494, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183.

⁵² *Id.* at 495, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183.

⁵³ *Id.*, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183.

⁵⁴ *Id.*, 472 N.E.2d at 1011-12, 483 N.Y.S.2d at 184 (quoting 1 W. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.5(d) at 360 (1978)).

⁵⁵ 63 N.Y.2d at 495-96, 472 N.E.2d at 1012, 483 N.Y.S.2d at 184.

⁵⁶ *Id.* at 496, 472 N.E.2d at 1012, 483 N.Y.S.2d at 184.

⁵⁷ *Id.*, 472 N.E.2d at 1012, 483 N.Y.S.2d at 184.

⁵⁸ *Id.*, 472 N.E.2d at 1012, 483 N.Y.S.2d at 184. The court of appeals also held that § 401(4) of the Vehicle and Traffic Law "provided no justification for [Officer McNamee's] entry of defendant's car." *Id.* at 497, 472 N.E.2d at 1013, 483 N.Y.S.2d at 185. According to the court, § 401(4) merely affords police officers the authority "to demand information necessary to identify" a stopped vehicle, including the VIN. *Id.* at 496, 472 N.E.2d at 1012, 483 N.Y.S.2d at 185 (emphasis in original). Thus, § 401(4) granted Officer McNamee the authority to request exhibition of the VIN; it did not, however, confer the authority to "ignor[e] this legislative direction" and intrude into Class' vehi-

V. THE STATE'S PETITION FOR A WRIT OF CERTIORARI

In its petition, New York urged the Court to grant certiorari to decide:

Whether the New York Court of Appeals erroneously construed the Fourth Amendment by holding that the actions of a police officer, who had lawfully stopped defendant's automobile for a traffic infraction and was attempting to routinely inspect the car's vehicle identification number, ordinarily viewable through the windshield, by pushing aside some papers on the dashboard which obstructed it, constituted an impermissible search of the vehicle.⁵⁹

The state argued that the Court had never set forth the limits on police authority to intrude into the interior of a vehicle during routine stops for traffic violations. The Court's previous cases dealing with traffic stops⁶⁰ and automobile searches,⁶¹ according to the state, "left open the question of what actions [an] officer could take toward the *vehicle itself*."⁶² The state, reminding the Court that "vehicle stops for traffic violations occur countless times each day,"⁶³ argued that a resolution of the permissible limits of police authority to enter into a vehicle during a routine traffic stop was "necessary to

cle without any objective justification. *Id.* at 497, 472 N.E.2d at 1012, 483 N.Y.S.2d at 185.

Judge Jones, joined by Judge Jason, dissented from the court's ruling on the fourth amendment issue. The dissent argued that the probable cause normally required to justify a police search into areas of protected privacy should be applicable to a VIN inspection "only if the objective of the police action was search for proof with respect to known or suspected preexisting criminal activity." *Id.* at 498, 472 N.E.2d at 1013-14, 483 N.Y.S.2d at 186 (Jones, J., dissenting). Where, however, the objective of the police intrusion was merely the identification of a vehicle, the requirement of probable cause has no application. *Id.*, 472 N.E.2d at 1013-14, 483 N.Y.S.2d at 186 (Jones, J., dissenting). According to Judge Jones, "there is no evidence" that the objective of Officer McNamee's search for the VIN was a search for evidence of criminal activity or contraband; instead, the objective was "*identification of the vehicle only*, with no thought of connection with known or suspected previous criminal activity." *Id.*, 472 N.E.2d at 1014, 483 N.Y.S.2d at 186 (Jones, J., dissenting)(emphasis added). Apparently, the dissent was unaware of the state's earlier statement that Officer McNamee's inspection of the VIN was initiated "in order to ascertain whether [Class'] car was stolen." Respondent's Brief in Appellate Division at 3.

After explaining the "compelling interest" of the police in identifying stopped vehicles, 63 N.Y.2d at 498, 472 N.E.2d at 1013, 483 N.Y.S.2d at 186 (Jones, J., dissenting), and characterizing Officer McNamee's intrusion as necessary only to obtain information, the dissent did not find it troubling that Officer McNamee never bothered to copy down the VIN number of Class' vehicle, even though this was the vital information which supposedly justified the police intrusion in the first place.

⁵⁹ Petition for Writ of Certiorari at I.

⁶⁰ See *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(per curiam); *United States v. Robinson*, 414 U.S. 218 (1973).

⁶¹ See *Michigan v. Long*, 463 U.S. 1032 (1983).

⁶² Petition for Writ of Certiorari at 5 (emphasis added).

⁶³ *Delaware v. Prouse*, 440 U.S. 648, 659 (1979).

clarify an important question of Fourth Amendment jurisprudence, and, perhaps more important, to guide law enforcement officials in the performance of their duty.”⁶⁴

The petition of the state asserted further that, as a part of the police officer’s “inspection process,” it was necessary for the police to view the VIN in order to verify information obtained from a motorist’s driver’s license and registration documents. This process, in the state’s view, should not be considered a search within the meaning of the fourth amendment because “its purpose is not the recovery of evidence, but rather, the mere inspection of a public document located in the most public, accessible areas of the vehicle.”⁶⁵ This type of intrusion, the state argued, was *de minimis* in light of the fact that a motorist has already been lawfully stopped, and it did not amount to the type of invasion which the fourth amendment intended to restrict. Instead, this police process should be deemed a “routine administrative inspection”⁶⁶ rather than a search subject to constitutional scrutiny.⁶⁷

⁶⁴ Petition for Writ of Certiorari at 6.

⁶⁵ *Id.* at 7.

⁶⁶ *Id.* at 8. The state’s efforts to emphasize the “administrative” nature of the VIN inspection, even when it necessitated a police intrusion into the interior of the vehicle, could not have been lost on the Court in light of its citation to the “administrative” search cases of *Michigan v. Tyler*, 436 U.S. 499 (1978), *United States v. Biswell*, 406 U.S. 311 (1972), and *Camara v. Municipal Court*, 387 U.S. 523 (1967). Indeed, in several places in its petition the state described the search by Officer McNamee as well as similar intrusions to observe the VIN as quick and routine administrative inspections. Petition for Writ of Certiorari at 7-8.

⁶⁷ The state also informed the Court that, although there was a split among the federal circuits and state supreme courts, a majority of the lower courts had held that “the opening of a door or engine hood for purposes of a VIN inspection does not constitute a search within the meaning of the Fourth Amendment and is permissible within the context of a routine traffic stop.” Petition for Writ of Certiorari at 8-9 (citations omitted); *see* Brief for Petitioner at 16-18, *New York v. Class*, 106 S. Ct. 960 (1986) (a majority of federal and state appellate courts have concluded that VIN inspections, even those involving an opening of the door or lifting of the hood, are not “searches” within meaning of the fourth amendment).

The state’s contention was disputed by Class. He noted that in a number of the lower court cases relied upon by the state where it was found that the police conduct was not a search, those courts “nevertheless considered whether the police officer had a ‘legitimate’ or ‘reasonable’ basis to examine the VIN.” Brief for Respondent at 20 n.9, *New York v. Class*, 106 S. Ct. 960 (1986) (citations omitted). Those decisions, according to Class, implicitly supported the view that the fourth amendment is applicable to VIN inspections. Indeed, Class asserted there are very few cases “involving *intrusive* VIN inspections which employ no Fourth Amendment criteria to determine whether the police procedure was permissible. . . .” *Id.* (emphasis added).

On April 1, 1985, the Court granted the state’s petition. *New York v. Class*, 471 U.S. 1003 (1985).

VI. THE SUPREME COURT DECISION

The Court divided its discussion of the fourth amendment issue⁶⁸ presented in *Class* into two parts.⁶⁹ The first half of the opinion discussed the VIN as a general tool in the regulation of automobiles. Justice O'Connor found it proper to make the VIN a part of the pervasive state regulation that surrounds automobiles. She explained that the VIN assists various levels of government in the identification and regulation of automobiles. For the federal government, the VIN improves the "efficacy of recall campaigns" and helps determine the risks of driving certain types of automobiles.⁷⁰ At the state level, the VIN aides in the compensation of those injured in automobile accidents, assists the health and safety inspection process, and promotes the states' ability to deter automobile theft.⁷¹ In light of these "laudable governmental purposes,"⁷² Justice O'Connor concluded that the federal and state governments were justified in making the VIN a "significant thread in the web of regulation of the automobile" and in requiring it to be placed in an area in plain view from outside the passenger compartment.⁷³

Justice O'Connor also found that "the factors that generally diminish the reasonable expectation of privacy in automobiles are applicable *a fortiori* to the VIN."⁷⁴ She noted that because of its physical characteristics, transportative function, and pervasive regulation, the automobile has been traditionally viewed as possessing a lesser degree of privacy than a private home.⁷⁵ Justice O'Connor explained that the same factors that lessened one's privacy in an au-

⁶⁸ Prior to its discussion of the fourth amendment issues, the Court rejected *Class*'s assertion that the Court was without jurisdiction to hear the case because the ruling of the court of appeals rested upon an adequate and independent state ground. 106 S. Ct. at 964. Relying upon its earlier holding in *Michigan v. Long*, 463 U.S. 1032, 1043 (1983), the majority found that the court of appeals' opinion lacked the necessary requisite "plain statement" that the opinion rests on state law. 106 S. Ct. at 964. Justice Brennan's dissent agreed with this finding. *Id.* at 970 (Brennan, J., dissenting).

On remand, the New York Court of Appeals held that its earlier ruling had rested upon an adequate and independent state ground: Officer McNamee's search violated Article I, § 12 of the state constitution. 67 N.Y.2d 431, 494 N.E.2d 444 (1986).

⁶⁹ Justice O'Connor's examination of the fourth amendment issue is actually divided into three subsections. For purposes of this Article, however, her resolution of the constitutional question is divided into two sections.

⁷⁰ 106 S. Ct. at 964.

⁷¹ *Id.* at 964-65.

⁷² *Id.* at 965.

⁷³ *Id.* at 964.

⁷⁴ *Id.* at 966.

⁷⁵ *Id.* at 965.

tomobile applied to the VIN.⁷⁶ The VIN, after all, played a vital role in the pervasive regulation of the automobile, and manufacturers were required by law to place the VIN in a location ordinarily visible from outside of the automobile. Justice O'Connor concluded, therefore, that a motorist possesses no reasonable expectation of privacy in the VIN itself.⁷⁷ Consequently, the mere viewing of the VIN, or one that was "formerly obscured" as was the case in *Class*, did not violate the fourth amendment.⁷⁸

The second half of Justice O'Connor's opinion explained why, under the balancing formula of *Terry v. Ohio*⁷⁹ and its progeny, the police search of *Class*' car was constitutionally reasonable. First, the Court acknowledged that a "car's interior as a whole"⁸⁰ is subject to some degree of fourth amendment protection. The Court also agreed with the conclusion of the New York Court of Appeals that Officer McNamee's intrusion constituted a "search" within the

⁷⁶ *Id.* at 966.

⁷⁷ *Id.* It should be noted here that the Court's findings that it was proper for the government to require that the VIN be placed in plain view in all vehicles and that a motorist has no expectation of privacy in the VIN itself are peripheral to the immediate fourth amendment issue decided by the court of appeals, namely, whether Officer McNamee's intrusion into and observations of the interior of *Class*' vehicle constituted an unconstitutional search. The New York Court of Appeals never questioned the important and laudable government interests served by the VIN, recognizing that there is "a compelling police interest, in situations such as automobile thefts and accidents, in the positive identification of vehicles." 63 N.Y.2d at 495, 472 N.E.2d at 1012, 483 N.Y.S.2d at 184.

Moreover, the court of appeals also acknowledged that motorists have no legitimate expectation of privacy in locations in a car that are ordinarily in plain view from outside the vehicle. *Id.* at 494, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183. The court stated that "an officer's simply peering inside an automobile does not constitute a search and the Fourth Amendment . . . does not limit this activity." *Id.* at 494-95, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183 (citations omitted). Thus, the first half of the Supreme Court majority's opinion does not directly address the constitutional issue under review. 106 S. Ct. at 971 (Brennan, J., dissenting) ("By focusing on the object of the search—the VIN—the Court misses the issue we must decide: whether an interior search of the car to discover that object was constitutional.") (emphasis in original).

⁷⁸ 106 S. Ct. at 966.

⁷⁹ 392 U.S. 1 (1968). In its narrowest form, *Terry* held that where an officer reasonably concludes that a suspect he is confronting is armed and dangerous, that officer may conduct a limited search of the suspect to discover weapons which might be used against him. *Id.* at 30.

In reaching this result, the *Terry* Court explained that because the facts involved a type of police conduct—"on-the-spot observations of the officer on the beat"—the fourth amendment's traditional requirements of probable cause and a judicial warrant were not practical. *Id.* at 20. Instead, the police conduct would be judged under a balancing formula to assess its reasonableness. That formula involved a dual inquiry. First, was the officer's intrusion justified at its inception? Second, was the intrusion reasonably related in scope to the circumstances which justified the interference in the first place? *Id.*

⁸⁰ 106 S. Ct. at 966.

meaning of the fourth amendment.⁸¹ Nevertheless, Justice O'Connor noted that if Class had stayed in his car and acceded to a request to remove the paper obstructing the VIN plate, Officer McNamee "would not have needed to intrude into the passenger compartment."⁸²

Justice O'Connor next depicted the apparent dilemma confronting Officer McNamee: he could have had Class return to the car to remove the obstructing paper, or he could continue to detain Class briefly outside of the car while he himself entered to examine the VIN.⁸³ For Justice O'Connor, the former option was unacceptable because it would have exposed the officer to potentially grave risks.⁸⁴

The pistol beneath the seat did not, of course, disappear when respondent closed the car door behind him. To have returned respondent immediately to the automobile would have placed the officer in the same situation that the holding in [*Pennsylvania v.*] *Mimms*⁸⁵ allows officers to avoid—permitting an individual being detained to have possible access to a dangerous weapon and the benefit of the partial concealment provided by the car's exterior.⁸⁶

From this proposition, Justice O'Connor noted that warrantless searches were permitted in certain law enforcement contexts despite their substantial intrusiveness. Under the rationale of *Terry*, the constitutionality of a warrantless search is to be judged by balancing the need to search against the intrusion which the search entails. According to Justice O'Connor, three factors existed which justified Officer McNamee's search. "[T]he safety of the officers was served by the intrusion; the intrusion was minimal; and the search stemmed

⁸¹ *Id.*

⁸² *Id.* at 967.

⁸³ *Id.* As phrased by Justice O'Connor, the question was "whether the officers could not only effect the seizure of [Class] necessary to detain him briefly outside the vehicle, but also effect a search for the VIN that may have been necessary only because of that detention." *Id.*

⁸⁴ *Id.* Of course, Officer McNamee was not cognizant of any danger when he approached Class' vehicle to look for the VIN. He simply sought the VIN. When he could not find it on the door jamb, he immediately proceeded to the next location where he thought it might be. When this area was obscured by paper, he entered the vehicle. During the brief moments that it took for Officer McNamee to accomplish his mission, he probably never thought of returning Class to the vehicle in order to have Class move the paper that was obstructing the VIN. It was simply much easier for Officer McNamee to do it himself.

⁸⁵ 434 U.S. 106 (1977)(per curiam). In *Mimms* the Court held that an officer's order to a motorist to exit his vehicle, issued after the motorist was lawfully stopped for a traffic infraction, was constitutionally permissible. The Court explained that the "mere inconvenience" for the motorist could not "prevail when balanced against legitimate concerns for the officer's safety." *Id.* at 111.

⁸⁶ 106 S. Ct. at 967.

from some probable cause focusing suspicion on the individual affected by the search. Indeed, [Officer McNamee's] probable cause stemmed from directly observing [Class] commit a violation of the law."⁸⁷ Weighed against these governmental interests was Class' interest in the privacy of his automobile. Because Class had no reasonable expectation of privacy in the VIN plate and had committed two traffic violations, Justice O'Connor found that the competing interests weighed in favor of the police intrusion.⁸⁸

Justice Powell, in a concurring opinion, characterized the majority's opinion as an application of "conventional" fourth amendment analysis.⁸⁹ He argued that an officer's efforts to observe a VIN should not be subjected to the same scrutiny that governs police intrusions into a vehicle in order to arrest or to search for evidence of crime.⁹⁰ Justice Powell suggested that Officer McNamee's entry to examine the VIN was part of the administrative process associated with the lawful stop of Class' vehicle. For Justice Powell, the only issue was whether the officer's actions were reasonable.⁹¹ Because it had not been proven that Officer McNamee's intrusion "was not reasonably necessary to achieve his lawful purpose," his search of the vehicle, according to Justice Powell, did not violate any of Class' fourth amendment rights.⁹²

In dissent, Justice Brennan criticized the Court for sanctioning a search of a private area notwithstanding a lack of objective cause justifying the search.⁹³ He contended the analysis of the majority could not be squared with the automobile exception to the fourth amendment, which permits warrantless searches of automobiles provided the police have probable cause to believe the vehicle contains contraband or criminal evidence.⁹⁴ Furthermore, the Court's reasoning was not consistent with *Terry v. Ohio* and its progeny because the officers had no reasonable grounds to support the

⁸⁷ *Id.* at 968.

⁸⁸ *Id.* at 968-69. As phrased by the Court, the necessary balancing compelled the holding that "this search was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed [Class] commit two traffic violations." *Id.*

⁸⁹ *Id.* at 969 (Powell, J., concurring).

⁹⁰ *Id.* (Powell, J., concurring).

⁹¹ *Id.* at 970 (Powell, J., concurring).

⁹² *Id.* at 970 (Powell, J., concurring). *But cf.* *South Dakota v. Opperman*, 428 U.S. 364, 377 n.1 (1976) (Powell, J., concurring) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)) ("Routine inventories of automobiles intrude upon an area in which the private citizen has a 'reasonable expectation of privacy.'").

⁹³ 106 S. Ct. at 970-75 (Brennan, J., dissenting).

⁹⁴ *Id.* at 971 (Brennan, J., dissenting). *See infra* notes 161-72 and accompanying text.

search.⁹⁵

Justice White, in his brief dissent, also criticized the majority's analysis. He argued that, in effect, the Court's holding provided a blanket authorization for the police to search a car for the VIN whenever there is a legal stop.⁹⁶

VII. ANALYSIS OF *CLASS*

The first section of this part of the Article will discuss why the result in *Class* cannot be defended persuasively by the facile assertion that *Class* held no reasonable expectation of privacy in the VIN and little expectation of privacy in his automobile. The next section focuses on the reasoning proffered by the Court in support of its conclusion that Officer McNamee's search was permissible. This section reveals that the Court's analysis and result are inconsistent with its prior cases and antithetical to the purpose of the fourth amendment, which is to prohibit arbitrary police invasions. The final section of this part of the Article describes the Court's new test for determining the constitutionality of police investigative intrusions. This section will assess the new formula and explain why the Court's test weakens fourth amendment freedoms.

A. AUTOMOBILE REGULATION AND THE FOURTH AMENDMENT

1. *Questions left unanswered by the Court*

Putting aside the actual result, the most striking feature of the *Class* opinion is the number of questions the Court leaves unanswered. First, on what doctrinal basis does the majority's ruling rest? Is it an expansion of the automobile exception to the fourth amendment,⁹⁷ or is it another *Terry* balancing case in which the Court is reviewing the ad hoc judgments of an officer in the field? Is

⁹⁵ *Id.* at 974-75 (Brennan, J., dissenting).

⁹⁶ *Id.* at 975 (White, J., dissenting).

⁹⁷ The judicially-created automobile exception (also known as the *Carroll* doctrine) to the fourth amendment's warrant requirement allows police to search an automobile where there is probable cause to believe the vehicle contains contraband or evidence of a crime. The automobile exception was first established in *Carroll v. United States*, 267 U.S. 132 (1925), where the Court ruled that an automobile's ready mobility justified dispensing with the fourth amendment's warrant procedure. *Id.* at 153. See also *United States v. Ross*, 456 U.S. 798, 806-07 (1982) ("Given the nature of an automobile in transit, the [*Carroll*] Court recognized that an immediate intrusion is necessary if police officers are to secure the illicit substance. In this class of cases, the Court held that a warrantless search of an automobile is not unreasonable.").

Since the *Carroll* decision, the Court has relied on an additional aspect of the automobile to justify the automobile exception. This aspect is the lesser expectation of privacy one has in an automobile. See *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality

the Court now saying that police officers have carte blanche to search automobiles lawfully stopped? Or, is the Court merely holding that a search for documents or another object associated with the state's regulation of the automobile is permissible, despite a lack of objective justification for the search? If that is all the *Class* majority intended to hold, however, how could such a ruling be limited? Could the police search a motorist's glove compartment for a registration certificate? Could the police enter a vehicle to search for a motorist's driver's license inadvertently left behind in the motorist's purse, suitcase or attache case? Also, could a police officer who is conducting a lawful roadblock check for licenses or drunk-driving forcibly open a motorist's door to check the VIN or demand entry underneath the hood or into some other secret location in order to inspect the VIN? Finally, could the police forcibly enter a locked and lawfully parked vehicle to inspect the VIN?⁹⁸

No one could expect that the Court's opinion in *Class* would (or could) answer all of these questions. Nevertheless, these questions do arise after a reading of the decision. The opinion of the majority did not address the practical consequences of its reasoning and provided little guidance for future resolution of these troubling questions. In the criminal procedure context, the Court should always strive to provide guidance to lower courts and government officials who must apply the Court's articulated principles on a daily basis.⁹⁹ If the Court's ruling addresses uncharted terrain, the Court must furnish a sound constitutional basis so that its judgment will provide an analytical foundation upon which later rulings can rest. The Court in *Class* failed to provide such guidance or rationale.

As will be discussed below,¹⁰⁰ the *Class* ruling provides no guidance to police officers or lower courts who are confronted with issues similar to those decided in *Class*. Moreover, the *Class* opinion lacked a sound doctrinal basis. Because Officer McNamee lacked probable cause for the search, the *Class* ruling cannot rest on the automobile exception to the fourth amendment.¹⁰¹ Nevertheless, it

opinion)("A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.").

Finally, in its most recent discussion of the automobile exception, the Court stated that the lesser expectations of privacy associated with the automobile "derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways." *California v. Carney*, 471 U.S. 386, 392 (1985).

⁹⁸ See *State v. Simpson*, 95 Wash. 2d 170, 181, 622 P.2d 1199, 1209 (1980)(en banc).

⁹⁹ LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141.

¹⁰⁰ See *infra* notes 267-68, 386-402 and accompanying text.

¹⁰¹ See *infra* notes 161-72 and accompanying text.

appears after a reading of the first half of the opinion that the Court intends to find that the search of Class' vehicle was valid under the automobile exception. Why else would the majority devote so much space and go into so much detail on the "important role played by the VIN in the pervasive governmental regulation of the automobile"¹⁰² and the lack of privacy in the VIN itself? If, however, the automobile exception only authorizes searches supported by probable cause,¹⁰³ what is the relevancy in finding that the VIN plays a vital role in automobile regulation and that a motorist has no privacy expectations in the VIN itself? One is left to conclude that the Court has offered these strawmen to divert the reader from the fact that the *Class* ruling lacks any connection with the Court's prior cases under the automobile exception.

2. *Class may not rest on a driver's lack of privacy in his car or the VIN*

The Court began its discussion of the fourth amendment issue in *Class* by explaining the governmental purposes served by the VIN. The majority noted that the VIN is useful to the federal government as a means of improving the "efficacy of recall campaigns, and [it] assists researchers in determining the risks of driving various makes and models of automobiles."¹⁰⁴ The VIN serves state officials in the implementation of insurance laws by reducing the number of persons injured in car accidents who go uncompensated for lack of insurance. It also helps state officials ensure that motorists are driving safe vehicles, and it assists law enforcement officials in combating automobile theft.¹⁰⁵ Because of these useful purposes, federal law requires manufacturers to place the VIN in the plain view of someone outside the automobile.¹⁰⁶ The *Class* majority declared that this requirement was "amply justified."¹⁰⁷

All of this is true but irrelevant. In fact, the Court had already recognized the authority of the states to ensure that "only those qualified to do so are permitted to operate motor vehicles, that

¹⁰² *Class*, 106 S. Ct. at 966.

¹⁰³ See *infra* notes 161-72 and accompanying text.

¹⁰⁴ *Class*, 106 S. Ct. at 964.

¹⁰⁵ *Id.* at 965.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Although it was not explained in the Court's opinion, the federal regulations which require that the VIN be placed in plain view are directed at manufacturers of automobiles, and not motorists themselves. 49 CFR § 571.115(S4.6) (1984); see 106 S. Ct. at 979 (Powell, J., concurring). Moreover, at the time *Class* was stopped, there was no independent state law requirement that motorists always have the VIN visible to an observer standing outside the vehicle. New York law merely authorized an officer "to demand information necessary to identify a vehicle." *People v. Class*, 63 N.Y.2d at 696, 472 N.E.2d at 1012, 483 N.Y.S.2d at 185 (emphasis in original). See *supra* note 58.

[their] vehicles are fit for safe operation, and . . . that licensing, registration and vehicle inspection requirements are being observed.”¹⁰⁸ Neither Class nor the court of appeals questioned the authority of the federal or state government to utilize the VIN in its regulatory processes.¹⁰⁹ Finally, none of the lower courts addressing the issue of the constitutionality of a police intrusion to examine the VIN had questioned the authority of a police officer to demand visual access to the VIN as part of a legitimate regulatory inspection.¹¹⁰ It is possible that the Court provided this background detail on the VIN and its significance in the “web of regulation of the automobile” in order to lay a foundation for the unexpected holding that the search of Class’ vehicle would be upheld under the automobile exception to the fourth amendment. This exception was first announced in *Carroll v. United States*¹¹¹ and was more recently expanded in *United States v. Ross*¹¹² and *United States v. Johns*.¹¹³ This reasoning, however, did not materialize.

The Court next turned to the motorist’s lack of privacy in the VIN itself.¹¹⁴ The “factors that generally diminish the reasonable expectation of privacy in automobiles,” the Court said, “are applicable *a fortiori* to the VIN.”¹¹⁵ Because the VIN serves a vital regulatory function,

[a] motorist must surely expect that such regulation will on occasion require the State to determine the VIN of his or her vehicle, and the individual’s reasonable expectation of privacy in the VIN is thereby diminished. This is especially true in the case of a driver who has committed a traffic violation.¹¹⁶

This reasoning seems unobjectionable. Most drivers do not expect as much privacy in a car as they have at home.¹¹⁷ They also

¹⁰⁸ *Delaware v. Prouse*, 440 U.S. 648, 658 (1979).

¹⁰⁹ Indeed, the court of appeals recognized that the VIN helped to facilitate the “compelling police interest . . . in the positive identification of vehicles.” 63 N.Y.2d at 495, 472 N.E.2d at 1012, 483 N.Y.S.2d at 184.

¹¹⁰ *See, e.g.*, *United States v. Polk*, 433 F.2d 644, 647 (5th Cir. 1970), *cited in* 1 W. LAFAVE, *supra* note 34, § 2.5(d) at 454-55.

¹¹¹ 267 U.S. 132 (1925).

¹¹² 456 U.S. 798 (1982). In *Ross* the Court held that the police may, during a lawful stop of a vehicle, conduct a warrantless search of compartments and containers within the vehicle where they have probable cause to believe that contraband is concealed somewhere in the vehicle.

¹¹³ 469 U.S. 478 (1985). The *Johns* Court construed *Ross* as authorizing a warrantless search of packages three days after they were removed from vehicles that police officers had probable cause to believe contained contraband.

¹¹⁴ 106 S. Ct. at 965.

¹¹⁵ *Id.* at 966.

¹¹⁶ *Id.*

¹¹⁷ In *California v. Carney*, 471 U.S. 386 (1985), the Court explained that automobiles are subject to a lesser expectation of privacy because of their inherent mo-

anticipate periodic government inspection¹¹⁸ to ensure that their vehicles are operated in a safe and responsible manner.¹¹⁹ Furthermore, a driver who has committed a traffic violation can expect to be questioned by the police and asked to produce evidence of his right to operate an automobile.¹²⁰

A closer examination of the Court's language, however, reveals several problems. Justice O'Connor declared that because the VIN plays an important regulatory role, "[a] motorist must surely expect that such regulation will on occasion require the State to determine the VIN of his or her vehicle."¹²¹ Was the Court suggesting that all motorists, no matter what the occasion, can (or should) expect that a police officer will demand—and expect to receive—access to the vehicle's VIN? Although not noted in the majority's opinion, the VIN is not always located on the door jamb or in the left-hand corner of the windshield.¹²² Some VINs are stamped "in secret locations generally known only to law enforcement personnel,"¹²³ including the

bility and the pervasive regulation of them by the government. According to *Carney*, "[t]he public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation." *Id.* at 392. Thus, the Court held that the fourth amendment was not violated when the police conducted a warrantless search, based on probable cause, of a motor home located in a public place.

An issue left open in *Carney*, whether the automobile exception was equally applicable to a motor home that is "situated in a way or place that objectively indicates that it is being used as a residence," *id.* at 394 n.3, was addressed by the Ninth Circuit in *United States v. Hamilton*, 792 F.2d 837 (9th Cir. 1986). The *Hamilton* court held that a motor home parked in a private residential driveway and connected to the home's electrical utilities could be searched without a warrant where the police have probable cause. The court dismissed the claim that the utility connection rendered this situation outside the scope of *Carney's* applicability. "A connection to electrical utilities by means of an extension cord is hardly the kind of 'pipe and drain' connection that would render the motor home more permanent and less mobile as was contemplated in *Carney*." 792 F.2d at 843.

¹¹⁸ *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976).

¹¹⁹ *See Prouse*, 440 U.S. at 659-60, noting that automobile licenses are issued periodically to ensure driver competency, and registration and vehicle inspection programs are designed to keep dangerous automobiles off the roads. Such requirements, "properly administered, are essential elements in a highway safety program." *Id.* at 658.

¹²⁰ *See Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977).

¹²¹ 106 S. Ct. at 966.

¹²² *See, e.g., State v. Moore*, 66 Haw. 202, 659 P.2d 70 (1983)(per curiam)(entry into the vehicle was necessary to inspect the VIN; because the entry was not justified by probable cause or reasonable suspicion that the vehicle was involved with a crime, the entry was unlawful); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980)(en banc)(though defendant had no legitimate expectation of privacy in the VIN itself, he did hold constitutionally protected expectation of privacy that the police would not enter his locked vehicle to inspect a VIN hidden from public view); *see also State v. Sidebotham*, 124 N.H. 682, 474 A.2d 1377 (1984) and *State v. McGann*, 124 N.H. 101, 467 A.2d 571 (1983)(official inspection of a VIN not in plain view is a search under State Constitution).

¹²³ 1 W. LAFAVE, *supra* note 34, § 2.5(d) at 453.

underside of the hood and the rear axle.¹²⁴ If one reads *Class* literally, motorists "must surely expect" that because of the pervasive nature of government regulation of automobiles, the police will be free to look under the vehicle's hood, crawl underneath the car or demand entry to some other secret location with no objective justification. This assertion is a questionable one.

The average motorist has a greater expectation of privacy in his or her vehicle than the Court is willing to admit. For example, hypothesize the average driver who, returning home on a Saturday night after a movie, encounters a typical driver's license and vehicle registration check or driving-while-intoxicated (DWI) roadblock.¹²⁵ After the vehicle is stopped at such a roadblock, an officer usually requests that the motorist produce his license and registration,¹²⁶ presumably to ascertain whether the driver and his vehicle are entitled to be on the road. After the *Class* decision, that same driver now "must surely expect" that the same governmental interest which justifies the officer's demand for his license and registration, will also justify the officer, without any additional objective justification, opening the driver's door, entering the vehicle to move away some paper innocently placed on the dashboard, forcibly opening the hood, crawling underneath the vehicle, or effecting some other intrusion into the vehicle to ascertain the VIN. Of course, any notion by the Court or anyone else familiar with police-motorist encounters of such an expectation by a motorist is unrealistic.

All motorists do expect that their driving abilities and their cars' performance will be the subject of "properly administered"¹²⁷ periodic government regulation. Such regulation often will be inconvenient and may temporarily interfere with a motorist's freedom of movement. But, the average motorist does not expect anything more than a temporary restraint of his freedom.¹²⁸ It is untenable to assert that the average motorist will "surely expect" a police inva-

¹²⁴ Although Justice O'Connor was certainly correct in stating that "federal law requires that the VIN be placed in view of someone *outside* the automobile," 106 S. Ct. at 965 (citing 49 CFR § 571.115 (S 4.6)(1984))(emphasis in original), police officers often check both the public and confidential VIN when investigating vehicles. See, e.g., *State v. Sidebotham*, 124 N.H. 682, 474 A.2d 1377 (1984); *Dick v. State*, 596 P.2d 1265 (Okla. Crim. App. 1979); *Commonwealth v. Grabowski*, 452 A.2d 827 (Pa. Super. Ct. 1982).

¹²⁵ For an interesting discussion of wholesale, suspicionless sobriety checkpoints, see Grossman, *Sobriety Checkpoints: Roadblocks to Fourth Amendment Protections*, 12 AM. J. CRIM. L. 123 (1984).

¹²⁶ See Note, *Curbing the Drunk Driver under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1460-63 (1983).

¹²⁷ *Prouse*, 440 U.S. at 658.

¹²⁸ See *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984)(A motorist's expectations during a routine traffic stop "are that he will be obliged to spend a short period of time

sion of his vehicle in order to inspect a VIN during routine police-motorist encounters. A police intrusion without any objective justification that goes beyond a simple request for a license and registration is not something that a motorist "must surely expect" as a result of the government's pervasive regulation of his automobile.

The Court's analysis is unconvincing for an additional reason. In its haste to find that a motorist has no expectation of privacy in the VIN, the Court failed to distinguish between the degree of privacy one can expect with regard to the VIN and the degree of privacy one has in the particular area in which the VIN is located. Justice O'Connor did not recognize that the degree of privacy one has in an identification number is wholly different from the degree of privacy one can reasonably expect in the portion of the vehicle which must be transversed in order to examine the VIN.

In *Smith v. Maryland*,¹²⁹ the Court recognized this important distinction in a different context. The *Smith* Court held that the warrantless installation and use of a pen register¹³⁰ by the police did not constitute a search within the meaning of the fourth amendment. Writing for the Court, Justice Blackmun rejected the defendant's claim that, notwithstanding the absence of a physical trespass, the police action infringed on a legitimate expectation of privacy which the defendant held regarding the numbers he dialed on his phone.

[W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the telephone company has facilities for making permanent records of the numbers they dial.¹³¹

Though the Court ultimately held that *Smith* had no expectation of privacy in the numbers he dialed, its conclusion rested on the fact that the police activities in *Smith* did not intrude into a "constitutionally protected area" of the defendant's property.¹³²

The *Class* Court's analysis also overlooked the view that the

answering questions and waiting while the officer checks his license and registration. . . .") (footnote omitted).

¹²⁹ 442 U.S. 735 (1979).

¹³⁰ The Court explained that a pen register is "a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." *Id.* at 736 n.1 (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 161 n.1 (1977)).

¹³¹ 442 U.S. at 742.

¹³² *Id.* at 741 (quoting *Katz v. United States*, 389 U.S. 347, 351-53 (1967)).

fourth amendment protects against official invasions of privacy, even when the intrusion appears to some to be trivial. *Arizona v. Hicks*¹³³ recently recognized this principle. In *Hicks*, police officers entered Hicks' apartment after learning that an individual in the apartment below Hicks' had been shot through the floor from the apartment above. The police found no one in Hicks' apartment, but they seized several weapons. After noticing expensive stereo equipment, one of the officers became suspicious that the equipment might have been stolen because it "seemed out of place in the squalid and otherwise ill-appointed four-room apartment."¹³⁴ The officer moved the equipment to inspect the serial number, which he recorded. After being informed over the phone that one piece of the equipment had been taken in an armed robbery, the officer immediately seized it. A later check of the other serial numbers revealed that the remaining equipment had also been stolen. Based on this information, a warrant was issued which authorized the seizure of the equipment.¹³⁵

On appeal, Arizona contended that the moving of the equipment and the recording of the serial numbers constituted neither a "search" nor a "seizure." The Court agreed that merely recording the numbers did not constitute a seizure because it did not meaningfully interfere with Hicks' possessory interests.¹³⁶ The Court rejected, however, the assertion that no search had occurred:

Merely inspecting those parts of the turntable that came into view during the [initial invasion of the apartment] would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest. But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstances that validated the entry.¹³⁷

Justice Scalia's opinion for the Court in *Hicks* rejected the claim that this position trivialized the fourth amendment. For Justice Scalia, the question was not whether the challenged search involved merely the moving of an item a few inches to disclose something of little value. Rather, the question was whether the police action exposed portions of the apartment not otherwise visible. It was not important, therefore, "that the search uncovered nothing of any great personal value to the respondent—serial numbers rather than

¹³³ 107 S. Ct. 1149 (1987).

¹³⁴ *Id.* at 1152.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* (citing *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)).

(what might conceivably have been hidden behind or under the equipment) letters or photographs. A search is a search, even if it happens to disclose nothing but the bottom of a turntable."¹³⁸

A similar allowance is not available when the police invade the interior of a car to inspect a VIN. An officer's observation of a VIN visible to anyone looking through the windshield does not implicate the fourth amendment privacy interests of a motorist because the officer is only observing that which is in plain view.¹³⁹ Where, however, an officer must invade the interior of a vehicle to examine the VIN, a motorist's expectations of privacy are threatened because the officer may intrude upon an area of the vehicle that is otherwise concealed from view. This point was aptly noted by an Illinois appellate court in the 1981 case of *People v. Piper*. The court stated that

[a]lthough one's expectation of privacy in the number may be no different, it is surely a matter of common sense that one's expectation of privacy in that which can be seen from outside the car is significantly different from that which can be seen only when the door has been opened. Otherwise, why bother to put things in the glove compartment, under the seat, or, as here, behind the seat and out of the view of passers-by?¹⁴⁰

Despite its broad language and questionable assumption about the reasonable privacy expectations of motorists, perhaps the *Class* Court intended its pronouncement regarding expectations of privacy possessed by motorists to apply only to those drivers who have

¹³⁸ *Hicks*, 107 S. Ct. at 1152.

¹³⁹ See *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974)(plurality opinion); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971)(plurality opinion). Compare *United States v. Knotts*, 460 U.S. 276 (1983)(warrantless monitoring on an electronic beeper inside a container of chemicals was not a search when it revealed no information that could not have been obtained through visual surveillance) with *United States v. Karo*, 468 U.S. 705, 714 (1984)(monitoring of a beeper in a private home, "a location not open to visual surveillance," constituted a search, and was therefore in violation of the fourth amendment rights of persons with a legitimate expectation of privacy in the home). For a perceptive criticism of *Knotts*, see LaFave, *supra* note 23.

¹⁴⁰ *People v. Piper*, 101 Ill. App. 3d 296, 301, 427 N.E.2d 1361, 1364 (1981). In *Piper*, the court held that an officer's opening of the door of a vehicle to examine the VIN during a routine traffic accident investigation, without the consent of the driver and in the absence of any suspicion of criminal conduct, violated the fourth amendment. See also *State v. Simpson*, 95 Wash. 2d 170, 184-85, 622 P.2d 1199, 1208-09 (1980)(en banc)("The degree of privacy interest in the part of the vehicle where the VIN is located is a separate question from the extent of privacy interest in the serial number itself. . . . The location of the VIN can have a significant effect on an individual's privacy interest. When VINs are stamped on the exterior parts of a vehicle or on the part of the dashboard that is plainly visible through the windshield, the numbers are fully exposed to the public. . . . A different question is presented when the VIN is hidden from public view on some interior portion of the vehicle, and it is necessary to enter the vehicle in order to view it.") See also *United States v. Johnson*, 431 F.2d 441, 447 (5th Cir. 1970)(Godbold, J., dissenting).

committed traffic violations.¹⁴¹ But even by accepting this much,¹⁴² the *Class* majority still overestimated the average driver's expectations of lesser amounts of privacy in his automobile and documents. As Justice Stevens has noted, "it is perfectly obvious that the millions of traffic stops that occur every year are not fungible."¹⁴³ It is indefensible to suggest that motorists who have committed traffic violations retain no constitutional interest against arbitrary police invasions into their cars, and any such suggestion has serious and dangerous implications for fourth amendment freedoms.

Indeed, the Court has already dismissed the contention that a valid seizure of an individual grants the police unlimited authority to search the premises of the person seized. In *Chimel v. California*,¹⁴⁴ the Court, while delineating the permissible scope of a search incident to arrest, rejected the position that "once an arrest has been made [in a suspect's home], the additional invasion of privacy stemming from the accompanying search [of the home] is 'relatively minor.'"¹⁴⁵ The *Chimel* Court stated that it could see "no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the fourth amendment would otherwise require."¹⁴⁶ This prin-

¹⁴¹ See 106 S. Ct. at 966 (the expectation of a motorist that the state will, on occasion, be required to determine the motorist's VIN "is especially true in the case of a driver who has committed a traffic violation.").

¹⁴² It is doubtful the Court intended a narrow construction of its holding such that only those motorists who have committed traffic violations would be subject to a police officer's inspection of the VIN. The pertinent passage reads as follows:

The factors that generally diminish the reasonable expectation of privacy in automobiles are applicable *a fortiori* to the VIN. . . . [T]he VIN plays an important part in the pervasive regulation by the government of the automobile. A motorist must surely expect that such regulation will on occasion require the State to determine the VIN of his or her vehicle, and the individual's reasonable expectation of privacy in the VIN is thereby diminished. This is especially true in the case of a driver who has committed a traffic violation.

Id. at 966.

Instead of referring only to motorists who have committed traffic infractions, the Court casts its language in general terms. Furthermore, the sentence following the general pronouncement that motorists "must surely expect" government regulation requiring access to the VIN highlights, rather than modifies, the general expectation that the state will demand access to the VIN on occasion.

¹⁴³ *Pennsylvania v. Mimms*, 434 U.S. at 121 (Stevens, J., dissenting). Cf. LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39, 87 (1968) (The *Terry* ruling makes it clear that "whether it is proper to make a protective search incident to a stopping for investigation is a question separate from the issue of whether it is permissible to stop the suspect; not all stops call for a frisk.").

¹⁴⁴ 395 U.S. 752 (1969).

¹⁴⁵ *Id.* at 766 n.12.

¹⁴⁶ *Id.* See also *Mincey v. Arizona*, 437 U.S. 385, 391-92 (1978) (rejecting the claim that a person lawfully taken into police custody retains no right of privacy in his home).

principle is equally applicable to the motorist traveling on the highway: a lawful stop does not automatically provide justification for a search. Imagine for example, the harried mother who leaves the house in a hurry to drive the kids to school. Inadvertently, she exceeds the speed limit on a twenty-five mile per hour stretch of suburban roadway. Certainly, in this instance, it is fair to assume that this motorist can be expected to be stopped and requested to produce proof of her license and registration certificate. Is it also fair to assume that this motorist retains no reasonable expectation of privacy against an officer's unnecessary intrusion into her vehicle to ascertain the VIN?

The majority's reasoning also cannot be confined to apply only to intrusions to ascertain the VIN. Suppose a motorist has committed a minor traffic infraction and is ordered by police to get out of her car.¹⁴⁷ If she forgets to bring her registration certificate or has left her driver's license in some other location inside the car, *Class* would sanction a police intrusion into the vehicle to retrieve the documents. This hypothetical situation is not a far-fetched reading of *Class*. The arguments in support of such a search are obvious enough. First, automobiles are properly the subject of extensive governmental regulation, and, thus, "every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy."¹⁴⁸ Second, "the factors that generally diminish the reasonable expectation of privacy in automobiles are applicable *a fortiori* to a [driver's license or registration certificate]."¹⁴⁹ Both play "an important part in the pervasive regulation by the government of the automobile."¹⁵⁰ Third, in light of this important role, "a motorist must surely expect that such regulation will on occasion require the State to determine [the existence of a driver's license or registration certificate], and the individual's reasonable expectation of privacy in [both the license and registration certificate] is thereby diminished."¹⁵¹ Fourth, "[t]his is especially true in the case of a driver who has committed a traffic violation."¹⁵² Therefore, the officer's intrusion into the vehicle's glove compartment to retrieve a registration certificate inadvertently left behind¹⁵³ or the officer's search of a driver's purse

¹⁴⁷ The fourth amendment clearly permits the police to do this much. *Mimms*, 434 U.S. at 108-11 (1977)(per curiam).

¹⁴⁸ *Class*, 106 S. Ct. at 965.

¹⁴⁹ *Id.* at 966.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ In some instances a failure to bring registration and insurance documents, nor-

or travel bag in order to obtain a driver's license are reasonable because the motorists in these instances possessed a lesser expectation of privacy in their automobiles and no reasonable expectation of privacy in the objects of the police intrusion.¹⁵⁴

The claim of the *Class* Court that "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile"¹⁵⁵ did not provide any substance to the Court's rationale. The assertion is not convincing. Consider, for example, a police officer who has stopped a motorist for driving without a visible license plate. And, suppose also that the motorist tells the officer that the temporary license plate has fallen from the rear windshield of the car. Under the majority's rationale, the motorist cannot reasonably have an expectation of privacy in the license plate, because the license plate is, after all, a part of the pervasive regulation of the automobile and is required by law to be located in a place in plain view. The officer, therefore, would be permitted to conduct a search of the vehicle in order to discover and inspect the license plate as part of the administrative procedures associated with a routine traffic stop.

Furthermore, the assertion that a motorist cannot reasonably expect any privacy in an object required by law to be in plain view is irrelevant to a logical resolution of the constitutional question under review. In this respect, this lack of reasonable expectation rationale is similar to the majority's earlier discussion about the laudable governmental purposes served by, and lack of privacy surrounding, the VIN. It is obvious, at least to the Court, that the "exterior of a car . . . is thrust into the public eye, and thus to examine it

mally located in the glove compartment, may not be the product of inadvertance. Drivers stopped by police, especially in large urban areas, are frequently cautioned to avoid unnecessary movements while seated inside a vehicle, especially any movement that looks like one might be reaching for a gun.

¹⁵⁴ This author is not the only one to detect such troublesome implications from the *Class* opinion. Justice White was also unprepared to follow the majority's reasoning:

Had *Class* remained in his car and refused an officer's order (1) to turn over his registration certificate and (2) to remove the article obscuring the VIN, there would have been no more justification for entering the interior of the car and doing what was necessary to read the VIN than there would have been to enter and search for the registration certificate in the glove compartment. It may be that under our cases, *Class* could have been sanctioned for his refusal in such a case, but we have never held that his refusal would permit a search of the glove compartment. Even if it did, it would be different if there was no refusal at all, but just an entry to find a registration certificate. If that is the case, this one is no different in kind: there was no refusal and nothing but a non-consensual entry to search without probable cause and without emergent circumstances.

106 S. Ct. at 975 (White, J., dissenting).

¹⁵⁵ *Id.* at 966.

does not constitute a 'search.'"¹⁵⁶ The New York Court of Appeals, however, did not hold, nor did *Class* claim, that merely viewing the VIN from outside the car constituted an impermissible search. Rather, the court of appeals based its reversal of *Class*' conviction on the ground that Officer McNamee's conduct—opening the door and reaching inside—constituted a search because it was "undertaken to obtain information and it exposed . . . hidden areas"¹⁵⁷ of *Class*' vehicle that were not in plain view. In other words, the intrusion to discover the VIN, *an object* in which *Class* concedely held no legitimate privacy interest, invaded *an area* in which *Class* reasonably could expect to remain free from unreasonable police scrutiny. By focusing on the object of the search—the discovery of the VIN—the *Class* majority avoided confronting the constitutional issue decided below, namely, whether a police officer's nonconsensual entry into an automobile to determine the VIN, based solely on a stop for a traffic infraction, violated the fourth amendment.¹⁵⁸

Finally, it is erroneous to suggest that the holding in *Class* will have no impact on other types of police intrusions involving lawful stops of motorists. The reasoning of *Class* will apply to cases in which a motorist has to produce an object for inspection as well as to cases in which a motorist has to keep information visible to the public. *Class* cannot be confined to VIN searches. It is significant, therefore, that the Court did not explain the constitutional difference between requiring a motorist to keep certain items *exposed* for possible police inspection and requiring a motorist to *produce* other items for police scrutiny.

Consider again, the harried parent who is driving to work after dropping off the kids at school. The parent is stopped validly for a minor traffic infraction and is asked to exit her vehicle.¹⁵⁹ Assume further that the motorist inadvertently leaves her driver's license inside her purse or forgets to bring her automobile registration certificate with her. The motorist's momentary forgetfulness does not relieve her of the obligation to produce for the investigating officer her driver's license or registration certificate. Under the rationale of *Class*, the officer is not required to return the motorist to her vehicle because that would permit "an individual being detained to have

¹⁵⁶ *Id.*

¹⁵⁷ *People v. Class*, 63 N.Y.2d 495, 472 N.E.2d at 1011, 483 N.Y.S.2d at 183.

¹⁵⁸ See 106 S. Ct. at 971 (Brennan, J., dissenting) ("By focusing on the object of the search—the VIN—the Court misses the issue we must decide: whether an interior search of the car, to discover that object was constitutional.") (emphasis in original).

¹⁵⁹ See *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), discussed *infra* notes 201-06 and accompanying text.

possible access to a dangerous weapon and the benefit of the partial concealment provided by the car's exterior."¹⁶⁰ Even assuming an independent obligation of motorists to keep their VIN plates constantly visible to passersby—an obligation similar in nature to the obligation of motorists to produce driver's licenses or registration certificates upon the valid demand of investigating police officers, it cannot be persuasively argued that the Court's reasoning in *Class* is limited to its particular facts. From the motorist's point of view and from a constitutional perspective, being forced to produce an item associated with the web of automobile regulation is no different from being forced to expose the VIN. In each instance in which the motorist, for whatever reason, cannot satisfy the demands of investigating officers, police are left free to intrude into the vehicle's interior. Thus, when a motorist is unable to produce requested documents without returning to the automobile, the reasoning of *Class* permits an officer to take the steps necessary to complete his investigation, including entering private areas of the vehicle to retrieve documents. Therefore, the rationale of *Class* extends beyond VIN searches.

The Court's emphasis on the vital regulatory role played by the VIN and the propriety of requiring that it be placed in plain view did not provide a foundation for the Court's reasoning and result. It is readily apparent that the VIN serves several useful governmental purposes. It is equally obvious that a motorist cannot or could not claim a protective interest in the secrecy of a VIN ordinarily in plain view of the public or in the secrecy of his license plate numbers. These principles are undisputed, and they were not contested by the parties or the lower courts. What was disputed, however, was the constitutional validity of Officer McNamee's intrusion. The first half of the majority's opinion failed to explain why the conduct of Officer McNamee was within the boundaries of permissible police action under established fourth amendment doctrine. The majority of the Court appears to be willing to sanction any type of police intrusion into a motorist's vehicle so long as that intrusion has some nexus to the state's interest in regulating the automobile and its driver.

3. *Class may not rest on the automobile exception*

The basis of the automobile exception to the fourth amendment was articulated by the Court in *Carroll v. United States*.¹⁶¹ In *Carroll*, the Court held that because of the impracticability of ob-

¹⁶⁰ 106 S. Ct. at 967.

¹⁶¹ 267 U.S. 132 (1925).

taining a warrant to search a movable vehicle, the police could search the interior of an automobile without first obtaining a warrant from an independent magistrate.¹⁶² *Carroll* made clear, however, that the authority of the police to stop and search vehicles on the nation's highways was not without limit. Only where an officer has probable cause for believing that a particular vehicle is carrying contraband or evidence of a crime is the officer permitted to conduct a warrantless search.¹⁶³ Absent such probable cause, a motorist has a "right to free passage without interruption or search."¹⁶⁴

Although the automobile exception has changed since its first articulation in *Carroll*,¹⁶⁵ the Court has not altered one of its original requirements, namely, that before embarking on a search of a vehicle, the police must have probable cause to believe that that vehicle contains evidence of a crime.¹⁶⁶ This continued adherence to the probable cause requirement is based on the belief that a contrary rule would create the intolerable result that any vehicle could be stopped and searched based on nothing more than the unsubstantiated hunch or whim of the officer in the field.¹⁶⁷ Therefore, the searching officer must possess objective facts which would justify the issuance of a warrant from a neutral and detached magistrate; subjective good faith in the legitimacy of the search is not enough.¹⁶⁸ Without this requirement, the protections guaranteed by the fourth amendment would "evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of

¹⁶² *Id.* at 153.

¹⁶³ *Id.* at 154.

¹⁶⁴ *Id.*

¹⁶⁵ See Gardner, *Searches and Seizures of Automobiles and Their Contents: Fourth Amendment Considerations In a Post-Ross World*, 62 NEB. L. REV. 1, 34-35 (1983); Kamisar, *United States v. Ross: The Court Takes Another Look at The Container-in-the-Car Situation*, in THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1981-82, at 74-81 (J. Choper, Y. Kamisar & L. Tribe eds. 1983). As Professor Kamisar has explained in his excellent critique of *United States v. Ross*, the *Carroll* doctrine, as originally understood, allowed police to search a car without a warrant on the basis of (a) probable cause to believe the car contained evidence of crime and (b) the presence of "'exigent circumstances' that made it impractical to obtain a warrant." Kamisar, *supra*, at 74. In the mid-1970s, however, several decisions of the Court chipped away at the exigency requirement. Finally, in *Texas v. White*, 423 U.S. 67 (1975) (per curiam), the Court eliminated the requirement entirely. After *White*, it appeared that the Court had manufactured a new "probable cause" exception to the warrant requirement for automobiles. In Professor Kamisar's view, the *Ross* decision merely extended the new exception created in *White* "to containers found anywhere inside the car." Kamisar, *supra*, at 78.

¹⁶⁶ *United States v. Ross*, 456 U.S. 798, 809 (1982); *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). See also Kamisar, *supra* note 165, at 75.

¹⁶⁷ *Carroll*, 267 U.S. at 153-54.

¹⁶⁸ *Ross*, 456 U.S. at 808.

the police.”¹⁶⁹ Indeed, in the Term preceding *Class*, the Court twice reaffirmed the principle that the automobile exception was applicable only to searches of vehicles which were based on probable cause.¹⁷⁰

By applying this principle to the *Class* facts, it is clear that the automobile exception to the fourth amendment did not legitimize Officer McNamee’s search. In fact, the Court recognized that “it [was] undisputed that the police officers had no reason to suspect that [Class’] car was stolen, that it contained contraband, or that [Class] had committed an offense other than the traffic violations.”¹⁷¹ Although New York had legitimate interests in regulating Class’ vehicle and in ordinarily requiring visual access to the VIN, those interests, despite their pervasiveness, could not justify the suspension of the probable cause requirement.

The police in *Class* had no probable cause to justify their entry into Class’ vehicle. The fact that Class had little expectation of privacy in his car and no legitimate expectation of privacy in the VIN plate cannot be used as a bootstrap to utilize the automobile exception in this case. The lesser expectations of privacy and the exigencies associated with the mobility of an automobile justify warrantless searches “so long as the overriding standard of probable cause is met.”¹⁷² In *Class*, that standard was not met, and, hence, Officer McNamee’s search did not fall within the automobile exception.

In sum, the *Class* ruling cannot be justified by the reasons proffered by the Court in the first half of its opinion. A motorist’s lack of privacy in the VIN and the lesser expectation of privacy associated with an automobile do not provide a principled basis for the Court’s decision. Moreover, the automobile exception fails to support the *Class* result. Unfortunately, the Court was no more persuasive in the second half of the *Class* opinion.

B. BALANCING AWAY *TERRY V. OHIO*

The first half of the *Class* opinion appeared to lay the foundation for a holding that Officer McNamee’s search was permissible under the automobile exception. The Court, however, abruptly

¹⁶⁹ *Terry*, 392 U.S. at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

¹⁷⁰ *California v. Carney*, 471 U.S. 386, 392 (1985); *United States v. Johns*, 469 U.S. 478, 483-84 (1985). In *Carney*, the Court explained that a motorist’s lesser expectation of privacy in his automobile derived from the pervasive state regulation of his vehicle. *Carney*, 471 U.S. at 392. The *Carney* Court, however, was careful to note that warrantless searches of vehicles were only valid “so long as the overriding standard of probable cause is met.” *Id.*

¹⁷¹ *Class*, 106 S. Ct. at 963.

¹⁷² *Carney*, 471 U.S. at 392.

shifted from a discussion of the pervasive state regulation of the automobile, of which the VIN played an important role, to a discussion of the balance between the competing interests of the state and the individual. Rather than extend the *Carroll* doctrine to allow arbitrary searches of automobiles during routine traffic stops, the majority utilized the balancing formula of *Terry v. Ohio*¹⁷³ to find that the search of Class' vehicle was constitutionally reasonable. This conclusion was reached by both torturing the facts and by an unjustified application of *Terry* and its progeny.

The Court began the second half of its opinion with a reasonable conclusion: Officer McNamee's invasion of Class' automobile was a search for fourth amendment purposes.¹⁷⁴ An automobile's "interior as a whole," the Court stated, is accorded some level of fourth amendment protection against unreasonable police intrusions.¹⁷⁵ This assertion, however, was the final concession the Court was prepared to make.

1. Preliminary balancing

a. "Blame the victim"

Before discussing why the search was reasonable under the *Terry* balancing formula, the Court made two initial observations. The first concerned the necessity for Officer McNamee's search. The second involved the dangers that "would have been presented" had Officer McNamee returned Class to his car in order to remove the paper obstructing the VIN.¹⁷⁶

Regarding its first observation, the Court declared that a police officer's "demand to inspect the VIN, like a demand to see license and registration papers, is within the scope of police authority pursuant to a traffic violation stop."¹⁷⁷ Therefore, if Class had re-

¹⁷³ 392 U.S. 1 (1968). As Justice O'Connor noted, under the *Terry* balancing formula, the constitutional reasonableness of a challenged government intrusion is determined "by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Terry*, 392 U.S. at 21 (citing *Camara v. Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967)). Justice O'Connor, however, neglected to note that *Terry* also set forth a two-step inquiry to aid the Court in assessing the reasonableness of police intrusions that interfere with the personal security of citizens. That inquiry involved considering "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20.

¹⁷⁴ 106 S. Ct. at 966.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 967.

¹⁷⁷ *Id.* at 966-67. § 401(4) of New York's Vehicle and Traffic Law authorizes an officer to demand information necessary to identify a vehicle. See *People v. Class*, 63 N.Y.2d at 496-97, 472 N.E.2d at 1012-13, 483 N.Y.S.2d at 185.

mained in his vehicle, "the police would have been justified in asking him to move the papers obscuring the VIN."¹⁷⁸ Class, however, exited his vehicle without removing the papers that obscured the VIN, and Officer McNamee "chose to conduct his search without asking [Class] to return to the car."¹⁷⁹ Thus, the Court was left to decide "whether the officer acted within the bounds of the Fourth Amendment in conducting the search."¹⁸⁰ The majority held that he did.

On what basis does such a holding rest? The *Class* majority had submitted no persuasive constitutional analysis up to this point in the opinion to explain its result. The majority, perhaps, believed that Class himself was responsible for the police intrusion. The Court suggested this possibility in subtle terms.¹⁸¹ Apart from Justice O'Connor's suggestive language, the Court in an earlier case indicated in manifest terms that the innocent behavior of an individual could form the basis for upholding an officer's otherwise questionable intrusion. This "blame the victim" theory arose out of the Court's decision in *United States v. Sharpe*.¹⁸² In explaining why a twenty-minute detention by a Drug Enforcement Agent and a state police officer was not too long for purposes of a valid *Terry* investigative stop of a motorist, the Court in *Sharpe* emphasized that "the delay . . . was attributable almost entirely to the evasive actions of [the defendant, Savage], who sought to elude the police as [his co-defendant, Sharpe] moved his Pontiac to the side of the road [in response to a police signal to pull over]."¹⁸³ In a footnote, however, the *Sharpe* majority offered the following comments.

Even if it could be inferred that Savage was not attempting to elude the police when he drove his car between [Officer] Thrasher's patrol car and Sharpe's Pontiac—in the process nearly hitting the patrol car—such an assumption would not alter our analysis or our conclusion. The significance of Savage's actions is that, whether *innocent* or *purposeful*, they made it necessary for [Officer] Thrasher and [Agent]

¹⁷⁸ 106 S. Ct. at 966.

¹⁷⁹ *Id.* at 967.

¹⁸⁰ *Id.*

¹⁸¹ "If [Class] had stayed in his vehicle and acceded to such a request [to remove the paper obscuring the VIN] from the officer, the officer would not have needed to intrude into the passenger compartment. [Class] chose, however, to exit the vehicle without removing the papers that covered the VIN." *Id.* See also 1 W. LAFAVE, *supra* note 34, § 2.5(d) at 457.

¹⁸² 470 U.S. 675 (1985). In *Sharpe*, two law enforcement officers attempted to stop two motorists (Sharpe, who was driving a Pontiac and Savage who was driving a pickup truck) whom the officers suspected were transporting drugs. After one officer signaled the Pontiac (the lead vehicle) to pull over, the pickup truck continued down the highway. This action caused the officers to split up.

¹⁸³ *Id.* at 687-88.

Cooke to split up, placed Thrasher and Cooke out of contact with each other, and required Cooke to enlist the assistance of local police before he could join Thrasher and Savage.¹⁸⁴

Justice Brennan, writing in dissent, characterized the majority's attempt to blame Savage's innocent actions for the lengthy delay surrounding his detention as an "astonishing assertion."¹⁸⁵ He stressed that if Savage's actions were indeed innocent, then it was constitutionally indefensible to hold that he had somehow waived his fourth amendment rights.

The Court contends that, "*whether innocent or purposeful,*" Savage's conduct "made . . . necessary" the length of these detentions. If the authorities did not reasonably carry out the stops, however, and if Savage's continued driving was "innocent" conduct, it is logically and constitutionally intolerable to hold that Savage waived important Fourth Amendment rights because the events were his "innocent" fault.¹⁸⁶

The *Class* majority apparently believed that the "blame the victim" theory used in *Sharpe*, even when applied to the concededly innocent activity of a defendant such as Class, was not so astonishing after all. Although the majority in *Class* did not refer to *Sharpe*, this reasoning provided a convenient, though subtle, rationale for the attempt to lay at least some of the blame for Officer McNamee's intrusion on Class himself.¹⁸⁷

Even if one accepts the Court's unfair suggestion that Class himself was responsible for Officer McNamee's search, it is plain that the Court's result would have been the same whether Class exited the car on his own or whether he was ordered out by the police. Justice O'Connor noted: "If [Class] had remained in the car, the police would have been justified in asking him to move the papers obscuring the VIN."¹⁸⁸ The police, however, would not have been required to proceed this way; they could have ordered Class to exit the car as well.¹⁸⁹

Justice O'Connor declared later in the opinion that "[i]f [Class] had stayed in his vehicle and acceded [to a request to remove the paper], the officer would not have needed to intrude into the pas-

¹⁸⁴ *Id.* at 688 n.6 (emphasis added).

¹⁸⁵ *Id.* at 716 n.20 (Brennan, J., dissenting).

¹⁸⁶ *Id.* (Brennan, J., dissenting)(emphasis in the original).

¹⁸⁷ *Cf. Dix, Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 891 n.257 (noting that "[e]ven innocent conduct by suspects that increases the time required for police actions might support the reasonableness of a prolonged detention on a rationale other than waiver").

¹⁸⁸ 106 S. Ct. at 966.

¹⁸⁹ *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(per curiam). For a discussion of *Mimms*, see *infra* notes 201-06.

senger compartment.”¹⁹⁰ But, as Justice O’Connor acknowledged in her very next paragraph, if Class had stayed in the car, nothing in the Constitution would have prevented the police from ordering him out.¹⁹¹ Once outside, the police then could have entered the passenger compartment to remove the papers.

Indeed, in her opinion in *Michigan v. Long*,¹⁹² Justice O’Connor grants carte blanche to police to order motorists in and out of their vehicles. The Court in *Long* upheld the right of police to conduct a weapons search of the interior of a car where they have a reasonable belief that the motorist is potentially dangerous. *Long* allows such searches because “roadside encounters between police and suspects are especially hazardous,”¹⁹³ and an “officer must [often] make a ‘quick decision as to how to protect himself and others from possible danger. . . .’ ”¹⁹⁴

During such encounters between police and potentially dangerous motorists, police do not have to ask a driver to exit and move away from the potentially dangerous vehicle. In *Long*, Justice O’Connor expressly rejected the argument that police must pursue this less intrusive and less dangerous alternative. As Professor LaFave has noted, “police are not required ‘to adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter.’ ”¹⁹⁵ Instead, police officers “may ignore that alternative (of keeping the driver away from the car) and thereby create a continuing danger that justifies a search inside the automobile for which the officer lacks probable cause.”¹⁹⁶ Of course, *Long* cites no authority “to support this bootstrapping principle because there is none.”¹⁹⁷

Long suggests therefore that after Class left his car, the police could have asked him to go back inside and remove the papers.¹⁹⁸ The police in the first instance could have looked inside, and they probably could have entered to make sure there were no weapons in the car. In other words, the police not only have discretion to order

¹⁹⁰ 106 S. Ct. at 967.

¹⁹¹ See *Mimms*, 434 U.S. at 110-11.

¹⁹² 463 U.S. 1032 (1983).

¹⁹³ *Id.* at 1052 (a suspect may be permitted “to reenter the vehicle before the *Terry* investigation is over”). See also 3 W. LAFAVE, *supra* note 34, § 9.4(e) at 539.

¹⁹⁴ 463 U.S. at 1049.

¹⁹⁵ 3 W. LAFAVE, *supra* note 34, § 9.4(e) at 528-29 (quoting *Michigan v. Long*, 463 U.S. at 1052).

¹⁹⁶ 463 U.S. at 1052 (quoting *Terry*, 392 U.S. at 28).

¹⁹⁷ LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1205 (1983).

¹⁹⁸ *Id.*

motorists in and out of their vehicles, they also have the concomitant authority to search those vehicles as a result of this discretion. Therefore, the Court's discussion and reliance on Class' exit of his vehicle is another red herring. It is apparent from the substantial authority afforded police by the *Long* ruling that the *Class* Court would have sanctioned a police search for the VIN regardless of whether Class stepped out of the car voluntarily or whether he was ordered out by the police.

b. Dangers that would have been presented?

After suggesting that Class was partially to blame for the police intrusion, the Court proceeded to analyze what it called the danger that "would have been presented"¹⁹⁹ by returning Class to his vehicle to remove the papers that obscured the VIN. The Court noted that police officers normally keep the driver of a vehicle in the car during routine traffic stops.²⁰⁰ *Pennsylvania v. Mimms*²⁰¹ established, however, that the fourth amendment does not prohibit the police from ordering a driver, lawfully stopped, to exit his vehicle.²⁰² This authority is granted "out of a concern for the safety of the police" and because the additional intrusion on the detained motorist "can only be described as *de minimis*."²⁰³ Indeed, the Court in *Class* asserted that the fact that "while in the driver's seat, [Class] had a loaded pistol at hand" illustrates one of the principal justifications for the authority granted to the police by *Mimms*.²⁰⁴ Consequently,

[t]o have returned [Class] immediately to the automobile would have placed the officers in the same situation that the holding in *Mimms* allows officers to avoid—permitting an individual being detained to have possible access to a dangerous weapon and the benefit of the partial concealment provided by the car's exterior. In light of the danger to the officers' safety that would have been presented by returning [Class] immediately to his car, we think the search to obtain the VIN was not prohibited by the Fourth Amendment.²⁰⁵

This logic has appeal. Surely it makes no sense to return a suspect to his vehicle where there exists a weapon which could be used against the police officer. In addition, if *Mimms* grants police officers the power to order motorists out of their vehicles, then requiring

¹⁹⁹ 106 S. Ct. at 967.

²⁰⁰ *Id.* at 967 (citing D. SCHUTTZ & D. HUNT, TRAFFIC INVESTIGATION AND ENFORCEMENT 17 (1983)).

²⁰¹ 434 U.S. 106 (1977)(per curiam).

²⁰² *Id.* at 111.

²⁰³ *Id.*

²⁰⁴ 106 S. Ct. at 967.

²⁰⁵ *Id.*

Officer McNamee to have returned Class to his car to move the paper obscuring the VIN certainly seems like an unreasonable result. As was argued by the state, this result would have substantially undercut the "sound rule of *Mimms*."²⁰⁶ Despite its initial attraction, however, the state's argument and the *Class* majority's adaptation of it will not stand close scrutiny.

Undoubtedly, the Court has been keenly aware of the hazards associated with police-citizen encounters and has given attention to the possible dangers related to the stopping of motorists by police.²⁰⁷ Until the *Class* decision, however, the Court had always been careful to require that there be some showing of objective criteria or justification before the police are allowed to intrude into constitutionally protected areas in the name of "officer safety." The requirement that officers possess some modicum of objective cause before intruding into constitutionally protected areas is, of course, necessary to prevent the "standardless and unconstrained discretion"²⁰⁸ that lies at the heart of the fourth amendment's protection against unreasonable police intrusions. *Michigan v. Long*²⁰⁹ illustrates this principle. In *Long*, two deputies observed the defendant's car traveling fast and erratically. The deputies stopped the vehicle. After Long exited his vehicle and failed to produce his vehicle registration, the deputies sensed that Long "'appeared to be under the influence of something.'"²¹⁰ As Long headed for his vehicle, apparently to retrieve his registration, the deputies followed him and observed a large hunting knife in plain view in the car. Long was then subjected to a *Terry* protective frisk, and the interior of his vehicle was searched for other weapons. As a result of this search, marijuana was discovered and seized by the deputies.

In upholding the search of Long's vehicle, Justice O'Connor's opinion for the Court explained that a search of the passenger compartment of an automobile is "permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons."²¹¹

²⁰⁶ Brief for Petitioner at 27, *New York v. Class*, 106 S. Ct. 960 (1986).

²⁰⁷ See *Mimms*, 434 U.S. at 110; *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973). Cf. *Michigan v. Long*, 463 U.S. at 1048; *Adams v. Williams*, 407 U.S. 143, 148 n.3 (1972).

²⁰⁸ *Prouse*, 440 U.S. at 661.

²⁰⁹ 463 U.S. 1032 (1983).

²¹⁰ *Id.* at 1036 (quoting *People v. Long*, 413 Mich. 461, 469, 320 N.W.2d 866, 868 (1982)).

²¹¹ *Id.* at 1049 (footnote omitted). See also *id.* at 1052 n.16 ("[O]ur opinion clearly

Similarly, in *Almeida-Sanchez v. United States*,²¹² the Court held that the fourth amendment prohibited roving border patrols from conducting warrantless searches of automobiles near the international border if such searches were not based on any probable cause.²¹³ As Justice Stewart, writing for the Court, explained, the “*Carroll* doctrine does not declare a field day for the police in

indicates that the area search that we approve is limited to a search for *weapons in circumstances where the officers have a reasonable belief that the suspect is potentially dangerous to them.*”) (emphasis added).

²¹² 413 U.S. 266 (1973).

²¹³ *Almeida-Sanchez* was the first of the Court’s modern border-search cases involving automobiles. The defendant in *Almeida-Sanchez* had been convicted of having knowingly received, concealed and facilitated the transportation of a large quantity of marijuana. In the Supreme Court, he contended that the search of his car, which occurred 25 miles north of the Mexican border, was unconstitutional. It was undisputed that the border patrol had no search warrant, probable cause or reasonable suspicion for stopping or searching the defendant’s vehicle. *Id.* at 268.

Rather than relying upon the automobile exception to the fourth amendment, the government argued that the search of the defendant’s car was permissible under the Court’s “administrative inspection cases.” *Id.* at 270. The Court rejected this contention, noting that the search of the defendant’s vehicle was “conducted in the unfettered discretion of the members of the Border Patrol,” and thus it “embodied precisely the evil the Court saw in *Camara* [*v. Municipal Court*, 387 U.S. 523 (1967)] when it insisted that the ‘discretion of the official in the field’ be circumscribed by obtaining a warrant prior to the inspection.” 413 U.S. at 270 (quoting *Camara*, 387 U.S. at 532-33).

In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court upheld the authority of a roving border patrol to stop a vehicle near the Mexican border and question its occupants when governmental agents possess a reasonable suspicion that the suspected vehicle may contain illegal aliens. The case differed from *Almeida-Sanchez* because the government did not claim the authority to search cars, but only to briefly question the occupants about their citizenship and immigration status.

Although the Court upheld the authority of the border patrol to stop vehicles, the Court was “unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.” *Id.* at 882. The Court stated:

To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. . . . Although we may assume for purposes of this case that the broad congressional power over immigration authorizes Congress to admit aliens on conditions that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

Id. at 882, 884.

In *United States v. Ortiz*, 422 U.S. 891 (1975), a companion case of *Brignoni-Ponce*, the Court held that border agents may not search private vehicles without consent or probable cause at traffic checkpoints—or their functional equivalents—removed from the border. *Id.* at 896-97. The government sought to distinguish the search in *Ortiz* from the search in *Almeida-Sanchez* by noting that an agent’s “discretion in deciding which car to search is limited by the location of the checkpoint,” and “the circumstances

searching automobiles. Automobile or no automobile, there must

surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop." *Id.* at 894.

While acknowledging the relevance of these differences in determining the constitutionality of a checkpoint stop, the Court concluded that such distinctions did not make any difference in judging the propriety of checkpoint searches. "The greater regularity attending the stop does not mitigate the invasion of privacy that a search entails." *Id.* at 895. Furthermore, the Court remained unconvinced of the government's claim that a checkpoint places sufficient limits on an agent's discretion to select cars for search. Noting that only 3% of the vehicles passing through the checkpoint are searched, the Court found that the agents exercised "a substantial degree of discretion in deciding which cars to search." *Id.* at 896. Such a degree of discretion to search, the Court declared, was "not consistent with the Fourth Amendment." *Id.*

The case of *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), resolved an issue left open in *Ortiz*, namely, whether the border patrol may stop a vehicle at a fixed checkpoint for brief questioning even though there is no reason to believe the particular vehicle contains illegal aliens. The Court concluded that such a stop was consistent with the fourth amendment and "need not be authorized in advance by a judicial warrant." *Id.* at 545.

The critical distinction between the checkpoint stop in *Martinez-Fuerte*, and the search in *Ortiz* and roving-patrol stops in *Brignoni-Ponce*, was the lesser intrusion upon the motorist's fourth amendment interests inherent in the *Martinez-Fuerte* procedure:

[In checkpoint stops, n]either the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search. This objective intrusion—the stop itself, the questioning, and the visual inspection—also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop.

Id. at 558. See also *United States v. Villamonte-Marquez*, 462 U.S. 579, 588-589 (1983) ("The difference in outcome between the roving patrol stop in *Brignoni-Ponce* and the fixed checkpoint stop in *Martinez-Fuerte*, was due in part to what the Court deemed the less intrusive and less awesome nature of fixed checkpoint stops when compared to roving patrol stops."); *Delaware v. Prouse*, 440 U.S. at 656.

Moreover, the Court in *Martinez-Fuerte* also found that vehicle stops at checkpoints do not involve unfettered enforcement authority by officers in the field:

[C]heckpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops.

428 U.S. at 559.

As all of the above cases plainly demonstrate, the Court has refused to sanction any type of stop or search of a vehicle based on the unsubstantiated hunch of a government official. Rather, the Court has required that "any stop or search requires probable cause, reasonable suspicion, or another discretion-limiting feature such as the use of fixed checkpoints instead of roving patrols." *United States v. Villamonte-Marquez*, 462 U.S. 579, 599 (Brennan, J., dissenting).

In another border case not involving a vehicle, the Court decided that the fourth amendment is not violated when custom officials, acting pursuant to a Congressional statute and without a warrant or any suspicion of wrongdoing, boarded for inspection of

be probable cause for the search.”²¹⁴ A contrary rule would permit the border patrol to exercise “unfettered discretion”²¹⁵ in deciding which vehicles would be subject to a thorough police search.

The result in *Pennsylvania v. Mimms* did not undercut this principle of a probable cause requirement for automobile searches. The *Mimms* Court upheld the practice of a Philadelphia patrol officer “to order all drivers out of their vehicles as a matter of course whenever they had been stopped for a traffic violation.”²¹⁶ The holding in *Mimms*, however, could not support the conduct of Officer McNamee for several reasons. First, the police intrusion in *Mimms*—the ordering of the motorist out of his vehicle—was justified at its inception by a compelling state interest, namely the safety of the officer. Due to the “inordinate risk confronting an officer as he approaches a person seated in an automobile,”²¹⁷ it was clear beyond any doubt that the state’s interest was both “legitimate and weighty.”²¹⁸ In contrast, the intrusion by Officer McNamee was not justified at its inception by a similar compelling state interest.²¹⁹ Indeed, Officer McNamee’s only reason for the search was the fact that Class had committed an ordinary traffic infraction, an offense which justified a temporary detention, not a search.²²⁰

Second, the intrusion involved in *Mimms* was limited in its scope to the “circumstances which justified the interference in the first

documents a vessel that was located in waters providing ready access to the open sea. *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983). In *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3311 (1985), the Court ruled that the prolonged detention of a traveler at the international border, “beyond the scope of a routine customs search and inspection,” is permissible where customs agents, considering all the facts surrounding the traveler and her trip, “reasonably suspect that the traveler is smuggling contraband in her alimentary canal.”

²¹⁴ *Almeida-Sanchez*, 413 U.S. at 269.

²¹⁵ *Id.* at 270.

²¹⁶ 434 U.S. at 110.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *New York v. Class*, 106 S. Ct. at 973 (Brennan, J., dissenting) (“Unlike the situation in *Mimms*, the intrusion in this case—the search of [Class]’ vehicle—did not directly serve officer safety. . . . [T]he Court forgets that the police, with *no reason* to search the interior, had *no reason* to return [Class] to his car. Thus, the state’s interest in protecting officer safety cannot validate the search.”)(emphases in original); *People v. Class*, 63 N.Y.2d at 496, 472 N.E.2d at 1012, 483 N.Y.S.2d at 184 (“The facts reveal no reason for the officer to suspect other criminal activity or *to act to protect his own safety*.”)(emphasis added); see also Brief for Respondent at 32, *New York v. Class*, 106 S. Ct. 960 (1986) (“This Court rightfully does not equate the ordinary law enforcement concerns present here—the discovery of the VIN for the purpose of enforcing a regulatory scheme or, at most, to recover stolen vehicles—with the imperative of protecting of a police officer or the public from a possibly armed suspect.”).

²²⁰ See *infra* notes 365-70 and accompanying text.

place."²²¹ The same could not be said about Officer McNamee's intrusion because he had no legitimate justification for it. Moreover, Officer McNamee's action was taken without any consideration of the necessity of his intrusion.²²² The officer did not bother to check Class' documents before proceeding with his search. His search was not the "least intrusive means reasonably available;"²²³ thus, it should not be compared with the stop in *Mimms* where "the officer lacked any less intrusive means to ensure his safety."²²⁴

Finally, the most important point distinguishing the intrusion in *Class* from the intrusion in *Mimms* is the constitutional distinction between a search and a seizure. Generally speaking, the Court has been careful to recognize that "[d]ifferent interests are implicated by a seizure than by a search."²²⁵ A seizure affects a person's possessory interests when police seize personal property²²⁶ and implicates a person's liberty interests when police interrupt one's freedom of movement.²²⁷ A search, on the other hand, affects a person's privacy interests.²²⁸ In light of these differences, the Court has tended to recognize the less intrusive nature of a seizure as compared to a search.²²⁹ In *Mimms*, the Court weighed "the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car."²³⁰ The Court found that this "additional intrusion [could] only be described as *de minimis*. The driver [was] asked to

²²¹ *Terry*, 392 U.S. at 20.

²²² As noted above, Officer McNamee sought the VIN without bothering to check the documents Class had brought with him as he exited his vehicle. See *supra* note 34 and accompanying text.

²²³ *Florida v. Royer*, 460 U.S. 491, 500 (1983)(plurality opinion). For further discussion of the "least intrusive means" test, see *infra* note 313.

²²⁴ Brief for Respondent at 32, *New York v. Class*, 106 S. Ct. 960 (1986).

²²⁵ *Segura v. United States*, 468 U.S. 796, 806 (1984)(plurality opinion). See also *Chimel v. California*, 395 U.S. 752, 766 n.12 (1969); discussion *supra* notes 144-46 and accompanying text.

²²⁶ See *United States v. Jacobsen*, 466 U.S. 109, 113 (1983); see also, *United States v. Karo*, 468 U.S. 705, 728 (1983)(Stevens, J., concurring in part and dissenting in part).

²²⁷ See *Terry*, 392 U.S. at 16 ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

²²⁸ *United States v. Karo*, 468 U.S. 705, 715-17 (1984); *id.* at 729-31 (Stevens, J., concurring in part and dissenting in part); *United States v. Jacobsen*, 466 U.S. 109, 113 (1983).

²²⁹ *Segura v. United States*, 468 U.S. 796, 806 (1984)(plurality opinion); *Texas v. Brown*, 460 U.S. 730, 747 (1983)(Stevens, J., concurring in the judgment); *United States v. Chadwick*, 433 U.S. 1, 13-14 n.8 (1977); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). Cf. *United States v. Ortiz*, 422 U.S. 891, 895 (1975); discussion *supra* note 213 (contrasting the fourth amendment interests implicated at a checkpoint stop with the privacy interests affected by a search at a checkpoint).

²³⁰ 434 U.S. at 111.

expose to view very little more of his person than [was] already exposed."²³¹ Hence, the police intrusion in *Mimms* did not constitute an invasion of privacy.

The circumstances in *Class*, in stark contrast to the seizure in *Mimms*, involved a search of a constitutionally protected area. The *Class* police intrusion went beyond the "mere inconvenience" involved in *Mimms*; it represented an injection of official scrutiny into an area over which the police had no authority. Moreover, the police intrusion in *Class* exposed an area of privacy that was not otherwise visible. Because this was a constitutionally protected area, *Class* held a reasonable expectation that his privacy would not be invaded unless the police possessed probable cause to believe his vehicle was carrying contraband or evidence of criminal activity.²³² Unlike the situation in *Mimms*, where the police seizure affected no constitutionally protected area or interest,²³³ the search in *Class* infringed *Class*' right to be free from official scrutiny absent the probable cause needed to support a search.

Accordingly, the majority's reliance on *Mimms* and its discussion about the danger that would have been presented by returning *Class* to his vehicle was not only unpersuasive in light of the significant constitutional differences between the seizure upheld in *Mimms* and the search challenged in *Class*, but it was also irrelevant. The Court's analysis begged the question whether Officer McNamee had any objective justification for his search in the first place.

2. *Struggling to balance prior precedents*

Following its preliminary comments on the blameworthiness of *Class*' conduct and the dangers of returning him to his vehicle, the Court shifted into a substantive discussion of whether Officer McNamee's search was "reasonable" under the *Terry* balancing formula.²³⁴ The majority relied on *Mimms* and *Michigan v. Summers*

²³¹ *Id.*

²³² *Carroll v. United States*, 267 U.S. 132, 153-54 (1925).

²³³ *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). *But cf. Mimms*, 434 U.S. at 120-124 (Stevens, J., dissenting)(motorists stopped for traffic violations retain an interest in not being required to obey an arbitrary command).

²³⁴ After setting forth *Terry*'s well-known standard for determining the reasonableness of a challenged search or seizure, *see Terry*, 392 U.S. at 21, and reaffirming that "this test generally means that searches must be conducted pursuant to a warrant backed by probable cause," *Class*, 106 S. Ct. at 967 (citations omitted), the *Class* majority made the following observation: "When a search or seizure has as its immediate object a search for a weapon, however, we have struck the balance to allow the weighty interest in the safety of police officers to justify warrantless searches based on a reasonable suspicion of

in enumerating three factors present in those cases which supported its conclusion that the search of Class' vehicle was permissible. The Court argued that the following three factors, which justified utilization of *Terry's* balancing formula in *Mimms* and *Summers*, were also present in *Class*: 1) the safety of the officers was served by the governmental intrusion; 2) the intrusion was minimal; and 3) the search stemmed from some probable cause²³⁵ focusing suspicion on the

criminal activity." *Id.* at 967-68 (citing *Terry* and *Adams v. Williams*, 407 U.S. 143 (1972)). With all due respect, the majority's formulation of the *Terry* standard is somewhat misleading. By its phraseology, the Court implies a search for a weapon is permissible where there is a reasonable suspicion of criminal activity. The crux of the *Terry* case, however, was not whether the warrantless police search of *Terry* was reasonable based merely on "a reasonable suspicion of criminal activity," *Class*, 106 S. Ct. at 968, "but rather, whether there was sufficient justification for [the] invasion of *Terry's* personal security by searching him for weapons in the course of that investigation." *Terry*, 392 U.S. at 23. The *Terry* Court expressly found that such justification is demonstrated only where the officer has "reason to believe that he is dealing with an armed and dangerous individual." *Id.* at 27; see also *id.* at 24, 30; *Adams v. Williams*, 407 U.S. 143, 146 (1972); *Sibron v. New York*, 392 U.S. 40, 64 (1968). Thus, a "reasonable suspicion of criminal activity" is not enough to justify an officer's search of a person for a weapon. Instead, an officer is permitted to conduct a patdown frisk to search for weapons only when he possesses a reasonable suspicion that the suspect he is confronting is armed and dangerous. See *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979) ("The 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked."); LaFave, *supra* note 143, at 87 (not all *Terry*-type stops call for a patdown frisk for weapons).

²³⁵ What the Court meant by its statement that "the search stemmed from some probable cause focusing suspicion on the individual affected by the search" is not clear. *Class*, 106 S. Ct. at 968 (emphasis added). Probable cause cannot be created out of thin air. Probable cause to stop is one thing; probable cause to search is a wholly different matter. Undoubtedly, the officers had probable cause to stop *Class* in light of their observation of his committing two traffic infractions. The possession of probable cause to stop a vehicle, however, cannot work as a bootstrap to also provide probable cause to search the vehicle where the police have no reason to suspect that the car was stolen, that it contained contraband, or that the motorist had committed an offense other than the traffic violations.

This principle was reaffirmed in a different context in *Arizona v. Hicks*, 107 S. Ct. 1149, 1153 (1987). The *Hicks* Court explained that, though police may have a legitimate justification for one type of intrusion, any additional intrusion that is unrelated to the objectives of the authorized intrusion must be supported by an independent legal justification. Thus, a valid police entry prompted by the need to search for a person or weapons did not also provide legal cause to examine suspicious-looking stereo equipment in order to read and record the serial numbers. *Cf. State v. Doe*, 115 N.H. 682, 685, 371 A.2d 167, 169 (1975):

[P]robable cause to search is not the same as [P]robable cause to arrest. Probable cause to arrest exists where the facts and circumstances within the officer's knowledge or of which he has reasonably trustworthy information would warrant a man of ordinary caution in the belief that the arrestee has committed or is committing a crime. *Ker v. California*, 374 U.S. 23, 37 (1963). But the right to search is not dependent upon the right to arrest. *Carroll v. United States*, 267 U.S. 132, 158 (1925). Probable cause to search exists if the man of ordinary caution would be justified in believing that what is sought will be found in the place to be searched . . .

individual affected by the search.²³⁶

The conclusion that Officer McNamee's search was constitutionally reasonable is not supported by the Court's prior precedents. First, it is clear that *Michigan v. Summers* provides no basis for the *Class* result. Furthermore, the conclusion that the police invasion of *Class*' car was minimally intrusive does not explain why the search was constitutional, despite an absence of probable cause or reasonable suspicion warranting the search. Finally, *Mimms* offers no foundation upon which the result in *Class* can rest. The temporary detention upheld in *Mimms* was qualitatively different from the search approved in *Class*. Indeed, even a cursory reading of *Mimms* and *Summers* reveals that the majority's analysis is not only far from "conventional," but also is without basis even under the broadest reading of the Court's prior cases.²³⁷

a. *Summers* does not support the *Class* result

Summers,²³⁸ unlike *Class*, focused on the constitutionality of the police detaining, rather than searching, the occupant of a house

and that what is sought, if not contraband or fruits or implements of crime, will "aid in a particular apprehension or conviction."

See also 1 W. LAFAVE, *supra* note 34, § 3.1(b) at 544-48. *But cf. id.*, § 2.5(d) at 457 ("[T]he *Class* majority reasoned that such cases as *Mimms* and *Michigan v. Summers* showed that certain police action undertaken in the interest of self-protection could be 'piggy-backed' onto some other police action (a traffic stop in *Mimms*, execution of a search warrant in *Summers*) grounded in probable cause (albeit not probable cause the person was armed).").

Perhaps the *Class* Court was intimating that probable cause for a stop also provided a lesser level of probable cause to search, where the object of the search is related to the administrative function surrounding the search. The Court's administrative search cases, however, provide no support for this novel theory of fourth amendment jurisprudence. See *infra* notes 328-57 and accompanying text.

²³⁶ Justice O'Connor utilized the *Summers* decision on a prior occasion to determine whether certain law enforcement interests are sufficiently substantial to justify a warrantless police intrusion on less than probable cause. In *United States v. Place*, 462 U.S. 696 (1983), Justice O'Connor noted three different law enforcement interests identified by the *Summers* Court which justified limited detention of the occupants of a home during execution of a valid search warrant. They were: 1) preventing flight should incriminating evidence be found; 2) minimizing the risk of harm both to the police and the occupants; and 3) orderly completion of the search. *Id.* at 704. Accordingly, Justice O'Connor concluded that "a generalized interest in law enforcement [could] justify an intrusion on an individual's Fourth Amendment interests in the absence of probable cause" and even where there was no "special law enforcement interest such as officer safety." *Id.* at 703.

²³⁷ *But cf. Class*, 106 S. Ct. at 969 (Powell, J., concurring) ("The Court has answered correctly the Fourth Amendment question presented in this case by applying conventional Fourth Amendment analysis.").

²³⁸ In *Summers*, the Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705.

while they executed a warrant to search the premises for contraband.²³⁹ Indeed, Justice Stevens' opinion in *Summers* was careful to emphasize that the seizure issue before the Court was unlike the search issue resolved in *Ybarra v. Illinois*.²⁴⁰ In *Ybarra*,²⁴¹ police who were executing a warrant to search a public tavern and its bartender for illegal drugs detained and searched all the customers present in the tavern. A search of *Ybarra* revealed a cigarette pack containing heroin. The Court ruled that the search was unconstitutional because the police had no particular reason to suspect that *Ybarra* was connected with illicit drugs and no basis for believing he was armed and dangerous.²⁴² *Ybarra* did not address the constitutionality of the detention of the defendant or any of the customers inside the tavern.²⁴³ *Summers*, in contrast, involved the constitutionality of detaining an occupant of premises subject to a valid search warrant while it is being executed.²⁴⁴

Furthermore, under the *Terry* balancing formula, it is clear that the possession by the police of a valid search warrant was of "prime importance" in assessing the competing interests at stake in *Summers*.²⁴⁵ The police in *Class* did not possess a valid search warrant, and they did not have probable cause to believe that *Class*' vehicle was associated with criminal conduct or that it contained contraband. Moreover, the *Summers* Court also thought it "appropriate to consider the nature of the articulable and individualized suspicion"²⁴⁶ upon which the police detention was supported. In *Summers*, this suspicion arose from the nexus of an occupant to the home

²³⁹ *Id.* at 694 ("The dispositive question in this case is whether the initial *detention* of respondent violated his constitutional right to be secure against an unreasonable seizure of his person.") (emphasis added).

²⁴⁰ *Id.* at 695 n.4.

²⁴¹ 444 U.S. 85 (1979).

²⁴² *Id.* at 90-93.

²⁴³ *Ybarra* also did not address the situation "where the warrant itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of [contraband]." *Id.* at 92 n.4.

²⁴⁴ 452 U.S. at 705. Later in his opinion in *Summers*, Justice Stevens noted the constitutional differences between a stop and a search of a vehicle in the context of the government's interest in controlling the flow of illegal aliens crossing the Mexican border:

The detention approved in *Brignoni-Ponce* did not encompass a search of the vehicle. The Court had held in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), that such a search must be supported by probable cause. In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Court held that stops at permanent checkpoints involved even less intrusion to a motorist than the detention by the roving patrol, and thus a stop at such a checkpoint need not even be based on any individualized suspicion.

452 U.S. at 699 n.10.

²⁴⁵ *Id.* at 701.

²⁴⁶ *Id.* at 703.

that is the subject of a valid search warrant.²⁴⁷ The existence of the warrant provided an “objective justification” for the detention. In *Class*, there was no such justification to support Officer McNamee’s search, and the police had no objective cause to search for the VIN.²⁴⁸

The Court noted in *Summers* that the police intrusion there “minimiz[ed] the risk of harm to the officers” and was “surely less intrusive than the search itself.”²⁴⁹ It is, however, a misreading of the *Summers* opinion to suggest that either of these two factors were significant in the Court’s application of the *Terry* balancing test. Indeed, the Court in *Summers* sought to refrain from any multifarious balancing test; the Court announced that it was establishing a categorical rule instead of an ad hoc, case-by-case test to be applied by an officer in the field.²⁵⁰

Although the Court’s reading of *Summers* is regrettable, *Class* extends the rationale of *Summers* even further by implicitly sanctioning an arbitrary police search during a routine traffic stop. This extension is specifically rejected in *Summers*.²⁵¹ Justice O’Connor, trying to establish justification for Officer McNamee’s search, focused on the fact that the search “stemmed from some probable cause focusing suspicion on the individual affected by the search.”²⁵² According to Justice O’Connor, “the officer’s probable cause stemmed from directly observing [Class] commit a violation of the law.”²⁵³ Unless Justice O’Connor intended to hold that the vehicles of all motorists stopped for routine traffic violations are subject to search at the whim of police officers, then, as Justice Brennan noted, “[t]his

²⁴⁷ *Id.* at 703-04 (footnote omitted):

A judicial officer has determined that police have probable cause to believe that someone in the home is committing a crime. Thus a neutral magistrate rather than an officer in the field has made the critical determination that the police should be given a special authorization to thrust themselves into the privacy of a home. The connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.

²⁴⁸ *Class*, 106 S. Ct. at 971 (Brennan, J., dissenting)(“The police had no justification whatever, let alone probable cause, to search for the VIN.”)(emphasis in original).

²⁴⁹ *Summers*, 452 U.S. at 701-702.

²⁵⁰ *Id.* at 705 n.19. See also 2 W. LAFAVE, *supra* note 34, § 4.9(e) at 309; Mertens, *supra* note 23, at 603.

²⁵¹ See Wasserstrom, *supra* note 23, at 355 (“Although the [*Summers*] Court had expanded the range of police conduct which is exempt from the warrant requirement, the Court had not left police with unfettered discretion. Rather, the Court required police officers to comply with workable rules and to justify searches and seizures by some quantum of evidence.”).

²⁵² *Class*, 106 S. Ct. at 968.

²⁵³ *Id.*

analysis makes a mockery of the fourth amendment.”²⁵⁴

The *Class* majority’s reasoning undermines fourth amendment protections because it permits an officer to search the interior of a stopped vehicle to discover the VIN, a motorist’s driver’s license, a registration certificate, or an insurance card without ever identifying any specific and articulable objective criteria that warrants such an intrusion. Undoubtedly, the commission of a traffic offense permits the police to stop a motorist and demand some form of identification.²⁵⁵ A valid stop, of course, allows the police to seize any items of contraband or evidence of crime located in plain view.²⁵⁶ Such a stop also affords an officer the opportunity to observe the public appearance of a motorist and his vehicle, including the VIN when it is visible from outside of the car. A routine stop, however, cannot provide the necessary probable cause to search the interior of a vehicle when the police are unable to articulate any objective reasons for doing so. “Probable cause” is not something an officer keeps in his hip pocket readily available should the officer decide he needs it to support a search. On the contrary, probable cause to search exists where an officer has good reason to believe that contraband or criminal evidence is located in a particular place.²⁵⁷

In contrast to the unpersuasive efforts of the *Class* majority to justify Officer McNamee’s search, the *Summers* Court was alert to the dangers of unchecked police authority and post hoc judicial rationalizations validating such authority. The constitutional rule approved by Justice Stevens did not depend upon an ad hoc determination because the officer in the field was “not required to evaluate the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.”²⁵⁸ As Professor Wasserstrom has pointed out, the *Summers* Court sought to apply the *Terry* balancing test in a categorical manner.²⁵⁹

Justice O’Connor’s post hoc rationalizations about the reasonableness of Officer McNamee’s conduct do not measure up to the “workable rules”²⁶⁰ of *Summers*. Her opinion articulated no clear checks on the authority of police to search the interior of a vehicle during a routine stop. Justice O’Connor contended that the “particular method of obtaining the VIN here was justified by a concern for

²⁵⁴ *Id.* at 972 (Brennan, J., dissenting).

²⁵⁵ *Delaware v. Prouse*, 440 U.S. 648, 659 (1979).

²⁵⁶ *See Texas v. Brown*, 460 U.S. 730, 736 (1983) (plurality opinion); *id.* at 749-50 (Stevens, J., concurring in the judgment).

²⁵⁷ *See supra*, note 235.

²⁵⁸ *Summers*, 452 U.S. at 705 n.19.

²⁵⁹ Wasserstrom, *supra* note 23, at 355. *See also* Mertens, *supra* note 23, at 594-95.

²⁶⁰ Wasserstrom, *supra* note 23, at 355.

the officer's safety."²⁶¹ This assertion is remarkable. There was nothing in the record to indicate that Officer McNamee's intrusion was predicated on a concern for his own or anyone else's safety.²⁶² Officer McNamee entered Class' vehicle because he had a hunch that it might be stolen. If the facts of *Class* can justify a search of a vehicle's interior in the name of "police safety," then it is hard to imagine that a similar search of a motorist's purse or glove compartment for a driver's license or registration certificate could not also be justified under the same rationale.²⁶³

b. Although the search was minimally intrusive, there still was no probable cause or reasonable suspicion to support it

The *Class* majority also found that the search was minimally intrusive. Even accepting this fact,²⁶⁴ the characterization of a search as minimally intrusive does not explain why that search is constitutional when the officer involved clearly lacked probable cause or reasonable suspicion to warrant the search. A police officer is not permitted to search every person or automobile whom he encounters, even if the search is minimal.²⁶⁵ The fourth amendment's

²⁶¹ *Class*, 106 S. Ct. at 968.

²⁶² In the lower courts, the state never argued that a concern for the officers' safety justified Officer McNamee's method for obtaining the VIN. Respondent's Brief in Appellate Division at 6-9; Respondent's Brief in Court of Appeals at 7-14. Also, the court of appeals expressly found that the "facts reveal no reason for the officer to suspect other criminal activity or to act to protect his own safety." 63 N.Y.2d at 496, 472 N.E.2d at 1012, 483 N.Y.S.2d at 184. Finally, the state only devoted only one paragraph of its fifty-page brief in the Supreme Court to argue that Officer McNamee's search served to protect police safety. Brief for Petitioner at 26-27, *New York v. Class*, 106 S. Ct. 960 (1986).

²⁶³ *State v. Byrd*, 23 N.C. App. 718, 209 S.E.2d 516 (1974), illustrates the danger in the Court's rationale. In *Byrd*, a state trooper decided to make a random check of Byrd's driver's license and registration. Byrd produced a driver's license but failed to produce a registration certificate. The officer then searched the vehicle's glove compartment and discovered a pistol. The court held that this search was constitutional because "[a] traffic violation as such will justify a search for things related to it. So, for example, if the operator is unable to produce proof of registration, the officer may search the car for evidence of ownership. . . ." 23 N.C. App. at 720, 209 S.E.2d at 517 (quoting *State v. Boykins*, 50 N.J. 73, 77, 232 A.2d 141, 143 (1967)). Although *Byrd* did not uphold the officer's search in the name of "police safety," there is, after the *Class* decision, a precedent available to justify a search of the type conducted in *Byrd*.

²⁶⁴ This proposition is not easily acceptable. Justice Brennan's dissent correctly noted that although the search of Class' vehicle was not a "full-scale excavation," it was nonetheless "substantially more intrusive than an ordinary traffic stop." *Class*, 106 S. Ct. at 974 (Brennan, J., dissenting). Therefore, the extent of the search in *Class* failed the *Terry* requirement that "the scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967)(Fortas, J., concurring)).

²⁶⁵ See *Sibron v. New York*, 392 U.S. 40, 64 (1968)("The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes

prohibition of searches and seizures that are not supported by some objective justification governs all police intrusions of a citizen's constitutionally protected privacy.²⁶⁶

Moreover, describing Officer McNamee's search as minimally intrusive in this instance does not provide the police or the lower courts with a standardized rule with which to judge the constitutionality of future searches under a variety of circumstances.²⁶⁷ Suppose, for example, a motorist, who is in the habit of keeping his wallet underneath the floor mat of his car, is stopped and forgets to bring it with him as he exits his vehicle.²⁶⁸ Would a police search for the wallet (or a briefcase or pocketbook) be "minimally intrusive?" Would a search of the glove compartment under similar circumstances also be unobjectionable? If the officer observes or detects something while inside the vehicle that would not be discoverable from outside, is this also an unobjectionable search? Is the Court seriously willing to state that these searches are also "minimally intrusive" and thus, constitutionally permissible in the context of a routine traffic stop?

The Court's willingness to downplay the intrusiveness of the search in *Class* does not provide law enforcement officials with a firm rule to guide their future searches.²⁶⁹ At best, the Court's rationalization encourages the police to take their chances when deciding whether to embark on a search and to hope that a reviewing court

inquiries."); see also *Arizona v. Hicks*, 107 S. Ct. 1149, 1153 (1987) (Justice Scalia explaining that "[a] search is a search even if it happens to disclose nothing but the bottom of a turntable").

²⁶⁶ *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam); *Terry*, 392 U.S. at 17 n.15.

²⁶⁷ See *LaFave*, *supra* note 99, at 141 ("My basic premise is that Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.").

²⁶⁸ Of course, a motorist's failure to retrieve a wallet located underneath a seat or a registration certificate placed in a glove compartment may not be due to inadvertence. Often, drivers who have been stopped by the police are cautioned not to make any furtive gestures which may appear to the police that the motorist has reached for a weapon. Motorists are generally told that if they are stopped by the police, it is best to place both hands on the steering wheel until instructed by an officer to do otherwise.

²⁶⁹ The Court did not address the propriety of Officer McNamee's opening the door of *Class*'s vehicle to locate the VIN plate. The reasoning and result in *Class* suggest that the Court was not unduly concerned with that intrusion. 106 S. Ct. at 968 ("The VIN, which was the clear initial objective of the officer, is by law present in one of two locations—either inside the door jamb, or atop the dashboard and thus ordinarily in plain view of someone outside the automobile. Neither of these locations is subject to a reasonable expectation of privacy.").

Notwithstanding the Court's casual treatment of Officer McNamee's opening of the door, this action (opening a vehicle's door to examine a VIN on the door jamb) should not be quickly dismissed as action which does not constitute a "search." The appropriate analysis of such conduct is provided by traditional fourth amendment doctrine.

will later be persuaded that the officer's conduct was, under the circumstances, reasonable.²⁷⁰ At worst, the *Class* opinion "leaves police discretion utterly without limits"²⁷¹ and requires courts to engage in an ad hoc balancing test, despite the absence of any proof offered by the police to justify their invasion of a motorist's constitutionally protected privacy.

c. The stop upheld in *Mimms* is easily distinguishable from the search allowed in *Class*

The *Class* Court relied on *Pennsylvania v. Mimms*²⁷² in formulating its balancing test. As with the reasoning of *Summers*, the majority utilized selected portions of *Mimms* that were helpful to achieve its desired result, while ignoring other important points that did not support the outcome reached in *Class*. Justice O'Connor's opinion in *Class* stated that the government intrusion in both *Class* and *Mimms* served the safety of the officers, was minimally intrusive, and stemmed from some probable cause focusing suspicion on the individual affected by the search.²⁷³ The intrusion in *Mimms* was initiated because of concerns for police safety,²⁷⁴ and it was viewed by a majority of that Court as not overly intrusive.²⁷⁵ In *Class*, however, the record did not show that Officer McNamee's intrusion was set in motion because of a perceived threat to his safety.²⁷⁶

Where an officer's conduct (in opening the door) provides the officer with visual access to items not otherwise visible, a search has occurred.

As explained in *People v. Piper*, 101 Ill. App. 3d 296, 302, 427 N.E.2d 1361, 1364 (1981), where "the VIN can be seen by the policeman only when he himself has opened the door to the vehicle, a search has begun." See also 1 W. LAFAVE, *supra* note 34, § 2.5(d) at 457 ("[I]t would seem that opening a vehicle door to see an otherwise hidden VIN is likewise a search. . ."). Cf. *Arizona v. Hicks*, 107 S. Ct. 1149, 1152-53 (1987) (police action, unrelated to valid intrusion, which exposed to view concealed portions of the premises or its contents did produce a new invasion of the suspect's privacy; "[a] search is a search" even if it reveals only serial numbers).

Moreover, where there are no neutral criteria or articulable facts "which are to guide police in deciding whether to open the doors of vehicles in search of [the] VIN," such a search is one conducted at the unbridled discretion of the police and, therefore, is constitutionally impermissible. *Piper*, 101 Ill. App. 3d at 304, 427 N.E.2d at 1366.

²⁷⁰ Cf. *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) ("We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers will interpret and apply themselves and will push to the limit.").

²⁷¹ *Pennsylvania v. Mimms*, 434 U.S. at 122 (Stevens, J., dissenting); see also *Class*, 106 S. Ct. at 972 (Brennan, J., dissenting).

²⁷² 434 U.S. 106 (1977) (per curiam).

²⁷³ *Class*, 106 S. Ct. at 968.

²⁷⁴ *Mimms*, 434 U.S. at 110.

²⁷⁵ *Id.* at 111.

²⁷⁶ See *supra* note 219.

Even if the Court's unsupported determination that Officer McNamee's search was initiated for reasons of safety is accepted, the record was completely devoid of the specific and articulable facts which are required by *Michigan v. Long* prior to searching a car in the name of police safety.²⁷⁷ The Court simply ignored the explicit requirement of *Long* that an officer possess a reasonable belief that a particular suspect is armed and potentially dangerous. The majority's refusal to discuss the relevance of the holding in *Long* would be tolerable if the entry for the inspection of the VIN in *Class* were considered by the majority to be incidental to, and not separate from, the administrative and regulatory procedures associated with the lawful stop.²⁷⁸ The *Class* majority, however, insisted on grounding its holding upon the balancing formula of *Terry*. Therefore, the Court's abandonment of *Long*'s reasonable suspicion requirements is indefensible and once again reveals what has become an obvious "tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any [search] be reasonable."²⁷⁹

The majority's willingness to find that the lawful stop of *Class* for an ordinary traffic infraction provided sufficient "probable cause" to justify an intrusion into *Class*' vehicle is also troubling. Although there is certainly room for criticizing the *Mimms* decision,²⁸⁰ the fact remains that the police conduct in *Class*—a search of the interior of an automobile based on nothing more than a routine traffic stop—"plainly involves an intrusion qualitatively different and more serious than that which occurred in *Mimms*."²⁸¹ The intrusion in *Mimms* involved the ordering of a motorist to exit from his car after a permissible stop; this action represents an incremental expansion of the already lawful seizure of a motorist.²⁸² This additional intrusion required that the motorist "expose to view very lit-

²⁷⁷ 463 U.S. 1032, 1049 (1983).

²⁷⁸ Justice Powell's concurrence hints that he might be willing to sanction such a view. 106 S. Ct. at 969-70 (Powell, J., concurring). See also *Illinois v. LaFayette*, 462 U.S. 640 (1983), where the Court held that a warrantless inventory search of a shoulder bag carried by an arrestee was permissible under the fourth amendment. "A so-called inventory search is not an independent legal concept but rather an incidental administrative step following arrest and preceding incarceration." *Id.* at 644.

²⁷⁹ *United States v. Place*, 462 U.S. 696, 721 (1983) (Blackmun, J., concurring in judgment).

²⁸⁰ See *Mimms*, 433 U.S. at 115 (Stevens, J., dissenting).

²⁸¹ Brief for Respondent at 33, *New York v. Class*, 106 S. Ct. 960 (1986).

²⁸² *Mimms*, 434 U.S. at 109. The Court's inquiry focused not on the legality of the intrusion "resulting from the request to stop the vehicle or from the later 'patdown,' but on the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped." *Id.*

tle more of his person than [was] already exposed.”²⁸³

In contrast to *Mimms*, however, the search of Class’ vehicle was fundamentally different from the initial stop of the vehicle in terms of the level of intrusiveness and in terms of the probable cause possessed by police. The stopping of a vehicle after the observation of a traffic violation is a routine police procedure. Although the motorist’s freedom of movement is interrupted, it is usually only a temporary detention which is not unduly intrusive and which is justified by the police observation of the traffic infraction. The search of Class’ vehicle, on the other hand, was qualitatively different from such a routine traffic stop. As a general matter, “a search, even of an automobile, is a substantial invasion of privacy.”²⁸⁴ Specifically, the search of Class’ vehicle was intrusive because it exposed hidden areas that were subject to constitutional protection. Furthermore, Class’ vehicle was stopped only because the police had probable cause to believe that Class was committing two traffic violations. The police had no probable cause to search for the VIN, and nothing suggested that the vehicle Class was driving was stolen or that Class himself was involved in any criminal activity.²⁸⁵

To claim that the probable cause which justified the stop of the vehicle also justified the search not only “makes a mockery of the Fourth Amendment,”²⁸⁶ but also grants the police unlimited authority to scrutinize the interior of stopped cars whenever it is necessary to do so as part of the administrative process surrounding ordinary traffic stops. This grant of power is wholly unprecedented and is unnecessary in light of the substantial authority afforded the police in *Michigan v. Long*. The *Class* opinion provides no convincing reason why this additional “power to scrutinize” is needed for routine traffic stops.

In its final passage, the *Class* majority explains the reasons why Officer McNamee’s search was constitutional. Obliquely relying on its new “diligent and necessary” test for determining the constitutionality of a *Terry*-type police intrusion,²⁸⁷ the Court stated that the

²⁸³ *Id.* at 111.

²⁸⁴ *United States v. Ortiz*, 422 U.S. 891, 896 (1975).

²⁸⁵ *See Class*, 106 S. Ct. at 963.

²⁸⁶ *Id.* at 972 (Brennan, J., dissenting).

²⁸⁷ In *United States v. Sharpe*, 470 U.S. 675, 686 (1985), the Court provided a full statement of its new standard for judging the constitutionality of limited intrusions based on less than probable cause. The *Sharpe* test is “[w]hether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain [or search] the defendant.” *See also United States v. Place*, 462 U.S. 696, 709 (1983) (“in assessing the effect of the length of the detention, we take into account whether the police diligently pursued their investiga-

search of Class' vehicle "was focused in its objective [the officer was diligent in carrying out his search] and no more intrusive than necessary to fulfill that objective."²⁸⁸ The majority noted that the search was certainly far less intrusive than a formal arrest and slightly more intrusive than having Class move the papers himself.²⁸⁹ Officer McNamee did not "root about" the interior of the vehicle, nor did he open any compartments or closed containers. He "simply reached directly for the unprotected space where the VIN was located to move the offending papers."²⁹⁰ This search, the Court declared, "was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy

tion"); Florida v. Royer, 460 U.S. 491, 500 (1983)(plurality opinion)("The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."); Michigan v. Summers, 452 U.S. at 701 n.14 (quoting 3 W. LAFAYE, *supra* note 54, § 9.2 at 40)("[t]he reasonableness of a detention may be determined in part by 'whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon.'").

This new "diligence and necessary" standard enables the Court to release itself, when necessary, from the first-prong of the stricter *Terry* test. *Class* illustrates this point. Under the traditional two-step *Terry* inquiry for determining whether a particular search or seizure was constitutionally reasonable, the initial inquiry of the Court would have been whether the police intrusion was justified at its inception. Clearly, Officer McNamee's conduct cannot pass this requirement because he had no reasonable suspicion, let alone probable cause, upon which to base his search of Class' vehicle. Under the Court's new standard, however, this inquiry was never performed. Instead, the Court focused on whether the police acted diligently in effectuating their intrusion, and whether the means utilized by the police were necessary. This new formula thus evades a central precept of fourth amendment doctrine: law enforcement officials must first be able to discern a minimum quantum of facts before intruding upon an individual's fourth amendment freedoms. Mertens, *supra* note 23, at 594-95.

The second inquiry of the Court under the *Terry* test is whether the police intrusion was reasonably related in scope to the circumstances which justified the interference in the first place. *Terry*, 392 U.S. at 19-20. In *Terry*, Detective McFadden's action was justified at its inception because he could point to specific and articulable facts which warranted his belief that the suspects he was confronting were armed and dangerous. Furthermore, the scope of Detective McFadden's intrusion was constitutionally valid because it was strictly tied to and justified by the circumstances which rendered its initiation permissible—he searched only the outer surfaces of the suspects' clothing for potential weapons that could be used against him. In *Class*, because Officer McNamee had no objective cause to justify his intrusion at its inception, there is no need to assess whether the scope of the intrusion was reasonably related to the circumstances which justified the interference to begin with. In other words, in the absence of a legitimate justification for his intrusion, Officer McNamee's search cannot be saved by claiming that it was minimally intrusive.

For further discussion of the Court's "diligence and necessary" test, see *infra* notes 371-426 and accompanying text.

²⁸⁸ *Class*, 106 S. Ct. at 968.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

in the VIN and the fact that the officers observed [Class] commit two traffic violations.”²⁹¹

The majority’s reasoning cannot withstand analysis. Certainly, the search was less intrusive than that which would have been allowed had the police formally arrested Class. Stating the obvious, however, does not explain why the search was constitutional despite the officers’ lack of probable cause or reasonable suspicion for the search.²⁹²

In the context of a formal arrest, police are permitted to search the arrestee for any weapons he might use against an officer, as well as any evidence or contraband in order to prevent its concealment or destruction.²⁹³ This authority to search a person incident to a lawful arrest does not depend upon any degree of probability or reasonable belief that the officer will find any weapons or criminal evidence on the arrestee. Rather, this authority is based on the fact that a lawful arrest has occurred; with “that intrusion being lawful, a search incident to the arrest requires no additional justification.”²⁹⁴

The rules governing a search incident to a lawful arrest, however, are not equally applicable to the “stricter *Terry* standards.”²⁹⁵ In the context of a *Terry* search, an officer must have a reasonable basis to “believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”²⁹⁶ The *Class* Court’s assertion that the search was less intrusive than a formal arrest is meaningless when one considers that Officer McNamee’s search was more intrusive than an ordinary automobile stop. In the 1979 case of *Delaware v.*

²⁹¹ *Id.* at 968-69.

²⁹² Of course, before police can make a formal arrest they must have probable cause to arrest the suspect. *United States v. Watson*, 423 U.S. 411, 423 (1976). In *Class* there was nothing in the record that indicated the police had planned to arrest Class for the traffic infractions he had allegedly committed. Indeed, he was eventually arrested only for possession of the gun; he was issued summonses for driving without a license and for driving with a cracked windshield. Brief for Respondent at 3, *New York v. Class*, 106 S. Ct. 960 (1986).

²⁹³ *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

²⁹⁴ *United States v. Robinson*, 414 U.S. 218, 235 (1973). As Professor LaFave has noted, *Robinson* described the authority of the police to search incident to a lawful arrest in “absolute terms.” LaFave, *supra* note 99, at 131.

²⁹⁵ *Robinson*, 414 U.S. at 234. See also *Michigan v. Long*, 463 U.S. 1032, 1049 n.14 (1983). Moreover, it is “axiomatic that an incident search may not precede an arrest and serve as part of its justification.” *Sibron v. New York*, 392 U.S. 40, 63 (1968). Thus, the search incident to arrest doctrine is plainly inappropriate in *Class*. Brief for Respondent at 8, *New York v. Class*, 106 S. Ct. 960 (1986) (“[T]he doctrine is simply inapplicable in a case where, as here, the officers merely stop a motorist for an ordinary traffic infraction and make the arrest only after conducting their search and based solely on the evidence seized as a result of that search.”).

²⁹⁶ *Terry*, 392 U.S. at 27.

Prouse,²⁹⁷ the Court held that an ordinary automobile stop is permissible only on the basis of some objective justification or pursuant to neutral criteria embodied in standard police procedures.

The *Class* Court also stated that the officer did not “root about” the interior of the car or look into any compartments or containers. Why this fact was important or relevant to the constitutional inquiry is not readily apparent. It likewise could be asserted that the warrantless intrusion by the police into a home owner’s garage to look for his automobile is permissible because the police did not “root about” the interior of the garage or open any closed containers while in the garage.

Officer McNamee did not conduct an extensive examination of Class’ vehicle for the simple reason that there was no reason to do so. A focused search was sufficient. Had he conducted a full-scale search of the car, it is safe to assume the Court would have carefully scrutinized his reasons for doing so. The fact remains, however, that the officer’s search did expose hidden areas of the vehicle. By emphasizing that the officer could have conducted a far greater search, the majority manages to avoid addressing the central question in *Class*: what justification, if any, did Officer McNamee have for conducting his concedely self-limited search in the first place?

Finally, the Court concludes that “this search was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed [Class] commit two traffic violations.”²⁹⁸ Such reasoning does not provide a principled basis to resolve the fourth amendment questions presented. Rather, this conclusion is no more than a restatement of the view that, whenever there is a legal stop for a traffic violation, police may search a motorist’s vehicle for the VIN or any other item in which a motorist has no expectation of privacy provided that it is associated with the government’s regulation of automobiles. This open-ended assertion provides no basis for concluding that a police search of a vehicle is constitutionally permissible in the absence of either probable cause, reasonable suspicion or another discretion-limiting device.

²⁹⁷ 440 U.S. 648 (1979). Recently, the Court turned down a request to consider the constitutionality of stopping a motorist at a sobriety checkpoint, pursuant to internal police procedures, where the police have no particular suspicion prior to the stop that the motorist was under the influence of alcohol. *Lowe v. Virginia*, 230 Va. 346, 337 S.E.2d 273 (1985), cert. denied, 106 S. Ct. 1464 (1986).

²⁹⁸ *Class*, 106 S. Ct. at 968-69.

3. *The Class holding ignored the central requirement of Terry*

As the above discussion indicates, the holding in *Class* was clearly incongruent with the Court's prior holdings. Furthermore, the *Class* opinion was contrary to the doctrinal basis of *Terry* and its progeny because it completely ignored *Terry*'s central requirement that police intrusions which implicate fourth amendment freedoms must be warranted at their inception by some quantum of objective justification.

In order to guard against the dangers of unchecked police discretion, *Terry* established a two-step inquiry to determine the constitutional "reasonableness" of searches and seizures which are based on less than probable cause and which are conducted without a judicial warrant: "[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."²⁹⁹ In *Terry*, the Court explained that the first prong of its balancing formula requires that, in justifying a particular intrusion, a "police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."³⁰⁰ In other words, an officer must possess adequate objective criteria to justify an intrusion upon an individual's fourth amendment freedoms.

The purpose behind this requirement is significant. Unchecked police discretion was the primary evil which motivated the adoption of the fourth amendment.³⁰¹ Through its warrant procedure, the fourth amendment safeguards the liberty of citizens by requiring that government officials obtain, from a neutral and detached magistrate, a warrant based on probable cause, specifying the place to be searched or persons or things to be seized.³⁰² *Terry*, however, dealt with an area of police conduct which historically and practically could not be subjected to the warrant process.³⁰³ The Court, therefore, had to create some discretion-limiting device to guard against unrestrained police authority. Police officers conducting warrant-

²⁹⁹ *Terry*, 392 U.S. at 19-20.

³⁰⁰ *Id.* at 21.

³⁰¹ See *South Dakota v. Opperman*, 428 U.S. 364, 377 (1976)(Powell, J., concurring); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949); Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1369-72 (1983).

³⁰² See U.S. CONST. amend. IV.

³⁰³ *Terry*, 392 U.S. at 20. See Mertens, *supra* note 23, at 585; Wasserstrom, *supra* note 23, at 352.

less searches and seizures on less than probable cause would have to justify those intrusions by pointing to objective facts that warranted the intrusion; inarticulate hunches or unsubstantiated facts would not suffice. To reinforce this principle, the officer's allegations and judgment would also be subject to the review of a neutral and detached judge who would "evaluate the reasonableness of a particular search or seizure in light of the particular circumstances."³⁰⁴ The judge's assessment of the officer's conduct, in turn, would be measured by an objective rather than subjective test.

Consequently, a "police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries."³⁰⁵ A contrary rule would expose the public to the risk of arbitrary harassment. As Justice Stevens has noted, "to eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of [police intrusions] and leaves police discretion utterly without limits."³⁰⁶

The inherent danger of unchecked police discretion is the potential for arbitrary or discriminatory exercise of police authority. In the context of on-the-street stops which are conducted without adequate checks, persons could be detained and questioned on nothing more than an officer's bald assertion that an individual "looked suspicious."³⁰⁷ In other situations, absent sufficient restraints, law enforcement personnel would be free to effectuate seizures of persons pursuant to so-called official "profiles."³⁰⁸ These seizures would probably include a few criminals in their numbers but, more importantly, would also subject a large number of innocent persons to substantial intrusions on little more than the inchoate determinations of an officer in the field.³⁰⁹ In its most of-

³⁰⁴ *Terry*, 392 U.S. at 21.

³⁰⁵ *Sibron v. New York*, 392 U.S. 40, 64 (1968).

³⁰⁶ *Mimms*, 434 U.S. at 122 (Stevens, J., dissenting).

³⁰⁷ See *Brown v. Texas*, 443 U.S. 47, 52 (1979).

³⁰⁸ For a discussion of the use of drug courier profiles, see Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843 (1985).

³⁰⁹ See *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3319 (1985) (Brennan, J., dissenting) (The number of highly intensive border searches of innocent travelers is high. "One physician who at the request of custom officials conducted many 'internal searches'—rectal and vaginal examinations and stomach pumping—estimated that he had found contraband in only 15 to 20 percent of the persons he examined. It has similarly been estimated that only 16 percent of women subjected to body cavity searches at the border were in fact found to be carrying contraband.") (footnotes omitted); *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam); *United States v. Mendenhall*, 446 U.S. 544, 571-573 (1980) (White, J., dissenting). For a cogent review of *Mendenhall* and its reliance on "drug courier" profiles, see Kamisar, *The Fourth Amend-*

fensive form, unfettered police discretion would encourage officers to wield their authority based on individual values and prejudices. Under such a regime, the police could stop or search a citizen where they did not like "the cut of his jib"³¹⁰ or the pace of his strut. Other individuals could be held and questioned based on their place of residence or the color of their skin.³¹¹ Some individuals would, of course, be spared police attention entirely. Therefore, to prevent this type of arbitrary police behavior and to safeguard the privacy and possessory interests of all citizens, the Court has required that an officer, at the very least, have constitutionally sufficient and reasonable grounds on which to base an invasion of an individual's fourth amendment interests.

The second prong of the *Terry* balancing formula concerned whether the police intrusion was "reasonably related in scope to the circumstances which justified the interference in the first place."³¹² In order to satisfy this criterion, it is incumbent that the scope of the police invasion be no more intrusive than is absolutely necessary and closely related to the purposes which justified its inception.³¹³

ment, in *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1981-82*, *supra* note 165, at 131-43.

³¹⁰ *Terry*, 392 U.S. at 39 (Douglas, J., dissenting).

³¹¹ See LaFave, *supra* note 143, at 59; Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 433, 452 (1967).

³¹² *Terry*, 392 U.S. at 20.

³¹³ This requirement is better known as the "least intrusive means" test. The concept, first articulated in *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) ("the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short time"), no longer appears to have the support of a majority of the Court, including the author of the rule, Justice White. In *United States v. Sharpe*, 470 U.S. 675 (1985), an investigative detention case, a majority of the Court (including Justice White) dismissed the notion that judges should inquire into whether alternative, less intrusive methods were available to an officer conducting a *Terry* investigative stop or search.

A court making this assignment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. . . . A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976). The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.

470 U.S. at 686-87. See also *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3311-12 (1985).

Justice Marshall's concurrence in *Sharpe* criticized the majority's apparent abandonment of the "least intrusive means" requirement, but assumed that the rule in *Royer* remained the law and that the "Court's mere quotation out of context of *Cady*, unsupported by any legal argument or reasoned discussion, [was] not meant to overrule

This limitation, as well as the requirement that an officer have objective justification for his initial intrusion, was designed to afford a police officer the flexibility to protect himself while investigating those suspected of criminal activity, while at the same time ensuring that the fourth amendment rights of citizens are not trampled by unduly intrusive and coercive police practices. Hence, this second requirement also serves to check police discretion.

The majority in *Class* totally disregards the constitutional demands established in *Terry*. Officer McNamee had absolutely no objective justification for the initiation of his intrusion into Class' vehicle, and no amount of distortion of the record can change this

Royer." 470 U.S. at 694 n.6 (Marshall, J., concurring). Justice Brennan was less sanguine about the continued viability of the *Royer* requirement. In his view, the *Sharpe* majority "evaded the plain requirement[]" of *Royer* that the government demonstrate that "the least intrusive means reasonably available" were used in effectuating a *Terry* stop. 470 U.S. at 718 (Brennan J., dissenting).

In light of *Sharpe*, commentators might be forced to revise their assessments of the Court's continued support of the "least intrusive means" requirement. Professor Mertens, prior to *Sharpe*, had pointed out that, despite statements to the contrary in *Illinois v. LaFayette*, 462 U.S. 640, 647-48 (1983)(involving an administrative search) and *Michigan v. Long* 463 U.S. 1032, 1052 n.16 (1983)(involving police safety), the Court still appeared to support the "least intrusive means" requirement "as a limit on police *investigative* practices." Mertens, *supra* note 23, at 618 n.301 (emphasis in original). *Sharpe* casts considerable doubt on Professor Mertens' laudable efforts to retain the application of the "least intrusive means" rule as a limit on police investigative procedures.

Professor LaFave, anticipating *Sharpe's* objections to the *Royer* holding, has criticized the rule because it is "particularly likely to result in second-guessing of police decisions on how to proceed during a *Terry* stop." LaFave, "*Seizures*" *Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds and Search Issues*, 17 U. MICH. J.L. REF. 418, 435 (1984). Professor LaFave supported the rule in cases like *Michigan v. Long* where there is an "obvious alternative" to the intrusion actually conducted by the police. In *Long*, according to Professor LaFave, the obvious alternative to the protective search of Long's vehicle was "moving the suspect away from the vehicle." *Id.* See also 3 W. LAFAVE, *supra* note 34, § 9.4(e) at 532-34. Apart from the situation where there exists an "obvious alternative," Professor LaFave contends the "least intrusive means" inquiry is otherwise troublesome: "[T]he question is not whether there will be a certain fourth amendment intrusion but rather how extensive it will be, and where in addition the consideration of alternatives is likely to involve numerous imponderables, a 'least intrusive means' inquiry has great potential for mischief." LaFave, "*Seizures*" *Typology, supra*, at 435.

Though Professor LaFave is correct in noting that in most cases the judicial focus should be centered on the extensiveness of the particular police intrusion rather than on whether an intrusion will occur, there are cases, such as *Class*, in which the Court will have to consider the necessity for a certain type of fourth amendment intrusion. In *Class* there was no disputing that a temporary *seizure* of Class' vehicle was constitutionally permissible. There was, however, serious doubt about the constitutional validity of Officer McNamee's search of the vehicle's interior. See *supra* notes 245-59 and accompanying text. In this instance, a "least intrusive means" inquiry is appropriate to ensure that police officers do not unnecessarily escalate or extend a permissible intrusion into a constitutionally impermissible invasion of personal security. See *Florida v. Royer*, 460 U.S. 491, 500-04 (1983)(plurality opinion)(What began as a consensual inquiry in a public place, escalated into an impermissible investigatory detention.).

fact. Officer McNamee had, at best, a hunch that the car Class was driving might be stolen. Based on this hunch, and without bothering to check the documents provided by Class, Officer McNamee intruded, undeniably, into an area that Class reasonably could expect would remain free from unwarranted police invasion.

There is no merit to the claim that, despite an absence of objective cause, the intrusion was warranted because the officer merely sought to obtain "information"³¹⁴ or that he had a general interest in combating automobile theft.³¹⁵ Under the constitutional framework constructed by *Terry*, every police intrusion affecting fourth amendment interests must be justified by some objective criteria.³¹⁶ The Court's subsequent cases have not deviated from this rule.³¹⁷

In the 1983 case of *United States v. Place*,³¹⁸ the Court ruled that a "generalized interest in law enforcement" was sufficient to support the limited seizure of personal property even though government agents lacked both a warrant and probable cause to believe the property contained contraband or evidence of a crime.³¹⁹ The *Place* Court, however, did not leave law enforcement officials unrestrained in their authority to effectuate detentions of personal items. The Court stated that official seizures of personal property are constitutionally valid only in situations in which the intruding officers have a reasonable suspicion that a suspect's property contains contraband or criminal evidence.³²⁰

Similarly, in *Brown v. Texas*,³²¹ a unanimous Court reversed the conviction of a defendant who had refused to comply with an officer's demand that he identify himself. The Court declared that "a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual

³¹⁴ *People v. Class*, 63 N.Y.2d at 497, 472 N.E.2d at 1014, 483 N.Y.S.2d at 186 (Jones, J., dissenting).

³¹⁵ Brief for Petitioner at 23, n*, *New York v. Class* 106 S. Ct. 960 (1986).

³¹⁶ *Terry*, 392 U.S. at 19.

³¹⁷ See, e.g., *Reid v. Georgia*, 448 U.S. 438, 440 (1980)(per curiam)(the fourth amendment's "prohibition of searches and seizures that are not supported by some objective justification governs all seizures [and searches] of the person")(emphasis added).

³¹⁸ 462 U.S. 696 (1983).

³¹⁹ *Id.* at 703-706. *But cf.* *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)(fourth amendment permits the stopping of a vehicle at a fixed border checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens). For a discussion of *Martinez-Fuerte*, see Grossman, *supra* note 125, at 145-56.

³²⁰ *Place*, 462 U.S. at 702.

³²¹ 443 U.S. 47 (1979).

officers."³²² In *Brown*, the police officers had neither objective facts evidencing a necessity for Brown's detention, nor had they acted pursuant to a neutral plan. Their only reason for stopping Brown "was to ascertain his identity."³²³ That purpose, standing alone, was not enough to outweigh Brown's fourth amendment guarantee to be free from unwarranted police intrusions.³²⁴ Therefore, Officer McNamee's search in *Class* cannot escape constitutional scrutiny by the facile assertion that the objective of his search was merely to obtain "information," was done for "purposes of identification" only,³²⁵ or helped to promote the state's interest in effective law enforcement.

Clearly then, the Court did not "apply conventional Fourth Amendment analysis"³²⁶ to the facts in *Class*. The result in this case cannot be supported under the automobile exception because the

³²² *Id.* at 51.

³²³ *Id.* at 52.

³²⁴ *Id.* Cf. *Hayes v. Florida*, 470 U.S. 811 (1985); *United States v. Hensley*, 469 U.S. 221 (1985). In *Hayes*, the Court held that the fourth amendment did not permit police to transport a suspect to a police station for fingerprinting without his consent and in the absence of probable cause or prior judicial authorization. In dicta, however, the Court stated that its holding did not imply "that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment." 470 U.S. at 816.

Likewise, in *Hensley*, the Court stated that the police could, where there is reasonable suspicion warranting a stop, briefly detain a suspect to check his identification, pose questions, or inform the suspect that another police department wishes to speak with him. 469 U.S. at 232. Even if the police intrusion in *Class* could be equated with the hypothetical "fingerprinting-in-the-field" of *Hayes*, or detention in *Hensley*, neither decision provides any support for the *Class* result because Officer McNamee had no reasonable suspicion for his intrusion—an element *Hayes* and *Hensley* deemed necessary to approve the police intrusions discussed in those cases.

³²⁵ Cf. *United States v. Johnson*, 431 F.2d 441 (5th Cir. 1970)(en banc)(Godbold, J., dissenting)(footnotes omitted), *aff'g* 413 F.2d 1396 (5th Cir. 1969).

An argument can be constructed that there is a difference where the police invasion is to seek identification numbers. I.e., because identification numbers, secret and otherwise, are for identification purposes the citizen can have no reasonable expectation of their remaining private—they are for identification, *ergo*, the citizen must expect them to be available to the police for the purpose for which intended. But the function of being an identification device does not exempt the device itself, or the instrumentality it identifies, from the fourth amendment. In our increasingly complex world our motor vehicles are not the only things numbered for identification. So are such tangible effects as household appliances, lawn mowers, outboard motors, and even the watches on our wrists. Add to the list such papers and documents kept in home, safe deposit box or on the person, as bank checks, drivers' licenses, social security cards, credit cards, insurance policies, securities, and deeds and mortgages, and the automobile registration papers often carried in the glove compartment of the car. All of these items have primary or secondary qualities of identification, but this does not subject them, when not in plain view, to being sought out by police action beyond the reach of the Fourth Amendment.

Id. at 447.

³²⁶ *Class*, 106 S. Ct. at 969 (Powell, J., concurring).

police lacked probable cause for the search. Nor can the ruling be rationalized under a traditional *Terry* analysis, because the police officer lacked objective justification for entering Class' vehicle. The *Class* ruling exceeds the scope of the Court's precedents in the automobile exception area and the *Terry* stop and search cases. Exactly how far the Court is willing to extend this rationale is left open. What is clear is that the majority chose to disregard the danger inherent in unchecked police discretion. The Court should have avoided this choice, notwithstanding the cost to law enforcement efficiency or administrative convenience that the police might have incurred.³²⁷

4. *The danger of unfettered discretion*

As a result of *Class*, police officers are not limited in their ability to conduct a search of a vehicle lawfully stopped. This principle affects not only the work of police, prosecutors and defense attorneys, but it is significant to everyone concerned with personal security and liberty. As one noted commentator observed, the protections of the fourth amendment are important to all persons because they determine "the kind of society in which we live."³²⁸ This criticism of the *Class* decision cannot be answered with the assertion that the search for the VIN was akin to an administrative search, because the Court's administrative search cases do not support this contention.

As Justice White stated in his dissent in *Class*, the majority's ruling "in effect holds that a search of a car for the VIN is permissible whenever there is a legal stop, whether or not the driver is even asked to consent."³²⁹ As noted above,³³⁰ if an officer is permitted to search for the VIN whenever he lawfully stops a motorist, he is also free to search for a driver's license, registration certificate or license plate which may be located somewhere inside the car. In addition, under the *Class* Court's reasoning, an officer will not need to possess any objective facts to justify his intrusion. Clearly, such a result is at odds with traditional fourth amendment jurisprudence.

The Supreme Court has stated that "[t]he essential purpose of the prescriptions in the Fourth Amendment is to impose a standard

³²⁷ Cf. *Bowsher v. Synar*, 106 S. Ct. 3181, 3193-94 (1986)(quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)(" 'fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.' ")).

³²⁸ E. Griswold, *SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT* 39 (1975).

³²⁹ 106 S. Ct. at 975-76 (White, J., dissenting).

³³⁰ See *supra* notes 147-55 and accompanying text.

of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'"³³¹ To give meaning to the fourth amendment's mandate that police intrusions be "reasonable," the Court has consistently required, at a minimum,³³² that an officer have objective facts which warrant his invasion into an individual's constitutionally protected privacy concerns.

This basic axiom of fourth amendment doctrine, until the *Class* ruling, always has been applicable to police encounters with motorists travelling on the nation's highways. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."³³³ The fourth amendment has always required some quantum of individualized suspicion with respect to police searches and seizures of an individual in his home and on the street.³³⁴ A similar safeguard is apposite when police confront drivers in their cars.

Automobile travel is a basic, pervasive, often necessary mode of transportation to and from one's home, work place, 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. As *Terry v. Ohio* recognized, people 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.³³⁵

By allowing a search for the VIN or some other object which comprises part of the state's regulatory scheme of automobiles anytime the police lawfully stop a vehicle, *Class* opened the door to abusive and discriminatory application of this new form of police authority. The *Class* Court did not enunciate any limitation upon an officer's

³³¹ *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979)(citations omitted).

³³² *Id.* at 654.

³³³ *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971)(plurality opinion).

³³⁴ Professor Mertens has cogently noted that the requirement of individualized suspicion is concerned not only with the need for "identifiable and describable evidence" by the police, but also with the "weight" of the information possessed by the officer. "[T]he police must be able to justify singling out from the rest of humanity (or at least from the rest of the people in the general area) the particular individual whom they have stopped [or searched] as somehow meriting this special attention." Mertens, *supra* note 23, at 594-95.

³³⁵ *Prouse*, 440 U.S. at 662-63. See also Gardner, *supra* note 165, at 16 n.87 (quoting Yackle, *supra* note 23, at 410-11).

decision to inspect the VIN. "Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin—may escape entirely."³³⁶

This criticism of the rationale in *Class* is not devitalized by the contention that the search for the VIN "may be likened to [a] type of warrantless administrative inspection. . . ."³³⁷ In response, "[t]he grave danger of abuse of discretion . . . does not disappear simply because the automobile is subject to state regulation resulting in numerous instances of police-citizen contact."³³⁸ Indiscriminate police intrusions do not become constitutionally palatable because the state's intrusion can be conveniently labeled "administrative only." The fourth amendment applies to searches considered administrative as well as to searches motivated by the possibility of discovering contraband or evidence of crime.³³⁹

The Court has granted governmental officials greater latitude to conduct warrantless administrative inspections in situations in which the search involves intrusion into an area of privacy less significant than the home.³⁴⁰ An inspection scheme, however, cannot delegate "unbridled discretion . . . [to] executive and administrative officers, particularly those in the field, . . . [to choose] when to search and whom to search."³⁴¹ In *Colonnade Corp. v. United States*³⁴² and *United States v. Biswell*,³⁴³ the Court upheld the authority of federal officials to conduct warrantless administrative searches of businesses subject to a tradition of close supervision and inspection. As the Court subsequently explained, *Colonnade* and *Biswell* made it clear that warrantless administrative searches are proper "when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory

³³⁶ *Pennsylvania v. Mimms*, 434 U.S. 106, 122 (Stevens, J., dissenting).

³³⁷ Brief for Petitioner at 33, *New York v. Class*, 106 S. Ct. 960 (1986).

³³⁸ *Prouse*, 440 U.S. at 662.

³³⁹ *Donovan v. Dewey*, 452 U.S. 594, 598 (1981); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-313 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 530-31 (1967).

³⁴⁰ In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court ruled that administrative searches for housing code violations were constitutional without a showing that the inspector possesses probable cause to believe that a particular dwelling is in violation of the law. The probable cause needed for administrative inspections could be based upon the passage of time, nature of the building, or condition of the area. *Id.* at 538. The Court, however, ruled that, absent an emergency, a routine administrative inspection must be authorized by a warrant. *Id.* at 531.

In *Class*, of course, not only was there no objective cause to justify the search for the VIN, there was also no warrant to authorize the search.

³⁴¹ *Marshall*, 436 U.S. at 323.

³⁴² 397 U.S. 72 (1970).

³⁴³ 406 U.S. 311 (1972).

presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.”³⁴⁴

Where a particular regulatory scheme has failed to provide any standards limiting the scope and frequency of warrantless administrative inspections, such searches have been invalidated by the Court. Accordingly, in *Marshall v. Barlow's, Inc.*,³⁴⁵ the Court declared unconstitutional a Congressional statute which conferred upon federal administrative officials unrestrained authority to conduct warrantless health and safety inspections of all businesses engaged in or affecting interstate commerce. The Occupational Safety and Health Act of 1970, which was challenged in *Marshall*, not only brought under its scope businesses which had not been the subject of a long tradition of federal regulation,³⁴⁶ it also granted administrative officials unfettered discretion to conduct searches without the authorization of a warrant or the guidance of “an administrative plan containing specific neutral criteria.”³⁴⁷

Conversely, in *Donovan v. Dewey*,³⁴⁸ the Court rejected the argument that Congress' authorization to the Secretary of Labor to conduct warrantless inspections of underground and surface mines violated the fourth amendment. The Court found that the challenged inspection program, “in terms of the certainty and regularity of its application, [provided] a constitutionally adequate substitute for a warrant.”³⁴⁹ First, the inspection scheme required the inspection of all mines and specifically defined the frequency of inspection. Second, mine operators were specifically notified of the standards required by the law. These standards included informing the mine operators of the frequency and purpose of the administrative inspections. Finally, the law afforded a judicial forum “for accommodating any special privacy concerns that a specific mine operator might have.”³⁵⁰

³⁴⁴ *Donovan*, 452 U.S. at 600.

³⁴⁵ 436 U.S. 307 (1978).

³⁴⁶ *Id.* at 313.

³⁴⁷ *Id.* at 323. *Cf.* *Michigan v. Clifford*, 464 U.S. 287 (1984)(plurality opinion)(the fourth amendment does not permit an exemption from the warrant requirement for all administrative investigations into cause and origin of a fire).

³⁴⁸ 452 U.S. 594 (1981).

³⁴⁹ *Id.* at 603.

³⁵⁰ *Id.* at 604. *Donovan* distinguished the plan for warrantless searches invalidated in *Marshall v. Barlow's, Inc.* by noting that the Occupational Safety and Health Act of 1970 [OSHA] program in *Marshall* failed to “tailor the scope and frequency of [OSHA] administrative inspections to the particular health and safety concerns posed by the numerous and varied businesses regulated by the statute.” *Id.* at 601. The OSHA

By applying these principles, a warrantless search to observe a VIN number, absent objective cause, cannot satisfy constitutional standards. The decision to search is left to the unchecked discretion of the officer in the field. The *Class* Court did not refer to any provision of New York law that requires police officers to inspect the VIN whenever they have lawfully stopped a motorist for a traffic violation. The pertinent statute reads: "Any . . . police officer may request that the operator of any motor vehicle produce for inspection the certificate of registration for such vehicle and . . . shall furnish to such . . . police officer any information necessary for the identification of such vehicle and its owner."³⁵¹ The officer's authority to demand inspection of the VIN is purely discretionary.

Furthermore, the argument that all motorists, in effect, consent to whatever invasion of privacy that occurs when police officers search for a VIN during a lawful traffic stop is not persuasive. For many, automobile travel is a necessity, not a luxury. "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."³⁵² Just because an officer is granted the authority to demand that a motorist produce for inspection items in which the motorist has little expectation of privacy such as a registration certificate or a VIN, the officer, in order to facilitate his administrative tasks, has not also been granted the authority to invade areas of acknowledged privacy in the automobile such as the trunk, glove compartment or area underneath the seat.³⁵³

program also did not "provide any standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search." *Id.*

In contrast to the OSHA plan in *Marshall*, the program for warrantless searches upheld in *Donovan* was specifically tailored to the mining industry and designed to detect the dangers associated with that industry. *Id.* at 602-03. Furthermore, while the Federal Mine Safety and Health Act of 1977 authorized warrantless searches, those searches were circumscribed by detailed guidelines that inspectors were required to follow. *Id.* at 603-04. *See also* *Illinois v. Krull*, 107 S. Ct. 1160 (1987).

³⁵¹ N.Y. Veh. & Traf. Law § 401(4)(McKinney 1984).

³⁵² *Prouse*, 440 U.S. at 662. *Cf.* *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), where the Court rejected the claim that motorists traveling near the international border "consent" to searches of their vehicles to discover illegal aliens or contraband. The Court in *Almeida-Sanchez* explained that, unlike the entrepreneurs in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), who were aware of the purpose and limits of the warrantless searches upheld in those cases, the motorist travelling on the open road is not engaged in any regulated or licensed business, nor does the motorist have any knowledge of the reasons for or limits of the intrusion to which he is subjected. *Almeida-Sanchez*, 413 U.S. at 270-72

³⁵³ *See* Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth*

The police cannot conduct a search without objective facts that justify intrusion. The simple claim that the challenged invasion enhanced their ability to perform routine functions does not suffice as a justification.³⁵⁴ Therefore, it is unconvincing to argue, as the state did in *Class*, that Officer McNamee's search after his lawful stop of *Class* was proper because of both the reduced expectation of privacy that one has in an automobile and the legitimate governmental and societal need for enforcement of its important regulatory policies.³⁵⁵ Arguments of lesser expectations of privacy and the pervasiveness of governmental regulatory schemes miss the point of the Court's fourth amendment cases in the context of administrative searches: the discretion of the officer in the field cannot go unchecked.³⁵⁶ To allow the police to decide when to search for the VIN of a lawfully stopped vehicle is inconsistent with the Court's disapproval of the unbridled discretion of OSHA inspectors to un-

Amendment Activity, Probable Cause and the Warrant Requirement, 69 J. CRIM. L. & CRIMINOLOGY 425 (1978).

[T]he Court has not proved its claim that expectations of privacy are lower in automobiles than in most other places. Automobiles are indeed regulated, but the fact that police may examine license plates, inspection stickers, headlights, exhaust systems, and other such things hardly proves that one has a reduced expectation of privacy in items held in the glove compartment, under the seat, or in the trunk. Similarly, the fact that an automobile travels public thoroughfares hardly proves that one has a reduced expectation of privacy against governmental prying into concealed areas. [Marshall v. Barlow's Inc., 436 U.S. 307 (1978)] seems to teach the very opposite: neither governmental regulation nor an individual's limited disclosures of some aspects of an activity give government a right of warrantless *carte blanche* access to all the rest. Expectations of privacy are not so easily diminished.

Id. at 459-60.

³⁵⁴ See *Michigan v. Summers* 452 U.S. 692, 709 (1981)(Stewart, J., dissenting)(The fourth amendment places "significant restraints upon police activities, even though the police and the courts may find those restraints unreasonably inconvenient.")

³⁵⁵ Brief for Petitioner at 32-33, *New York v. Class*, 106 S. Ct. 960 (1986).

³⁵⁶ See *Donovan*, 452 U.S. at 599, 604-05; *Marshall*, 436 U.S. at 323; *Colonnade*, 397 U.S. at 77; *Camara*, 387 U.S. 532-33. Cf. *United States v. White*, 401 U.S. 745, 782 (1971)(Harlan, J., dissenting)(The fourth amendment's warrant procedure is applicable to administrative inspections because such searches involve an invasion of privacy and the risk of arbitrariness by government officials).

It cannot be seriously argued that the Court's "inventory search" cases—*Illinois v. LaFayette*, 462 U.S. 640 (1983) and *South Dakota v. Opperman*, 428 U.S. 364 (1976)—provide any support for upholding the search of *Class*' automobile. In *Opperman*, the Court held that the police do not violate the fourth amendment when they conduct warrantless searches, "using a standard inventory form pursuant to standard police procedures," of automobiles which have been lawfully impounded. 428 U.S. at 366. In *LaFayette*, the Court found it was reasonable for police to search the personal effects of a person lawfully arrested as part of the routine administrative procedure at a police station incident to booking and jailing the suspect. 462 U.S. at 648. In both cases the Court emphasized the standardized nature of the searches. *LaFayette*, 462 U.S. at 646; *Opperman*, 428 U.S. at 375; *id.* at 380 n.6 (Powell, J., concurring); *id.* at 387 n.4 (Marshall, J., dissenting). In *Class* there was no standardized rule to guide officers when deciding whether to search for the VIN.

dertake random searches in *Marshall*.³⁵⁷

5. *Is there a need for the Class ruling?*

The result in *Class* was not necessary for the effective enforcement of traffic and vehicle safety laws. While it may be true that car theft has become an uncontrollable epidemic,³⁵⁸ the Court must not let the need for more enhanced police authority dilute the protection afforded all citizens under the fourth amendment.³⁵⁹ Prior to the *Class* ruling, existing search and seizure doctrine provided the police with adequate means to deal with criminal conduct involving moving vehicles. Existing law also furnished the necessary tools for effective enforcement of traffic and vehicle safety laws. While ensuring that the police are not handcuffed in their efforts to enforce the law, the Court has recognized that unrestrained police authority to search an automobile constitutes a serious intrusion upon the privacy of the motorist.³⁶⁰ To safeguard the Constitution's prohibition against arbitrary invasions by government officials, the Court has required consistently, up until the *Class* decision, that the police possess some objective justification or follow neutral criteria³⁶¹ before

³⁵⁷ *Marshall*, 436 U.S. at 323. See *supra* notes 345-57 and accompanying text for a discussion of *Marshall*.

³⁵⁸ Brief for Petitioner at 23 n.*, *New York v. Class*, 106 S. Ct. 960 (1986).

³⁵⁹ See *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973); cf. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (plurality opinion).

³⁶⁰ See *United States v. Ortiz*, 422 U.S. 891, 896 (1975). The *Ortiz* Court stated that unlimited "discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search." *Id.*

³⁶¹ The Nebraska Supreme Court, in *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986), ruled that the use of neutral criteria is not enough to uphold a police detention where establishment and application of that criteria is left to the unfettered discretion of the officer in the field. In *Crom*, several patrolmen and a sergeant of the Omaha Police Department decided to set up a "transitory checkpoint." The officers were to check every fourth vehicle reaching the checkpoint on the pretext of checking the motorist's driver's license and registration. In fact, the actual purpose was to discover whether the driver emitted an odor of alcohol. The decision to set up the checkpoint had been made on the spot by the officers in the field; they "were not acting under any standard, guidelines, or procedures promulgated by policymakers for the police department or other law enforcement agency." 222 Neb. at —, 383 N.W.2d at 462. *Crom*'s vehicle was one of the fourth cars to reach the checkpoint. Prior to his arrival, there was no indication that he was driving under the influence of alcohol, or that he had otherwise committed a crime or traffic violation. At the stop, the odor of alcohol was detected on *Crom*'s breath. He was given a field sobriety test which he failed. He was later charged and convicted of driving while under the influence of alcohol. 222 Neb. at —, 383 N.W.2d at 462.

The Nebraska Supreme Court reversed *Crom*'s conviction, ruling that *Crom* had been unreasonably seized in violation of the fourth amendment. The court stated that the checkpoint was "subject to the constitutional infirmity found to exist in both *Dela-*

detaining or searching vehicles traveling in the interior of the nation's roads.

As a general rule, where law enforcement officials have probable cause to believe that the driver of a particular automobile is involved in or associated with criminal conduct or has committed a traffic infraction, they may stop the vehicle and, depending on local custom, arrest the driver³⁶² or issue the driver a citation. In addition, where the police have probable cause to believe that a certain car is carrying contraband or evidence of crime, they may search that vehicle without first obtaining a warrant.³⁶³ Moreover, even when the police do not possess probable cause for linking a motorist with criminal activities, the police may stop and detain a motorist for investigative purposes if they have a reasonable suspicion that a motorist is involved in criminal conduct.³⁶⁴

In the ordinary traffic stop situation, the police enjoy substantial flexibility in ensuring the safety of others and themselves while conducting their investigations and law enforcement functions. The Court has upheld the police practice of ordering motorists out of their cars even in the context of a routine traffic stop because of "the inordinate risk confronting an officer as he approaches a person seated in an automobile."³⁶⁵ In addition, where an officer in-

ware [v. Prouse] and Brown [v. Texas]; that is, a driver's reasonable expectation of privacy was rendered subject to arbitrary invasion solely at the discretion of officers in the field." 222 Neb. at —, 383 N.W.2d at 463.

³⁶² See *Chambers v. Maroney*, 399 U.S. 42 (1970). After arresting the driver, the police may also conduct a search of the passenger compartment of the automobile, including any closed container found there. *New York v. Belton*, 453 U.S. 454 (1981). The Court has not directly ruled whether a custodial arrest of a motorist for violating a minor traffic offense is constitutional under the fourth amendment. See *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring) ("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.").

³⁶³ *United States v. Ross*, 456 U.S. 798, 823-24 (1982).

³⁶⁴ See *United States v. Sharpe*, 470 U.S. 675 (1985). In *United States v. Hensley*, 469 U.S. 221 (1985), the Court ruled that the police could stop and detain a person whom they reasonably believed was involved in or was wanted in connection with a completed felony. Balancing the competing interests at stake, the Court concluded that the police need not always have probable cause to arrest before detaining a suspect wanted in connection with a past crime. *Id.* at 229. The Court found the "strong government interest in solving crimes and bringing offenders to justice" outweighed the individual's interest "to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes." *Id.* The *Hensley* Court also held that an officer may stop and detain a suspect in reliance on a police bulletin of another police department provided that the bulletin has been issued on "the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense." *Id.* at 232.

³⁶⁵ *Mimms*, 434 U.S. at 110.

investigating a routine traffic stop has reasonable grounds for believing a motorist represents a potential threat to the officer's safety, a protective search of the vehicle for weapons is constitutionally permissible.³⁶⁶ Given these powers, it cannot be said that the police are handicapped by constitutional "technicalities" in their efforts to apprehend those who violate the law. Furthermore, law enforcement officials are not required "to take unnecessary risks in the performance of their duties."³⁶⁷

Notwithstanding the substantial flexibility afforded police in conducting their investigations, the Court has remained sensitive to the seriousness which accompanies any police intrusion upon a motorist on the open road. Detaining vehicles randomly is an intolerable restraint on the motorist's right to "free passage without interruption."³⁶⁸ Arbitrary searches of automobiles constitute a substantial invasion of drivers' reasonable expectation of privacy.

The *Class* decision, however, discards these constitutional safeguards and enhances police power to an unprecedented degree without adequate explanation. The state's interest in effective enforcement of its traffic laws does not compel this unparalleled amount of police authority. *Class* was stopped for the commission of two traffic violations, speeding and driving with a broken windshield. The officers had no reasonable suspicion or probable cause to believe he or his vehicle had been involved in criminal activities. Officer McNamee's only reason for checking the VIN was based on an unsubstantiated hunch that the vehicle might be stolen. Thus, the sole basis for the police search was *Class*' commission of two ordinary traffic violations.

The Court has previously acknowledged that "[t]he foremost method of enforcing traffic and vehicle safety regulations, . . . is acting upon observed violations."³⁶⁹ During such stops, an officer is permitted to inspect a VIN in plain view or to scrutinize other forms of identification. While a valid stop gives the officer an opportunity to observe the VIN or other items subject to governmental regulation, such a stop does not supply an objective reason to search a vehicle and invade a motorist's legitimate expectation of privacy.³⁷⁰ Officer McNamee lacked an objective reason to search *Class*' vehicle. His conduct was an arbitrary invasion and, thus, struck at the

³⁶⁶ *Michigan v. Long*, 463 U.S. 1032 (1983).

³⁶⁷ *Mimms*, 434 U.S. at 110.

³⁶⁸ *Carroll v. United States*, 267 U.S. 132, 154 (1925).

³⁶⁹ *Prouse*, 440 U.S. at 659.

³⁷⁰ *Class*, 106 S. Ct. at 972 (Brennan, J., dissenting).

core of the fourth amendment's protection against unreasonable police intrusions.

C. THE *CLASS* RULING IS ANOTHER EXAMPLE OF THE BURGER COURT'S HOSTILITY TOWARD ESTABLISHED FOURTH AMENDMENT DOCTRINE

The *Class* decision is further evidence of the Court's willingness to undermine fourth amendment freedoms in the name of efficient law enforcement. Over the last several years, the Court's efforts to scale-down the scope of the fourth amendment's substantive protection has been most evident in cases involving investigative detentions and searches. Beginning with *Summers*,³⁷¹ continuing with *Royer*³⁷² and *Place*,³⁷³ and finally ending with *Sharpe*,³⁷⁴ the Court has established a new test for assessing police intrusions which do not amount to full-blown searches or arrests. That test, which may be called the "diligence and necessary" test, was fully formulated in *Sharpe*. The *Sharpe* Court was asked to decide whether a twenty-minute detention was too long to qualify as an investigative stop. This new test, however, has not been limited to the particular issue raised in *Sharpe*. Indeed, Justice O'Connor relied indirectly on the test in *Class*.³⁷⁵

As described by Chief Justice Burger in *Sharpe*, the new standard for judging the constitutionality of investigative searches or seizures reads as follows: "Whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain [or search] the defendant."³⁷⁶ This standard is problematic for several reasons. First, the "diligence and necessary" test has permitted the Court to overlook the lack of objective facts possessed by police to justify their intrusions. Second, the test is a convenient judicial tool for handling troublesome police intrusions; it can be used whenever a police invasion stops short of a full-scale search or seizure. Third, the test offers no guidance to the officer in the field. Fourth, at the point of application by a judge, the test is a constitutional illusion. It provides no framework for decision; therefore, the judge is invited to wink at dubious police behavior in the name of efficient law

³⁷¹ 452 U.S. at 701 n.14.

³⁷² 460 U.S. at 500 (plurality opinion).

³⁷³ 462 U.S. at 709.

³⁷⁴ 470 U.S. at 686.

³⁷⁵ See *supra* notes 287-91 and accompanying text.

³⁷⁶ *Sharpe*, 470 U.S. at 686.

enforcement. Finally, the test misplaces the Court's focus when deciding fourth amendment cases.

First, by focusing on whether the police have acted diligently and taken steps necessary to effectuate the purpose of their intrusion upon a suspect, the Court ignores the principal strength of the *Terry* holding that even a minor intrusion "must be based on a fixed, objective level of suspicion, and cannot be justified merely on the basis of its utility to law enforcement in a particular case."³⁷⁷ Under its new test, the Court has often "manufactured" a reasonable suspicion in order to satisfy the central requirement of *Terry*.³⁷⁸

Second, the Court's new "diligence and necessary" test is too malleable. Courts can utilize it whenever police intrusions are claimed to implicate fourth amendment interests. *Terry*, however, did not intend to convert the protections of the fourth amendment into a general test that all police intrusions falling short of a full-scale search or arrest need only be "reasonable."³⁷⁹ *Terry* dealt with

³⁷⁷ Wasserstrom, *supra* note 23, at 350; see also Mertens, *supra* note 23, at 594-95 ("[T]he police must be able to justify singling out from the rest of humanity (or at least from the rest of the people in the general area) the particular individual whom they have stopped as somehow meriting this special attention."). See *Ybarra v. Illinois*, 444 U.S. 85, 91-92 (1979) (The police must have a reasonable belief or suspicion that a person is carrying a weapon before they may frisk him.).

³⁷⁸ For example, in *Summers*, the Court explained that the existence of a valid search warrant for contraband provided the objective justification for detaining an occupant of the premises to be searched. 452 U.S. at 703. But the search warrant in *Summers* did not authorize the seizure of *Summers* or anyone else. A reasonable suspicion for detaining *Summers* was established only by the Court's inference that because there was probable cause to search the premises for contraband, there was also a reasonable basis for suspecting that an occupant of the premises was likewise engaged in criminal activity. The Court left open whether a similar result would be justified if the search warrant merely authorized a search for evidence. *Id.* at 705 n.20.

For a discussion as to what the *Summers* Court meant by "occupants" of the premises, see Kamisar, *The Steagald and Summers Cases: What is the Scope of the Authority Carried by Arrests and Search Warrants*, in *THE SUPREME COURT: TRENDS AND DEVELOPMENTS*, *supra* note 165, at 130-132; see also 2 W. LAFAVE, *supra* note 34, § 4.9(e) at 309-10.

In *Sharpe*, the Court's basis for upholding the assumption of the court of appeals that there was reasonable suspicion to support a stop of *Savage's* pickup truck was highly questionable. 470 U.S. at 700-02 (Marshall, J., concurring); *id.* at 710 n.9 (Brennan, J., dissenting). Moreover, as Justice Marshall noted in his concurrence, discussion of the issue was unnecessary; the Court could have simply assumed the existence of reasonable suspicion as had been done earlier in *United States v. Place*, 462 U.S. 696, 699 n.1 (1983). Instead, the Court found a "clear justification" for the stop, 470 U.S. at 693 n.3, despite the fact that the government had not presented the issue of whether there was reasonable suspicion for the stop in its certiorari petition and "not a single word [was] devoted to it in the briefs." *Id.* at 700 (Marshall, J., concurring). In *Class*, there was no reasonable suspicion whatsoever which could have justified Officer McNamee's intrusion into *Class's* vehicle. 106 S. Ct. at 963.

³⁷⁹ See *Place*, 462 U.S. at 721 (Blackmun, J., concurring). See also *Summers*, 452 U.S. at 706 (Stewart, J., dissenting).

a specialized area of police conduct which did not lend itself to the traditional requirements of the warrant procedure and probable cause standard. This unique conduct involved the "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat."³⁸⁰

The Burger Court has applied its new test to situations and environments not envisioned by the Court in *Terry*. This new standard applies to the officer on the beat reacting swiftly to his observations, to the officer making a planned, warrant-supported search of a private home,³⁸¹ to state and federal drug enforcement agents operating in the relative security of the nation's airports,³⁸² to law enforcement officials patrolling the nation's interstate highways,³⁸³ to customs officials stationed at the international border,³⁸⁴ to school officials in the nation's public schools,³⁸⁵ and, now, to police officers conducting routine stops for traffic violations. Arguably, any police intrusion falling short of a full scale search or arrest can be defended as a valid *Terry*-investigation in spite of an obvious lack of similarity to the type of police-citizen encounter involved in the *Terry* facts.

The third problem with the Burger Court's standard is that it provides no guidance to the officer in the field in relation to the outer boundaries of a permissible *Terry* stop or search. As Professor LaFave has noted, the Court's fourth amendment jurisprudence "is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged."³⁸⁶ The Court's articulation and application of the "diligence and necessary" standard simply says to the police: "Do whatever it takes to complete your investigation, just make sure that it is done quickly."

*United States v. Sharpe*³⁸⁷ illustrates this point. The *Sharpe* Court held that an individual reasonably suspected of criminal conduct may be detained for twenty minutes when the detention is necessary to conduct an investigation of suspected criminal activity. Drug En-

³⁸⁰ *Terry*, 392 U.S. at 20.

³⁸¹ *Michigan v. Summers*, 452 U.S. 692 (1981).

³⁸² *Place*, 462 U.S. at 709; *Florida v. Royer*, 460 U.S. 491, 500 (1983)(plurality opinion).

³⁸³ *Sharpe*, 470 U.S. at 687.

³⁸⁴ *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3312 (1985); see *United States v. Brignoni-Ponce*, 422 U.S. 873-82 (1975).

³⁸⁵ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

³⁸⁶ LaFave, *supra* note 99, at 141. See also LaFave, *supra* note 143, at 52 n.63.

³⁸⁷ 470 U.S. 675 (1985).

forcement Agent (DEA) Cooke, patrolling in an unmarked vehicle, observed a pickup truck traveling with a Pontiac on a South Carolina highway. Cooke's suspicions were aroused because the truck appeared to be "heavily loaded"; he radioed the South Carolina State Highway Patrol for assistance in making an investigative stop.³⁸⁸ Officer Thrasher of the State Patrol responded in a marked patrol vehicle to Cooke's call. After the officers decided to stop the two suspected vehicles,³⁸⁹ Thrasher signaled the Pontiac, the lead vehicle, to pull over. As Thrasher did so, the driver of the pickup truck "cut between"³⁹⁰ the patrol car and the Pontiac, and continued down the highway. Cooke then stopped the Pontiac, while Thrasher chased after the pickup truck.³⁹¹

Cooke secured identification from the driver of the Pontiac, who was defendant Sharpe. Unable to reach Officer Thrasher, Cooke then radioed the local police and requested two officers to "maintain the situation,"³⁹² while Cooke left to find Thrasher. In the interim, Thrasher had stopped the pickup truck and secured identification from its driver, defendant Savage. Thrasher conducted his own investigation of the situation, but apparently found no cause to arrest Savage. Despite Savage's protests, Thrasher prohibited Savage from leaving until Cooke arrived. Approximately fifteen minutes later, Cooke arrived on the scene and conducted his own investigation. Upon detecting the odor of marijuana and without Savage's permission, Cooke opened the truck and found a large number of burlap-wrapped bales resembling bales of marijuana. Savage was then arrested. Cooke later returned to the Pontiac and arrested Sharpe.

Approximately thirty to forty minutes had elapsed between the stop of the Pontiac and the arrest of Sharpe.³⁹³ The Fourth Circuit concluded that the length of the detentions of both Savage and Sharpe exceeded the limits of a valid *Terry* stop.³⁹⁴ Before the Supreme Court, the only issue considered was whether it was reasonable to detain Savage, the driver of the pickup truck, for approximately twenty minutes.³⁹⁵

³⁸⁸ *Id.* at 677.

³⁸⁹ There was reason to believe the officers decided to stop the vehicles not because they possessed a reasonable suspicion of criminal conduct, but because Agent Cooke was about to run out of gas. *Id.* at 710-11 n.9 (Brennan, J., dissenting).

³⁹⁰ *Id.* at 678.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.* at 679.

³⁹⁴ 712 F.2d 65 (4th Cir. 1983), *rev'd*, 470 U.S. 675 (1985).

³⁹⁵ The Court explained that the length of Sharpe's detention was not in issue be-

Avoiding the creation of firm rules to guide police officers on the permissible duration of *Terry* stops, the *Sharpe* Court declared that "our cases impose no rigid time limitation on *Terry* stops. [Instead] . . . we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes."³⁹⁶ The Court was correct when it stated that its cases have imposed "no rigid time limitation on *Terry* stops." In fact, the Court has imposed very few limitations on police conduct in executing *Terry* investigations.

Indeed, in its efforts to offer the police maximum flexibility in effectuating their investigations, the Court has given police a virtual "green light" to detain persons and their possessions until probable cause is established for an arrest. In *Sharpe*, the Court was unwilling to hold that a twenty-minute detention was per se too long. While conceding that an investigative stop cannot continue indefinitely, the *Sharpe* Court argued that a bright line rule would undermine police effectiveness and was unnecessary because "common sense and ordinary human experience must govern over rigid criteria."³⁹⁷ This statement, unfortunately, means little, if anything, to the officer in the field who must decide how long he may detain a suspect before exceeding the limits of a valid *Terry* stop. Furthermore, such a standard does not inform the officer when he may conduct a search of a suspect's possessions or his vehicle.

On the contrary, the application of the *Sharpe* criteria to everyday police activities encourages ad hoc determinations by individual police officers. If "common sense and ordinary human experience" are to provide the guideposts for the officer in the field, then virtually any conduct which the average officer considers necessary to his investigation would be permissible; presumably, most police officers exercise "common sense" and are trained not to exceed the bounds of "ordinary human experience" in their investigative functions. Thus, the Court's new standard is unsatisfactory because it fails to establish any guidelines to govern the conduct and discretion of the police when they administer *Terry* stops and searches.

The fourth problem presented by the "diligence and neces-

cause his detention was not pertinent to Cooke's discovery of the marijuana in Savage's pickup truck. "The marihuana was in Savage's pickup, not in Sharpe's Pontiac; the contraband introduced at [their] trial cannot logically be considered the 'fruit' of Sharpe's detention." 470 U.S. at 683.

³⁹⁶ *Id.* at 685.

³⁹⁷ *Id.* See also, *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3312 (1985)(quoting *Sharpe*, 470 U.S. at 685)("[W]e have consistently rejected hard-and-fast time limits. . . . Instead, 'common sense and ordinary human experience must govern over rigid criteria.'").

sary" standard announced in *Sharpe* is closely related to its third flaw. The test provides no guidance to the officer in the field and similarly fails to provide any framework to the judges who must ultimately determine the legality of police searches and seizures. Judges in the lower courts can easily manipulate the application of the test in efforts to uphold official intrusions which exceed the limits of a valid *Terry* investigation.³⁹⁸ This criticism is not intended to disparage judges all of whom are sworn to uphold the Constitution.³⁹⁹ Instead, it simply recognizes that judges are affected by societal pressures to uphold convictions, especially in cases where overwhelming and illegally obtained evidence is linked to the defendant.⁴⁰⁰

This pressure has become particularly acute where convictions have been secured against individuals trafficking illegal drugs.⁴⁰¹

³⁹⁸ *State v. Byrd*, 23 N.C. App. 718, 209 S.E.2d 516 (1974), illustrates this point. A New Jersey state trooper observed Byrd operating a vehicle on the New Jersey Turnpike and, without any probable cause or suspicion of crime or a traffic violation, decided to make a random check of Byrd's license and registration. After Byrd produced a license but failed to produce a registration certificate, the officer searched the glove compartment. The officer found a pistol in the glove compartment and immediately arrested Byrd. A subsequent inventory search of the car disclosed jewelry implicating Byrd in an armed robbery in North Carolina. 23 N.C. App. at 719-20, 209 S.E.2d at 517.

The North Carolina Court of Appeals held that the search of Byrd's vehicle was not contrary to the fourth amendment. "When defendant could not produce a registration certificate, the examination of the glove compartment for evidence of registration and ownership was reasonable, and the officer could not ignore the pistol that he found." *Id.*, 209 S.E.2d at 517.

³⁹⁹ *Cf. Grano, Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting The Innocent?*, 72 MICH. L. REV. 717, 780 (1974)(there is compelling pressure on trial and appellate courts to sustain convictions, especially in "ugly cases," notwithstanding constitutional errors in eyewitness identification procedures).

⁴⁰⁰ *Cf. Manson v. Brathwaite*, 432 U.S. 98, 118 (1977)(Stevens, J., concurring)(in judging the "admissibility of particular identification testimony it is sometimes difficult to put other evidence of guilt entirely to one side.").

⁴⁰¹ See generally *N.Y. Times*, August 10, 1986 at A1. *Cf. Florida v. Royer*, 460 U.S. 491, 513-519 (1983)(Blackmun, J., dissenting)(Society's compelling interest in "overcoming the extraordinary obstacles to the detection of drug traffickers" justifies police intrusions designed to detect illegal drug smuggling.). Interestingly, over the last several years drug-related cases have dominated the Court's search and seizure docket, and have provided the vehicles for some of the Court's most important fourth amendment rulings. See, e.g., *United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985); *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Place*, 462 U.S. 696 (1983); *Florida v. Royer*, 460 U.S. 491 (1983); *Michigan v. Summers*, 452 U.S. 692 (1981); *United States v. Mendenhall*, 446 U.S. 544 (1980).

For other recent drug-related cases resolving important fourth amendment issues, see *California v. Carney*, 471 U.S. 386 (1985)(the warrantless search of a motor home is constitutional provided there is probable cause for the search); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)(school officials need not obtain a warrant to search students subject to their authority, nor are they required to possess probable cause to justify warrantless searches of students; a reasonable suspicion of wrongdoing is sufficient); *Segura v.*

“Get tough” policies sound good on the evening news and provide good political hay for constituents oppressed by drug-related crime and violence, but the application of such measures will affect the fourth amendment interests of the law-abiding as well as the law-breaker.⁴⁰² Indeed, it is conceivable that when Officer McNamee “poked his head” inside Class’ vehicle to look for the VIN, he took advantage of the situation to check for the existence of illegal drugs in locations that were not visible from outside the vehicle. Judicial standards that provide no checks against such police intrusions will not only fail to provide adequate guidelines for the officer in the field, but will also fail to protect innocent persons from police overreaching.

The Court’s new test also invites judges to construct post hoc rationalizations for police conduct that ordinarily would not pass constitutional muster. Justice Brennan, dissenting in *Sharpe*, demonstrated that the government had not established that it was objectively infeasible to investigate the suspects in a more efficient

United States, 468 U.S. 796 (1984)(plurality opinion)(distinguishing between possessory and privacy interests in the context of a warrantless entry to secure a private residence); United States v. Karo, 468 U.S. 705 (1984)(police monitoring of a beeper signal that reveals information that could not have been obtained through visual surveillance is subject to fourth amendment restrictions); United States v. Jacobsen, 466 U.S. 109 (1984)(the additional invasion of an individual’s privacy by a government agent must be tested by the degree to which the government intrusion exceeded the scope of the private intrusion); Texas v. Brown, 460 U.S. 730 (1983)(plurality opinion)(the seizure of property in plain view is permissible provided, *inter alia*, there is probable cause to associate the property with criminal activity); United States v. Knotts, 460 U.S. 276 (1983)(police monitoring of a beeper signal, emitting from a defendant’s car while traveling on public roads, did not invade any legitimate expectation of privacy of the defendant); United States v. Ross, 456 U.S. 798 (1982)(automobile exception permits warrantless search of sealed containers found inside a lawfully stopped vehicle); Washington v. Chrisman, 455 U.S. 1 (1982)(police officer may accompany an arrested person into his residence and seize contraband in plain view); New York v. Belton, 453 U.S. 454 (1981)(custodial arrest of an occupant of an automobile permits a search of the passenger compartment of the automobile). See also Illinois v. Gates, 462 U.S. 213 (1983)(determination of whether probable cause exists to support the issuance of a search warrant should be judged by the totality of the circumstances). The Court’s eagerly awaited ruling on the “good-faith” exception to the exclusionary rule came in United States v. Leon, 468 U.S. 897 (1984), another drug-related case.

⁴⁰² See generally *Malley v. Briggs*, 106 S. Ct. 1092 (1986)(a police officer is liable for damages arising from an arrest that was not “objectively reasonable,” even though the officer had obtained an arrest warrant from a judicial officer finding that probable cause exists for the arrest). In *Malley*, the good-faith police allegations supporting issuance of the arrest warrant were based on dubious references, overheard in a court-ordered wiretap, that linked the defendant Briggs to a marijuana party. The Briggs were a prominent couple from Narragansett, Rhode Island. Mr. Briggs was a real estate developer and bank director with no criminal record who had actively participated in civic and charitable affairs. See N.Y. Times, March 6, 1986, at A20.

manner.⁴⁰³ The government failed to show why two trained officers, driving in separate vehicles each equipped with flashing lights, could not have completed simultaneously, or nearly so, the stop of the Pontiac and pickup truck. The government also failed to explain why Agent Cooke did not follow the pickup truck since it was the primary focus of his suspicions. In addition, the government did not offer an adequate explanation as to why Officer Thrasher, who was aware of the reasons for Agent Cooke's suspicions and was an officer trained in basic narcotic detection, was incapable of executing the investigation of Savage's pickup truck.⁴⁰⁴ Finally, the *Sharpe* majority failed to consider why it was necessary for Agent Cooke to enlist the services of a state patrolman and two local officers. Other DEA agents should have been available to assist Agent Cooke. As noted by Justice Brennan, Agent Cooke was unable to reach his DEA backups apparently because the other agents were "sleeping or eating breakfast rather than monitoring their radios for calls."⁴⁰⁵

Rather than hold the government accountable for these blunders in investigative procedures, Chief Justice Burger simply responded that courts "should not indulge in unrealistic second-guessing"⁴⁰⁶ of police activities. Requiring law enforcement officials to effectuate their investigative methods in a manner which is least intrusive upon an individual's fourth amendment interests is not, however, unrealistic judicial second-guessing. The fourth amendment is no "technicality."⁴⁰⁷ The rights it guarantees "are not mere second-class rights but belong in the catalog of indispensable freedoms."⁴⁰⁸ The amendment is a constitutional bulwark designed to protect all citizens, the law-abiding as well as the criminal, from arbitrary and unreasonable police intrusions.

The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. That is not a political outcome impressed upon an unwilling citizenry by unelected judges. It is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power.⁴⁰⁹

⁴⁰³ 470 U.S. at 712 (Brennan, J., dissenting).

⁴⁰⁴ *Id.* at 712-13 (Brennan, J., dissenting). See also Dix, *supra* note 187, at 891.

⁴⁰⁵ 470 U.S. at 716 (Brennan, J., dissenting).

⁴⁰⁶ *Id.* at 686.

⁴⁰⁷ See Stewart, *supra* note 301, at 1393.

⁴⁰⁸ *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

⁴⁰⁹ Stewart, *supra* note 301, at 1392-93. As Professor Amsterdam has reminded us, the Court's enforcement of fourth amendment restrictions "is quintessentially a regula-

The Court in *Terry* did not depart from this principle, and the rationale of the *Terry* Court should not be utilized as a tool to enhance police authority in the name of "more effective law enforcement." It does not suffice to suggest that the police must be allowed to "graduate their responses to the demands of any particular situation."⁴¹⁰ The fourth amendment was proposed and ratified in order to limit the investigative powers of law enforcement officials; it was not intended to be a judicial device for "balancing away" constitutional safeguards. While it is true that police officers should be provided sufficient flexibility to deal with the serious encounters they face daily, they must not be granted an open-ended license to "graduate" their responses because of careless policework or to ignore readily available and less intrusive investigative alternatives. As Justice Brennan aptly noted in *Sharpe*: "*Terry's* exception to the probable-cause safeguard must not be expanded to the point where the constitutionality of a citizen's detention turns only on whether the individual officers were coping as best they could given inadequate training, marginal resources, negligent supervision or botched communications."⁴¹¹

The final problem with the Court's "diligence and necessary" test is that it focuses on the wrong issue. The central question under the fourth amendment should be whether the challenged intrusion is unduly intrusive.⁴¹² By focusing on the diligence of the police, the Court's formulation of fourth amendment principles takes its shape from the perspective of the police officer rather than from the perspective of the individual who is the subject of a particular police intrusion. Although the Court's fourth amendment jurisprudence helps provide the police with workable guideposts for their everyday activities,⁴¹³ the amendment's ultimate purpose is to protect the personal security and privacy of the individual.⁴¹⁴ Thus, when the Court resolves fourth amendment questions it must keep in mind that the explicit function of the amendment is to guarantee

tion of the police." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 371 (1974).

⁴¹⁰ *Place*, 462 U.S. at 709 n.10.

⁴¹¹ *Sharpe*, 470 U.S. at 719 (Brennan, J., dissenting).

⁴¹² *See id.* at 690 (Marshall, J., concurring in the judgment) ("Even a stop that lasts no longer than necessary to complete the investigation for which the stop was made may amount to an illegal arrest if the stop is more than 'minimally intrusive.' The stop must first be found not unduly intrusive before any balancing of the government's interest against the individual's becomes appropriate."); *Place*, 462 U.S. 722 n.2 (Blackmun, J., concurring in judgment).

⁴¹³ LaFave, *supra* note 99, at 141.

⁴¹⁴ *See* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 103 (1937).

“[t]he right of the people to be secure in person, houses, papers, and effects, against unreasonable searches and seizures. . . .”⁴¹⁵ The Court’s “diligence and necessary” test poorly serves the fourth amendment’s expressed intention. Whether the police have acted diligently often has little to do with whether an individual’s fourth amendment interests have been violated. As Justice Blackmun has noted in the context of airport stops, “[i]t makes little difference to a traveller whose luggage is seized whether the police conscientiously followed a lead or bungled the investigation. The duration and intrusiveness of the seizure is not altered by the diligence the police exercise.”⁴¹⁶

The Court’s current approach to investigative search and seizure questions is both formless and unrestrained. It is formless because the current standard provides no guidance to lower courts and officers operating in the field. It is unrestrained because the traditional methods for circumscribing investigative intrusions no longer are effective. Under *Terry*, a police intrusion had to be “reasonably related in scope to the circumstances which justified the interference in the first place.”⁴¹⁷ If, however, the asserted governmental interest that justifies an intrusion is merely a generalized interest in law enforcement, the requirement that the intrusion be reasonably related to its justification provides no limitation for confining the intrusion.⁴¹⁸ For instance, as applied to a detention for purposes of facilitating a search of a home,

the requirement that the scope of the intrusion be reasonably related to its justifications does not provide a limiting principle for circumscribing the detention. If the purpose of the detention is to help the police make the search, the detention can be as long as the police find it necessary to protract the search.⁴¹⁹

Likewise, the detentions in *Sharpe* and *United States v. Montoya de Hernandez*⁴²⁰ were constitutionally “reasonable” because they were reasonably related in scope to the circumstances which justified their initiation, namely, a generalized interest in law enforcement. Both detentions, according to the Court, were necessary to confirm police suspicions of criminal conduct and, thus, were constitutional despite their protracted length. In other words, so long as the po-

⁴¹⁵ U.S. CONST. amend. IV.

⁴¹⁶ *Place*, 462 U.S. at 722 n.2 (Blackmun, J., concurring in judgment).

⁴¹⁷ *Terry*, 392 U.S. at 20.

⁴¹⁸ See *Summers*, 452 U.S. at 712 (Stewart, J., dissenting).

⁴¹⁹ *Id.* (Stewart, J., dissenting).

⁴²⁰ 105 S. Ct. 3304 (1985). In *de Hernandez*, the Court upheld a 24-hour detention of a suspected alimentary canal smuggler at the international border. For a strong criticism of *de Hernandez*, see 3 W. LAFAVE, *supra* note 34, § 10.5(b) at 718.

lice action promoted in a reasonable manner the government's interest in effective law enforcement, that action was constitutionally permissible. As currently stated, however, the Court's test is inappropriately balanced in favor of police interests. Rather than construct fourth amendment principles with an eye toward the enchancement of law enforcement practices, the Court should fashion fourth amendment rules that protect personal security and privacy.

In short, the Burger Court's standard for assessing the constitutionality of *Terry*-type searches and seizures is an unsatisfactory test that provides no guidance to the police and lower courts, and does little to protect fourth amendment liberties. The *Class* decision is another example of the Court's inadequate efforts in this area.

The *Class* majority declared that the police search was "focused in its objective and no more intrusive than necessary to fulfill that objective."⁴²¹ The Court also noted that the officer "did not root about the interior of [Class'] automobile before proceeding to examine the VIN."⁴²² These statements, while unobjectionable in their description of Officer McNamee's search, do not articulate the objective fact or reason which justified Officer McNamee's search. The *Class* Court's reasoning was unconvincing in this critical aspect: not one of the factors catalogued by the Court to support Officer McNamee's intrusion—the lack of a reasonable expectation of privacy in the VIN itself, the observation of Class committing two minor traffic violations, the government's interest both in promoting road safety and shielding officers from danger, and the unintrusive nature of the search—provide, either jointly or severally, a persuasive reason to uphold his search for the VIN.⁴²³

Closer scrutiny reveals that the majority simply combined these factors on one side of a tenuous balancing equation to justify the conclusion that the competing interests at stake weigh in favor of upholding the police invasion. As Justice Brennan noted on a prior occasion, this type of balancing process is one "in which the judicial thumb apparently [was] planted firmly on the law-enforcement side of the scales."⁴²⁴

The *Class* ruling also demonstrates, albeit *sub silentio*, the Court's dissatisfaction with the "least restrictive means" test.⁴²⁵ Justice O'Connor does not discuss the issue, despite the existence of rea-

⁴²¹ *Class*, 106 S. Ct. at 968.

⁴²² *Id.*

⁴²³ *Id.* at 975 (Brennan, J., dissenting).

⁴²⁴ *Sharpe*, 470 U.S. at 720 (Brennan, J., dissenting).

⁴²⁵ *See supra*, note 313.

sonable alternatives to Officer McNamee's unchecked intrusion.⁴²⁶ The officers, for example, could have conducted a radio check on the vehicle's license plate or registration certificate.⁴²⁷ Officer McNamee also could have sought Class' consent to enter the vehicle and move the papers. Moreover, Officer McNamee could have demanded access to the VIN pursuant to § 401 of New York's Vehicle and Traffic Law.⁴²⁸

Finally, the Court's holding proffers no adequate test for judging the constitutionality of future police behavior analogous to Officer McNamee's search. Instead, officers in the field must decide for themselves when entry into a vehicle to inspect a VIN that is not visible from the outside is constitutionally permissible.

The Court's pre-*Class* doctrine which required that police have probable cause or reasonable suspicion before intruding into the private areas of stopped vehicles is preferable to the new test articulated in *Sharpe* and applied in *Class*. The standards are "probable cause" and "reasonable suspicion," and were articulated in *Carroll v. United States*⁴²⁹ and *Michigan v. Long*. They both are workable rules

⁴²⁶ See Brief for Respondent at 28, *New York v. Class*, 106 S. Ct. 960 (1986), where *Class* argued that "the record here does not establish that law enforcement officers lack less intrusive methods to combat the problem of car theft which the State emphasizes."

⁴²⁷ Even after discovering the gun, *Class*' status as an unlicensed driver, and the fact that *Class* did not own the vehicle he was driving, the officers still did not conduct a radio check on the vehicle *Class* was operating. This omission was not explained in the state's briefs in the lower courts or in the Supreme Court.

⁴²⁸ See *supra* note 58 and accompanying text for the language of § 401. Of course, this option is troublesome because it potentially could have "placed the officers in the same situation that the holding in *Mimms* allows officers to avoid—permitting an individual being detained to have possible access to a dangerous weapon and the benefit of the partial concealment provided by the car's exterior." *Class*, 106 S. Ct. at 967.

On the other hand, if the Court's reasoning is applied literally, then police officers will have unrestrained authority to search glove compartments, pocketbooks, briefcases and other areas of recognized privacy if a motorist fails to bring every item of documentation with him after exiting his vehicle during a police stop. A constitutionally more attractive alternative to this proposition is that nonconsensual police intrusions to secure documentation are valid only when necessitated by some reasonable suspicion that justifies the search. Thus, where a motorist emerges from his car without his driver's license or registration certificate, a nonconsensual search of the interior of the vehicle would not be permitted unless the officer possessed some objective justification for the search—for example, a reasonable suspicion that the car was stolen or contained contraband.

Of course, where a motorist refuses consent to a police request for a document search, he subjects himself to sanction in the form of a summons or possibly even arrest for not producing the document. The officer has no right to search the protected area absent objective justification; but the motorist does have an obligation to produce requested documents when legitimately stopped by the police. Except in extraordinary cases, it is likely that most motorists, confronted with this choice, will consent to a limited search for the documents.

⁴²⁹ 267 U.S. 132 (1925). See also *United States v. Ross*, 456 U.S. 798 (1982).

that are not only easily applied by courts reviewing police intrusions, but are also familiar to the officer on the beat.

VIII. CONCLUSION

To many, the result in *Class* will not seem objectionable. After all, Officer McNamee's intrusion into Class' vehicle was hardly the type of police invasion that disturbs most people. He simply entered the vehicle to ascertain the VIN. And, while it was true that Officer McNamee had no objective reason to justify this intrusion, his invasion was considerably more temperate than other infamous police searches that have incurred the wrath of the Supreme Court.⁴³⁰ To those who view *Class* in so mild a light, the words of

⁴³⁰ Probably the most abominable search to be reviewed by the Court in the twentieth century occurred in *Rochin v. California*, 342 U.S. 165 (1952). There, three deputy sheriffs illegally entered Rochin's home and forced open the door to his bedroom. They found Rochin partly dressed sitting on the bed on which his wife was lying. After the deputies observed two capsules, Rochin put them in his mouth. A struggle ensued during which the three deputies jumped upon Rochin in an attempt to extract the capsules. *Id.* at 166.

Unable to retrieve the capsules in this manner, the deputies handcuffed Rochin and brought him to a hospital. There, a doctor, at the direction of one of the deputies and against the will of Rochin, administered an emetic solution through a tube into Rochin's stomach. The solution induced vomiting, and in the vomited matter the deputies discovered two capsules which later proved to contain morphine. *Id.*

Speaking for the Court, Justice Frankfurter stated that this conduct "shocks the conscience" and was "bound to offend even hardened sensibilities." *Id.* at 172. In Frankfurter's view, these police methods were "too close to the rack and the screw to permit constitutional differentiation" and, thus, they violated the due process clause of the fourteenth amendment. *Id.*

Another well-known search case was *Mapp v. Ohio*, 367 U.S. 643 (1961). Although *Mapp* is best known for its holding that the exclusionary rule of the fourth amendment—which prohibits in a criminal prosecution the admission of evidence obtained in violation of the fourth amendment—is applicable to the states pursuant to the fourteenth amendment, the police search in that case was also detestable. The breadth of *Mapp's* holding on the exclusionary rule was significantly limited in *United States v. Leon*, 468 U.S. 897 (1984). In *Leon* the Court modified the exclusionary rule to permit the use of evidence obtained by the police "acting in reasonable reliance on a search warrant" issued by a magistrate but later found to be unsupported by probable cause. *Id.* at 913.

Without a warrant or exigent conditions, several police officers broke into the home of Dollree Mapp looking for a suspect wanted in a recent bombing and some "policy paraphernalia." When Mapp demanded to see a search warrant, a piece of paper was displayed by an officer. Mapp then grabbed the paper and placed it in her bosom. A struggle occurred in which the officers retrieved the paper and roughly treated Mapp. The officers then conducted a top-to-bottom search of Mapp's home. *Mapp*, 367 U.S. at 644-45.

Although no suspect or "policy paraphernalia" were found, the police did find four books—*Affairs of a Troubadour*, *Little Darlings*, *London Stage Affairs*, and *Memories of a Hotel Man*—and one hand-drawn obscene picture. See Stewart, *supra* note 301, at 1367. Eventually, Mapp was charged with possession of lewd and lascivious books and pictures. 367 U.S. at 643 n.1.

Justice Bradley, spoken over a century ago, provide an appropriate counterpoise:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.⁴³¹

If the Court must balance the fourth amendment liberties of citizens, it must be ever-cognizant of the concerns of those who framed this amendment. The framers were most concerned with the evil associated with the general warrant and writ of assistance, which was the official grant of unfettered discretion to search and seize.⁴³² The reasoning and result in *Class* disregards this vital concern. The Court has opted for a formula that undermines personal privacy in the name of effective law enforcement rather than a clear statement of principle that prohibits all police intrusions absent objective cause. If James Otis were alive today, he surely would denounce such a position as vehemently as he denounced the old writs of assistance. These writs, claimed Otis, were "as the worst instance of arbitrary power, the most destructive of English liberty. . . ."⁴³³

⁴³¹ *Boyd v. United States*, 116 U.S. 616, 635 (1886). A noted fourth amendment expert has recently urged the Court to reaffirm Justice Bradley's "stirring words." See LaFave, *supra* note 23.

⁴³² See Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 574-75 (1983) ("The colonists concentrated their fire on general warrants because they 'opposed leaving the power to search and seize solely in executive hands' and because in their immediate past experience uncontrolled executive discretion had taken *this particular* form. . . . [T]he colonists condemned writs of assistance *because* such writs 'no more controlled official discretion than would a statute that simply permitted warrantless searches.'") (footnotes and citations omitted) (emphases in original). See also N. LASSON, *supra* note 414, at 51-105; Stewart, *supra* note 301, at 1369-72.

⁴³³ N. Lasson, *supra* note 414, at 59.