



1-1-2010

Constitutional Roadkill in the Courts: Looking to the Legislature to Protect North Dakota Motorists Against Almost Unlimited Police Power to Stop and Investigate Crime

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CONSTITUTIONAL ROADKILL IN THE COURTS:
LOOKING TO THE LEGISLATURE TO PROTECT
NORTH DAKOTA MOTORISTS AGAINST
ALMOST UNLIMITED POLICE POWER
TO STOP AND INVESTIGATE CRIME

THOMAS M. LOCKNEY*
MARK A. FRIESE**

ABSTRACT

Police vehicle stops theoretically require a good reason. Because of the vast number of traffic regulations and the low standard of certainty required, the police may in effect legally stop any driver at will. Once stopped, the police may treat even non-criminal traffic violators as criminal suspects by subjecting them to extensive questioning unrelated to the traffic stop, criminal history checks, requests for consent to search, and drug-detection dogs. Courts have sanctioned such extensive investigation of non-criminal offenders because the courtroom context is most often a criminal defendant seeking to suppress evidence of guilt rather than an innocent motorist complaining about intrusive investigation. Because the courts are unlikely to limit the carte blanche authority afforded the police in practice, we propose legislation to require probable cause for car stops based on non-criminal offenses. The legislation also requires reasonable suspicion of criminality as a basis for questioning unrelated to the basis for the stop, for criminal history checks of drivers and passengers, for requests for consent to search, and for use of drug detection dogs.

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I. INTRODUCTION: A CAR STOP FROM THE VIEWPOINT OF AN ORDINARY CITIZEN INNOCENT OF CRIME

Imagine a typical drive to work. You get up early to avoid the rush. You get in your car, accompanied by your spouse, whom you plan to drop off on your way. You check the mirrors. As you consider the day's work agenda during your normal morning route, a flash of emergency lights

appears in your rear-view mirror. Assuming an emergency, you dutifully pull to the right side of the road. Waiting for the police cruiser to pass, you suddenly realize it does not. You have just been pulled over! For what? Your seatbelt is fastened, you signaled properly, and you were not driving too fast. You wonder, “What’s going on?”

“Good Morning! My name is Officer Jones, and I work for the City Police Department. Do you know why I stopped you this morning?”

“No. No, I really do not.”

“That parking permit hanging from your rear-view mirror?”

“Yeah”

“It’s obstructing your view. You can’t have any items obstructing the windshield.”

“Oh, I didn’t know. My employer requires me to hang the permit on the mirror.”

“I understand, but it obstructs your view.” The officer pauses while looking inside the vehicle. “Your employer should have explained that you need to remove it while driving. Let me see your license, registration, and proof of insurance. By the way, while you are getting those, can you tell me where you are going this morning?”

“Uh. I was just . . . uh.” Fumbling for the demanded items, you answer, “I was just, ah, going to work.”

“Any contraband in the vehicle you want to tell me about?”

“Contra? Um, no. Here.” You hand the officer your license, registration, and proof of insurance.

“So is there contraband you don’t want to tell me about?”

“Uh, no. I am sorry, did I do something wrong?”

“I already explained why I pulled you over. Why are you getting so nervous? Who is that sitting next to you?”

“I don’t know. I just . . . I really didn’t know about the windshield thing. This is my husband.” Officer Jones then asks you and your husband to get out of the car and stand on the sidewalk next to the car.

“Yeah well, stay here for a second. I have to check your information. You are acting a bit nervous, and as you can understand, that makes me nervous. I appreciate the cooperation.”

“Uh, yes, ma’am.”

To this point, you are concerned about the delay and somewhat intimidated by the flashing lights and the aggressiveness¹ of the officer, but

1. Richard R. Johnson claims that “[t]he most consistent set of interpersonal communication techniques taught to police officers in the USA is a system called verbal judo.” Richard R.

you assume that you will either get a warning or, at worst, a citation with a small fine.² However, while waiting for the officer to return, you observe another police car. A second officer approaches your car accompanied by a large German Shepherd. The pair walks around your car while the dog extensively sniffs the car's exterior. Your husband, who suffers from cynophobia,³ begins to sweat.

Meanwhile, Officer Jones comes back to you and asks, "You and your husband came up clean. So, I assume you don't have either drugs or weapons in your car, do you?" You answer no, and Officer Jones replies, "Then I don't suppose you would mind if I look through your car if you have nothing to hide?" You have some confidential work papers in your car, but you assume that the officer will not look closely at those. You prefer to be on your way, because both you and your husband will now be late for work, but you feel psychologically pressured to say okay.

The officer proceeds to search. She looks through your glove compartment, under the front seats, and then notices your stack of papers on the back seat. She rifles through them, which makes you quite nervous given your professional duty of confidentiality, but she then seems satisfied and comes back. "Some interesting papers there—mind if I search your trunk?" You are becoming quite nervous about being late for work, but you assume that a quick search of the trunk will be your quickest way to proceed, so you again reply okay. The officer looks through your trunk. After a minute or two, she comes back, hands you the key, comments on "your interesting hobbies," and then, finally, to your relief, says, "You have been cooperative, so I am just going to give you a verbal warning to take the permit off the mirror and avoid obstructions in the future. Have a nice day."

When you finally arrive at work late, you are upset with the delay for such a trivial and obscure offense. You call your friend, a criminal defense lawyer, and describe the encounter. Your friend explains that nothing the officer did is contrary to federal or North Dakota law. Although there is some dispute about the basis for the stop,⁴ even if the stop was improper, you have no real remedy since you did not get a ticket and nothing was

Johnson, CITIZEN EXPECTATIONS OF POLICE TRAFFIC STOP BEHAVIOR, 27 POLICING 487, 489 (2004). Our hypothetical dialogue seems consistent with the training described by Johnson.

2. See N.D. CENT. CODE § 39-06.1-06(2) (2009) (providing the fee for most moving violations in North Dakota is \$20).

3. "Cynophobia: An abnormal and persistent fear of dogs. Sufferers from cynophobia experience anxiety even though they realize that most dogs pose no threat. To avoid dogs, they may barricade yards or refuse to travel except in an enclosed vehicle." MedicineNet.com, Definition of Cynophobia, <http://www.medterms.com/script/main/art.asp?articlekey=12201> (last visited June 6, 2010).

4. See *infra* notes 39-40, 148-51 and accompanying text.

found. Once stopped, it was permissible for the officer to ask you for your license, registration, and proof of insurance.⁵ It was also permissible to ask you where you were going⁶ and to get you both out of the car.⁷ Checking your information, and that of your husband, was legal,⁸ as was using a drug-sniffing dog.⁹ Asking for consent to search your car was permissible, even without a warning that you do not need to consent.¹⁰

This episode may seem unusual. To the contrary, we believe that any driver may be legally stopped by an officer who merely observes the vehicle being driven for a short time.¹¹ In order for the police to stop a vehicle, the stopping officer must have a good reason.¹² The reason must consist of a belief that the person driving has committed an offense or that the car contains evidence of a crime. Most people assume vehicle stops rarely occur without legal justification. The reality, however, is quite different.¹³ The plain fact is that a police officer may indeed stop almost

5. *State v. Fields*, 2003 ND 81, ¶ 8, 662 N.W.2d 242, 245.

6. *Id.* (citing *United States v. Jones*, 269 F.3d 919, 924 (8th Cir. 2001)).

7. *Maryland v. Wilson*, 519 U.S. 408, 410-11 (1997) (stating an officer can ask a passenger to exit the vehicle); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (stating an officer can ask a driver to exit the vehicle). *See also* *State v. Haverluk*, 2000 ND 178, ¶ 20, 617 N.W.2d 652, 656-57 (noting the North Dakota Supreme Court has “embraced and extended the *Mimms* rationale”) (citing *State v. Gilberts*, 497 N.W.2d 93, 95-99 (N.D. 1993); *State v. Mertz*, 362 N.W.2d 410, 413 (N.D. 1985) (extending *Mimms* by allowing an officer to place a traffic violator in a patrol car)).

8. *United States v. Gregory*, 302 F.3d 805, 809 (8th Cir. 2002) (authorizing police to check identification and registration, to direct a driver to step out of the vehicle, and to ask routine questions about the driver’s destination).

9. *Illinois v. Caballes*, 543 U.S. 405, 408 (2005).

10. *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Schneekloth v. Bustamonte*, 412 U.S. 218, 231 (1973).

11. David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 816 (2002). Professor Moran puts it more simply and bluntly, describing what he calls “the Supreme Court’s new, and greatly simplified, Fourth Amendment vehicle doctrine: the police may, in their discretion, stop and search any vehicle at any time.” *Id.*

12. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). *See Kappel v. Director*, N.D. Dep’t of Transp., 1999 ND 213, ¶ 10, 602 N.W.2d 718, 721 (noting police need not see a motorist violating a traffic law, nor must police “rule out every potential innocent excuse for the behavior in question before stopping a vehicle for investigation”). The North Dakota Supreme Court noted in *Kappel* that a “prolonged stop” at a stop sign, or weaving within a travel lane, or an “abrupt halt” at an intersection would each provide a basis for an investigative stop. *Id.* ¶¶ 12-13, 608 N.W.2d at 721-22. This requirement of a “good reason” exists in almost all circumstances, except special circumstances like sobriety checkpoints. *See, e.g., Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (authorizing suspicionless stops for the purpose of identifying and apprehending suspected drunk drivers).

13. David A. Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, 66 GEO. WASH. L. REV. 556, 565 (1998). Harris concludes:

[F]or all practical purposes, the venerable Fourth Amendment principle that the police need a reason—call it probable cause, reasonable suspicion, or whatever—to interfere with a citizen in his or her daily activity has all but vanished for anyone who drives or rides in a car. Traffic stops have become both the occasion and the legal justification

anyone, as long as the person is in a vehicle.¹⁴ This outcome results from a combination of an unbelievably detailed accumulation of traffic regulations with a judicial propensity to expand police search and seizure powers to promote effective law enforcement.

Several years ago, coauthor Lockney discovered his vehicle registration yearly renewal tab was displayed upside down. For eleven months, he was subject to being stopped at will.¹⁵ Surely only the professorially absent-minded like the author, or criminals like drunk drivers, or “offenders” like speeders would be subject to police action on the streets and highways. The majority of drivers, one might suspect, are still immune from police stops; most citizens would not think that at nearly any time, almost all of us may be legally stopped by any reasonably observant police officer. For many, that notion smacks of a police state.¹⁶

Although coauthor Lockney now has his tab right side up, he occasionally neglected to remove his employee parking permit from his rear-view mirror. Most traffic stops result from minor traffic violations like an obstructed windshield, which are noncriminal offenses in North

for a new kind of criminal investigation: one that features suspicionless investigation on an individual level, without any special governmental need beyond ordinary law enforcement.

Id.

14. David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 298-99. Sklansky observes, “Because almost everyone violates traffic rules sometimes, this means that the police, if they are patient, can eventually pull over anyone they are interested in questioning” *Id.* We agree that anyone may be stopped, but, as this article demonstrates, we contend little patience is needed due to the vast extent of traffic regulation and the low standard required.

15. *See, e.g.*, N.D. CENT. CODE § 39-04-11 (2009) (requiring vehicle plates to be “displayed, horizontally and in an upright position,” and registration stickers for only a single year to be displayed “in the area designated by the department for the tab or sticker”); *see also* Bartch v. North Dakota Dep’t of Transp., 2007 ND 201, ¶ 10, 743 N.W.2d 109, 111 (holding display of an expired registration sticker provided a lawful basis for officer’s stop).

16. Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 169-70 (1996). Our language may seem stark. Professor Levit goes further and compares our situation to that of former South Africa:

It would be repugnant to American notions of justice if our government were to allow, much like the former South African government allowed, random stopping of individuals on the street to check for citizenship or identification papers. It would be equally objectionable to allow random stopping of cars to check the validity of the driver’s license and vehicle registration, a practice that the Supreme Court explicitly invalidated in *Delaware v. Prouse*. Our repulsion at the South African example, like the Supreme Court’s rejection of the practice of random car stops, is motivated by a fear that unfettered discretion creates opportunity for arbitrary and abusive uses of police power. But how different is it to sanction stops of vehicles to conduct intrusive and extensive searches and seizures on the basis of minor traffic violations that we all commit every time we enter our cars? The case law demonstrates that no meaningful distinction exists.

Id. (footnote omitted).

Dakota.¹⁷ Many stopped drivers are then subjected to a wide variety of police practices designed to uncover crime. Police stops for noncriminal traffic offenses easily escalate into protracted and intrusive police efforts to find evidence of criminality, such as drunk driving or possession of drugs.¹⁸ Those police procedures increase the length and intrusiveness of stops by allowing the police to treat all traffic offenders as suspected criminals, no matter how trivial the offense for which the driver was stopped.

This article had its genesis in the coauthors' experience.¹⁹ Coauthor Lockney discovered it is common knowledge among police officers, prosecutors, and judges that a police officer needs very little time to discover some reason to stop a driver. Indeed, it was common to ask, almost as a challenge, "How long would it take you to pick a car and find a valid reason to stop it?" Although estimates vary from officer to officer,

17. The authors are unaware of any statistical studies regarding the bases for stops in North Dakota. Studies elsewhere confirm that most stops are for moving traffic violations. For example, a follow-up study of stops by the Wichita, Kansas Police Department found that, "[c]onsistent with the 2001 study, in 2004 most stops were the result of an officer observing a moving traffic violation." City of Wichita, City News, June 16, 2005, at 2, <http://www.wichita.gov/NR/rdonlyres/53AB36CD-D526-444C-9600-5B98DC0B589C/0/2004stopstudy.pdf> (summarizing The Wichita Stop Study 2004 Follow-Up Analysis, <http://www.wichita.gov/NR/rdonlyres/82B2A3EF-475D-409B-B4EA-4FC566DE504B/23139/Racial20Profiling20Stop20Study20Follow20Up202005.pdf>). In North Dakota, the number of non-criminal traffic offenses vastly exceeds the few criminal offenses. North Dakota Century Code section 39-06.1-02 provides that a person cited for a traffic violation "is deemed to be charged with a noncriminal offense" unless charged with one of the few offenses listed in section 39-06.1-05 as criminal, the most common of which are driving under the influence, reckless driving, driving under suspension or revocation, and driving without liability insurance. Common sense, and the authors' experience, suggest that most North Dakota stops are for noncriminal traffic violations.

18. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3, at 359-60 (4th ed. 2004). Professor LaFave describes the efforts of the federal government to use the highways as a battleground in the "war on drugs" and to encourage state officers to do the same. *Id.* at n.2. Professor David A. Harris claims that:

[P]olice have almost all the discretion they could hope for, and the concepts designed to limit police discretion—warrants, probable cause, and reasonable suspicion—are never an obstacle when cars are the target. Viewed together, the cases and techniques described here effectively amount to a new exception to the Fourth Amendment's usual requirements: the 'vehicular drug interdiction' exception, under which the commission of a traffic violation means that, for all practical purposes, the usual constitutional safeguards do not apply.

Harris, *supra* note 13, at 573. Parts II and III of this article show that he is not off the mark regarding North Dakota legislation and case law, and Part IV proposes legislation to provide motorists some degree of protection beyond the measly protection of current Fourth Amendment case law. *See infra* Parts II, III, and IV.

19. Coauthor Lockney taught criminal procedure at the University of North Dakota School of Law for over thirty-five years. During that time, he served as the Grand Forks Municipal Court Prosecutor for a year in the 1970s, prosecuting all city traffic cases charged by the Grand Forks Police Department. Thereafter, he served as municipal judge for the North Dakota cities of Emerado and Larimore for almost thirty years. Thus, he had many occasions, both in court and out of court, to discuss, and sometimes to rule on, police car stops and their aftermath.

most police officers agree it takes very little time to legally stop a car.²⁰ Once a car is stopped, it is often easy to discover something more serious than the usual low fine, noncriminal offense that typically served as the basis for the stop.

Coauthor Friese had direct experience with car stops, serving as a patrolman for over five years on the Bismarck, North Dakota, police force. Subsequently, he enrolled at the University of North Dakota School of Law, where he was coauthor Lockney's student and research assistant. During a criminal procedure class discussing car stops, Professor Lockney described his skeptical view of the North Dakota Supreme Court's approach. As Lockney had written in this same publication,²¹ he told the class that reasonable suspicion investigative stops for traffic offenses were criticized by Professor Wayne LaFave as inappropriate for minor criminal cases.²² North Dakota goes even further, allowing so-called investigative stops based on reasonable suspicion even for *noncriminal* traffic, equipment, and parking violations.²³ Lockney criticized the North Dakota Supreme Court's "consistent failure in many cases over many years to even discuss the serious issue raised by Professor LaFave" as "bad policy, silly, and most often, unnecessary"²⁴ because the stops are often actually based on probable cause—rendering the reasonable suspicion standard unnecessary.

Friese raised his hand to comment. As a police officer, he had found the reasonable suspicion standard very useful. Friese agreed that probable cause is often present, but he claimed there were many situations that resulted in what he termed a "reasonable suspicion traffic stop." As examples, he mentioned regulations requiring bumpers be of a certain height, or steering wheels be greater than a certain diameter.²⁵ Friese claimed that when he saw a bumper that appeared too high, or a steering wheel that appeared to be too small, he stopped the car based on suspicion of a violation and then could use a tape measure or take a closer look to "investigate." He described how the low standard of reasonable suspicion, combined with his list of numerous bases for stops, allowed him to stop virtually any car he desired. Professor Lockney asked Friese if he would

20. Professor Harris notes, "[p]olice officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation." David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 557-58 (1997).

21. Thomas M. Lockney, *Justice Beryl Levine: Taking Her Title Seriously in North Dakota Criminal Cases*, 72 N.D. L. Rev. 967, 974-83 (1996).

22. LAFAVE, *supra* note 18, § 9.3(a), at 366.

23. *See infra* notes 71-72.

24. Lockney, *supra* note 21, at 978.

25. *See infra* notes 180-83.

share that list, and the genesis for this article was born. Although many authors mention the multitude²⁶ of traffic violations for which stops may be made, the volume of reasons on Friese's list surprised the professor, despite his experience as a traffic court prosecutor and judge. The list was shared on an Internet discussion forum with other criminal law professors, who were similarly surprised.

After sharing the list with others, the coauthors had trouble agreeing on Friese's claim that he needed the lower reasonable suspicion standard for "investigative stops." Lockney questioned why an officer's observation of a high bumper or small steering wheel would not satisfy the probable cause standard, making the lower standard of reasonable suspicion unnecessary. Friese's response was that he needed to make an "investigative stop" to complete a further investigation. Lockney replied that even where a search warrant is sought, requiring probable cause, evidence of a crime may or may not be found, and even if it is, further investigation may still be needed to meet the requirements for a conviction.

The discussion has continued for more than ten years, and the authors have agreed to disagree about investigative stops based upon reasonable suspicion of a traffic violation. Whether these examples provide reasonable suspicion or probable cause is likely the result of the elusiveness of the distinction between the two standards.²⁷ The authors' disagreement puts them in good company. Professor Christopher Slobogin observes that:

"[P]robable cause" and "reasonable suspicion" are broadly defined, with the result that their application to particular facts is often difficult to predict. These developments were inevitable: outside of quantifying the standards, as . . . [his article does], meaningfully distinguishing between these or any other levels of certainty (other than at the extremes) is very difficult.²⁸

26. *E.g.*, *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (noting the existence of a "multitude of applicable traffic and equipment regulations"). Others label the quantity of traffic regulations as: a "plethora," Chris K. Visser, Comment, *Without a Warrant, Probable Cause, or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car?*, 35 HOUS. L. REV. 1683, 1690 n.44 (1998-1999); "host," *United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1160 (D. Kan. 2004); and "vast number," Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1651 (1998).

27. *State v. Mantle*, 779 S.W.2d 357, 362 (Mo. Ct. App. 1989) (Maus, J., dissenting) (stating "[t]he distinction between reasonable suspicion and probable cause is elusive and a matter of degree.").

28. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 72 (1991) (footnotes omitted). As his title signifies, Professor Slobogin imagines how we would regulate searches and seizures if the Fourth Amendment did not exist. Although he compares his imagined regulation with Fourth Amendment law and Supreme Court law, he ultimately contends his imagined regulation would be an improvement over existing Fourth Amendment law created by the courts. *Id.* at 75-78. We propose instead that better regulation is more likely to be achieved

Citing Professor LaFave's famous treatise,²⁹ Slobogin agrees the difference between probable cause and reasonable suspicion lies in the degree of probability required, but that comparison on that area is difficult because "it is less than clear precisely what quantum of probability is required."³⁰ He quotes Professor LaFave's claim that the distinction "is well illustrated by the case of *Luckett v. State*," where the court "properly concluded" an officer lacked probable cause but had reasonable suspicion to stop a car based on the color and first three characters of a license plate because of the proximity to the crime in time and space.³¹ Slobogin responds:

[I]f this case is considered a good illustration of how probable cause and reasonable suspicion can be distinguished, it makes my point. I would argue that probable cause to arrest existed on these facts (even if, after stopping the car, nothing further alerted the officer's suspicion). The chances are extremely high that the car stopped was the car described by the radio broadcast and fairly high (given the short time between the burglary and the stop) that the people in it were those who fled the burglary.³²

Slobogin also notes that "the police are no better than the courts (or law professors) at making the distinction between probable cause and reasonable suspicion."³³ The fact that Professors LaFave and Slobogin cannot agree on whether a particular case demonstrates probable cause or

through legislation, at least in the area we discuss—car stops and subsequent police investigation. See *infra* Part IV.

29. Professor LaFave is the preeminent scholar of the Fourth Amendment. He has written a five volume treatise on the Fourth Amendment (itself a mere sentence), now in its fourth edition. The University of Illinois, Center for Advanced Study observes:

Professor LaFave is a prominent scholar and expert in the field of criminal justice. He has written extensively on criminal law and criminal procedure, especially on the subject of arrest, search, and seizure. His work has had a profound influence on judicial decisions in these areas; his writings have been quoted or cited in more than 10,000 reported state and federal appellate court opinions, including more than 120 U.S. Supreme Court cases.

University of Illinois Center for Advanced Study, <http://www.cas.uiuc.edu/faculty/ViewPerson.aspx?Guid=797CD7E1-3215-4CE4-B147-ADD0F78C370B&Role=e> (last visited June 6, 2010). When teaching criminal procedure, author Lockney opines that to litigate a Fourth Amendment issue without checking LaFave's position is tantamount to malpractice. LaFave's suggestions for Fourth Amendment rules to govern police procedure for vehicle stops inspire most of our proposals. We agree with LaFave's suggestions but, because the courts generally do not, we suggest legislative rules in Part IV of this article.

30. Slobogin, *supra* note 28, at n.232 (quoting 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.3(c), at 431 (2d ed. 1987)).

31. *Id.* at n.232.

32. *Id.*

33. *Id.*

reasonable suspicion underscores the authors' belief that the distinction we have debated for years is not particularly helpful in guiding police conduct, however unrealistically it may be fixed in courts' car stop jurisprudence, including the North Dakota Supreme Court.³⁴

This article explicates the authors' contention that police may stop drivers very easily. Part II describes the viewpoint of the courts, which created the legal status quo.³⁵ Part III shows the difficulty of translating court doctrine into meaningful guidance for police through a hypothetical training dialogue, including discussion of an expansive list of legal bases for stops.³⁶ In Part IV, the authors propose legislation to curb the court-created status quo of at-will stops by proposing protections for motorists suspected of noncriminal traffic offenses.³⁷ Alternatively, the authors propose legislation to make the current situation, at-will stops and intrusive investigations for all drivers, even those not suspected of any crime, a matter of clear legislative policy.³⁸

II. THE VIEWPOINT OF COURTS

This article began with a scenario of a driver being stopped on the basis of a police officer's belief that a parking permit hanging from the rear-view mirror obstructed the driver's view. North Dakota law provides:

A motor vehicle must be equipped with a windshield. An individual may not drive any motor vehicle with any sign, poster, or other non-transparent material upon the front windshield, side wings, or side or rear windows which obstructs the driver's clear view of the highway or any intersecting highway.³⁹

A reasonable reading of the statute would suggest that a hanging permit is not "upon" the windshield. Moreover, given the number of people who drive with such hanging permits—not to mention the ever popular air-fresheners, graduation tassels, religious medals, and other such

34. See *City of West Fargo v. Ross*, 2001 ND 163, 634 N.W.2d 527. In *Ross*, the court analyzed reasonable suspicion for a stop where an officer observed a suspended driver operating a vehicle. *Id.* ¶¶ 1-2, 634 N.W.2d at 528. The officer's observations clearly established probable cause for the stop and an arrest, yet the court specifically labeled the stop "investigatory." *Id.* ¶ 12, 634 N.W.2d at 529. Our speculation about why a court, like ours, would strain to discuss an investigatory stop when the stop was so clearly based on probable cause is discussed in Part II of this article.

35. See *infra* Part II.

36. See *infra* Part III.

37. See *infra* Part IV.

38. *Id.*

39. N.D. CENT. CODE § 39-21-39(1) (2009).

accoutrements⁴⁰—it seems few drivers believe that their clear view is obstructed.

Assume the driver in our hypothetical scenario is a state judge. Would the judge believe the stop was justified by section 39-21-39(1) of the North Dakota Century Code? It seems reasonable to assume she would deny she had anything “upon” her windshield. Moreover, even if the parking permit was “upon” the windshield, she would not likely believe the permit obstructed her clear view of the road. Even a driver as knowledgeable as a judge, however, would probably not be aware of the language of the statute at the time of the stop. Of course, in most similar stops, like that of the sober and otherwise law-abiding judge, the inconvenience is not terrible, and the incident might well be forgiven and forgotten.

Alas, the judicial driver’s story is not the way such issues generally get resolved in court. Instead, litigated stops most often involve either a drinking driver or the discovery of drugs.⁴¹ The courts’ theory of protection under the Fourth Amendment and the police practice of “anything goes” seemingly conflict. Professor LaFave’s treatise suggests numerous ways in which the Fourth Amendment should be interpreted to guide police conduct,⁴² but courts have generally not implemented his thoughtful recommendations regarding routine car stops when interpreting the law regarding traffic stops.⁴³ After many years of following, teaching, and practicing

40. See *Gordon v. State*, 901 So. 2d 399, 402 (Fla. Dist. Ct. App. 2005) (noting “[m]any motorists in the United States drive with objects hanging from the rear-view mirrors of their vehicles. The reported cases reflect the wide variety of such objects”). Typical items include: air fresheners, golf ball-sized spherical crystals, parking placard, medic alert card, dog tags, Mardi Gras-type beads, St. Christopher medal, graduation tassel, cross hanging on a chain, fuzzy dice, garter belt, Masonic emblem, and handcuffs. *Id.* at n.4.

41. *E.g.*, *State v. Westmiller*, 2007 ND 52, 730 N.W.2d 134 (addressing drunk driving); *In re K.H.*, 2006 ND 156, 718 N.W.2d 575 (involving drunk driving); *State v. Haibeck*, 2004 ND 163, 685 N.W.2d 512 (discussing drugs); *Hanson v. Director, North Dakota Dep’t of Transp.*, 2003 ND 175, 671 N.W.2d 780 (concerning drunk driving); *State v. Leher*, 2002 ND 171, 653 N.W.2d 56 (relating to actual physical control of a vehicle while under the influence of intoxicating liquor); *In re T.J.K.*, 1999 ND 152, 598 N.W.2d 781 (regarding drunk driving); *Kahl v. Director, North Dakota Dep’t of Transp.*, 1997 ND 147, 567 N.W.2d 197 (pertaining to drunk driving); *State v. Storbakken*, 552 N.W.2d 78 (N.D. 1996) (considering drunk driving); *Zimmerman v. North Dakota Dep’t of Transp. Director*, 543 N.W.2d 479 (N.D. 1996) (addressing drunk driving); *State v. Hawley*, 540 N.W.2d 390 (N.D. 1995) (concerning actual physical control); *City of Wahpeton v. Roles*, 524 N.W.2d 598 (N.D. 1994) (involving drunk driving); *State v. Stadsvold*, 456 N.W.2d 295 (N.D. 1990) (considering drunk driving). *But see State v. Fields*, 2003 ND 81, 662 N.W.2d 242 (involving drug offenses—conviction reversed).

42. See generally LAFAVE, *supra* note 18, § 9.3.

43. See, *e.g.*, *State v. Guscette*, 2004 ND 71, ¶ 34, 678 N.W.2d 126, 132 (Maring, J., dissenting) (criticizing the court’s determination of consent in the context of a traffic stop) (citing 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(a), at 49 (3d ed. & Supp. 2004)). Another author explains the courts’ status quo this way:

[M]ost of the recent cases can be justified only by a sense that police need to have every imaginable advantage in stopping automobiles. The current ad hoc, police-

traffic stop law, we have concluded it is our reliance on the courts to interpret and enforce constitutional doctrine regarding vehicle stops that is misplaced. Courts are particularly ill-suited to protect motorists' privacy because of the context of criminal cases on appeal. That context most often involves a drunk driver or drug offender,⁴⁴ and the main remedy—exclusion of evidence—favors criminals. Judicial intervention offers the accused a benefit—suppression of evidence found as a result of the illegality—and sometimes a total victory when it leads to a dismissal or acquittal for lack of other sufficient evidence. As a result, appellate courts are not directly asked to protect innocent drivers like our hypothetical judge, but instead do so indirectly and in a context that favors a guilty criminal defendant.⁴⁵

Relying on courts to develop rules of conduct for police has resulted in a jumble of confusing and often inconsistent rulings.⁴⁶ To call them “rules” is a stretch. If one thinks of basic legal process methodology, the “holding” of each case is to be interpreted based upon the particular facts in light of the issue decided and the reasoning offered. Interpreting a judicial opinion is heady stuff for law students, lawyers, and judges, but it is a poor way to guide police officers. One good example of confusion is the authors' debate about the difference between probable cause and reasonable suspicion as standards of certainty.⁴⁷ If lawyers are confused, how can we expect the police to understand?

always-win regime makes no attempt to attain an even balance between the competing concerns of law enforcement and officers' safety, on the one hand, and citizens' freedom from unwarranted interference in daily activities on the other.

Harris, *supra* note 13, at 557-58.

44. *See supra* note 41.

45. *See* Akhil Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1133-34 (1996). Amar says:

[T]he exclusionary rule is wrong, as a constitutional rule, precisely because it creates huge windfalls for guilty defendants but gives no direct remedy to the innocent woman wrongly searched. The guiltier you are, the more evidence the police find, the bigger the exclusionary rule windfall; but if the police know you are innocent, and just want to hassle you (because of your race, or politics, or whatever) the exclusionary rule offers exactly zero compensation or deterrence.

Id. The exceptional case involves a trial court suppression and an appeal by the prosecution. N.D. CENT. CODE § 29-28-07(5) (2007). Nonetheless, we believe the prosecution wins most of its appeals too because of court aversion to suppressing evidence relevant to guilt. *See, e.g., State v. Glaesman*, 545 N.W.2d 178, 179 (N.D. 1996) (reversing, upon prosecution's appeal, the district court's ruling that an officer lacked reasonable and articulable suspicion to stop defendant); *State v. Nelson*, 488 N.W.2d 600, 601 (N.D. 1992) (reversing the trial court's ruling that a stop was unreasonable on appeal by prosecution).

46. Thomas M. Lockney, *An Open Letter to the North Dakota Attorney General Concerning Search and Seizure Law and the Exclusionary Rule*, 62 N.D. L. REV. 17, 21 (1986).

47. *See supra* notes 22-27 and accompanying text; *see also infra* Part III.

The Fourth Amendment explicitly requires “probable cause” as the basis for warrants.⁴⁸ However, in 1968, the United States Supreme Court created the now well-known doctrine of investigative seizures, requiring something less than probable cause—so-called “reasonable suspicion” or “reasonable articulable suspicion” that the person stopped may be a criminal.⁴⁹ This expansion of Fourth Amendment law, permitting what are now called “*Terry* stops,” was controversial.⁵⁰ In creating the doctrine, the United States Supreme Court was evaluating suspicion of felony level criminal activity.

How does the reasonable suspicion analysis apply to traffic stops? Most traffic stops in North Dakota are based on offenses that were “decriminalized” by the legislature and converted into so-called “administrative offenses” in the 1970s.⁵¹ The law revision was a pragmatic recognition that the typical low-level traffic offenses did not merit the heavy artillery and battle procedures of traditional criminal law.⁵² The North Dakota Legislature established two classes of traffic offenses: (1) noncriminal administrative offenses, with simplified procedure and specified fines as the only sanction; and (2) criminal offenses, with traditional procedures and jail as a possible penalty.⁵³ Other legislation,

48. “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

49. See generally *Terry v. Ohio*, 392 U.S. 1 (1968) (permitting warrantless seizures when officers have reasonable suspicion of criminal activity).

50. See generally John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court’s Conference*, 72 ST. JOHN’S L. REV. 749 (1998) (outlining the Supreme Court’s internal controversy in stop-and-frisk cases); Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423 (2004) (outlining the development of the stop-and-frisk doctrine and its controversy); Russell L. Weaver, *Investigation and Discretion: The Terry Revolution at Forty (Almost)*, 109 PENN ST. L. REV. 1205 (2005) (noting *Terry v. Ohio* has profoundly influenced the law of warrantless seizures).

51. See Senate Bill No. 2033, 45th N.D. Legis. Sess. (ND. 1973); see also N.D. CENT. CODE § 39-06.1-02 (2009) (noting administrative traffic violations are deemed “noncriminal” offenses).

52. See *Summary of Senate Bill No. 2033 Before the S. Judiciary Committee*, 1973 45th N.D. Legis. Sess. 1 (N.D. 1973) [hereinafter *Summary of S.B. 2033*] (statement of Senator Barth, Sponsor, 35th District) (stating, “Our courts are overloaded now with traffic offenses, and this bill would alleviate the problem.”). Then-Bismarck Municipal Judge Harry Pearce explained:

On a weekend, we may have as many as 40 cases for Monday morning for minor traffic [sic] offenses As it stands now, we do the traffic violator a great injustice. This is the only way we can go and non-judicial punishment is the only way it will work.

Id.

53. *Id.* Senate Bill 2033 established section 39-06.1-02, a section of code entitled “Traffic violations noncriminal—Exceptions—Procedures.” The Senate Summary of the Bill explains:

Senate Bill No. 2033 provides a different method of disposition of most traffic offenses. The bill starts with the premise these traffic offenses are noncriminal, and then establishes a procedure for disposing of them which does not involve either the

also contained in North Dakota Century Code title 39, pertaining to motor vehicles, specifies the duties of “halting officers” making noncriminal traffic stops, and generally prohibits taking a traffic violator into custody.⁵⁴

The existing legislation does not specify the required level of certainty a police officer must have to make such a stop. Enter the courts. Professor LaFave has long advocated that power to stop for investigation based on reasonable suspicion should be limited under the Fourth Amendment to “serious” crimes.⁵⁵ This controversial issue⁵⁶ deserves serious consideration,⁵⁷ but our state supreme court, not alone in this regard,⁵⁸ has long and consistently ignored it.⁵⁹ Our court has not provided meaningful analysis.

The authors, after considering the jurisprudence of the North Dakota Supreme Court over many years, believe that effective limits, if any are possible, will not come from the judiciary. Instead, the legislature should consider the issues raised in this article and determine what balance between crime control and privacy protection it thinks appropriate for the

right to a jury trial or any possibility that the offender could be incarcerated Any person who is cited for a state or municipal traffic offense, other than the serious ones listed above [e.g. DWI, reckless driving, negligent homicide], has several [noncriminal procedural] alternatives available to him.

Summary of S.B. 2033, supra note 52.

54. § 39-07-07.

55. Professor LaFave states that:

An express limitation upon Terry stops on reasonable suspicion to those instances in which the suspected offense is one “involving danger of forcible injury to persons or of appropriation of or damage to property,” so that probable cause would be required for most traffic stops (except, e.g., driving under the influence), would be one significant step toward enhancing the Fourth Amendment rights of suspected traffic violators[.]

LAFAVE, *supra* note 18, § 9.3(a), at 366.

56. *Id.* Professor LaFave further states, “when it comes to traffic violations . . . , virtually anyone (even a Supreme Court Justice) can readily be stopped, suggesting a need for some additional limitation upon the authority to stop[.]” *Id.*

57. *See* Recent Cases, *Criminal Procedure—Fourth Amendment—Search and Seizure—Tenth Circuit Applies Reasonable Suspicion Standard to Stops for Minor Traffic Infractions—United States v. Callarman*, 273 F.3d 1284 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 1950 (2002), 116 HARV. L. REV. 697, 704 (2002). The controversy abounds:

Over a thirty-four-year period—from the year immediately preceding *Terry* up to *Callarman*—the law has moved from requiring probable cause for all seizures, to allowing temporary seizures on reasonable suspicion of potentially dangerous offenses, to, as exemplified in *Callarman*, allowing temporary seizures on reasonable suspicion of the most minor of offenses. It is conceivable that over the next thirty years courts could erode Fourth Amendment protections even more. Courts, scholars, and citizens should be aware that decisions such as *Callarman* push in that direction.

Id. (footnote omitted).

58. David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case for a Fourth Amendment Non-custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143, 1155-57 (2000).

59. *Id.* Professor Moran observes that “[p]erhaps no court has applied *Terry* to routine traffic stops as often as the North Dakota Supreme Court, which has done so on at least eight occasions since 1994.” *Id.* at 1156 n.87.

citizens of the state.⁶⁰ Although some suggest executive or administration regulation by the police themselves,⁶¹ we do not believe significant self-regulation to limit investigative power is likely in North Dakota.

Legislative action would also be superior to judicial action because reliance on court decisions, enforced by the exclusionary rule, assumes the police know the rules. But rules made by court decisions, although part of the common law inheritance from England, suffer from many defects that limit their effectiveness in guiding police conduct. Appellate court rules arise only by the accidental feature that they were raised by trial lawyers and appealed to the point of becoming a binding decision. That means such

60. See Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279 (2004). Writing about probable cause and the Fourth Amendment, Professor Bacigal begins: "More so than any other provision of the Bill of Rights, the Fourth Amendment has always been a deadly serious gamble. How much of our collective security are we willing to risk in order to promote individual freedom?" *Id.* at 279. We argue the courts are not necessarily the best odds makers for the gamble, especially in the context of noncriminal car stops. See generally 1 JOSHUA DRESSLER & ALAN MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, 34 (4th ed. 2006). Dressler and Michaels conclude with the "pragmatic point" that "[m]ost conflicts between the police and private individuals never reach the courts, much less can be resolved by the Supreme Court." *Id.* at 34-35. Thus, as a practical matter, the hard work must be done by legislators and executive officers. *Id.* See generally Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004) (illustrating a proposed preference for legislation over adjudication in the area of "new technologies" and Fourth Amendment protections). Although stopping vehicles is hardly new police technology, much of Professor Kerr's skepticism about relying on courts and his proposal for legislation supports the shift in emphasis we propose in this article. More generally, after assessing the role of courts, juries, legislatures, and executive agencies, Professor Bacigal earlier concluded that:

Historically, legislators and administrators have been minor players in search-and-seizure jurisprudence, but they have the potential to be the greatest heroes of the Fourth Amendment's morality tale because they are best situated to protect the people by regulating and controlling law enforcement officials—the actors who most directly impact on citizens' Fourth Amendment interests. Should legislators or administrators fail to live up to their potential, they can be educated, prodded, or removed from office by the people.

Ronald C. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 431 (1994).

61. See, e.g., Harris, *supra* note 13, at 576-79. In their path-breaking criminal procedure book, Professors Miller and Wright provide examples of police-adopted rules and policies that cabin some of the police practices we discuss. MARC LOUIS MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS (3d ed. 2007). We focus, however, on the legislature because we think legislative concern for drivers' privacy is more likely in North Dakota than police self-restriction. See *Arizona v. Gant*, 129 S. Ct. 1710, 1723-24 (2009) (prohibiting categorical searches of vehicles incident to arrest). In *Gant*, the court noted the concept of searching all vehicles incident to arrest of an occupant was "widely taught in police academies." *Id.* at 1722. Moreover, law enforcement officers extensively relied on this broad court-created rule for twenty-eight years. *Id.* The court noted, "[c]ountless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result." *Id.* at 1722-23. In *Gant*, the searching officer testified the search was conducted "[b]ecause the law says we can do it." *Id.* at 1715. In other words, we believe that North Dakota police will generally go as far in looking for criminals as the law allows, even while inconveniencing many more innocent drivers.

rules exist subject to the vagaries of case and issue selection by lawyers and judges. The rules also are written by judges for lawyers and other judges; while one can argue about whether the judiciary or the legislature writes clearer rules, court decisions are often unclear to many, including the police. Moreover, supposed neutrality is doubtful given that one would be hard pressed to point to a bright-line rule created by the United States Supreme Court that favors defendants.⁶² Statistically, most defendants are guilty, and that underlies some of the disparity between rulings for the prosecution and criminal defendants. The focus might shift if the question were rhetorically framed as “crime control versus innocent citizens’ privacy,” but even with that change, there are many reasons judges are less suited to strike the balance. If judges rule in the defendant’s favor, they make it easier for an accused criminal to get an advantage, even a possible victory. North Dakota judges are elected, and it would be unrealistic to think they are unaware of the reality that decisions that favor the prosecution seldom receive adverse publicity. A decision in favor of a criminal’s Fourth Amendment claim, however, may be criticized by the media but is seldom portrayed as a “victory for everyone’s privacy.”

A prime example of a court straining to rule against a drunk driver is *City of Bismarck v. Uhden*,⁶³ the North Dakota Supreme Court decision that solidified the status of reasonable suspicion as an adequate basis for a minor traffic offense stop, which was subsequently applied even to noncriminal or “administrative” offenses.⁶⁴ In 1969, the year after *Terry* was decided, the legislature enacted North Dakota Century Code section 29-29-21, which authorized investigative stops based on reasonable suspicion for a reasonably short list of crimes.⁶⁵ The statute specifically limited the new *Terry* authority to make reasonable suspicion stops to investigation of felonies, misdemeanors involving weapons, and possession of controlled drugs.⁶⁶ Apparently nobody noticed the statute for years, while the North

62. LaFave wryly observes that the United States Supreme Court has “‘consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry’ (except, of course, when the bright line favors the prosecution rather than the defendant).” LAFAVE, *supra* note 18, § 9.3(g), at 405 (quoting *Ohio v. Robinette*, 519 U.S. 33, 34 (1996)). For a general introductory discussion of bright-line rules versus case-by-case adjudication, see DRESSLER & MICHAELS, *supra* note 60, at 35.

63. 513 N.W.2d 373 (N.D. 1994).

64. See *State v. Zimmerman*, 516 N.W.2d 638, 640 (N.D. 1994) (applying the *Uhden* analysis to an “investigative stop” of a vehicle, and upholding an investigative stop of a vehicle that drove on the roadway shoulder and crossed the fog line four times).

65. The statute authorizes seizures for: (1) any felony; (2) a misdemeanor relating to the possession of a concealed or dangerous weapon or weapons; (3) burglary or unlawful entry; and (4) a violation of any provision relating to possession of marijuana or of narcotic, hallucinogenic, depressant, or stimulant drugs. N.D. CENT. CODE § 29-29-21 (2009).

66. *Id.*

Dakota Supreme Court, without mentioning the statute, repeatedly allowed stops based on reasonable suspicion for offenses not listed in the statute.⁶⁷ When the statute was finally argued to the court in *City of Bismarck v. Uhden*, the court refused to apply the statutory limitation.⁶⁸ *Uhden* involved a roadblock stop,⁶⁹ so why reasonable suspicion was even at issue is not clear. Nonetheless, the court read the apparently clear legislative limits as no limits at all, but rather only legislative examples of crimes for which investigative stops are permitted.⁷⁰ *Uhden* and subsequent cases show that our court generally will not limit the police in any significant way regarding bases for reasonable suspicion stops⁷¹—even for parking violations.⁷²

Accordingly, assume that instead of being sober, our introductory hypothetical driver was found to be drunk, convicted of drunk driving, and on appeal contested the parking permit-obstructed vision stop. It is fair to

67. *E.g.*, *State v. Smith*, 452 N.W.2d 86, 88-90 (N.D. 1990) (holding the presence of a beer bottle taken off the top of a car by a person standing next to the car created reasonable suspicion of an open-bottle violation); *State v. Beyer*, 441 N.W.2d 919, 922-23 (N.D. 1989) (concluding a police officer had a reasonable and articulable suspicion warranting an investigatory stop of a vehicle when it was “making excessive or unusual noise in violation of the law”); *State v. Goeman*, 431 N.W.2d 290, 291-92 (N.D. 1988) (holding a stop was justified where the car came to an abrupt halt at an intersection and the car later weaved within its own lane); *Neset v. North Dakota Highway Comm’r*, 388 N.W.2d 860, 862-63 (N.D. 1986) (concluding a stop was justified where the driver weaved “from side to side in its own lane of travel and . . . failed to signal for a right-hand turn”); *State v. Dorendorf*, 359 N.W.2d 115, 117 (N.D. 1984) (stating a vehicle’s weaving within its own lane may be enough to justify the stop of that vehicle).

68. *City of Bismarck v. Uhden*, 513 N.W.2d 373, 376 (N.D. 1994).

69. *Id.* at 374.

70. *Id.* at 376.

71. *State v. Loh*, 2000 ND 188, ¶ 14, 618 N.W.2d 477, 480 (concluding the officer had not only reasonable suspicion, but also probable cause for a traffic stop when he observed a vehicle weaving and crossing lane lines); *Kappel v. Director, N.D. Dep’t of Transp.*, 1999 ND 213, ¶ 12, 602 N.W.2d 718, 721 (holding police had reasonable suspicion to make an investigative stop based on observing a motorcycle pause longer than normal at a stop sign and then watching it weave within its own lane); *Johnson v. North Dakota Dep’t of Transp.*, 530 N.W.2d 359, 361 (N.D. 1995) (declining to hold unreasonable, as a matter of law, an officer following a suspect driver for nearly five miles before stopping the vehicle); *State v. Hawley*, 540 N.W.2d 390 (N.D. 1995) (permitting an investigative seizure for a possible parking violation resulting from a car parked on an off-ramp); *Wolf v. North Dakota Dep’t of Transp.*, 523 N.W.2d 545, 547 (N.D. 1994) (declining to hold unreasonable, as a matter of law, an officer following a suspect driver for nearly five miles before stopping the vehicle). *But see* *Johnson v. Sprynczynatyk*, 2006 ND 137, ¶ 15, 717 N.W.2d 586, 590 (traveling eight to ten miles per hour in a twenty-five mile per hour zone does not constitute reasonable and articulable suspicion to support a stop); *Salter v. N.D. Dep’t of Transp.*, 505 N.W.2d 111, 114 (N.D. 1993) (holding police did not have reasonable and articulable suspicion to stop a car traveling 30 to 35 miles per hour in a 50 mile per hour zone even though the car was weaving slightly within its own lane); *State v. Brown*, 509 N.W.2d 69, 71 (N.D. 1993) (holding evidence that a driver is traveling at a slower than usual speed does not create reasonable and articulable suspicion).

72. *See* *State v. Hawley*, 540 N.W.2d 390, 393 (N.D. 1995) (holding reasonable suspicion justified investigation of illegal parking); *see also* *State v. Leher*, 2002 ND 171, ¶ 1, 653 N.W.2d 56, 58 (stating if the defendant “was parked on an elevated structure,” committing a parking violation, “then the arresting officer had reasonable and *articulable suspicion of criminal activity*”) (emphasis added).

assume that the North Dakota Supreme Court would be unlikely to suppress evidence and let the guilty criminal go free. Our point is that an abstract and plain reading of either the reasonable suspicion stop statute or the windshield obstruction statute would yield a result that limits police authority to serious crimes and serious windshield obstructions. However, expecting an appellate court faced with a guilty defendant asking for a ruling that will restrict the activity of police in all cases to protect the many citizens not guilty of crime is unrealistic. Thus, in Part IV, we propose legislation to provide modest protection to North Dakota motorists.⁷³ But first, in Part III, we consider the status quo as it affects the police.

III. VEHICLE STOPS FROM THE VIEWPOINT OF THE POLICE

The stops with which we are concerned here are routinely held to be seizures under the Fourth Amendment. Thus, they require either probable cause or, as our court held in *Uhden*, merely reasonable suspicion. But what is the difference between the two standards? One can read countless court opinions, legal treatises, and journal articles, and still find it difficult to distinguish probable cause from reasonable suspicion.⁷⁴ As discussed above, the authors have a longstanding disagreement about the distinction.⁷⁵

73. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 832 (2006). Stuntz agrees that relying on judicial regulation of police via constitutional law is the wrong approach, and goes much further than our modest legislative proposal:

For these reasons [protection that favors the rich and the evils and limits of the exclusionary rule], the best thing to do with the massive body of Fourth Amendment privacy regulation, together with the equally massive body of law on the scope and limits of the exclusionary rule, is to wipe it off the books. Let states experiment with different regulatory regimes. Some will protect privacy more than others, just as some offer more environmental protection or better public schools than others. Voters will decide what tradeoffs they prefer.

Id. A cynic might suggest that *Uhden* shows the futility of legislation in the face of a strained interpretation by a result-oriented court. We hope our proposed legislation will send a clearer direction to the police and courts and will not be circumvented by them.

74. To distinguish the standards, Professor LaFave's five volume treatise on search and seizure is a good place to begin. LaFave devotes over 400 pages to Chapter 3, "Probable Cause," 145 pages to § 9.5, "Grounds for a Permissible Stop," and another 8 pages to § 9.3(a) on "Routine Traffic Stops Distinguished." See generally LAFAVE, *supra* note 18. Two of the best articles discussing the levels of certainty required by probable cause and reasonable suspicion are: C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293 (1982), and Bacigal, *supra* note 60. McCauliff surveyed 166 federal judges who specified, with wide variation, an average level of certainty of 44.52% for probable cause (ranging from 10% to 90%). McCauliff, *supra* at 1327-28. One hundred sixty-four judges specified an average level of certainty of 29.59% for reasonable suspicion—ranging from 0% to 100%—showing that some federal judges had no clue, as further evidenced by one judge responding to her survey question about reasonable suspicion with, "never heard of that one." *Id.* McCauliff's survey also regarded the terminology "reasonable cause," and, even though the United States Supreme Court has equated it with probable cause, the surveyed judges' average ascribed percentage of certainty was 40.73%. *Id.* at 1327.

75. See *infra* Part I.

The important point, for the purpose of this article and the reality on the road, is what the police make of the distinction. A police officer's decision in the field is "guided" by unclear concepts. So, to avoid an unduly long rehash of all the material available to lawyers and judges, we imagine a realistic exchange between police officers and a lawyer⁷⁶ trying to help the officer understand the relevant considerations in North Dakota.

Assume an in-service training session with a group of officers who want to better understand the required bases for traffic stops. The following dialogue shows in a practical way that the police, if they understand the law, will be able to stop virtually any driver.⁷⁷ In addition, by lowering the required basis for the stop from probable cause to the reasonable suspicion standard, more people, most of them innocent of any crime, will be stopped and subjected to investigation for crimes absent any reasonable suspicion.

Trainer

As you already know from the academy and your previous training, probable cause is required to make an arrest. A lesser standard, called reasonable suspicion,⁷⁸ is enough to make a so-called *Terry* investigative stop.

The difficulty of quantifying evidentiary standards like reasonable suspicion and probable cause is quite evident. Probable cause is "an exceedingly difficult concept to objectify."⁷⁹ The same can be said for the reasonable suspicion standard. Indeed, part of the problem is that the courts

76. The authors have conducted numerous training seminars for law enforcement officers. The dialogue we hypothesize between a lawyer and police officer is intended to illustrate the difficulty of explaining legal concepts to the police in a clear and objective way—and, of course, to demonstrate an exhaustive list of violations providing bases for stops.

77. See Harris, *supra* note 13, at 574-76 (providing a pithy description of how a legally astute officer might characterize the power afforded by the courts). His hypothetical officer concludes:

So, if you're out there in a car and we think you're dirty, forget it. If we want you, we'll get you, and we'll find whatever you've got, one way or another. It's like they used to say about the Mounties—we always get our man. And the best part is, we always follow the law while we do it. That's no problem at all.

Id. at 576.

78. The term "reasonable suspicion" is also referred to as "reasonable and articulable suspicion" or "particularized and objective basis." See, e.g., United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (en banc) (stating "[a] traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring"); see also United States v. Cortez, 449 U.S. 411, 417-18 (1981) (defining reasonable suspicion as "a particularized and objective basis for suspecting the particular person stopped of criminal activity"). Many courts apply this low level of proof to "routine traffic stops." See, e.g., United States v. Holt, 264 F.3d 1215, 1220 (10th Cir. 2001) (en banc) ("We have consistently applied the principles of *Terry v. Ohio* to routine traffic stops.") (citation omitted).

79. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.2(a), at 22 (3d ed. 1996) (quoting Joseph G. Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317, 317 (1971)).

consistently refuse to quantify the standards. Without quantification, a standard is hard to “objectify.”

Instead, we get statements like this from the United States Supreme Court: Probable cause exists for the police when “the facts and circumstances within their knowledge and of which they have reasonably trustworthy information [are] sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.”⁸⁰ According to *Terry*, reasonable suspicion exists when an officer has “specific and articulable facts” leading to a reasonable belief that “criminal activity is afoot.”⁸¹ The United States Supreme Court has made it clear that reasonable suspicion requires less certainty than probable cause that the person stopped is an offender. However, because the Supreme Court refuses to quantify both standards, how much less is neither quantified nor clear.

Our own North Dakota Supreme Court is no more helpful. It often quotes from United States Supreme Court decisions, like *Illinois v. Gates*.⁸² In *Kappel v. Director, North Dakota Department of Transportation*,⁸³ the North Dakota Supreme Court said:

[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens’ demands In making a determination of probable cause the relevant inquiry is not whether particular conduct is “innocent” or “guilty,” but the degree of suspicion that attaches to particular types of noncriminal acts.⁸⁴

The court went on to explain, “This principle applies equally well to the reasonable suspicion standard.”⁸⁵ In *State v. Washington*,⁸⁶ the North Dakota Supreme Court observed that: “[I]nvestigative stops of automobiles

80. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). *See also* *Brinegar v. United States*, 338 U.S. 160, 174-76 (1949).

81. *Terry v. Ohio*, 392 U.S. 1, 21, 30 (1968). “A piece of trivia: The Court did not use the term ‘reasonable suspicion’ in *Terry*” DRESSLER & MICHAELS, *supra* note 60, at 285 n.29. Nonetheless, we, as do Dressler, Michaels, and most others, refer to the “‘reasonable suspicion’ standard applied in *Terry*”. *Id.* at 285.

82. 462 U.S. 213 (1983).

83. 1999 ND 213, ¶ 9, 602 N.W.2d 718, 720-21 (quoting *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983)).

84. *Id.*

85. *Kappel*, ¶ 9, 602 N.W.2d at 721 (citing *United States v. Sokolow*, 490 U.S. 1, 10 (1989)).

86. 2007 ND 138, ¶ 11, 737 N.W.2d 382, 386-87 (citations omitted).

and their occupants for suspected violations of law may be upheld if an officer has at least a reasonable suspicion that the motorist has violated the law or probable cause to believe the motorist has done so.”⁸⁷

Reasonable suspicion requires more than a mere hunch. Reasonable suspicion for a stop exists when a reasonable person in the officer’s position would be justified by some objective manifestation to suspect potential unlawful activity. The reasonable suspicion standard is objective and does not hinge upon the subjective beliefs or motivations of the arresting officer. In order to determine whether an investigative stop is valid, we consider the totality of the circumstances and examine the information known to the officer at the time of the stop. The reasonable suspicion standard does not require an officer to rule out every possible innocent excuse for the behavior in question before stopping a vehicle for investigation.⁸⁸

As you can see, then, the language of the courts is not particularly clear or helpful. In fact, the language is of little or no help in distinguishing probable cause from reasonable suspicion.

Officer

So the courts tell us that we have probable cause when we have information sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. We have reasonable suspicion when we are reasonably justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity. How are they different? They both seem to boil down to “being reasonable.” Are there levels of reasonableness?

Trainer

Let us try it this way: to make better sense of various standards, we could think of levels of proof or certainty as a percentage of likelihood of being correct. In other words, we can create a relative continuum of certainty. An omniscient god would be one hundred percent certain of everything. In criminal trials, the defendant must be found guilty by jurors who are certain of guilt beyond a reasonable doubt, which is the highest standard required in our legal system. Courts also refuse to quantify this standard, and have problems articulating and instructing juries on its meaning. For purposes of comparison, assume that proof beyond a reasonable doubt requires a jury to be at least ninety percent certain that the defendant

87. *Washington*, 2007 ND 138, ¶ 11, 737 N.W.2d at 387.

88. *Id.* (citations omitted) (quoting *State v. Westmiller*, 2007 ND 52, 730 N.W.2d 134).

is guilty. In civil cases, the plaintiff must prove the case by a preponderance of evidence. That means the evidence favors the plaintiff or, quantitatively, that it is at least more likely than not—more than fifty percent—that the case is proven. Preponderance of the evidence is the only level of certainty that is to some extent quantified by the courts, albeit primarily by the metaphor of the scales of justice tipping slightly in favor of a plaintiff.

Probable cause is most often held to be less than the fifty percent certainty of preponderance, although the United States Supreme Court has never held so directly.⁸⁹ Let us assume, for purposes of comparison, that probable cause requires a level of certainty of at least forty percent.⁹⁰ Where then does reasonable suspicion fall as a level of certainty? Reasonable suspicion is said to be less than probable cause but more than a mere hunch, although again the courts avoid quantification. So, to flesh out our continuum, assume a mere hunch is at best twenty percent certainty. A mere hunch of rain tomorrow therefore means rain is at best twenty percent likely. Where then does reasonable suspicion fit? In our arbitrary assignment of relative levels of certainty, it would be less than 40%, but more than 20% certainty—something around, let us say, 30%.⁹¹

Again, the courts refuse to speak in such quantitative terms. Therefore, the best we can say is that reasonable suspicion is more than a mere hunch, but less than probable cause. Or, as the North Dakota Supreme Court has expressed it, “The reasonable suspicion standard is less stringent than probable cause.”⁹²

Although the language of the courts does not help much, our continuum of certainty helps us visualize the differences. Beyond that, nothing but examples from published case opinions can help. But even there, reasonable judges, lawyers, police officers, and even law professors, often disagree.⁹³

Officer

Well, what is required for a car stop for a traffic offense anyway: probable cause or reasonable suspicion?

89. LAFAVE, *supra* note 18, § 3.2(e), at 69.

90. See McCauliff, *supra* note 74, at 1332. Federal judges surveyed on their understanding of the minimal level of certainty required to meet the probable cause standard averaged approximately forty percent as the level of certainty. *Id.*

91. *Id.* (finding federal judges, on average, estimate the level of certainty for reasonable suspicion as approximately thirty percent).

92. State v. Corum, 2003 ND 89, ¶ 10, 663 N.W.2d 151, 155.

93. See *supra* notes 27-30 and accompanying text (describing the authors' and the LaFave-Slobogin disagreement).

Trainer

Most of the time, when you observe a traffic offender, the offense is being committed in your sight, and when you stop the offending car and driver, you have what you need for both a stop and a conviction. Let's take running a stop sign for example. You see the person go through an intersection, past a stop sign, without coming close to stopping. If the offender asks for a hearing, you will basically describe what you saw and the basis for your stop. If the judge is convinced that it is more likely than not that you saw the defendant go through the stop sign, you have proven the offense by the required preponderance of evidence,⁹⁴ which is a standard greater than probable cause and reasonable suspicion. So, your stop was valid under either standard. For any stop of this sort, you have at least probable cause and need not worry about the lower standard of reasonable suspicion.

The United States Supreme Court has never directly held that investigative stops based on reasonable suspicion are permitted for minor crimes, much less noncriminal traffic offenses.⁹⁵ But the North Dakota Supreme Court has allowed reasonable suspicion stops for many years, even for noncriminal traffic offenses. So, until the North Dakota Supreme Court changes its mind, or unless a federal court with jurisdiction over North Dakota determines investigative stops are not permitted for minor traffic offenses, as some experts argue they should,⁹⁶ you may stop anybody in North Dakota based on reasonable suspicion of even the most trivial traffic violation.

Officer

Are there any statutes that provide limits on traffic stops?

Trainer

Even though minimal certainty is required for a stop, there are legislative limits restricting police authority for some traffic violations. The clearest example is a statute that prohibits custodial arrests for most noncriminal traffic offenses.⁹⁷ Another example is North Dakota's seatbelt

94. See N.D. CENT. CODE § 39-06.1-03(6) (2009) (providing the government "must prove the commission of a charged violation at the hearing . . . by a fair preponderance of the evidence").

95. LAFAVE, *supra* note 18, § 9.3(a), at 361.

96. *Id.*; see also Moran, *supra* note 58, at 1155-57; Lockney, *supra* note 21, at 974-83.

97. § 39-07-07. See also Thomas M. Lockney & Mark Friese, *Atwater in North Dakota: Soccer Moms Beware, Sometimes*, 78 N.D. L. REV. 467, 467-78 (2002) (discussing exceptions to the general rule prohibiting custodial arrests for noncriminal traffic offenses).

statute, which may prohibit stops based solely on a seatbelt violation.⁹⁸ But whether the statute prohibits officers from stopping unbelted motorists is questionable.⁹⁹ There are other limits as well. For example, it is unlawful to drive in North Dakota without a driver's license in possession.¹⁰⁰ But someone cited for this violation can make the ticket go away by producing his license at the police station or in court.¹⁰¹ These and other provisions¹⁰² are perhaps legislative indications that some offenses are probably not important enough to justify normal criminal—or even normal traffic citation—procedures.

Officer

Why do we need reasonable suspicion if most of the time we will see an offense and have probable cause?

Trainer

Most traffic stops do indeed involve the observation of an offense: running a red light or stop sign, speeding, and the like. There are, however, numerous circumstances where an officer may believe a violation is occurring, for which further investigation will confirm or dispel the officer's suspicion. It is more likely that stops for this type of violation will be evaluated under the reasonable suspicion standard.

98. See § 39-21-41.5 (providing, “A peace officer may not issue a citation for a violation of section 39-21-41.4 [the seatbelt provision] unless the officer lawfully stopped or detained the driver of the motor vehicle for another violation”).

99. The controlling language of the secondary enforcement statute states “an officer may not issue a citation” for a seatbelt violation unless the driver was “stopped or detained . . . for another violation.” *Id.* The statute does not say “an officer may not stop a driver for violating the seatbelt provision.” Here, again, semantics come into play. Imagine the enterprising officer who stops a violator for not wearing a seatbelt, while never intending to issue a citation—because the statute forbids issuance of a citation. Like many of these stories, the officer sees contraband in plain view. The officer issues a warning ticket, not a citation, for the seatbelt offense and arrests the driver for possession of contraband. Is the contraband “fruit of a poisonous stop,” or does the enterprising prosecutor alert the court that the statute says “no ticket” and not “no stop?” This case has not presented itself in a reported opinion, but experience suggests it has occurred. Moreover, consistent with the rationale of *Virginia v. Moore*, 553 U.S. 164 (2008), it is quite possible that the remedy would not be exclusion of the evidence. In *Moore*, the United States Supreme Court held evidence is admissible under the Fourth Amendment even though the evidence is obtained in a search incident to an arrest that, according to state statute, was unlawful. *Id.* at 178.

100. § 39-06-16.

101. *Id.*

102. § 39-08-20(2) (providing a driver who cannot produce satisfactory proof of having liability insurance may be charged with operating a vehicle without insurance if the driver fails “to submit satisfactory evidence of the policy to the officer or the officer’s agency within twenty days from the date of the request”).

Officer

But if in most cases there is already probable cause, why would the North Dakota Supreme Court allow and apply a lower standard of reasonable suspicion?

Trainer

That's a good question, and I'm not sure I know the answer. Requiring probable cause would not be extraordinary, and likely would not greatly reduce the number of traffic stops because, as you note, in most cases the officer has probable cause. Courts that allow reasonable suspicion as the basis for routine traffic stops seem reluctant to limit, in any significant way, the power of the police. Why? Because, when a court is asked to create limits, the context is almost invariably a guilty criminal.¹⁰³ A defense victory results in a new trial or, if the evidence suppressed is essential to a conviction, a dismissal and total victory for the guilty criminal. Is it any wonder then that judges, especially elected judges, many with prosecutorial backgrounds, strain to rule in favor of the prosecution—"the good guys"—and against the convicted criminal—a "bad guy?"

Translation for you, the police: "We want you to catch as many criminals as possible. You do not need probable cause, an observed crime, or even a noncriminal offense. If you even suspect an offense, however trivial or minor—stop the car. Maybe you will get lucky and find a drunk driver or drug courier."

Officer

If we properly stop a car, do the courts limit what we can do during the stop?

Trainer

Although one legal scholar has remarked that after a traffic stop "things get ugly," from your perspective in trying to catch criminals, things actually get easy.¹⁰⁴ Drunk drivers will provide you the odor of alcohol, slurred

103. See *supra* note 45 and accompanying text.

104. LAFAVE, *supra* note 18, § 9.3(a), at 358. Professor LaFave notes:

In recent years more Fourth Amendment battles have been fought about police activities incident to a stopping for a traffic infraction, what the courts call a "routine traffic stop," than in any other context. There is a reason why this is so, and it is *not* that police have taken an intense interest in such matters as burned-out taillights and unsignaled lane changes per se. Rather, the renewed interest of the police in traffic enforcement is attributable to a federally-sponsored initiative related to the "war on drugs." Both in urban areas and on the interstates, police are on the watch for "suspicious" travelers, and when a modicum of supposedly suspicious circumstances are observed—or, perhaps, even on a hunch or pursuant to such arbitrary considerations as the color of the driver's skin—it is only a matter of time before some technical or trivial offense produces the necessary excuse for a traffic stop. Perhaps because the offenses are often so insignificant, the driver may be told at the outset that he will merely be given a warning. But then things get ugly. As part of the "routine," a

speech, and glassy, bloodshot eyes. Sometimes you will detect the odor of drugs, or maybe even see them in plain view. You may run a drug-sniffing dog around the car and ask for permission to search, if you do not unduly extend the time of the stop.¹⁰⁵ If you have reasonable suspicion to believe you may be in danger, you may do a protective search of the car. You may remove the driver and passengers for no reason. You may order the driver or passengers to be seated in the back of your patrol car. You can check driver's license and registration status, insurance information, and criminal history information. You can question the driver and passengers about their travels. In short, you have very broad authority to investigate not only the violation, but possible criminal activity.

And, of course, if you develop probable cause to believe the car contains contraband, you may search the car—including locked containers inside—without a warrant, under the automobile exception.¹⁰⁶ If you develop probable cause to arrest the driver or a passenger, you may search the passenger compartment under the search incident to arrest doctrine.¹⁰⁷

The actual or subjective reason a particular motorist is subjected to additional investigation—like the decision to stop—is generally unquestioned by the courts.¹⁰⁸ Ambiguous factors like nervousness, lack of details regarding travel plans, use of a rental vehicle, inability to promptly locate a vehicle registration, and others can be used to justify a longer seizure, search of the passengers, or a search of the vehicle itself. Someone engaged in criminal behavior might well be nervous. The typical motorist—stopped by an armed and uniformed police officer, and subjected to a series of

criminal history and outstanding warrants records check is run on the driver and passengers; they are closely questioned about their identities, the reason for their travels, their intended destinations, and the like, and may be quizzed as to whether they have drugs on their persons or in the vehicle. The driver may be induced to submit to a full search of the vehicle, or a drug-sniffing dog may appear on the scene and “do his thing.”

Id.

105. See *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (holding the practice of using dogs to sniff the exterior of a car does not constitute a search, subject to the Fourth Amendment). *But see State v. Fields*, 2003 ND 81, ¶ 21, 662 N.W.2d 242, 249 (holding a continued seizure occurred while awaiting the arrival of a drug-sniffing dog, in violation of the Fourth Amendment).

106. See *California v. Acevedo*, 500 U.S. 565, 580 (1991) (expanding the scope of warrantless automobile searches to locked containers within the vehicle); *Carroll v. United States*, 267 U.S. 132, 153, 155 (1925) (permitting warrantless searches of cars upon probable cause to believe the cars contain contraband).

107. See *New York v. Belton*, 453 U.S. 454, 457-61 (1981) (authorizing warrantless searches of cars incident to the lawful arrest of an occupant); see also *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009) (holding the search of the defendant's vehicle while he was handcuffed in a patrol car was unreasonable); *Thornton v. United States*, 541 U.S. 615, 617 (2004) (applying the *Belton* rule even if the officer does not make contact until after the arrested person has left the vehicle).

108. *Whren v. United States*, 517 U.S. 806, 813 (1996); *State v. Bartelson*, 2005 ND 172, ¶¶ 15-16, 704 N.W.2d 824, 829.

questions unrelated to the claimed violation—is undoubtedly equally nervous.¹⁰⁹ You can use these factors to legally prolong the detention and sometimes to search the vehicle and its occupants.

But, you should exercise caution in moving the motorist from the scene,¹¹⁰ or from extending the seizure too long. The courts have said that an investigative detention must be “reasonably related in scope to the circumstances which justified the interference in the first place.”¹¹¹ So, if you stop a motorist for a traffic violation, courts say it is permissible for you to: (1) obtain the driver’s license and registration; (2) have the driver step out of the vehicle; (3) require the driver wait in the patrol car; (4) conduct computer inquiries to determine the validity of the license and registration or to investigate the driver’s criminal history to determine if the driver has outstanding warrants; and (5) inquire into the motorist’s destination and purpose.¹¹²

If the seizure is extended too long, a court may conclude an officer has made a *de facto* arrest.¹¹³ Although the courts have not recognized a bright-line rule to establish the existence of a *de facto* arrest, the United States Supreme Court has held a detention of twenty minutes or less is likely reasonable.¹¹⁴ Moving a traffic violator from the scene of the stop to further investigate whether the driver is impaired is also problematic.¹¹⁵ For example, the North Dakota Supreme Court held it was unreasonable to take a driver from the scene of a traffic stop to the police department to further investigate whether the driver was impaired.¹¹⁶ The court noted that taking the driver from the scene of the stop is a much greater personal intrusion than conducting field tests at the scene.¹¹⁷

Officer

So the reduced standard allows us to stop more cars with less certainty?

109. *See, e.g.*, *United States v. Beck*, 140 F.3d 1129, 1139 (8th Cir. 1998) (citing *United States v. Wood*, 106 F.3d 942, 947 (10th Cir. 1997)) (noting it is not uncommon for most citizens, whether innocent or guilty, to exhibit signs of nervousness when confronted by law enforcement officers).

110. *Gant*, 129 S. Ct. at 1719 (holding the search of the defendant’s vehicle while he was handcuffed in a patrol car was unreasonable); *see also City of Devils Lake v. Grove*, 2008 ND 155, ¶ 1, 755 N.W.2d 485 (holding an officer’s transport of a motorist away from the scene of a stop constituted an impermissible *de facto* arrest).

111. *State v. Fields*, 2003 ND 81, ¶ 8, 662 N.W.2d 242, 245 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

112. *Fields*, ¶ 8, 662 N.W.2d at 245 (citing *United States v. Jones*, 269 F.3d 919, 924 (8th Cir. 2001)).

113. *Grove*, 2008 ND 155, ¶ 1, 755 N.W.2d at 488.

114. *United States v. Sharpe*, 470 U.S. 675, 685 (1985).

115. *See Grove*, 2008 ND 155, ¶ 1, 755 N.W.2d at 488.

116. *Id.*

117. *Id.* ¶ 27, 755 N.W.2d at 494.

Trainer

As we discussed earlier, the court's language defining probable cause and reasonable suspicion is not very helpful. The courts refuse to quantify either standard. But, the courts frequently remind us that probable cause is a "more exacting" standard than reasonable suspicion.¹¹⁸ Even without a quantified meaning for both standards, the message is clear: you can stop more cars under the reasonable suspicion standard. And, as you know from your experience, the more cars you stop, the more criminals you will find. Occasionally, the courts will find that your suspicion was only "a mere hunch."¹¹⁹ But, if you believe the stop is reasonable, go ahead and stop. We can most likely justify the stop in court.¹²⁰ Moreover, most people will not be guilty of a crime, and will not have the opportunity to contest the stop. Of those who are, many will not hire lawyers, so the basis of the stop will never be litigated. For those who hire lawyers, many will be offered and will accept plea bargains, so we will get some kind of conviction. For those litigated, judges will bend over backwards to try to find a way to make your stop legal, and if they cannot manage that, they will often find an exception to the exclusionary rule. If none of those things work, well, you still got a criminal off the street for awhile. If the evidence is suppressed, or a conviction is reversed, it is a small price to pay for the deterrent value of stopping as many people as possible. The more people you stop, the more criminals we find. The innocent people stopped will be happy they only received a warning or an inexpensive fine.

Officer

Can you provide a few examples from the traffic code of stops based on probable cause or reasonable suspicion?

118. *State v. Smith*, 2005 ND 21, ¶ 16, 691 N.W.2d 203, 209 (quoting *City of Minot v. Nelson*, 462 N.W.2d 460, 462 (N.D. 1990)).

119. *See State v. Brown*, 509 N.W.2d 69, 71 (N.D. 1993) (stating a seizure "requires less than probable cause but more than a mere hunch").

120. In 1978, coauthor Lockney, while on sabbatical from the University of North Dakota, worked in the University of Texas School of Law's Criminal Defense Clinic. Lockney remembers hearing the Clinic Director, Professor Robert Dawson, explain to a criminal procedure class that a realistic prosecutor, aware of the complexities of search and seizure law, might reasonably consider advising police to "just do what seems reasonable, and let us worry about the complex rules of search and seizure later. We'll win most of them, and the few we lose we'll just chalk up to the cost of doing law enforcement business." Professor Bacigal more recently made a similar observation:

The inability to formulate clear rules or precise probability levels governing probable cause has led the Court to adopt one over-arching rule for the police—just use your common sense and act reasonably. In an imperfect world where correct answers are uncertain, a "pragmatic" Court recognizes that it must muddle through to the best of its ability, and that it can hardly ask more from the police.

Bacigal, *supra* note 60, at 318 (footnotes omitted).

Trainer

I can give you more than a few. Indeed, I can give you so many that, if you are reasonably observant, you should be able to stop anybody you want based either on probable cause or reasonable suspicion. Assume probable cause exists when an officer has observed a violation of the traffic code. Assume reasonable suspicion, on the other hand, arises when the officer believes a traffic violation may have occurred, but further investigation is required.¹²¹ I will show you how incredibly easy it is to stop somebody, precisely because of the myriad of reasons the law gives you. If you cannot remember all the legal reasons I describe, I will give you a list you can carry with you in your squad car.

Let us start with examples that constitute probable cause. As any experienced officer knows, observing a speeding motorist—even for only a mile or two over the limit—is completely routine.¹²² You can safely stop any motorist who—by radar or observation—appears to be exceeding the posted limit, or who is driving so slow as to impede traffic.¹²³ Likewise, if you observe a motorist violate a traffic-control-signal,¹²⁴ you may lawfully stop the driver. Even if a motorist rushes to beat the light, it is likely that you may lawfully stop the motorist for passing through a “pink” signal.¹²⁵ North Dakota law requires vehicles proceeding at “less than normal speed of traffic at the time and place and under the conditions then existing” to drive in the right-hand lane except when passing or preparing for a left hand

121. *See supra* notes 19-34 and accompanying text. The authors agree that most traffic violations, including those that require “additional investigation,” provide probable cause to stop. Because courts refer to “investigative stops,” some form of distinction has to be drawn. Accordingly, the authors have attempted to draw a distinction in traffic violations by analyzing those violations within a typical traffic code in which an officer stops to investigate the existence or non-existence of a traffic violation. Whatever their theoretical differences, it is important to note that the distinction was recognized by coauthor Friese when he was making stops as a licensed police officer.

122. N.D. CENT. CODE §§ 39-09-01 to -09 (2009). Interestingly, North Dakota, like many states, has a minimum speed limit. North Dakota’s minimum speed limit is not expressed in quantifiable terms, but rather a person may not drive so slow “as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with the law.” § 39-09-09(1).

123. § 39-09-09(1).

124. Violations of traffic-control-signals are commonly known as “red light” violations or “semaphore violations” in some states. *See, e.g.*, *State v. Kilmer*, 741 N.W.2d 607, 609 (Minn. Ct. App. 2007).

125. The “pink” terminology is jargon for the motorist who rapidly accelerates to pass through a signal changing from yellow to red. In such circumstances, a driver may not be exercising due care in the operation of his or her vehicle and may be subject to the “catch-all” care required provision. § 39-09-01.1. *But see Kilmer*, 741 N.W.2d at 612 (holding Minnesota law does not prohibit a driver’s entry into an intersection on a steady yellow traffic light).

turn.¹²⁶ Accordingly, you have authority to stop most “left lane drivers” at will.¹²⁷

As officers, you know that motorists frequently—and likely unwittingly—violate statutes when making a turn. For example, a driver must signal the intention to turn continuously for a distance of at least one hundred feet;¹²⁸ a driver must turn from the farthest “practicable” portion of either the right or the left side of the roadway, while maintaining the appropriate lane.¹²⁹ Your observations will likely confirm that half or more drivers turn improperly. Moreover, most motorists are unaware that they cannot cross a railroad crossing while the control arms are going down or up.¹³⁰ By consciously observing just one railroad crossing controlled by crossing gates or barrier arms, you will likely see the first few motorists crossing the tracks after the train has passed, and while the barrier arms are still in the process of rising.

It is unlawful to pass a stopped school bus from either direction if the bus displays a stop arm or red flashing signals.¹³¹ A person may not drive with more than three passengers on the vehicle’s front seat if the driver’s view is obstructed or if the number of passengers interferes with the driver’s control of the vehicle.¹³² Neither a driver nor a passenger may open the door of a motor vehicle unless opening the door is done “safely” and only for so long as is “reasonably necessary to load or unload passengers.”¹³³ It is unlawful to follow a “fire apparatus” within 500 feet or to cross a fire hose.¹³⁴

Size, weight, and height restrictions also provide you with plentiful reasons to stop vehicles. Consistent with our analysis of investigative stops for traffic violations, this type of violation may more appropriately be termed a reasonable suspicion stop because you may have to inspect, weigh, or otherwise measure a given load to determine if a violation has actually occurred.¹³⁵

126. § 39-10-08(2).

127. *Id.*

128. § 39-10-38(2).

129. § 39-10-35(2).

130. § 39-10-41(2).

131. § 39-10-46(1).

132. § 39-10-54.

133. § 39-10-54.1.

134. §§ 39-10-57 to -58. A remarkable number of people will cross a fire hose and police officers are often called to fire scenes for the mere purpose of protecting the expensive fire hose.

135. *See generally* §§ 39-12-01 to -23 (establishing numerous height, weight, and load restrictions for vehicles). The expansiveness of these provisions becomes technical and broad; a detailed summary of these provisions would exceed the scope of this article. Suffice it to say, there are numerous limitations as well as exceptions to vehicles carrying loads.

Vehicle equipment violations are exceptionally common. Headlight use is required in North Dakota from sunset to sunrise and when weather conditions limit visibility to less than 1000 feet.¹³⁶ Motor vehicles must have at least two headlamps.¹³⁷ Vehicles, trailers, or any item drawn at the end of a train of vehicles must have a tail lamp emitting a red light that is plainly visible for at least 1000 feet.¹³⁸ A tail lamp or separate lamp must illuminate, with a white light, the rear license plate at any time headlamps or auxiliary driving lamps are lighted.¹³⁹ This lamp must be bright enough to render the rear license plate “clearly legible” from a distance of fifty feet to the rear of the vehicle.¹⁴⁰ Additionally, vehicles must be equipped with reflectors, stop, and turn signals.¹⁴¹

Numerous color restrictions apply to clearance lamps, side markers, and reflectors.¹⁴² Violations of these provisions are common with accessorized motor vehicles.¹⁴³ Between certain hours, parked vehicles must have white or amber lights lighted to the front and red lamps visible from the rear.¹⁴⁴ Additional accessorizing of a vehicle may not exceed two auxiliary driving lamps, two auxiliary passing lamps, or two fog lamps.¹⁴⁵

During any shift, you will observe common equipment violations, including vehicle mufflers that are not in good working order, causing “excessive or unusual” noise or annoying smoke.¹⁴⁶ Vehicles must be equipped with a rear-view mirror allowing a rearward view of at least 200 feet.¹⁴⁷ All motor vehicles must have a windshield, which must be

136. § 39-21-01. Farm implements, however, need not display headlamps until one half hour after sunset to one half hour before sunrise. § 39-21-01(1).

137. § 39-21-03(1). In *Wheeling v. Director, N.D. Dep’t of Transp.*, a headlight violation provided “not only reasonable articulable suspicion, but also probable cause for a stop.” 1997 ND 193, ¶ 6, 569 N.W.2d 273, 275.

138. § 39-21-04(1).

139. § 39-21-04(3).

140. *Id.*

141. §§ 39-21-05 to -06.

142. § 39-21-09.

143. *See, e.g., State v. Johnson*, 713 N.W.2d 64, 66 (Minn. Ct. App. 2006) (syllabus) (noting “reasonable, articulable suspicion exists to justify stopping a vehicle displaying any colored light, other than permitted by” statute).

144. § 39-21-14(2).

145. §§ 39-21-17(2)-(4).

146. § 39-21-37. Incredibly, stops do result from excessive engine noise, even if only a police officer witnesses the event. “If a tree falls in the forest, and nobody is there to hear it, does it make any sound? If a car makes excessive noise, and only a police officer hears it, is the peace disturbed? The first question is an enigma, but the second we can answer: The noise permits an investigative stop by the officer.” *Wolf v. N.D. Dep’t of Transp.*, 523 N.W.3d 545, 547 (N.D. 1994) (Meschke, J., concurring).

147. § 39-21-38.

unobstructed and equipped with operational wipers.¹⁴⁸ Common to the northern plains is early morning frost; the inattentive motorist who clears only a small portion of her windshield is quite susceptible to violating this provision. Further, in North Dakota, for example, any material affixed to the windshield must have at least a seventy percent light transmittance and side windows adjacent to the driver must have at least fifty percent light transmittance.¹⁴⁹ Interestingly, factory automobile windows have approximately an eighty-two percent light transmittance; therefore almost any tinting, however slight, will likely result in a violation. Oftentimes a simple “for sale” sign, or even a large air freshener hanging from a rear-view mirror could be a violation of this section.¹⁵⁰ Literally read, the statute permits a stop of all motorists who have a rear-view mirror affixed to the vehicle windshield.¹⁵¹

Safety belt use is required for front seat passengers in North Dakota and for children ages four to seventeen, regardless of where the child is seated.¹⁵² Child restraint devices are required for children under four years of age.¹⁵³ Although not recommended because of our “secondary enforcement” law, it is possible that you could lawfully stop a vehicle in which adult passengers in the front seat are not using safety belts.¹⁵⁴

148. § 39-21-39(1)-(2).

149. § 39-21-39(4).

150. *See, e.g.*, *United States v. Ramos-Caraballo*, 375 F.3d 797, 799 (8th Cir. 2004) (holding a vehicle stop proper when a driver had an air freshener hanging from the rear-view mirror); *see also* WIS. ADMIN. CODE [Sec. Trans.] § 305.34(3) (1997) (requiring a vehicle’s windshield must not be “excessively cracked or damaged”); *United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000) (holding a stop valid when the stop was based solely on a cracked windshield in violation of Wisconsin law). In a similar case, a criminal defendant, for whom an arrest warrant had been issued, briefly eluded an officer who was attempting to find him to make an arrest. *United States v. Oliver*, No. 98-4863, 1999 U.S. App. LEXIS 22371, at *5 (4th Cir. Sept. 15, 1999). When another officer located the defendant’s car and stopped “him under 46.2-1000, which is a safety violation [for the cracked windshield],” the court upheld the stop notwithstanding the argument the halting officer might not have observed the cracked windshield before the stop. *Id.*

151. Section 39-21-39(4) of the North Dakota Century Code prohibits operating a “motor vehicle with *any* object . . . affixed, or applied on the front windshield.” § 39-21-39(4) (emphasis added). *See also supra* notes 39-40 and accompanying text (discussing windshield obstructions).

152. § 39-21-41.4 (2009). Arguably, a police officer observing an apparently unbuckled juvenile passenger would have either reasonable suspicion or probable cause to conduct an investigative stop to determine whether a violation has occurred. *See also supra* notes 98-99 and accompanying text (discussing seatbelt violations).

153. § 39-21-41.2.

154. *See* § 39-21-41.5 (prohibiting the issuance of a citation for a seatbelt violation unless the motorist is stopped for another violation); *see also supra* notes 98-99 and accompanying text (noting the statute does not prohibit seizures, but instead prohibits issuance of a citation). What is a court to do about the stop if there is no other traffic violation? An enterprising or experienced officer will likely have observed another reason to justify the stop, but an honest or inexperienced cop may simply stop to warn. Is the stop unreasonable? Is the resulting evidence excluded from trial? *See supra* note 45. Several years ago, when coauthor Friese was serving as a police officer, a public interest group provided t-shirts for cops to distribute for seatbelt-using motorists. The

If you remain observant, you will find numerous vehicles with improperly displayed license plates and registration tabs. North Dakota law requires that vehicles display license plates on the front and rear of the vehicle, with exceptions for motorcycles and apportioned vehicles.¹⁵⁵ The plates must be “securely fastened,” “displayed horizontally and in an upright position,” and must be, as far as reasonably possible, “clear of mud, ice, or snow so as to be clearly visible.”¹⁵⁶ Further, only one annual registration tab or sticker for the current year can be applied to the number plate, and it must be displayed “in the area designated by the department [of transportation] for the tab or sticker.”¹⁵⁷ If you pay attention, you will likely find remarkable the large number of motorists who display registration tabs for numerous years by pasting them in a border fashion around the exterior of the license plate; this, again, provides a statutory violation warranting a traffic stop.¹⁵⁸ In northern climates like ours, it is almost certain most vehicles will have at least partially obstructed rear license plates from snow or mud lifted from the road surface by the vehicle as it travels. Your ability to stop motorists greatly increases with inclement weather. Many motorists protest the front license plate requirement as diminishing the appearance of their car; the usual protest method is simply not displaying the front plate and violating the statute.¹⁵⁹

In sum, the litany of potential traffic violations provides enterprising police officers an expansive statutory basis for making a lawful stop of a motorist based upon probable cause or more. This litany increases exponentially when “investigative stops” are based upon reasonable suspicion of a violation.

As we have discussed, courts have authorized “investigative stops” upon “reasonable suspicion” of a traffic violation. North Dakota courts are not alone in this approach. Other courts have also held an officer’s belief that a traffic violation may occur or may be occurring provides authority to

shirts said something like “the cops caught me . . . wearing a seatbelt.” The group publicly announced that police would be distributing the shirts. Some citizens reported that they actually stopped wearing their seatbelt during the promotion because they did not want to be stopped—on their way home from the bar—simply because they were wearing a seatbelt.

155. § 39-04-11. Most apportioned vehicles are semi tractors—where the rear plate is usually not visible because a trailer is normally attached.

156. *Id.*

157. *Id.*; see also *Bartch v. N.D. Dep’t of Transp.*, 2007 ND 109, ¶ 1, 743 N.W.2d 109, 110 (upholding a stop based upon an improper display of an annual registration sticker).

158. § 39-04-11.

159. *Id.*; see also *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005) (noting it was permissible to stop a motorist with only one license plate when state law required two plates); *United States v. Geelan*, 509 F.2d 733, 743-44 (8th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975) (upholding a stop for one license plate even though the officer was unaware of the vehicle’s state of origin and whether the vehicle required two plates).

stop.¹⁶⁰ Courts allowing investigative stops to determine whether a traffic violation may have occurred attempt to ascertain the reasonableness of the stop based on the specific facts of each case.¹⁶¹ Here are some examples that arguably provide reasonable suspicion to conduct an investigative stop: (1) the sound of studded snow tires from a vehicle when such use is out of season; (2) a potentially misaligned headlight; (3) a bumper or suspension height that appears improper; (4) potentially tinted or obstructed windows; (5) a potential violation of the open bottle law;¹⁶² (6) an apparently youthful driver operating a vehicle without seatbelts; and even, (7) a driver who is weaving within her own lane of traffic.¹⁶³ Under existing case law,

160. Moran, *supra* note 58, at 1155-57. Some courts have upheld these types of stops even if the officer is mistaken in his or her observation. *See, e.g.*, United States v. Jenkins, 452 F.3d 207, 212 (2d Cir. 2006) (noting “because the officers had a reasonable but mistaken belief that the SUV lacked license plates, stopping the vehicle was ‘justified at its inception’”).

161. For example, a trilogy of cases in North Dakota reached varying results on the issue of whether an officer’s observation of a temporary registration sticker justified a seizure. *See* State v. Skarsgard, 2007 ND 160, 739 N.W.2d 786; State v. Johnson, 2006 ND 248, 724 N.W.2d 129; State v. Oliver, 2006 ND 241, 724 N.W.2d 114. These cases were summarized in a fourth decision:

The officer in *Oliver* stopped the defendant because the defendant’s vehicle had no license plates in possible violation of state law. A temporary registration certificate was on the rear window of the vehicle, but was faded. We held that the “faded temporary registration certificate with no visible printing was indicative of a temporary certificate that was more than thirty days old and constituted an objective fact giving the officer a right to stop [the defendant] to check its validity.” The faded tag was an indication that a violation had been, and was, occurring.

...

In *Johnson*, a highway patrolman initiated a traffic stop of a vehicle that did not have license plates but did have a temporary registration certificate in the back window. Unlike the faded registration certificate observed by the officer in *Oliver*, there was nothing unusual about the registration certificate in *Johnson*. The officer in *Johnson* stopped the vehicle only because he believed many people drive vehicles with temporary registration certificates beyond the allowable thirty-day period. *Id.* We held that the officer’s hunch that the defendant may have been in violation of a vehicle registration statute was not enough to authorize the stop. We reversed the district court’s denial of the defendant’s motion to suppress.

...

In *Skarsgard*, an officer stopped a vehicle because it had no license plates or visible temporary registration certificate, and the officer recognized the driver as a suspended driver from a past call. We held, “[w]hen a law enforcement officer observes a vehicle with no license plates and no viewable registration certificate, the officer has reasonable grounds to stop the driver and check if the driver has a valid certificate in his possession.”

City of Grand Forks v. Mitchell, 2008 ND 5, ¶¶ 11-13, 743 N.W.2d 800, 803 (internal citations omitted).

162. State v. Smith, 452 N.W.2d 86, 89-90 (N.D. 1990) (upholding an “investigatory vehicle stop” based on reasonable suspicion of a violation of North Dakota Century Code section 39-08-18 (open bottle law)).

163. Weaving is a well-recognized indication of impairment. Nonetheless, weaving can result from a variety of other circumstances: lighting or extinguishing a cigarette, adjusting the radio volume, distractions, eating while driving, speaking on a cellular telephone, or a host of

virtually any possible traffic violation establishes a lawful basis for you to conduct an “investigatory seizure.”

Officer

I’m a bit confused. Can you provide us with additional examples in the traffic code where an officer can stop a motorist to investigate whether a violation may exist?

Trainer

Assume you observe a vehicle lighting configuration that appears to violate a statute; you would be permitted to conduct an investigative stop. The following statutes show the numerous lighting requirements of a typical traffic code. North Dakota law provides vehicle headlights must be no more than fifty-four inches and no less than twenty-four inches from the ground when measured to the center of the lamp.¹⁶⁴ Tail lamps must be located not more than seventy-two inches and not less than fifteen inches from the ground to the center of the lamp.¹⁶⁵ No more than two fog lamps are permitted; they must be mounted between twelve and thirty inches from the ground and cannot project light left of the center of the vehicle at a distance of greater than twenty-five feet.¹⁶⁶

Auxiliary passing lamps may not exceed two, must be mounted between twenty-four and forty-two inches from the ground, and may have a limited use if in specific combination with other lamps.¹⁶⁷ Auxiliary driving lamps may not exceed two, must be mounted between sixteen and forty-two inches from the ground, and may not be used if in specific combination with other lamps.¹⁶⁸ Vehicle-road lighting equipment is subject to specific light distribution and light beam composition requirements.¹⁶⁹

Interestingly, a person cited with improper lighting equipment may avoid the penalty by fixing the equipment within forty-eight hours after the

other reasons. In North Dakota, the court has provided limits for stops predicated on “weaving.” Erratic weaving is sufficient to stop, but if the weaving is “slight,” a stop is not permitted. *Salter v. Director, N.D. Dep’t of Transp.*, 505 N.W.2d 111, 114 (N.D.1993).

164. N.D. CENT. CODE §§ 39-21-02(2), -03(2) (2009).

165. §§ 39-21-02(2), -04(2).

166. § 39-21-17(2).

167. § 39-21-17(3).

168. § 39-21-17(4).

169. *See generally* §§ 39-21-20 to -31 (providing numerous requirements for proper vehicle lighting). For example, high intensity composite beams (the uppermost distribution of light) must be aimed so as to reveal persons and vehicles at a distance of at least 450 feet for multi-beam lights. § 39-21-20(1). Lowermost distribution of the composite beam for multi-beam lights must reveal persons and vehicles at 150 feet ahead of the vehicle. § 39-21-20(2). Similar provisions exist for single beam road lighting equipment. § 39-21-22. Further, lamps exceeding 300 candlepower must be appropriately adjusted so the high intensity portion of the beam will not “strike the level of the roadway on which a vehicle stands at a distance of more than seventy-five feet.” § 39-21-26(1).

ticket is issued.¹⁷⁰ This is an apparent legislative acknowledgement that lighting equipment may be unknowingly misaligned. While a law enforcement officer trained in observing misaligned headlights could likely establish reasonable suspicion to conduct further investigation, most motorists are likely oblivious to a potential violation. None of this, however, would likely limit your ability to lawfully stop the motorist.¹⁷¹

Motor vehicles must have a rear-view mirror reflecting a view of the highway of at least 200 feet.¹⁷² While most of you presumably would not conduct an “investigative stop” to measure the reflectivity of a rear-view mirror, the complete absence of a rear-view would likely provide not only reasonable suspicion, but also probable cause of a violation.¹⁷³

As mentioned earlier, an obstructed windshield, or an obstruction on the side windows adjacent to the driver, may provide probable cause to stop a motorist.¹⁷⁴ But this type of violation may also create a basis for an investigative stop, particularly if the officer detected tinting that would require quantitative measuring to determine the level of light transmittance.¹⁷⁵

Studded snow tires are permitted in North Dakota between October 15th and April 15th of each year.¹⁷⁶ Police officers know it is virtually impossible to actually see the studs on the tires of a moving vehicle. However, the sound of studded tires on dry pavement is readily discernible to the trained ear. Again, you may believe a violation is occurring, but an investigative stop may establish the violation. Or, upon further investigation, you may discover the vehicle had driven through a nail factory.

Officer

Are there traffic laws that give us particularly broad ability to stop and investigate?

Trainer

Yes. Perhaps the most unique, and undoubtedly the most obscure, provisions of the North Dakota traffic code do not exist in the traffic code itself. Under a specific provision of the traffic code, entitled Modification

170. § 39-21-24.

171. *See supra* note 160.

172. § 39-21-38.

173. *See supra* note 137 (citing *Wheeling v. Director, N.D. Dep’t of Transp.*, 1997 ND 193, ¶ 6, 569 N.W.2d 273, 275) (noting minor traffic violations provide not only reasonable suspicion, but also probable cause for a stop).

174. § 39-21-39.

175. *Id.* Many officers and police agencies in states that disallow window tinting have “tint meters” which measure the light transmittance of windshields or side windows. The meter is a simple, handheld electronic device that measures the light transmittance and provides a numerical readout of the actual percentage of light transmittance.

176. § 39-21-40(3).

of a Motor Vehicle,¹⁷⁷ a person altering a vehicle—in virtually any manner—must conform to administrative rules promulgated by the Director of the Department of Transportation.¹⁷⁸ Under this provision of the traffic code, a person modifying a vehicle has the burden of proving the modification complies with the rules promulgated by the Director.¹⁷⁹ The modified vehicle statute has enumerated violations,¹⁸⁰ but most of the prohibited modifications are “hidden,” requiring reference to article 52-04 of the North Dakota Administrative Code. Some “hidden” examples include operational door handles and latches for any door leading directly into the passenger compartment.¹⁸¹ Front opening hoods must have a primary and secondary hood latch to hold the hood in a closed position.¹⁸² Steering wheels must have an outside diameter of no less than thirteen inches.¹⁸³ And, contrary to the aforementioned rear-view mirror requirement,¹⁸⁴ modified, or “special,” motor vehicles must have two rear-view mirrors affording a 200 foot view of the rear road surface, and the mirrors must have a minimum of ten square inches of reflective surface.¹⁸⁵

The Director also has promulgated additional brake and exhaust regulations.¹⁸⁶ Fenders must cover the entire width of the tire tread and must be “at least fifteen degrees in front to at least seventy-five degrees to the rear of the vertical centerline of each wheel measured from the center of wheel rotation.”¹⁸⁷ No part of a tire may come into contact with the body, fender, or chassis of the vehicle.¹⁸⁸

Steering and suspension provisions require that no part of the vehicle, except the tires or electric grounding devices, shall extend below the lowest part of a wheel rim.¹⁸⁹ The steering system must remain unobstructed “when turned from lock to lock;” the steering wheel cannot have less than

177. § 39-21-45.1.

178. *Id.*

179. § 39-21-45.1(5).

180. *Id.* Listed modification requirements include: (1) front and rear bumpers are required; (2) maximum body height of forty-two inches; (3) maximum bumper height of twenty-seven inches; (4) maximum outside diameter of tires of forty-four inches; and (5) maximum suspension lift of four inches. §§ 39-21-45.1(1)-(4).

181. N.D. ADMIN. CODE § 52-04-02-01 (2009).

182. § 52-04-02-03.

183. § 52-04-02-04.

184. *See supra* note 147.

185. § 52-04-02-05.

186. §§ 52-04-03-01, -03.

187. § 52-04-03-04.

188. *Id.*

189. § 52-04-03-06.

two turns or more than six turns from “lock to lock.”¹⁹⁰ Release of the steering wheel between five and fifteen miles per hour “shall result in a distinct tendency for the vehicle to increase its turning radius.”¹⁹¹ No less than thirty percent of the gross vehicle weight shall be allocated to any axle.¹⁹²

Further, front tires must measure a minimum of sixty percent of the tread width of the rear tires.¹⁹³ Local enforcement officers have developed a comparison chart to expedite calculations regarding enforcement of this provision, and the chart and tape measures for verifying violations are often carried in local patrol cars. In sum, the sheer number of potential violations makes it obvious that enterprising police officers can detect a possible traffic or equipment violation on virtually all motor vehicles.

Officer

Are there situations in which a court will conclude that an observed violation does not allow police to stop a motorist?

Trainer

Yes. Although the North Dakota Supreme Court—like many others—has generally been very accepting of stops of motor vehicles for virtually any violation, the court nonetheless held that “slight” in-lane weaving may not be sufficient to justify a stop.¹⁹⁴ The North Dakota Supreme Court has, on other occasions, held that in-lane weaving may be sufficient to stop.¹⁹⁵

Officer

Does it matter if the weaving causes the car to cross lane-marking lines?

Trainer

Yes. For example, on numerous occasions, the North Dakota Supreme Court has held that crossing a fog line or center line is sufficient to justify a stop.¹⁹⁶ But, interestingly, governing traffic law notes that it is not always

190. *Id.*

191. *Id.*

192. *Id.*

193. § 52-04-03-07.

194. *Salter v. N.D. Dep’t of Transp.*, 505 N.W.2d 111, 113 (N.D. 1993).

195. *Hanson v. Director, N.D. Dep’t of Transp.*, 2003 ND 175, ¶ 17, 671 N.W.2d 780, 784 (holding that weaving, even without a traffic offense, justifies a seizure); *State v. Dorendorf*, 359 N.W.2d 115, 116-17 (N.D. 1984) (concluding the officers had the requisite reasonable suspicion to stop after observing a vehicle weaving within its own lane of traffic).

196. *See, e.g., State v. Berger*, 2001 ND 44, ¶ 2, 623 N.W.2d 25, 26; *State v. Loh*, 2000 ND 188, ¶ 8, 618 N.W.2d 477, 479 (holding a stop valid when an officer observed slow speed, crossing the fog line twice, crossing the center line once, and in-lane weaving); *State v. Burris*, 545 N.W.2d 192, 193 (N.D. 1996) (traveling less than the posted speed limit and crossing the fog line twice justified a stop); *Johnson v. N.D. Dep’t of Transp.*, 530 N.W.2d 359, 360-61 (N.D. 1995) (crossing the fog line and the center line justified a stop); *Jorgenson v. N.D. Dep’t of Transp.*, 498 N.W.2d 167, 168 (N.D. 1993) (crossing the center and fog lines justified a stop).

“practicable” to maintain a single traffic lane. The relevant statute says, “[a] vehicle must be driven as nearly as practicable entirely within a single lane and may not be moved from such lane until the driver has first ascertained that such movement can be made with safety.”¹⁹⁷ One would think that by using the term “practicable,” while providing authority to move outside a lane if it is done “with safety,” the legislature has attempted to provide some leeway for drivers. The North Dakota Supreme Court, however, has rigidly upheld stops for minimal movement outside a travel lane.¹⁹⁸

Officer

Do courts in other states allow some leeway for drivers?

Trainer

Yes. Many other state courts—in states with statutory language identical to that of North Dakota—have held that stopping a motorist for weaving outside a travel lane is not constitutionally reasonable.¹⁹⁹ Those courts have recognized that very minor traffic violations may not authorize police stops.²⁰⁰ Many of these courts have recognized that several innocent reasons may explain why a driver slightly moves outside a travel lane, such as wind, a brief distraction, a roadway obstruction, or the like. In North

197. N.D. CENT. CODE § 39-10-17(1) (2009).

198. *See* State v. Wolfer, 2010 ND 63, ¶ 9, 780 N.W.2d 650 (declining to adopt the rationale of courts concluding that movement outside a travel lane, without more, is insufficient to warrant a seizure); *see also supra* note 163.

199. *See, e.g.*, State v. Ross, 149 P.3d 876, 880 (Kan. Ct. App. 2007). Analyzing a statute identical to North Dakota Century Code section 39-10-17(1), the court stated driving within a single lane:

“[a]s nearly as practicable” connotes something less than the absolute. Automobiles are not railway locomotives. They do not run on fixed rails. [The statute] does not prohibit a vehicle from changing lanes. A driver is permitted to exercise, rather is *required* to exercise, discretion in deciding when and where to change lanes. We need not drive through a pothole in the road and damage our vehicle in the process when we may safely avoid it by changing lanes or moving partially onto the shoulder of the roadway.

Id. at 879.

200. *See* State v. Curtis, 29 S.W.3d 688, 695 (Tex. App. 2006) (swerving from lane to lane and crossing the fog line did not justify a seizure), *overruled by* State v. Curtis, 238 S.W.3d 376 (Tex. Crim. App. 2007); State v. Phillips, No. 8-04-25, 2006 WL 3477003, at *3 (Ohio App. 3d Dec. 4, 2006) (crossing the fog line did not provide reasonable suspicion or probable cause to seize a vehicle), *abrogated by* State v. Mays, 894 N.E.2d 1204, 1206, 1210 (Ohio 2008) (holding police have reasonable suspicion to stop a motorist who twice crosses a right white edge line); Commonwealth v. Turney, 76 Pa. D. & C.4th 211, 212, 217 (2005) (police did not have sufficient basis to seize a driver who crossed the fog line two times and traveled on the berm one time); State v. Huddleston, 164 S.W.3d 711, 716 (Tex. App. 2005) (crossing the fog line on five occasions over five to six miles does not justify a seizure); State v. Allain, 688 N.W.2d 783 (Table), No. 03-3272-CR, 2004 WL 2110402, at *2, *5 (Wis. Ct. App. Sept. 24, 2004) (crossing the fog line on a curved road does not justify a seizure); State v. Smith, 21 S.W.3d 251, 252, 258 (Tenn. Crim. App. 1999) (driving on the fog line did not justify a seizure); *see also* Wolfer, 2010 ND 63, ¶ 9, 780 N.W.2d 650 (compiling cases in which courts have held crossing a lane marker is insufficient to justify a seizure).

Dakota, however, innocent or explainable reasons for unusual driving conduct have been rejected by the court.²⁰¹ Our state supreme court has repeatedly said, “It is well settled, traffic violations, even if considered common or minor, constitute prohibited conduct which provide officers with requisite suspicion for conducting investigatory stops.”²⁰² So, while many courts may conclude stopping too long at a stop sign and in-lane weaving of a motorcycle does not authorize a stop, our court has held otherwise.²⁰³

Officer

Am I permitted to stop or contact citizens even if there is no violation?

Trainer

In North Dakota, the answer is likely yes, but it depends upon the circumstances. These could be classified as “suspicionless stops,” or stops resulting from no particularized, articulable, or identifiable suspicion. The most recognized example of suspicionless stops are sobriety checkpoints.²⁰⁴ In suspicionless stops, the officer has stopped, or in some way interfered with, a person’s freedom of movement, even though the officer has no articulable suspicion to justify the interference.

Officer

Because officers need some level of proof to seize or stop people, do I need probable cause or reasonable suspicion to approach a parked car?

Trainer

In North Dakota, you likely need neither. Courts have generally upheld police-citizen encounters based upon unfettered discretion of an officer to approach an already stopped motorist.²⁰⁵ The North Dakota Supreme

201. See *Kappel v. Director*, N.D. Dep’t of Transp., 1999 ND 213, ¶ 19, 602 N.W.2d 718, 722. In *Kappel*, the court held a police officer had reasonable suspicion to make an investigative stop after observing a motorcycle pause longer than normal at a stop sign and then watching it weave within its own lane. *Id.* ¶¶ 5, 19, 602 N.W.2d at 720, 722. In reaching its conclusion, the court said “the reasonable suspicion standard does not require an officer to see a motorist violating a traffic law or to rule out every potential innocent excuse for the behavior in question before stopping a vehicle for investigation.” *Id.* ¶ 10, 602 N.W.2d at 721.

202. *State v. Westmiller*, 2007 ND 52, ¶ 9, 730 N.W.2d 134, 138; *In re K.H.*, 2006 ND 156, ¶ 8, 718 N.W.2d 575, 578; *State v. Haibeck*, 2004 ND 163, ¶ 13, 685 N.W.2d 517, 517; *Hanson v. N.D. Dep’t of Transp.*, 2003 ND 175, ¶ 15, 671 N.W.2d 780, 784; *State v. Fields*, 2003 ND 81, ¶ 7, 662 N.W.2d 242, 245; *State v. Leher*, 2002 ND 71, ¶ 12, 653 N.W.2d 56, 61; *In re T.J.K.*, 1999 ND 152, ¶ 9, 598 N.W.2d 781, 784; *Kahl v. Director*, N.D. Dep’t of Transp., 1997 ND 147, ¶ 12, 567 N.W.2d 197, 200; *State v. Storbakken*, 552 N.W.2d 78, 80 (N.D. 1996); *Zimmerman v. N.D. Dep’t of Transp.*, 543 N.W.2d 479, 482 (N.D. 1996); *State v. Hawley*, 540 N.W.2d 390, 393 (N.D. 1995); *City of Wahpeton v. Roles*, 524 N.W.2d 598, 600-01 (N.D. 1994); *State v. Stadsvold*, 456 N.W.2d 295, 296 (N.D. 1990).

203. See *supra* note 201.

204. See, e.g., *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990); *City of Bismarck v. Uhden*, 513 N.W.2d 373, 377 (N.D. 1994).

205. In *City of Fargo v. Sivertson*, the North Dakota Supreme Court stated, “Ordinarily, an officer must have an articulable and reasonable suspicion that a law has been or is being violated to stop a moving vehicle for an investigation.” 1997 ND 204, ¶ 9, 571 N.W.2d 137, 140. But,

Court has quickly, readily, and consistently applied this theory.²⁰⁶ The court reasons that encounters between parked motorists and police are “consensual encounters,” not seizures.

Officer

What about driving under the influence or drug interdiction checkpoints? These encounters obviously are not based upon reasonable suspicion or probable cause.

Trainer

Indeed, these are suspicionless seizures. Although the United States Supreme Court has found suspicionless stops of vehicles reasonable for purposes of detecting and apprehending drunk drivers,²⁰⁷ suspicionless stops to detect and apprehend drug couriers are not reasonable.²⁰⁸ In determining whether the actions of police are reasonable, the courts will balance the governmental interests with the interests of individuals who are subjected to the governmental action. Although one could reasonably argue the governmental interest in deterring the introduction of drugs into society is as dangerous as deterring a drinking driver, the United States Supreme Court has held a “checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing,” like drug possession, is not constitutional.²⁰⁹ Importantly, sobriety checkpoints must be operated within guidelines that limit discretion left to the patrol officer.

Officer

What about circumstances where an officer stops a car because it appears the driver or occupants might be sick?

Trainer

The “community caretaking encounter” is another suspicionless seizure.²¹⁰ This suspicionless stop is justified on the notion that the

according to the court, “the law distinguishes between approaching an already stopped vehicle and stopping a moving one.” *Id.* (citing *State v. Neis*, 469 N.W.2d 568, 569 (N.D.1991)); *see also* *State v. Gahner*, 554 N.W.2d 818, 820 (N.D.1996).

206. *Sivertson*, ¶ 9, 571 N.W.2d at 140; *see also* *City of Grand Forks v. Zejdlik*, 551 N.W.2d 772, 774 (N.D. 1996); *Borowicz v. N.D. Dep’t of Transp.*, 529 N.W.2d 186, 188 (N.D. 1995); *State v. Halfmann*, 518 N.W.2d 729, 731 (N.D. 1994); *State v. Franklin*, 524 N.W.2d 603, 605 (N.D. 1994); *State v. Langseth*, 492 N.W.2d 298, 300 (N.D. 1992); *Wibben v. N.D. State Highway Comm’r*, 413 N.W.2d 329, 334-35 (N.D. 1987) (Vande Walle, J., concurring).

207. *Sitz*, 496 U.S. at 455.

208. *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2001). After *Edmond*, the United States Supreme Court allowed brief suspicionless stops to find witnesses to a crime. *Illinois v. Lidster*, 540 U.S. 419, 428 (2004).

209. *Edmond*, 531 U.S. at 37-38; *but see* *State v. Everson*, 474 N.W.2d 695, 701 (N.D. 1991) (holding a narcotics checkpoint did not violate the Fourth Amendment).

210. *See, e.g.,* *Lapp v. N.D. Dep’t of Transp.*, 2001 ND 140, ¶ 17, 632 N.W.2d 419, 424; *Sivertson*, ¶ 16, 571 N.W.2d at 141; *Zejdlik*, 551 N.W.2d at 773-75; *Franklin*, 524 N.W.2d at 605; *Halfmann*, 518 N.W.2d at 730-31.

encounter is not a seizure because the officer is not investigating a violation. The community caretaking encounter is recognized in a number of states,²¹¹ and generally requires the officer to act “in a capacity totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”²¹² The theory is that police function not only to investigate crime, but also to assist the public, so when police approach a parked car to make sure “everything is okay,” a seizure does not result.²¹³ This doctrine recognizes and enforces the concept that police have virtually unfettered discretion to approach a stopped car. Courts almost always uphold this type of activity as a “consensual encounter” as long as the officer initiates contact without a show of authority like the use of emergency lights.²¹⁴

Officer

Are there circumstances where police may be able to stop a motorist even though there is no suspicion or caretaking role?

Trainer

Sure. Although these contacts could arguably be called “community caretaking,” it is probably more appropriate to refer to these contacts as “unclassifiable encounters.” For example, as public servants, police often believe they have a duty to assist citizens, regardless of the minimal nature of the citizen’s peril. Officers have been known to stop motorists for: open doors; coats caught in a car door; keys, purses, or luggage atop a car; or various other reasons.²¹⁵ An unusual, but not atypical, example is the stop of a motorist driving with a flat tire. As you may have already concluded, this conduct is arguably a violation of the traffic code.²¹⁶

211. *State v. Nemeth*, 23 P.3d 936, 944-45 (N.M. 2001); *State v. Goetaski*, 507 A.2d 751, 753 (N.J. 1986); *State v. Parker*, 503 A.2d 809, 813 (N.H. 1985); *State v. Harrison*, 533 P.2d 1143, 1145 (Ariz. 1975).

212. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

213. *See* cases cited *supra* note 206.

214. *See State v. Langseth*, 492 N.W.2d 298, 300 (N.D. 1992) (noting a show of authority, including emergency lights, constitutes a seizure).

215. These cases don’t make the reporters—perhaps as a matter of prosecutorial discretion, perhaps as a matter of plea bargaining, or perhaps because the officer knows a resulting arrest would not withstand scrutiny regarding the validity of the stop. In any event, these stops do take place—and citizens truly do expect an officer to stop them to make them aware their purse is loose atop the car. It is, by the way, the taxpayer’s money that bought all the fancy equipment that can be used to get the absent-minded driver’s attention before the purse hits the road.

216. *See* N.D. CENT. CODE § 39-21-40(2) (2009) (prohibiting “metal tires” from making contact with the roadway).

Officer

As a police officer, it seems that expansive authority to stop motorists is a good thing. More stops result in more arrests. As long as we follow the guidance provided by the courts, why would people be concerned?

Trainer

For the most part, citizens will respect you for following the law and doing your best to do your job—which includes detecting and apprehending criminals. The concern, however, is that many citizens with whom you have contact are not criminals; instead, they have simply violated a traffic law or ordinance. Some limitations may be appropriate.

IV. PROPOSED LEGISLATION TO PROTECT THE PRIVACY OF PERSONS STOPPED FOR NONCRIMINAL TRAFFIC OFFENSES

Currently, North Dakota Century Code section 39-07-07, entitled “Halting person for violating traffic regulations - Duty of officer halting,” provides:

Whenever any person is halted for the violation of any of the provisions of chapters 39-01 through 39-13, 39-18, 39-21, and 39-24, or of equivalent city ordinances, the officer halting that person, except as otherwise provided in section 39-07-09 and section 39-20-03.1 or 39-20-03.2, may:

1. Take the name and address of the person;
2. Take the license number of the person’s motor vehicle; and
3. If a city ordinance or state criminal traffic violation, issue a summons or otherwise notify that person in writing to appear at a time and place to be specified in the summons or notice or, if a state noncriminal traffic violation, notify the person of the right to request a hearing when posting bond by mail.

A halting officer employed by any political subdivision of the state may not take a person into custody or require that person to proceed with the officer to any other location for the purpose of posting bond, where the traffic violation was a noncriminal offense under section 39-06.1-02. The officer shall provide the person with an envelope for use in mailing the bond.²¹⁷

We propose adding the following:

An officer halting a vehicle for a noncriminal offense under section 39-06.1-02 must possess at least probable cause to believe the

217. § 39-07-07.

offense was committed. After a vehicle is halted for a noncriminal offense:

1. The halting officer must diligently and expeditiously complete the citation process, which may last not longer than necessary. Any questions or activities during that process must be limited to those related to the traffic offense serving as the basis for the stop.
2. The halting officer may require production of and inspect the driver's license, documentation regarding the vehicle's ownership, and proof of insurance. In addition, the officer may obtain computer verification of the driver's license and vehicle registration and check for warrants outstanding on the driver, provided the warrant check does not unreasonably extend the duration of the stop. Criminal records searches may be done only where the officer has reasonable suspicion to believe the driver is engaged in criminal conduct. No demand for identification shall be made of any passenger, and no other checks (e.g., warrants and criminal history) of passengers may be conducted unless there is reasonable suspicion to believe the passenger is engaged in criminal activity. If the driver is incapable of continued driving, and if the vehicle is relinquished to a passenger, the halting officer may require the passenger to produce a valid driver's license before being allowed to drive the halted vehicle.
3. The halting officer may question the driver about the traffic offense for which the stop was made, but, unless the officer has reasonable suspicion to believe the driver or a passenger possesses drugs, a weapon, or contraband, no questions may be asked about drugs, weapons, or other subjects unrelated to the traffic offense for which the stop was made, such as questions regarding travel plans (e.g., destination and purpose).
4. The halting officer may not seek consent to search the stopped vehicle, the driver, or the passengers, during the stop or after the citation is issued, unless there is reasonable suspicion to believe contraband or evidence of a crime is concealed in the vehicle or on the person of a vehicle occupant. Before seeking consent, an officer must clearly end the traffic stop by explaining that the motorist is free to leave and need not

consent and by returning any occupants' documents before or while so explaining.

5. The vehicle stopped and its occupants may not be subjected to the inspection of a drug detection dog unless there is reasonable suspicion to believe there are drugs in the vehicle or conveyed by the occupants.

Evidence found as a result of a violation of this section by a law enforcement officer is not admissible in a criminal case against any occupant of the car at the time of the stop.

A. PROBABLE CAUSE REQUIRED FOR NONCRIMINAL TRAFFIC STOPS

We propose the legislature require probable cause as the required minimum basis for a noncriminal traffic offense stop in North Dakota. This would be a minimal change from the status quo. Professor LaFave has long argued that serious *criminal* offenses should be suspected as the required basis for an investigative stop based on reasonable suspicion.²¹⁸ The range of historical and proposed bases for vehicle stops is roughly as follows, from the least restrictive to the most restrictive: (1) reasonable suspicion sufficient for any stop, even for noncriminal offenses; (2) probable cause required for noncriminal stops; (3) probable cause required for all stops except reasonable suspicion sufficient for stops to investigate serious crime; and (4) probable cause required for all vehicle stops. The first basis listed is the current legal status quo, described at length above. The second basis listed is our proposed legislative modification. The third basis listed is Professor LaFave's longstanding suggestion for appropriate Fourth Amendment law, which has been ignored by many courts, especially those of North Dakota. It was apparently adopted by the North Dakota Legislature in 1969 with section 29-29-21's limits on such stops, but subsequently was rejected by the North Dakota Supreme Court in *Uhdén*.²¹⁹ The final basis was proposed in 1992's initiated measure (Proposition 6). It would have gone further and required probable cause for all car stops.²²⁰ Law enforcement came out strongly against Proposition 6 as too severe an impediment

218. LAFAVE, *supra* note 18, § 9.3(a), at 366.

219. 513 N.W.2d 373 (N.D. 1994). *See supra* notes 63-67 (abrogating statutory limitations on police authority to seize).

220. Memorandum prepared by the North Dakota Legislative Council Staff, Information on the 1992 Primary and General Election Ballot Measures (Sept. 1992) (on file with authors).

to their efforts to catch criminals, and the proposition was rejected by the voters.²²¹

The proposal to limit investigative stops to serious offenses is commendable. Drawing lines between serious and minor *crimes*, however, might be impractical today given the long disregard for, and subsequent gutting of, section 29-29-21's limits on such stops.²²² Thus, we propose the more modest step of requiring probable cause only for noncriminal offense stops. The United States Supreme Court's misgivings in *Atwater* about drawing lines between serious and minor crimes²²³ are irrelevant to North Dakota and noncriminal traffic cases. Since 1973, the state legislature has mandated different procedures for criminal and noncriminal offenses. Everyone knows the maxim "ignorance of the law is no excuse," and it would be unseemly for North Dakota police to claim ignorance or the courts to cut the police slack for not knowing whether they are stopping for a criminal or noncriminal offense.

Our proposal gains legislative palatability, however, at the possible expense of broader enhancement of Fourth Amendment rights urged by LaFave.²²⁴ But the modest step we propose might limit the use of minor traffic offenses as pretexts for drug investigations. Stops are now permitted on reasonable suspicion for "extremely minor and technical violations."²²⁵ We have shown that even in North Dakota, "very few drivers can traverse any appreciable distance without violating some traffic regulation. This means that virtually anyone (even a Supreme Court Justice) may readily be stopped, which suggests a need for some additional limitation upon the authority to stop that might help prevent pretextual or arbitrary seizures."²²⁶

221. INITIATIVE AND REFERENDUM INSTITUTE, NORTH DAKOTA INITIATIVE HISTORICAL LISTING 7, <http://www.iandrinstute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/North%20Dakota.pdf>.

222. See *supra* notes 63-67, 219 and accompanying text.

223. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347-51 (2001).

224. LAFAVE, *supra* note 18, § 9.3(a), at 366. LaFave argues:

[a]n express limitation upon Terry stops on reasonable suspicion to those instances in which the suspected offense is one "involving danger of forcible injury to persons or of appropriation of or damage to property" so that probable cause would be required for most traffic stops (except, e.g., driving under the influence), would be one significant step toward enhancing the Fourth Amendment rights of suspected traffic violators, especially in light of the now well-established police practice of using traffic stops to seek out drugs. The point is simply this: any extraordinary grant of police authority out to be circumscribed in such a way so that meaningful review is possible, so that the public is not apprehensive about police excess, and so as to "remove the temptation for the police to go on fishing expeditions for contraband."

Id. at 366 (footnotes omitted).

225. *Id.*

226. *Id.*

This is especially important because the United States Supreme Court “slammed the door” on preventing pretextual stops in *Whren v. United States*.²²⁷ *Whren*’s rejection of a pretext doctrine calls for both a probable cause requirement for at least noncriminal stops and further limits on the dimensions of such stops, which we discuss below.

Current North Dakota case law, after *Udden*, permits reasonable suspicion stops for the most trivial of offenses. We hope that legislators will identify with the average driver that is not guilty of any criminal violation, more than our state supreme court justices who seldom meet a traffic stop they feel is unwarranted. Justices see only that the motorist—first the defendant, and now the appellant—is a guilty criminal. What of the average stop? Although statistics are not readily available, legislators should realize that most North Dakota drivers and their passengers are not criminals. The lower the required basis for a stop, the more innocent drivers and passengers will be stopped. How many is too many? We know the answer of the North Dakota Supreme Court—essentially, “you, the police, may stop anybody you even reasonably suspect of a minor, noncriminal, traffic offense. You do not need the higher certainty of probable cause—anything more than a mere hunch will do.”

Assume, as discussed earlier,²²⁸ that probable cause requires at least a forty percent likelihood the offense is taking place.²²⁹ Reasonable suspicion is less than probable cause, so, again, assume it requires only a thirty percent likelihood. If the police actually understand the difference, a doubtful proposition,²³⁰ it would mean that out of every 100 stops in North Dakota, 60% could be innocent of the violation for which stopped if probable cause is required; if only reasonable suspicion is required, 70% could be innocent. The stops would still be justified because both standards permit errors.

Of course, a ten percent decrease in invasions of privacy rights might seem insignificant to some—unless they are one of the stopped innocents. Because courts, including both the United States Supreme Court and our own state courts, refuse to name the statistical level of certainty identified with either probable cause or reasonable suspicion, the reality is that

227. *Whren v. United States*, 517 U.S. 806, 813 (1996); see also, Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine” and Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1853 (2004) (stating the Supreme Court “slammed the door” on effective reform to prevent pretext stops in *Whren*).

228. See *supra* notes 89-93.

229. See *supra* note 90.

230. This is not meant as disrespect for the police. Rather, it reflects the authors’ own difficulty in understanding the difference between the two standards. See *supra* note 93 (acknowledging the complexity of quantifying the distinctions between reasonable suspicion and probable cause).

reducing the level required from probable cause to reasonable suspicion is largely a rhetorical move. What we are proposing is simply to curtail such widespread encouragement for police to stop motorists not reasonably suspected of any crime by limiting the police to instances where they have probable cause, as is often the case.²³¹ The remainder of the proposed statute deals with limits on what the police may do, in their zeal to catch criminals, once they stop someone for a noncriminal offense.

B. LIMITS ON POLICE ACTIVITY AFTER STOPPING

1. *Length of Stop and General Limit on Questioning and Other Police Post-Stop Activity*

Courts have not generally applied the temporal and scope limits of *Terry* stops to traffic stops.²³² Contrary to *Illinois v. Caballes*,²³³ our proposed legislation is intended to make clear that the stopping officer's actions must be "reasonably related in scope to the circumstances which justified the interference in the first place."²³⁴ In *State v. Fields*, the North Dakota Supreme Court applied *Terry* analysis and specifically reminded it had previously "explained that for traffic stops, '[a] reasonable period of detention includes the amount of time necessary for the officer to complete his duties resulting from the traffic stop.'"²³⁵ "Once the purposes of the initial traffic stop are completed, a continued detention of a traffic violator violates the Fourth Amendment unless the officer has a reasonable suspicion for believing that criminal activity is afoot."²³⁶ An individual reading that strong statement might wonder whether our proposed legislation is indeed necessary. Our answer is that for persons not suspected of a criminal offense—the average speeder, for example—the scope of the halting officer's duties as explained in *Fields* is too expansive. *Fields* quotes the Eighth Circuit's list of duties:

[R]equest[ing] the driver's license and registration, request[ing] that the driver step out of the vehicle, request[ing] that the driver wait in the patrol car, conduct[ing] computer inquiries to determine the validity of the license and registration, conduct[ing]

231. See *supra* note 121 (noting most observed traffic violations establish probable cause of a traffic violation).

232. See LAFAVE, *supra* note 18, § 9.3(a), at 367.

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

234. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

235. *State v. Fields*, 2003 ND 81, ¶ 8, 662 N.W.2d 242, 245 (quoting *State v. Mertz*, 362 N.W.2d 410, 412 (N.D. 1985)).

236. *Fields*, ¶ 10, 662 N.W.2d at 246.

computer searches to investigate the driver's criminal history and to determine if the driver has outstanding warrants, and mak[ing] inquiries as to the motorist's destination and purpose.²³⁷

Our proposed statute would not permit such a wide range of duties for noncriminal stops. It would also limit police manipulation of traffic stop duties, which would in turn limit unfounded criminal investigation.

Limitations are appropriate, even with a probable cause requirement. Although the United States Supreme Court said in *Berkemer v. McCarty*²³⁸ that a traffic stop is "more analogous to a so-called 'Terry stop' than to a formal arrest," analogous does not mean identical.²³⁹ We propose additional limitations because the subjects of the covered stops are not criminal suspects. Some may object that the police and prosecution should not be hampered by a higher requirement (probable cause) than for a *Terry* investigative stop (reasonable suspicion), while still held to the *Terry* scope limits. The simple answer to that objection is that the basis for the stop is based upon a belief only that a very minor, indeed noncriminal, offense has been committed. Motorists not suspected of any crime should get the benefit of both temporal and scope limits and the higher quantum of evidence (probable cause rather than reasonable suspicion) precisely because there is no basis to believe criminal activity is involved. The criminal activity uncovered in typical cases is a result of long and intrusive stops, not a rationale for them. Given the large number of traffic offenders subjected to longer and more intrusive procedures, the benefit of uncovering the criminals among them is insufficient justification for the protracted detentions. Specific limitations are described below.

2. *Specific Limits on Post-Stop Questions and Investigation*

Our suggestions basically parallel Professor LaFave's for courts interpreting the Fourth Amendment.²⁴⁰ LaFave points out that the "bare essentials of a routine traffic stop consist of causing the vehicle to stop, explaining to the driver the reason for the stop, verifying the credentials of the driver and the vehicle, and then issuing a citation or a warning."²⁴¹ Additional activities beyond the "bare essentials" violate close application

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

238. 468 U.S. 420 (1984).

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

240. See LAFAVE, *supra* note 18, § 9.3(c)-(d), at 379-94.

241. *Id.* at 377.

of the *Terry* doctrine.²⁴² Nonetheless, verification of a driver's license and vehicle registration is consistent with the basis for the stop.²⁴³

a. Warrant and Criminal History Checks

Warrant checks, at least if not overly time-consuming, are grudgingly permitted by LaFave's vision of the Fourth Amendment.²⁴⁴ But we incorporate LaFave's argument for:

[A] total prohibition (without regard to whether the check increases the time of detention significantly or at all) on the use of criminal history checks incident to traffic stops except when there also exists a reasonable suspicion of more serious criminal conduct. Because in this "war on drugs" via traffic stops the criminal history check serves to identify drivers who deserve (at least in the officer's mind) more intense scrutiny, a prohibition on such checks could contribute in a meaningful way to reducing the number of pretext stops as well as the number of stops in which the motorist is subjected to excessive scrutiny and detention.²⁴⁵

LaFave rejects the justification of criminal history checks based on the rubric of officer safety. He concludes that other permitted procedures, such as frisks and searches of a vehicle based on reasonable suspicion and even removal of the driver and passengers without any reasonable suspicion, are sufficient to assure officer safety.²⁴⁶

The proposed legislation prohibits record checks of passengers, absent reasonable suspicion of crime. Any argument in favor of routine, suspicionless checks of passengers would presumably apply to citizens generally. Imagine you are at the public library paying a fine for an overdue book. While waiting for the librarian to check your lending record, a

242. *Id.* at 377-94.

243. *Id.* at 378-80.

244. *Id.* at 380-84. LaFave, while noting that warrant checks have become routine, also notes good reasons for prohibiting them when not related to any specific suspicion related to the traffic offense upon which the stop is based. Nonetheless, LaFave states:

While there is much to these arguments, I would not press as hard for a change in the warrant check practice as I would as to other procedures I recommend later herein should be prohibited. This is because there are at least *some* rational arguments that can be made for retaining the warrant check routine as to a person who apparently has committed a traffic offense.

Id. (emphasis added). The "rational arguments" LaFave offers are to check for prior traffic offenses, which he analogizes to the license and registration check, and to make the scope of inquiries for traffic violations parallel with non-traffic *Terry* stops, where warrant checks are permitted for offenses not related to the reason for the stop. *Id.* at 383-84.

245. *Id.* at 385-86.

246. *Id.*

government computer is checked to see if you have any outstanding warrants or criminal history. Such checks would be analogous to “routinely” doing the same for drivers, minus, of course, the intimidation factor of a police officer’s authority—a uniform, badge, gun, and police power.

Now, imagine you are merely accompanying a friend stopping at the library to pay a fine. Assume the librarian asks your name and perhaps for your library card to justify your presence in the library, then runs a warrant and criminal history check on you while your friend waits to complete the fine payment procedure. Such invasiveness would be intolerable, but is practically indistinguishable from routine record checks of passengers riding with noncriminal traffic offenders.

b. Prohibition of Questioning About Drugs, Weapons,
and Other Subjects Unrelated to a Traffic Offense,
Absent Reasonable Suspicion

LaFave criticizes numerous court decisions that have allowed questioning unrelated to the traffic stop, but was instead designed to uncover the possession of drugs or weapons. Regarding court decisions claiming this type of questioning promotes the public interest in fighting illegal drugs, he bluntly states:

These positions are dead wrong! They are totally at odds with the *Terry* line of Supreme Court decisions on the limits applicable to temporary detentions, and amount to nothing more than an encouragement to police to undertake pretextual traffic stops so that they may engage in interrogation about drugs in a custodial setting (albeit not custodial enough to bring even the protections of *Miranda* into play). The correct rule is that followed by some other courts: that in strict accordance with *Terry* and its progeny, questioning during a traffic stop must be limited to the purpose of the traffic stop and thus may not be extended to the subject of drugs.²⁴⁷

LaFave’s position requires him to criticize “the Supreme Court’s no-search-ergo-no-scope-violation oversimplification in *Illinois v. Caballes*.”²⁴⁸ Because *Caballes* led to *Muehler v. Mena*, where the court held that a “detainee could be questioned on any subject so long as the seizure was not lengthened as a consequence,” courts have understandably

247. *Id.* at 391.

248. *Id.* (discussing *Illinois v. Caballes*, 543 U.S. 405 (2005)).

relied on *Muehler* in taking that same approach with respect to traffic stops.²⁴⁹

LaFave recognizes that questioning about weapons is a close call, but he ultimately rejects the idea that such questions should be permitted under a theory that officer and bystander safety is a more compelling interest than uncovering criminality. He rejects that theory because there are many other means available for ensuring officer safety, including requiring the traffic violator to exit his vehicle and remain outside during the entire period of the detention.²⁵⁰

c. Reasonable Suspicion and Warning Required for Request for Consent to Search

Seeking consent to search has become routine for officers making minor traffic stops.²⁵¹

These requests result in affirmative responses in the overwhelming majority of cases; guilty or innocent, “most motorists stopped and asked by police for consent to search their vehicles will expressly give permission to search their vehicles,” resulting in “thousands upon thousands of motor vehicle searches of innocent travelers each year.”²⁵²

As with the police techniques discussed earlier, when the resulting search turns up drugs, courts generally approve of the request for consent, finding the consent to be voluntary.²⁵³ The exceptions involve cases where the consent is requested and obtained after the traffic stop had or should have been completed.²⁵⁴ Professor LaFave again criticizes the courts for their excessive deference to what has become routine police practice:

Here again, the failure of most courts, when dealing with traffic stop consent searches, to adhere to the *Terry* limits on what constitutes a reasonably temporary detention has produced very distressful results. Consent searches are no longer an occasional event by which a crime suspect may “advise the police of his or her wishes and for the police to act in reliance on that understanding,” but are now a wholesale activity accompanying a great

249. LAFAVE, *supra* note 18, § 9.3(d), at 391.

250. *Id.* § 9.3(b), at 239.

251. *Id.* § 9.3(e), at 395.

252. *Id.* (quoting Robert H. Whorf, *Consent Searches Following Routine Traffic Stops—The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1, 2 (2001)).

253. LAFAVE, *supra* note 18, § 9.3(e), at 396.

254. *Id.*

many traffic stops, submitted to by most drivers, guilty or innocent, and resulting in continued interruption of their travels for a substantial period of time while they wait by the roadside as their vehicles are ransacked, a process which beyond question “is highly invasive of the dignitary interest of individuals.” Certainly the best way to deal with this problem is as in *State v. Fort*, involving a traffic stop for speeding and a cracked windshield; the court quite correctly held that the officer’s “consent inquiry . . . went beyond the scope of the traffic stop and was unsupported by any reasonable articulable suspicion,” meaning the evidence obtained via the consent must be suppressed, without regard to whether the inquiry and subsequent search “may also have extended the duration of the traffic stop.” Regrettably, here again the Supreme Court’s ill-considered decision in *Illinois v. Caballes* appears to point in the opposite direction.²⁵⁵

Our proposed legislation sides with Professor LaFave and the Minnesota Supreme Court’s decision in *Fort*²⁵⁶ by limiting the intrusiveness of the noncriminal traffic stop through a requirement of reasonable suspicion as a condition to requesting consent.²⁵⁷

The language “during the stop or after the citation is issued”²⁵⁸ is prompted by the tendency of some courts to allow officers to ask for consent to search after completion of the traffic stop on the bogus theory that the “stop” has magically transformed into a “consensual encounter.”²⁵⁹ Granted, the United States Supreme Court held, in *Ohio v. Robinette*,²⁶⁰ that no police warnings are required to obtain consent. But that does not belie the fact that courts have unrealistically determined that the initial stop is terminated because the driver at this point feels free to leave. As LaFave convincingly argues:

It is . . . nonsensical for courts to continue their embrace of the . . . position that a reasonable motorist, having been seized, would conclude he was free to leave (even though not told so) in the face of ongoing police interrogation. As police materials for public consumption and for use in driver’s education training specifically

255. LAFAVE, *supra* note 18, § 9.3(e), at 396 (footnotes omitted).

256. *State v. Fort*, 660 N.W.2d 415 (Minn. 2003).

257. LAFAVE, *supra* note 18, § 9.3(e), at 397.

258. See discussion *supra* Part IV (proposing an addition to section 39-07-07 of the North Dakota Century Code).

259. LAFAVE, *supra* note 18, § 9.3(g), at 402-06.

260. 519 U.S. 33 (1996).

indicate, a motorist subjected to a traffic stop is not free to leave until expressly told so by the officer.²⁶¹

The warning requirement we propose is consistent with the Ohio Supreme Court's remedy, rejected by the United States Supreme Court,²⁶² and also adds "a requirement that police return a motorist's driving documents before or simultaneous with the statement 'you are free to go.'"²⁶³

d. Reasonable Suspicion Requirement for Use of Drug Sniffing Dog

Although some courts have found dog drug-detection sniffing to be objectionable when done after the traffic detention was completed, in most cases, it can be completed during or quickly after the traffic stop itself. LaFave describes the courts' willingness to employ a "fudge factor" on the temporal limits to a traffic stop:

Here as well, it may be concluded that the appellate courts have, for the most part, missed the mark completely on the matter of drug dog sniffing in connection with traffic stops. There should be no need for the complex and often nearly impossible task of calculating just when the time should be deemed to have expired in the case of a particular traffic stop and, often, the equally bedeviling task of heading down the slippery slope [sic] to determine just how much extra time after the proper ending of the traffic stop should be excused on some de minimus theory. Rather, the central point is that use of a drug sniffing dog has absolutely nothing to do with the traffic infraction which served as the sole justification in the first place, and for that reason alone should not be permitted at all. Allowing the dogs to be used serves only as a positive encouragement for police to engage in pretext and subterfuge, hardly a defensible move given the common knowledge that traffic law enforcement has been diverted from its justified objectives to serve as a means for seeking out drugs. Allowing use of the drug dogs at all in conjunction with traffic stops can only encourage the making of stops for insignificant and technical violations on the basis of unarticulated suspicions and mere hunches or, at worst, on totally arbitrary and discriminatory bases. Moreover, allowing use

261. LAFAVE, *supra* note 18, § 9.3(g), at 402.

262. *State v. Robinette*, 653 N.E.2d 695, 698 (Ohio 1995), *rev'd*, 519 U.S. 33 (1969).

263. Robert H. Whorf, "Coercive Ambiguity" in the Routine Traffic Stop Turned Consent Search, 30 SUFFOLK U. L. REV. 379, 410 (1997); *United States v. Soto*, 988 F.2d 1548, 1557 (10th Cir. 1993).

of the dogs at all intrudes into the process another decision, whether to summon a drug dog, which the cases indicate requires neither reasonable suspicion nor, for that matter, any justification whatsoever, but which the practice indicates is also likely to be made on an arbitrary basis.²⁶⁴

Professor LaFave's critique of the status quo is compelling. He incredulously notes the courts have held the dog sniff itself is not a Fourth Amendment search.²⁶⁵ But that legal determination is incongruent because dog sniffs "taint the stop purportedly made only for a traffic violation because they have absolutely no relationship to traffic law enforcement."²⁶⁶ He convincingly points out the defects in the United States Supreme Court's *Caballes*²⁶⁷ decision and underscores our repeated main point: maintaining the status quo created by courts, including the United States Supreme Court, ignores the rights of innocent motorists, for whom the use of drug dogs "produces many unpleasant and adverse consequences."²⁶⁸

LaFave's list of five aspects of how the use of drug dogs is unpleasant and adverse is compelling.²⁶⁹ We ask readers—and legislators and judges—to imagine they are stopped for a minor offense, as in our introductory story where a judge, on her way to work, is stopped for obstructed vision from a parking permit hanging from her rear-view mirror. First, for many people, the use of large dogs has an intimidating character. "Drug dogs 'are large, and to many ordinary innocent people, fearsome animals,' and hence the 'intrusion of these dogs is offensive to some, frightening to others, and, sadly, to at least a few, reminiscent of the ugliest types of scenes that have occurred in police states.'"²⁷⁰ Second, the use of the drug sniffing dog for a

264. LAFAVE, *supra* note 18, § 9.3(g), at 400.

265. *Id.*

266. *Id.*

267. *Id.* LaFave characterizes *Illinois v. Caballes*, 543 U.S. 405 (2005), which he extensively critiques earlier in section 9.3(b), as follows:

[I]n the *Caballes* case a majority of the Supreme Court missed this point completely and, in rather summary fashion, overturned a sound state court decision by merely declaring (contrary to its own prior decisions) that nonsearch activity cannot constitute a violation of the Terry scope limitation. Had the Court not taken that misstep, it would have had occasion to consider the petitioner's claim that use of a drug dog as in *Caballes* is not merely no search, but a total 'non-event,' no different than if the officer, standing by to receive the driver's license and registration, were instead handed a bag of cocaine. But this is most assuredly not the case, for such use of drug dogs produces many unpleasant and adverse consequences even for an innocent motorist.

LAFAVE, *supra* note 18, § 9.3(f), at 401.

268. *Id.*

269. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(f), at 32-34 (4th ed. Supp. 2006).

270. *Id.* at 32 (quoting *United States v. DiCesare*, 765 F.2d 890, 901 (9th Cir. 1985)).

person not otherwise suspected of a crime is “an accusatory act, one which will be upsetting to the innocent motorist because it will appear he has been singled out as a drug suspect for reasons about which he can only speculate.”²⁷¹ Third, the use of the dog is also “likely to be humiliating to the driver of the vehicle, for such use manifests police suspicion of the driver as a drug courier to all those who may pass by while the scenario is being played out on the side of an interstate highway or city street.”²⁷² Fourth, the use of the dog may cause delay to the driver and any passengers.²⁷³ Finally, perhaps most telling for this article’s premise and appeal to the legislature, the use of drug dogs “in wholesale fashion without individualized suspicion creates an unnecessary and unjustified risk that many motorists totally innocent of any wrongdoing regarding drugs will be subjected to an extended and exhaustive roadside search of their vehicles.”²⁷⁴

Courts almost invariably find that a drug dog’s alert constitutes probable cause to search the vehicle and its occupants.²⁷⁵ But doing so without a reasonable suspicion prerequisite creates what we hope the legislature will find to be an unacceptable risk of “false positives.” LaFave recounts the danger as described in a law review article examining the training and reliability of narcotics detection dogs.²⁷⁶ Assume a dog and handler accuracy rate of 98%, that 0.5% of the population has drugs in their possession, and 10,000 random drug sniffs. Of 10,000 people, only 50 individuals (10,000 x 0.005) will possess drugs, and the dog will find 49 of them (50 x 0.98). Nine thousand nine hundred fifty individuals of the 10,000 will not possess drugs, but the dog will erroneously alert to 199 (9950 x 0.02). This example statistically underscores the main point of our proposal—the cost to innocent citizens of excessive zeal to catch drug offenders. Those 199 innocent individuals are not just subjected to the unjustified intimidation, humiliation, accusation, and suspicion of the dog sniff itself; the alert will lead to a thorough search of the vehicle and its occupants for the drugs. We agree with LaFave that the correct result is obtained in Minnesota, where, in *State v. Wiegand*,²⁷⁷ the Minnesota Supreme Court found that even though the sniff itself was not a search, the

271. *Id.* at 63. LaFave goes on to explain why the use of dogs for individual traffic stops is worse than the use of dogs at a checkpoint for all persons stopped; condemned by the United States Supreme Court in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

272. *Id.*

273. *Id.*

274. *Id.* at 34.

275. *Id.*

276. *Id.* (relying on Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 427-32 (1997)).

277. 645 N.W.2d 125 (Minn. 2002).

stop was prolonged beyond the time necessary to issue a warning ticket for a burned out headlight.²⁷⁸ LaFave praises and summarizes the Minnesota approach as follows:

Proceeding step by step, the court reasoned (1) that “the *Terry* principles are appropriately applied in this case”; (2) that “*Terry* authorizes us to balance the nature and quality of the intrusion into the individual’s Fourth Amendment interests against the importance of the governmental interests as [sic] stake”; (3) that “there is some intrusion into privacy interests by a dog sniff”; and (4) that consequently the Fourth Amendment requires “a reasonable, articulable suspicion of drug-related criminal activity before law enforcement may conduct a dog sniff around a motor vehicle stopped for a routine equipment violation in an attempt to detect the presence of narcotics.”²⁷⁹

We have little confidence that the North Dakota Supreme Court would follow the persuasive reasoning of the Minnesota Supreme Court. As explained above, the North Dakota Supreme Court has shown little or no concern for the rights of innocent drivers subjected to extensive criminal investigation techniques when stopped for noncriminal offenses. Thus, we propose a legislative reasonable suspicion requirement for the use of narcotics dogs.

C. LEGISLATIVE EXCLUSIONARY REMEDY

The authors are not particularly fond of the exclusionary rule. Indeed, coauthor Lockney, in an Open Letter to the North Dakota Attorney General published in this journal over twenty years ago, offered a proposal for a way to avoid the evils of the exclusionary rule.²⁸⁰ The legislature, the executive branch, and the courts have not shown any inclination to pursue that proposal. In lieu of an alternative that is likely to ensure the respect for the privacy of motorists promoted by our proposed legislative limits, we reluctantly conclude that the police are unlikely to restrict their tendency to pursue criminal investigations of noncriminal traffic offenders and their passengers.²⁸¹

278. *Wiegand*, 645 N.W.2d at 127-39.

279. LAFAVE, *supra* note 18, § 9.3, at 402.

280. Lockney, *supra* note 46, at 26-32.

281. Of course, it is also possible to begin to implement the proposal that coauthor Lockney made years ago to provide an alternative to the exclusionary remedy. *See generally id.* (discussing a proposed alternative to the exclusionary rule.) That alternative would require clearer rules (made administratively, or, perhaps, as proposed here, by legislation), education to assure police knowledge of the rules, and a record of serious enforcement against the police for violations of the

D. ALTERNATIVE PROPOSAL FOR MAXIMUM CRIME CONTROL—
OPEN AND HONEST LEGISLATIVE RATIFICATION OF THE
STATUS QUO

We understand that there will be opposition to part or all of our proposed legislation. Each part changes the status quo. The status quo guarantees two things: (1) more criminals are caught, and (2) more innocent drivers and passengers have their privacy invaded.²⁸² Professor LaFave and others have many practical and reasonable suggestions to protect the privacy of motorists as a matter of judicial interpretation of the Fourth Amendment. We have little confidence his suggestions will be followed by either federal or North Dakota state courts. Thus, we propose the legislature examine each issue from the perspective of traffic offenders stopped for noncriminal traffic violations, such as the judge in our introductory

rules. Thereafter, it was proposed that a court, ultimately the United States Supreme Court, could be urged to find a North Dakota alternative sufficient to protect privacy and justify an exception to the exclusionary rule.

For years, coauthor Lockney has realistically or cynically—depending on your point of view—suggested to his students that nothing has happened because the powers that be are happy with the status quo. They can claim, on the one hand, that we have a Constitutional exclusionary rule and thus take Constitutional rights seriously—keeping liberals happy. But, on the other hand, the police and prosecution authorities know that the courts find many exceptions to the exclusionary rule and, when that is not possible, weaken the protections of the Fourth Amendment to the point where the police are not often seriously inhibited from doing what they need to do to get evidence for conviction of the guilty—keeping the law and order side happy. In other words, we have our cake (show a civil rights friendly face) and eat it too (create weak limits on the police and numerous exceptions to the exclusionary rule for the occasional violation the courts cannot avoid). As a final alternative—or perhaps in addition to exclusion of resulting evidence—minimal revisions could be made to North Dakota Century Code section 39-07-10, which provides an officer violating the legislative limits “is guilty of misconduct in office and is subject to removal from office.” N.D. CENT. CODE § 39-07-10 (2009).

282. Professor Harris noted the tradeoff in 1998:

Of course, there is a benefit to such broad police power: law enforcement will catch more criminals. Police will use the law to stop cars, question drivers, and search vehicles; this will result in a greater number of apprehensions than if they had more limited discretion. But if this is the main benefit of these cases, one must also note an important, and usually disregarded, cost; for each wrongdoer intercepted, some much larger number of absolutely innocent people are also stopped, questioned, and often searched—in short, treated like criminals. Moreover, this will not be spread evenly across all citizens. African Americans and people of color will suffer this treatment in numbers far out of proportion to their representation in the driving population.

Harris, *supra* note 13, at 558. Like LaFave, Harris proposed that courts limit traffic stops to reasonable efforts to enforce traffic laws, limit questioning, require that officers advise drivers they need not consent and may limit the scope of consent, and limit “detection devices” like drug-sniffing dogs. *Id.* at 585-89. Ten years later, the courts are still not listening; thus, our legislative proposal. Our legislation is in agreement with Harris’s conclusion that “[t]reating all citizens like criminals in order to catch the malefactors among us represents an unwise policy choice, an outlook favoring crime prevention over all of our other values,” and asks the legislature to provide limits the courts have avoided. *Id.* at 558.

hypothetical.²⁸³ We ask each legislator to consider the following questions regarding our suggested statute:

- If you or a loved one is stopped for a noncriminal offense such as an obstructed windshield, do you want the police to be fairly sure you are committing the offense (probable cause), or less sure—thinking there’s a reasonable chance you might be committing an offense (reasonable suspicion)?
- Do you want the officer to quickly and efficiently write your traffic ticket, or to be allowed to take her time and ask you questions about possible criminal violations for which there is no reasonable basis to believe you guilty?
- Do you believe that in addition to being asked to produce your driver’s license, documentation of vehicle ownership, and proof of insurance, the officer, while checking for outstanding warrants on you, should also be allowed to check your criminal history without any particular reason to believe you may be a convicted criminal?
- Do you believe the officer should be allowed to ask your passengers for identification and check their record for outstanding warrants and criminal history without any articulable reason to believe anything will turn up?
- Do you want the officer to be authorized to ask you questions unrelated to the reason for your stop—about drugs, weapons, or other contraband—without any reasonable suspicion you may have something illegal in your car?
- Do you want the officer to be able to ask you questions about your travel plans?
- After you deny possession of drugs or anything else illegal, do you want the officer to be able to ask you for consent to search your car absent any reasonable suspicion anything will be found?
- Should the officer be able to enlist the aid of a drug detection dog to sniff you and your vehicle for the presence of drugs, thus subjecting you to the resulting indignation and the possibility of

283. *Id.* Professor Harris suggested courts should examine “the full cost” of the broad power of the police in the war on drugs: “Any fair discussion of the effort to interdict drugs through traffic stops must take into account the bother, fear, embarrassment, and even humiliation that law-abiding people must tolerate in order that this ‘war’ be waged.” *Id.* at 580. Because the courts have not, we hope the legislature will.

a false alert, which will lead to a thorough search and more delay, even without a reasonable suspicion to believe you have drugs prior to the dog sniff?

A negative answer to any of these questions favors our proposed legislation on the point of agreement. If, however, the North Dakota Legislature believes that motorists have no reason to object to the currently “routine” procedures treating minor traffic offenders like criminals in order to find a small subset of them to be true criminals, it should enact our alternative statute. To clearly guide police, and to warn drivers and passengers of what is permissible if our proposed legislation is rejected, we urge honest legislative ratification of the status quo via the following alternative legislation:

Anybody may be stopped for any traffic or parking violation, whether serious or noncriminal, based on reasonable suspicion alone. Once stopped, the officer may require not only production of a driver’s license, documentation of the vehicle’s ownership and registration, and proof of insurance, but may also ask questions unrelated to the traffic offense for which the stop was made. In addition to checking for outstanding warrants for the driver, the officer may, for no particular reason, run a criminal history check of the driver. Passengers may be asked to identify themselves even when not suspected of any criminal activity. Warrant, license, and criminal history checks of passengers may also be made for no particular reason. The officer may ask about the possession of drugs or weapons and for consent to search the car without any particular reason to believe there are drugs or weapons in the car. The officer may also use a drug detection dog to determine the possible presence of drugs in the car without any reasonable basis to suspect the presence of drugs.

It is possible that today, long after Orwell’s *1984*²⁸⁴ and well into the not-so-brave new post-9/11 world, our expectations of privacy have eroded to the point where most legislators or the majority of drivers and voters in North Dakota would reject the increase in privacy that our proposal offers because of the reduction in prosecution of drug offenders and drunk drivers it admittedly entails. Consideration of the proposed legislation will allow that trade-off to be debated and decided openly and comprehensively, outside the narrow and prosecution-favorable context of a specific criminal court case.

284. GEORGE ORWELL, 1984 (1961).

V. CONCLUSION

Appellate judges in criminal appeals are generally faced with issues raised by guilty criminals. Defendants found innocent by the police are released on the scene; those found not guilty by trial judges or juries have nothing to appeal; appellants, therefore, are complaining about traffic stops that discovered their guilt. Appellate courts are thus asked whether the police, who used this procedure to produce a conviction of this guilty criminal, should be told that to protect the rights of others, this particular procedure will not be allowed, knowing that if it does so the appellant will get a new trial and possibly an acquittal. The deck is stacked in favor of the “correct” result—affirmation of the conviction of the guilty criminal, rather than restricting the police in order to protect other motorists who may be innocent. Each individual issue—basis for stop, duration of stop, questions, identity and records checks, requests for consent to search, drug sniffing dogs, etc.—seems “trivial” compared to the cost of favoring the guilty criminal; without consideration of the other stop procedures not involved or raised in the particular case.

The questions we pose to the legislature, however, allow for a comprehensive look at the total picture—and the privacy of all drivers and passengers in North Dakota. How many time-consuming and embarrassing, even to innocent drivers, procedures will we authorize the police to use to produce additional drug and drunk driving convictions? If the answer is “any and all,” then we propose that decision be made openly and honestly by the legislators for all North Dakota motorists. If the status quo is maintained, all concerned North Dakotans should be aware of the fact that their precious state and federal constitutional right to be free from unreasonable searches and seizures on the road is, in reality, a sham.

As the authors have discussed for over ten years, any reasonably astute police officer can stop any vehicle virtually at will. And, under current law, that officer may treat noncriminal offenders and passengers in many similar ways as criminals, without any reasonable basis to suspect crime. Our proposed legislation imposes limits on existing judicially-created authority to employ criminal procedures in dealing with people who are not suspected of any criminal offense.