Pace Law Review

Volume 17
Issue 3 *Tribute 1997*
Celebrating the Life of Barbara C. Salken

Article 16

June 1997

The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses

Barbara C. Salken

Follow this and additional works at: http://digitalcommons.pace.edu/plr

Recommended Citation
Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 17 Pace L. Rev. 97 (1997)
Available at: http://digitalcommons.pace.edu/plr/vol17/iss3/16

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

[Reprinted with Permission from Temple Law Review, 62 TEMP. L. REV. 221 (1989). Citations appear as they do in the original.]

The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses

Barbara C. Salken*

* Associate Professor of Law, Pace University. B.A., Skidmore College, 1969; J.D., Brooklyn Law School, 1975.

I gratefully acknowledge the thoughtful editorial suggestions of Professors Bennett L. Gershman, M. Stuart Madden, and Harry I. Subin, as well as the research assistance of Warren Roth and Joseph Poggiolo. I would like to separately thank me friend, Professor Donald L. Doernberg, whose generous contribution of time and intellect was truly extraordinary.

Introduction

The fourth amendment[1] protects against unreasonable searches and seizures.[2] A search is generally considered unrea-

1. U.S. CONST. amend. IV provides:

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.

2. United States v. Rabinowitz, 339 U.S. 56, 60 (1950); Carroll v. United States, 267 U.S. 132, 147 (1925).

sonable unless it is based on probable cause and has been authorized by warrant.[3] Given that the intent of the framers of the amendment was to protect against the unlimited and arbitrary exercise of power by the government,[4] a layman would doubtless be surprised to learn that police officers in most states may arrest and search virtually every adult almost at whim. This power exists because of the combination of two factors: the myriad rules regulating automobile travel and the Supreme Court's refusal to treat searches and seizures arising out of violations of traffic laws any differently from searches and seizures associated with serious criminal offenses.[5]

When a police officer sees a traffic offense, such as driving with a faulty turn signal, the officer has the power to direct the driver to stop the vehicle and produce identification.[6] Although most would expect the officer to issue a summons, that is not the only option available. In many jurisdictions the officer may arrest the driver, which may involve a brief ride to the precinct followed by the payment of a bond[7] or the signing of an agreement to later appear in court.[8] The arrest may also be as intrusive as detention in a jail cell until appearance before a magistrate.[9] But in any case, after arrest, the officer may search the driver. This is not a mere pat-down search, sometimes called a frisk, which is associated with a search for weap-

3. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (search of car absent prior approval by judge or magistrate is per se unreasonable under fourth amendment).

4. *See infra* notes 208-33 and accompanying text for a discussion of history antecedent to the fourth amendment.

5. *See infra* notes 45-68 and accompanying text for a discussion of the Supreme Court's treatment of searches incident to an arrest for traffic offenses.

6. *See, e.g.*, People v. Lichtenheld, 44 Ill. App. 3d 647, 358 N.E.2d 694 (1976) (officer, after observing defendant driving with burnt-out headlight, has authority to require defendant to stop).

7. *See, e.g.*, People v. Mathis, 55 Ill. App. 3d 680, 371 N.E.2d 245 (1977) (officer has authority to request traffic offender to go to station to post bond when driver is unable to produce valid license).

8. *See, e.g.*, TENN. CODE ANN. § 40-7-118(d)(2) (Supp. 1988) (offender will be released from custody after signing citation).

9. *See, e.g.*, N.Y. CRIM. PROC. LAW § 140.10(1)(a) (McKinney 1986) (permits any officer to arrest for any offense committed in his presence); *id* § 140.21 (McKinney 1986) (requires performance of certain procedures following arrest until ultimate appearance before magistrate who may then release).

ons.[10] Rather, the search involves the entire body of the arrestee, including the contents of pockets, pocketbooks, and containers found in pockets or within the driver's reach. Indeed, the search is not even limited to the driver's body; it can include the entire passenger compartment of the car. The permissible scope of the search includes "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well a luggage, boxes, bags, clothing, and the like."[11] In most jurisdictions, failure to notice that one's taillight is out subjects one and one's possessions to the same loss of privacy as an arrest for robbery.[12]

Wide-ranging searches conducted on the basis of such ubiquitous events as traffic violations are subject to abuse. Almost every American adult drives; hence the pool of potential arrestees is enormous.[13] The innumerable rules and regulations governing vehicular travel make it difficult not to violate one of them at one time or another. "Very few drivers can traverse any appreciable distance without violating some traffic regulation."[14] The police officer's unconditional power creates the danger that the discretion to arrest for a traffic violation will be exercised as a pretext to enable the officer to search. Such a

---

10. A frisk is a search, usually limited to a patting of the suspect's outer clothing, in an effort to determine, without going inside the pockets or under the outer surface of the garments, whether the suspect possesses any hard object that might be a weapon. Terry v. Ohio, 392 U.S. 1, 30-31 (1968).

11. New York v. Belton, 453 U.S. 454, 460-61 n.4 (1981).

12. *See infra* notes 188-90 and accompanying text for a discussion of police discretion to arrest for traffic violations.

13. In 1986, there were an estimated 154,435,000 licensed drivers in the United States who were 18 years of age or older. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 581 table 1001 (108th ed. 1988). Millions of traffic tickets are issued each year. Although there are no national statistics, a sampling of just a few states is ample evidence of the size of the potential pool. In New York alone there were 1,593,195 convictions for moving violations in 1985. NELSON A. ROCKEFELLER INSTITUTE OF GOVERNMENT, 1986-1987 NEW YORK STATE STATISTICAL YEARBOOK 274 (13th ed.). A small state like Connecticut convicted 288,420 persons of moving violations in 1987. Telephone interview with Don Williams, Connecticut Department of State Police (Sept. 6, 1988). The California Highway patrol issued 3,111,769 citations for moving violations in 1987. Telephone interview with Beverly Christ, Management Information Section of the California Highway Patrol Jurisdiction (Sept. 12, 1988).

14. B.J. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 23 (1966).

search might be motivated "simply to satisfy his [or her] curiosity, to pursue vague suspicions, or even to harass."[15]

In an article written immediately after *United States v. Robinson*,[16] in which the Supreme Court refused to distinguish between searches incident to an arrest for a traffic violation and those incident to arrests for more serious offenses, Professor Wayne LaFave called the problem of traffic arrests as a pretext to search the "*Robinson* Dilemma" and suggested various measures to prevent arbitrary exercise of police power in this context.[17] Although the Court has never directly addressed the pretext problems raised by Professor LaFave, state courts and legislatures have. A few states reject the holding in *Robinson* and limit the power to search incident to a traffic offense.[18] Courts in other states struggle to identify pretextual arrests and, when identified, suppress evidence discovered in a subsequent search.[19] Some legislatures restrict the police power to arrest for minor offenses, but do so ineffectively.[20] Very few jurisdictions have solved the *Robinson* Dilemma either judicially or legislatively.

Restricting the power to arrest is the most rational and effective solution to preventing unjustified searches incident to arrest for traffic offenses, since without an arrest the necessity for permitting a search vanishes. This article makes the case that the fourth amendment prohibits these arrests. Part I examines the Supreme Court decisions that permitted the problem to develop. Part II evaluates the solutions proposed by other commentators, surveys how the fifty states have responded, and concludes that few states have satisfactorily eliminated the danger of pretextual arrests. Part III considers the fourth amendment implications of custodial arrests for traffic offenses and shows that the authority to arrest for a traffic of-

15. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 281 (1984).

16. 414 U.S. 218 (1973).

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

18. *See infra* notes 149-55 and accompanying text for a list of states rejecting *Robinson*.

19. *See infra* notes 121-27 and accompanying text for a discussion of suppression of evidence on a showing of pretext.

20. *See infra* notes 187-90 and accompanying text for a discussion of state limitations on police discretion to conduct searches.

fense creates power to search tantamount to the unlimited and arbitrary authority that led to the adoption of the fourth amendment.[21] Part III also shows that custodial arrests for minor offenses have neither historical nor practical justification.[22] Recent decisions by the Supreme Court provide a basis for examining the reasonableness of government intrusions and lead to the conclusion that custodial arrests for minor traffic infractions offend the requirements of the fourth amendment.[23] After balancing the government's need for custodial arrests and the individual's right to be free from unreasonable seizures, this article concludes that there is little need to arrest for most traffic offenses. With the exception of people who cannot furnish identification, there is no legitimate governmental need to arrest for any traffic offense other than driving while intoxicated. Therefore, the fourth amendment should be recognized to prohibit custodial arrest for other traffic offenders. Such a rule satisfies both the government's need to enforce the traffic laws and prevents serious intrusions on a person's privacy by avoiding the possibility, otherwise not subject to effective limitation, of pretextual arrests.

I. How the Supreme Court Created the Unconditional Power to Conduct Far-Reaching Searches of a Traffic Offender

Although the Court has frequently said that searches without warrants are the exception rather than the rule,[24] the reverse is actually true.[25] One of the oldest exceptions to the search warrant requirement, search incident to the arrest of a

21. *See infra* notes 205-39 and accompanying text for a discussion of reasons for the fourth amendment's adoption and their relation to traffic violations.

22. *See infra* notes 240-53 and accompanying text for a discussion of the historical and practical justifications for custodial arrests for minor offenses.

23. *See infra* notes 258-87 and accompanying text for a discussion of Supreme Court opinions concerning custodial arrests for minor traffic violations.

24. *See, e.g.*, United States v. Robinson, 414 U.S. 218, 242 (1973); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967); McDonald v. United States, 335 U.S. 451, 453 (1948).

25. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE introduction of commentary at 156-58 (Proposed Official Draft No. 1, 1972) (although the Supreme Court has repeatedly stressed constitutional importance of warrants, as practical matter, searches without warrant and incidental to arrest have been of greater importance and frequency).

suspect, permits warrantless searches more often than police receive permission to search by warrant.[26] Searches of traffic violators are justified under this exception to the warrant requirement. A police officer may conduct such a search based exclusively on the authority to arrest a person for a traffic offense. An officer need not have any particular reason to think that weapons or evidence of crime will be found. The far-reaching search power that the Supreme Court now permits incident to such an arrest increases the danger of arbitrary arrests for traffic offenses. Unconditional power to search permits a police officer to legally search an individual by arresting the person for violation of a minor traffic ordinance, and therefore bypass the normal probable cause and warrant requirements of the fourth amendment. The Court granted this power to search because of its desire to define the search-incident-to-arrest exception in such a way as to make it easy for police officers to determine when and where they may search. But the development of the exception has not run a straight course.

A. *Search Incident to Arrest Exception*

Searches of both person and place incident to lawful arrest have traditionally been made without the prior approval of a magistrate.[27] As early as 1914, in *United States v. Weeks*,[28] the Court alluded to "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime."[29] The Court noted that "[t]his right has been uniformly maintained in many cases."[30] Like most of the exceptions to the warrant requirement, the justification for these warrantless searches was originally based on an emergency.[31] The necessity for warrantless action incident

26. *Id.* at 183.
27. *Robinson*, 414 U.S. at 224.
28. 232 U.S. 383 (1914).
29. *Id.* at 392.
30. *Id.*
31. *See* Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFFALO L. REV. 429, 425 (1973). The exceptions to the warrant requirement include the following: automobile searches, Carroll v. United States, 267 U.S. 132 (1925); searches pursuant to consent, Bumper v. North Carolina, 391 U.S. 543 (1968); seizures in plain view, Coolidge v.

to arrest is founded on the reasonable need to disarm an arrestee and to prevent him or her from destroying evidence.[32] Search incident to arrest differs from other exceptions to the warrant requirement in that it not only permits the government to search without a warrant, but also permits a search without probable cause to believe that evidence of criminal activity will be found during the search. All that is required is a valid arrest.

The Court has not always been clear on the appropriate scope of a search incident; its contours have ebbed and flowed.[33] *Carroll v. United States*[34] spoke of "whatever is found upon [the arrestee's] person or in [the arrestee's] control,"[35] but only a year later the Court viewed search-incident as including not only the right to search the person arrested but "[t]he right . . . to search the place where the arrest is made."[36] Search incident reached its broadest scope in 1947 when the Court upheld a search of a defendant's entire five room apartment.[37]

The Court restricted the scope of search incident in *Chimel v. California*.[38] Police officers arrived at Chimel's house with a warrant to arrest him for the burglary of a coin shop. After arresting him, the officers looked through the entire three-bedroom house, including the attic, the garage, and a small workshop. In some rooms they opened and searched drawers.[39] After reviewing the body of law that created and extended the

---

New Hampshire, 403 U.S. 443 (1971); limited searches and seizures under the stop and frisk doctrine, Terry v. Ohio, 392 U.S. 1 (1968); searches and seizures on hot pursuit of a fleeing felon, United States v. Santana, 427 U.S. 38 (1976); and searches and seizures in exigent circumstances, Warden v. Hayden, 387 U.S. 294 (1967).

32. Chimel v. California, 395 U.S. 752, 763 (1969) (arresting officer may search suspect's person to discover and remove weapons, and to seize evidence to prevent its destruction and may also search area "within immediate control" of suspect).

33. *See* United States v. Robinson, 414 U.S. 218, 224 (1973) (extent of area subject to search incident to arrest inconsistently interpreted in Court's decisions).

34. 267 U.S. 132 (1925).

35. *Id.* at 158.

36. Agnello v. United States, 269 U.S. 20, 30 (1925).

37. Harris v. United States, 331 U.S. 145 (1947). "One agent was assigned to each room of the apartment and, over petitioner's protest, a careful and thorough search proceeded for approximately five hours." *Id.* at 149.

38. 395 U.S. 752 (1969).

39. *Id.* at 753-54.

search-incident exception, the Court concluded that the doctrine's broad development could "withstand neither historical nor rational analysis."[40] In another context,[41] the Court had recently held "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."[42] Applying the rationale in *Chimel*, the Court reasoned that,

> [w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.[43]

Thus, the Court concluded that the only justifications for permitting a search broader than the arrestee's person were to protect the police and to prevent destruction of evidence that might be within easy reach of the arrestee. The proper scope of a search incident was therefore only the arrestee's person and "grabbable area."[44]

---

40. *Id.* at 760.

41. Terry v. Ohio, 392 U.S. 1 (1968). In *Terry*, the Court considered the propriety of a search to protect the safety of an officer during a street encounter when the officer's knowledge falls short of probable cause to arrest the suspect. The Court concluded that such a search is permitted provided it is limited to a frisk. *Id.* at 4-8, 27.

42. *Id.* at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)), *quoted in Chimel*, 395 U.S. at 762.

43. *Chimel*, 395 U.S. at 762-63.

44. *Id.* at 763. The Court explained:

> A gun on the table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Id.

B. *Search Incident to an Arrest for a Traffic Violation*

Chimel thus clearly defined the scope of a search incident to an arrest for a crime. But what of arrests for traffic offenses? One could reasonably argue that since a police officer would not normally expect the average traffic violator to be armed and, since for most traffic offenses there is no real evidence that can be destroyed, searches incident to these arrests should be limited to a frisk or perhaps not permitted at all. The Supreme Court addressed this problem in three cases.

1. *United States v. Robinson* and *Gustafson v. Florida*

In 1973 the Court decided *United States v. Robinson*[45] and *Gustafson v. Florida*,[46] both of which involved searches incident to arrests for traffic offenses. In each, the defendant had argued that the searches, which uncovered narcotics, were illegal because the officers did not fear that the defendants were armed and because the traffic offenses involved no destructible evidence.[47] Accordingly, the justifications for a full search incident to arrest as articulated in *Chimel*[48] were absent.

In *Robinson*, a police officer observed the defendant driving. The officer knew from an encounter with Robinson only four days earlier that his operator's permit had been revoked, so he signaled Robinson to stop and arrested him for "operating after revocation and obtaining a permit by misrepresentation."[49] Pursuant to departmental guidelines, the officer began to search Robinson and, feeling a soft object in the breast pocket of his coat, removed a crumpled cigarette package containing four-

45. 414 U.S. 218 (1973).

46. 414 U.S. 260 (1973).

47. United States v. Robinson, 471 F.2d 1082, 1094 (D.C. Cir. 1972) (officer searched person arrested for operating motor vehicle without valid license and found 14 capsules of heroin; search held unconstitutional because officer only had probable cause to believe suspect possessed fraudulently obtained temporary operator's permit), *rev'd*, 414 U.S. 218 (1973); Gustafson v. Florida, 243 So. 2d 615, 625 (Fla. 1971) (officer exceeded scope of custodial search by removing cigarette package from defendant's coat pocket and examining its contents), *aff'd*, 414 U.S. 260 (1973).

48. *See supra* notes 38-44 and accompanying text for a discussion of the justifications for a full search incident to arrest as explained by the *Chimel* Court.

49. 414 U.S. at 220.

teen gelatin capsules of white powder which turned out to be heroin.[50]

The court of appeals viewed *Robinson* as squarely presenting the question of whether a person can be subjected to a full search of the person incident to an arrest for a mere traffic violation.[51] In deciding to suppress the narcotics, the court considered *Chimel* controlling and, noting the Supreme Court's requirement that the search be strictly justified by the circumstances that rendered its initiation permissible, concluded that a reviewing court's " 'inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' "[52] The court specifically identified the two justifications for an arrest-based search of the person as being "1) seizure of fruits, instrumentalities and other evidence of the crime for which the arrest is made in order to prevent its [sic] destruction or concealment; and 2) removal of any weapons that the arrestee might seek to use to resist arrest or effect his escape"[53] and then considered whether these objectives could justify a full search in a traffic case.

The court concluded that the search of Willie Robinson could not be based on the first justification since the officer already possessed the only possible evidence of the offense, the fraudulently-obtained temporary operator's permit.[54] The second justification, however, could not be so easily dismissed. Even if a traffic offender is less likely to be armed than one thought guilty of a criminal offense, a police officer is in danger when placing anyone in custody.[55] The close proximity and extended contact between an officer and an arrestee subjects the officer to greater risk than the momentary and relatively minor dangers presented in either the stop-and-frisk situation or in

50. *Id.* at 221-23.

51. United States v. Robinson, 471 F.2d 1082, 1090 (D.C. Cir. 1972), *rev'd*, 414 U.S. 218 (1973).

52. *Id.* at 1093 (quoting Terry v. Ohio, 392 U.S. 1, 19-20 (1968)).

53. *Id.*

54. *Id.* at 1094.

55. Placing a person in custody should be distinguished from the mere issuance of a summons and permitting the driver to drive away.

the routine traffic stop.[56] The court decided, therefore, that a search in this case was justified.[57]

Having made that decision, the court went on to consider whether the search was reasonably related in scope to the circumstances that justified it. The court concluded that "where, as in the routine traffic arrest there can be no evidentiary basis for a search, the *most* intrusive search the Constitution will allow is a limited frisk for weapons."[58] Relying on the Supreme Court's rationale in *Terry v. Ohio*,[59] the court held that a search incident to an arrest for a traffic offense must be limited to a pat-down frisk.[60] Only if the frisk reveals something suspicious would a full search be permitted.[61] In *Robinson*, therefore, examining the contents of a soft crumpled cigarette package was beyond the scope of a frisk and without any appropriate predicate.[62] Based on this analysis, the court of appeals reversed Robinson's conviction.[63]

The Supreme Court disagreed with the circuit court on two counts. First, the Court took issue with the idea that the *only* justification for a full search incident to lawful arrest was preventing the destruction of evidence.[64] Rather, the Court held, "[t]he justification or reason for the authority to search in-

56. 471 F.2d at 1098.

57. *Id.*

58. *Id.* at 1095 (emphasis in original).

59. 392 U.S. 1 (1967). In *Terry*, the Supreme Court considered the fourth amendment implications of a common police practice called stop and frisk. A stop is a brief detention of a person which enables the police to investigate suspicious behavior and which can be based on less than probable cause to arrest. If th officer has reasonable grounds to believe that the suspect is armed or dangerous, he is permitted to frisk (conduct a limited search of the suspect's outer garments by patting them from the outside) in order to determine whether the suspect is armed. In permitting the frisk, the Court noted that "it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Id.* at 26.

60. *Robinson*, 471 F.2d at 1097-98. However, unlike the decision in *Terry*, which required police to have a reason to believe the suspect was armed or dangerous before even a frisk was permitted, the circuit court concluded that a frisk might be conducted whenever a police officer makes a custodial arrest, even though the officer has no particularized suspicion that the suspect is armed. *Id.* at 1097.

61. *Id.* at 1098.

62. *Id.*

63. *Id.* at 1088.

64. *Robinson*, 414 U.S. at 233.

cident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial."[65] A full search is required for a custodial arrest because the extended contact and close proximity between the officer and the arrestee permits an arrestee more time to retrieve a hidden or small weapon that might not be discovered in a frisk. The question was not whether one arrested for a traffic offense was as likely to be armed as a suspect stopped for a criminal offense. The danger was created by the opportunity to use a razor or other small weapon if the traffic offender possessed one.[66]

Second, the Court soundly repudiated the lower court's case-by-case determination as to whether the underlying justifications for a search incident to an arrest were present in the *Robinson* case. The Court concluded that although the right to search was based upon the need to disarm and to discover evidence, its authority came automatically from the right to arrest and did not depend on a case-by-case determination of necessity. Recognizing that "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment,"[67] the Court wanted the rules to clearly reflect the officer's authority. The Court concluded:

> It is the fact of the lawful arrest which established the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.[68]

After *Robinson*, it is clear that an arrest for a traffic violation is to be treated like any other arrest. Since it is the fact of arrest that gives officers the power to search, the reason for the arrest is irrelevant in determining the power to search or the scope of a search.

---

65. *Id.* at 234.
66. *Id.* at 234-35.
67. *Id.* a 235.
68. *Id.*

The officer arrested Robinson because the procedures under which the officer operated required it.[69] The decision to arrest was not discretionary and therefore could ot be used as a pretext to search someone who might not otherwise have been arrested. But what about the case in which the power to arrest is discretionary? There is a real danger of custodial arrests as pretexts to search in such a situation. The Court might have eliminated the danger of traffic arrests as pretexts for searches by permitting arrests and searches only pursuant to established police regulations.[70] However, on the same day the court decided *Robinson*, it decided its companion case, *Gustafson v. Florida*.[71]

James Gustafson was a college student who went out one night, leaving his driver's license in his dormitory room.[72] A police officer was on routine patrol when he observed Gustafson's car weaving across the center line and back to the right side of

---

69. *Id.* at 221 n.2.

70. *See* Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974). Professor Amsterdam argues that if the Court had distinguished *Robinson* from *Gustafson* on the basis of the presence of local police regulations it would have "made by far the greatest contribution to the jurisprudence of the fourth amendment since James Otis argued against the writs of assistance in 1761." *Id.* Professor Amsterdam fears the arbitrary exercise of discretion by a police officer. To prevent that danger he would have all searches and seizures evaluated by these three rules:

> 1) Unless a search or seizure is conducted pursuant to and in conformity with either legislation or police departmental rules and regulations, it is an unreasonable search and seizure prohibited by the fourth amendment. 2) The legislation or police-made rules must be reasonably particular in setting forth the nature of the searches and seizures and the circumstances under which they should be made. 3) The legislation or rules must, of course, be conformable with all additional requirements imposed by the fourth amendment upon searches and seizures of the sorts that they authorize.

Id. at 416-17.

The Supreme Court has recognized the role of standardized procedures in controlling arbitrary police action by requiring that administrative warrants show reasonable legislative or administrative standards for conducting inspections. *See* Camara v. Municipal Court, 387 U.S. 523, 538 (1967) (fourth amendment bars warrantless administrative searches to enforce Housing Code). It has also suggested that other standard police procedures are acceptable only pursuant to standard regulations. *See* South Dakota v. Opperman, 428 U.S. 364, 376 (1976) (automobile inventories must be carried out in accordance with standard procedures of local police department).

71. 414 U.S. 260 (1973).

72. *Id.* at 262.

the road.[73] The officer stopped the car and, after learning from Gustafson that he was licensed but did not have his license with him, arrested and searched him.[74] The officer placed his hand in the left front coat pocket of Gustafson's coat and extracted a cigarette box.[75] He opened the box and discovered marijuana cigarettes.[76] Gustafson was charged with possession of the marijuana and driving without an operator's license. The latter charge was dropped when Gustafson subsequently produced his license.[77]

There are a number of important differences between *Robinson* and *Gustafson*. First, Gustafson had no previous encounters with the officer and was arrested for a minor offense,[78] one for which the officer more often that not did not arrest.[79] Second, and of greater importance because this is what creates the opportunity for arbitrary searches, there were no police regulations requiring the officer to take Gustafson into custody or to search him.[80] The Court, however, after noting these differences, reached the same result that it had in *Robinson*. With the authority to arrest came the authority to search. In both cases the defendant was arrested. That fact, and that fact alone, justified the search.[81] The constitutional validity of ar-

---

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 261-63.

78. *Id.* at 263.

79. *Id.* at 265 n.3.

80. *Id.* at 263.

81. *Id.* at 265. The propriety of the arrest was not at issue in either case. Gustafson fully conceded the constitutional validity of his custodial arrest. *Id.* at 267. That being so, consideration of any constitutional challenge to the arrest was foreclosed. However, Justice Stewart's concurrence in *Gustafson* consisted of a brief comment which noted that, although the defendant had not challenged his arrest, an arrest for a minor traffic offense might violate the fourth amendment. *Id.* at 266-67 (Stewart, J., concurring). *See infra* note 198 and accompanying test for Justice Stewart's comments. Justice Powell also commented on the questionable validity of Gustafson's arrest. In his concurrence, he noted that Gustafson

> conceded the validity of the custodial arrest although that conclusion was not as self-evident as in *Robinson*. *Gustafson* would have presented a different question if the petitioner could have proved that he was taken into custody only to afford a pretext for a search actually undertaken for collateral objectives. But no such question is before us.

rests for traffic offenses has not been considered in the years since *Robinson* and *Gustafson*.[82]

2. *New York v. Belton*

In *New York v. Belton*,[83] the Court considered the appropriate *scope* of a search incident to arrest, rather than the authority to conduct such a search. Roger Belton and three friends were riding in an automobile and passed an unmarked patrol car at an excessive rate of speed.[84] The trooper in the patrol car overtook the vehicle, in which Belton was a passenger, and ordered the driver to pull over.[85] As the officer examined the driver's license and the car's registration he smelled burnt marijuana and saw an envelope marked "Supergold" on the floor of the car.[86] He told all the men to get out of the car and placed them under arrest for possession of marijuana.[87] He frisked each man, "split them up into four separate areas of the Thruway . . . so they would not be in physical touching area of each other," and handcuffed them.[88] Only then did he search the passenger compartment of the car, discovering Belton's black leather jacket on the back seat.[89] The officer opened the zippered pocket of the jacket and found cocaine.[90]

Belton was convicted of possession of cocaine.[91] He appealed, claiming that the cocaine had been discovered illegally, and the New York Court of Appeals agreed.[92] The court held

---

Robinson, 414 U.S. at 238 n.2 (Powell, J., concurring in both *Robinson* and *Gustafson*).

82. Part III of this article will consider the constitutional validity of arrests for traffic offenses in greater detail. *See infra* notes 193-354.

83. 453 U.S. 454 (1981).

84. *Id.* at 455.

85. *Id.*

86. *Id.* at 455-56.

87. *Id.* at 456. Belton was subject to arrest for the marijuana found in the passenger compartment of the automobile because N.Y. PENAL LAW § 220.25(1) (McKinney 1980) provides that the presence of a controlled substance in a car is presumptive evidence of knowing possession by each and every person in the automobile at the time the substance was found.

88. 453 U.S. at 456.

89. *Id.*

90. *Id.*

91. *Id.*

92. People v. Belton, 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 574 (1980), *rev'd*, 453 U.S. 454 (1981). The New York Court of Appeals began its opinion with the following statement:

that the search was beyond the scope permitted by the search-incident exception since all of the occupants had been removed from the car and were in handcuffs.[93] The inside of the car was, therefore, well beyond their "grabbing area."[94]

The Supreme Court seized upon this case as an opportunity to reduce confusion by creating a straightforward, easily-applied, and predictably-enforced rule.[95] Justice Stewart, writing for the Court, stated the question as: "[w]hen the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile in which he is riding?"[96]

Rather than considering the traditional justifications for search incident to arrest to determine the propriety of its scope (as articulated in *Chimel*), the Court looked to *Robinson* and again "rejected the suggestion that 'there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest.' "[97] Instead, the Court established a bright-line rule that permits a police officer to search the passenger compartment of a car whenever he arrests a recent occupant of the car, regardless of the surrounding circumstances.[98] The officer may not only search the passenger compartment, he may also search any containers found therein.[99] "Container here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger com-

---

A warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article.

Id. at 449, 407 N.E.2d at 422, 429 N.Y.S.2d at 575.

93. *Id.* at 449, 407 N.E.2d at 422, 429 N.Y.S.2d at 575.

94. *Id.*

95. *Belton*, 453 U.S. at 459.

96. *Id.* at 455.

97. *Id.* at 459 (quoting United States v. Robinson, 414 U.S. 218, 235 (1973)).

98. *Id.* at 460.

99. *Id.*

partment, as well as luggage, boxes, bags, clothing and the like."[100]

The Court's broad rule does not by its terms apply to arrests for traffic offenses. Belton, after all, was arrested for possession of marijuana, not for a violation of a traffic ordinance. However, both *Belton* and *Robinson* are designed to relieve police officers from having to determine on a case-by-case basis whether and where they may search. Both explicitly evidence a desire to treat all searches incident to arrest similarly.[101] *Belton* does make clear that its holding applies to the scope of searches incident to the arrest of *an occupant of an automobile*.[102] There is no indication whatsoever that the occupant must be arrested for a serious crime or even for a criminal offense. In his dissent in *Robbins v. California*,[103] decided the same day as *Belton*, Justice Stevens affirmatively stated his belief that *Belton* permits searches of the entire passenger compartment incident to an arrest for a traffic offense.[104] That *Belton* permits the police to search the private possessions found in any automobile when a person is arrested for a traffic

100. *Id.* at 460 n.4. The decision in *Belton* does not permit searches of automobile trunks. *Id.* Such a search is permitted only with probable cause to believe evidence of criminal activity is located within the car. Ross v. United States, 456 U.S. 798, 823 (1982). Nor does it permit a warrantless search of a container that happens to be found in a car if the container does not fall within the search incident exception either because there was not probable cause to arrest the occupants of the car or because no recent occupant of the car had been arrested at the time the container was seized. Chadwick v. United States, 433 U.S. 1, 12-13 (1977).

101. *Belton*, 453 U.S. at 459-460; *Robinson*, 414 U.S. at 235.

102. *See Belton*, 453 U.S. at 455.

103. 453 U.S. 420 (1981).

104. *See id.* at 450-51 & n.12 (Stevens, J., dissenting). Referring to the decision in *Belton* Justice Stevens stated:

> [A driver stopped for a traffic offense] could make no constitutional objection to a decision by the officer to take the driver into custody and thereby obtain justification for a search of the entire interior of the vehicle. Indeed, under the Court's new rule [in *Belton*], the arresting officer may find reason to follow that procedure whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation. That decision by a police officer will therefore provide the constitutional predicate for broader vehicle searches than any neutral magistrate could authorize by issuing a warrant.

Id. at 452 (Stevens, J., dissenting).

offense is also attested to by the numerous state court decisions that have upheld such searches.[105]

As a result of *Robinson, Gustafson,* and *Belton*, police officers now have unconditional power to make far-reaching searches of anyone arrested for a traffic offense. *Robinson* declares that traffic offenders will be treated like any other arrestee. *Gustafson* ignores the discretionary nature of the decision to arrest for a traffic offense, thereby permitting police to exer-

105. *See e.g.*, Clifton v. State, 501 So. 2d 539, 540 (Ala. Crim. App. 1986) (search of passenger compartment following arrest for driving while intoxicated ("DWI")); State v. Hersch, 135 Ariz. 528, 531, 662 P.2d 1035, 1038 (1983) (search of luggage in passenger compartment of car after arrest for DWI); Traylor v. State, 458 A.2d 1170, 1174 (Del. Super. Ct. 1983) (search of passenger compartment incident to arrest for driving with suspended license); State v. Williams, 516 So. 2d 1081, 1083 (Fla. Dist. Ct. App. 1987) (search of passenger compartment incident to arrest for reckless driving); Dixon v. State, 180 Ga. App. 222, 225, 348 S.E.2d 742, 745 (1986) (search of passenger compartment incident to arrest for speeding and driving with suspended license); People v. Grigsby, 111 Ill. App. 3d 38, 42, 443 N.E.2d 746, 749 (1982) (search of glove compartment incident to arrest for driving without license plates and with suspended license); Fraiser v. State, 262 Ind. 59, 65, 312 N.E.2d 77, 80 (1974) (search of paper bag in passenger compartment incident to arrest for driving with noisy muffler); State v. Deskins, 234 Kan. 529, 542-43, 673 P.2d 1174, 1186 (1983) (search of passenger compartment incident to arrest for DWI); Commonwealth v. Ramsey, 744 S.W.2d 418, 418 (Ky. 1987) (search of passenger compartment incident to arrest for DWI); State v. Laplante, 534 A.2d 959, 962 (Me. 1987) (search of passenger compartment incident to arrest for improper license tags and driving without license); Parker v. State, 66 Md. App. 1, 9, 502 A.2d 510, 514 (1986) (search of container in passenger compartment incident to arrest for driving without license); Horton v. State, 408 So. 2d 1197, 1998 (Miss. 1982) (search of passenger compartment after stop for no license plates); State v. Miskolczi, 123 N.H. 626, 628, 465 A.2d 919, 920 (1983) (search of passenger compartment after arrest for DWI); State v. Cooper, 304 N.C. 701, 705, 286 S.E.2d 102, 103 (1982) (search of passenger compartment and containers found inside after arrest for DWI); State v. Hensel, 417 N.W.2d 849, 852 (N.D. 1988) (search of passenger compartment after arrest for DWI); State v. Rice, 69 Ohio St. 2d 442, 424, 433 N.E.2d 175, 180 (1982) (search of passenger compartment after arrest for DWI); Commonwealth v. Henry, 358 Pa. Super. 306, 307, 517 A.2d 559, 560 (1986) (search of closed container after stop for speeding); Williams v. State, 726 S.W.2d 99, 99 (Tex. Crim. App. 1986) (search of container in passenger compartment after arrest for parking on wrong side of street); State v. K.K.C., 636 P.2d 1044, 1047 (Utah 1981) (search of passenger compartment after arrest of juvenile for drinking in motor vehicle). *See also* LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 438-42 (1984) (discussing danger of arbitrary arrests for minor crimes because of the *Robinson/Belton* search power); Rudstein, *The Search of an Automobile Incident to an Arrest: An Analysis of* New York v. Belton, 67 MARQ. L. REV. 205, 248 (1984) (broad rule of constitutional law fashioned by the court in *Belton* potentially applies to the stop of every traffic offender).

cise that discretion at will. *Belton* extends the scope of a permissible search incident to an arrest of a recent occupant of a car to include private areas well beyond what safety requires. These decisions leave in their wake the possibility that police officers will use traffic offenses as pretexts for searches. Others have addressed this difficulty and proposed solutions. The next section considers those proposals and demonstrates why they are inadequate to deal with the problem that the Court has created.

II. Perspectives on *Robinson*

The danger of arbitrary exercise of police authority inherent in unconditional power to conduct far-reaching searches of a traffic offender has not gone unnoticed. Professor Wayne LaFave was among the many who commented on *Robinson* and *Gustafson* immediately after they were decided.[106] Professor LaFave was one of the earliest advocates of limiting case-by-case adjudication of fourth amendment problems in favor of standardized procedures.[107] He stated that fourth amendment doctrine should be expressed by rules "not qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions"[108] for guiding police conduct. There can be no doubt that the decision in *Robinson* creates a clear rule not dependent on case-by-case adjudication. Nonetheless, LaFave was not entirely enthusiastic about the Court's work. He agreed with the Court's holding that the general authority to search incident to a lawful custodial arrest should be

106. *See* LaFave, *supra* note 17. *See also* Aaronson & Wallace, *A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest*, 64 GEO. L.J. 53 (1975); Nakell, *Search of the Person Incident to a Traffic Arrest: A Comment on Robinson and Gustafson*, 10 CRIM. L. BULL. 827 (1974); White, *The Fourth Amendment As A Way Of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165.

107. *See* LaFave, *Improving Police Performance Through the Exclusionary Rule* (pt. 2), 30 MO. L. REV. 566, 592 (1965) (courts will be unable to make greater contributions without effective legislative action); LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire,"* 8 CRIM. L. BULL. 9, 76-77 n.4 (1972) (suggesting that rules need greater clarity and should be expressed in terms that police can understand).

108. LaFave, *supra* note 17, at 141.

unqualified,[109] but thought that arrests for minor traffic violations should be a special case.[110] He noted that not only are the traditional justifications for search incident to arrest not as compelling in the case of traffic violations,[111] but also argued that searches incident to such an arrest should be restricted for a "more powerful reason."[112] Professor LaFave was concerned that police officers would use a traffic offense as a pretext to conduct a search that they might not otherwise be empowered to make.

> Given the fact that 'in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer,' and that 'very few drivers can traverse any appreciable distance without violating some traffic regulation,' this is indeed a frightening possibility. It is apparent that virtually everyone who ventures out onto the public streets and highways may then, with little effort by the police, be placed in a position where he is subject to a full search. Nor is one put at ease by what evidence exists as to police practices in this regard; it is clear that this subterfuge is employed as a means for searching for evidence on the persons of suspects who

---

109. Professor LaFave first examined prior Supreme Court decisions and then the evidence on the intent of the Framers of the fourth amendment. He agreed with the *Robinson* Court that neither principles of *stare decisis* nor the evidence of the original intent of the Framers of the Constitution foreclosed the Court from holding that a full search of the person arrested flows automatically from the fact of the arrest without any additional showing, but he also concluded that neither source required such a rule. *Id.* at 136. Although the *Robinson* Court had not done so, he thought it would be useful to examine whether the "general authority" to search incident to arrest *ought* to be unqualified. *Id.* at 137-45. LaFave concluded that search incident is the kind of search that ought to be unlimited and controlled by a rule that could be expressed in terms of "standardized procedures" for four reasons: 1) it occurs frequently and under an infinite variety of circumstances; 2) to require the officer to make probable-cause-to-search decisions in each case would be too difficult; 3) the decision to search an arrested person must be made quickly and frequently unexpectedly; 4) the search of the person is less intrusive than a search of a house and is only applicable to someone as to whom there are already grounds to arrest. *Id.* at 143-44.

110. *Id.* at 150.

111. LaFave noted that, except in the rare case, there is no evidence of a traffic offense to be destroyed. *Id.* He also observed that, even though traffic violators as a class are less likely to be armed than other offenders, there is no way for a police officer to know whether a particular traffic offender is armed. If the offender turns out to be armed, the risk to the officer is genuine. *Id.* at 151-52.

112. *Id.* at 152.

could not be lawfully arrested for the crimes of which they are suspected.[113]

To Professor LaFave, the specter of the pretext arrest loomed so large that it had to be considered in formulating any rule.[114] The use of a traffic offense as a subterfuge to search for evidence of a more serious crime has been documented in empirical studies.[115] That police officers arrest for bad as well as good motives cannot seriously be doubted.

Professor LaFave identified four possible solutions to the problem of traffic arrests as pretexts for searches: 1) that evidence discovered during a search incident to a traffic arrest be suppressed on a showing that the arrest was a pretext; 2) that a search incident to a traffic offense be limited in scope so as to preclude its use to discover evidence other than weapons; 3) that a full search be permitted incident to a traffic arrest, but that any evidence discovered other than weapons be inadmissible in a criminal prosecution; or 4) that legislative or administrative procedures be developed that limit the power of the police to arrest for a minor offense. None of the possible solutions has been endorsed by the Supreme Court and none has had enthusiastic acceptance in state courts, although some are utilized in varying degrees. This section will examine each suggestion in turn, both in the abstract and empirically.

A. *Suppression on a Showing of Pretext*

Professor LaFave thought that the most obvious solution was to exclude evidence discovered during a search incident to a traffic offense upon a showing that the arrest was a pretext to

113. *Id.* at 152-53 (footnotes omitted) (quoting *Robinson*, 414 U.S. at 248 (Marshall, J., dissenting, joined by Douglas and Brennan, JJ.); B.J. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 65 (1973)).

114. LaFave, *supra* note 17, at 153. Police officers themselves have testified to the ease with which a traffic stop can be made for a pretextual purpose. One officer is quoted as stating, "You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made." L. TIFFANY, D. MCINTYRE, & D. ROTENBERG, DETECTION OF CRIME 131 (1967) [hereinafter L. TIFFANY]. Another reported, "You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway." *Id.*

115. *See, e.g.*, L. TIFFANY, *supra* note 114, at 131-36; W. LAFAVE, ARRESTS; THE DECISION TO TAKE A SUSPECT INTO CUSTODY 151-52 (1965).

search,[116] but also noted that this was the least effective way to deal with this problem.[117] The difficulty with suppressing evidence on a showing of pretext is that the legality of the search will depend on the ability of the defendant to prove the motivation of the officer. As Justice White succinctly put it, "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."[118] Without an express admission of "bad motive" by the officer, there will be no direct evidence on the question.[119]

Even Professor Burkoff, the most confirmed advocate of this solution, acknowledged the difficulty of proving motivation.[120]

---

116. LaFave, *supra* note 17, at 153.

117. *Id.* at 154. LaFave stated, "I doubt whether it is within the ability of trial and appellate courts to determine with any fair rate of success the uncommunicated intentions or expectations of the police officer." *Id.*

118. Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting).

119. The improbability of an express statement by the offending officer has been noted by Professor Anthony Amsterdam:

> But surely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen in this context. A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably. Motivation is, in any event, a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second.

Amsterdam, *supra* note 70, at 436-37.

120. *See* Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 114 (1982) [hereinafter Burkoff, *Bad Faith*] (extremely difficult to make unequivocal showing of police officer's improper motive). For an interesting dialogue on whether subjective police motivation should be relevant in determining the legality of a search or seizure, *see id.* (arguing in favor of considering subjective police intent); Burkoff, *Rejoinder: Truth, Justice, and the American Way—Or Professor Haddad's "Hard Choices,"* 18 U. MICH. J.L. REF. 695 (1985) [hereinafter Burkoff, *Rejoinder*] (important to permit evidence of improper police motive to deter pretext arrests and searches); Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984) [hereinafter Burkoff, *Pretext*] (urging continued support for the pretext search doctrine notwithstanding recent Supreme Court decisions); Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639 (1985) [hereinafter Haddad, *Another Viewpoint*] (arguing against the use of subjective police motivation in evaluating the lawfulness of police conduct); Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 204-14 (1977) [hereinafter Haddad, *Claims of Sham*] (arguing in favor of narrowing police power rather than considering subjective police motivation to limit searches and seizures).

While motivation may be inferred from the totality of relevant facts, cases in the area leave very little hope that courts will be willing to reach that conclusion.[121] Although some lower courts suppress evidence when they believe the officer is engaging in pretextual activity,[122] most courts do not do so even when the evidence of pretext is overwhelming.[123] *People v. Holloway*[124]

---

121. LaFave, *supra* note 17, at 155. In support of this conclusion, Professor LaFave cited three cases that he thought represented clear indications of pretext, but in which the searches were upheld by the courts: People v. Watkins, 19 Ill. 2d 11, 19, 166 N.E.2d 433, 437 (after following defendant for some time, officers assigned to gambling squad arrested him for parking too close to crosswalk—"the kind of minor offense that ordinarily results in a 'parking ticket' hung on the handle of the door of the car"), *cert. denied*, 364 U.S. 833 (1960); Anderson v. State, 444 P.2d 239, 249 (Okla. Crim. App. 1968) (city policeman who arrested defendant for making right turn from incorrect lane was accompanied by federal narcotics agent), *cert. denied*, 393 U.S. 1017 (1969); Adair v. State, 427 S.W.2d 67, 68 (Tex. Crim. App. 1968) (officer followed defendant for fifteen blocks because he looked suspicious and then arrested him for changing lanes without signaling). LaFave, *supra* note 17, at 155 n.130.

122. *See, e.g.*, Richardson v. State, 288 Ark. 407, 410, 706 S.W.2d 363, 365 (1986) (evidence of murder and arson discovered in search incident to arrest for public drunkenness suppressed where clear that police were investigating murder and took defendant's clothes to search for evidence of murder); State v. Hoven, 269 N.W.2d 849, 851 (Minn. 1978) (evidence suppressed where discovered during inventory search incident to arrest an old traffic warrants after police received tip that defendant had drugs in his truck).

123. *See, e.g.*, People v. Anderson, 169 Ill. App. 3d 289, 523 N.E.2d 1034 (1988). The defendant was suspected of murder but the police did not have probable cause to arrest him. *Id.* at 291, 523 N.E.2d at 1036. The officers waited for him to leave his office and then arrested him for driving with a suspended license, interrogating him about the murder until he confessed. *Id.* The court stated that the motive of the officers didn't matter so long as they had properly arrested the defendant for the suspended license. *Id.* In Traylor v. State, 458 A.2d 1170 (Del. 1983), officers had observed the defendant engaging in suspicious activities while sitting in his car in an area known for drug trafficking. *Id.* at 1173. The officers learned that the defendant's license had been suspended after checking with headquarters. *Id.* After the defendant had driving away, the officers stopped the car and arrested him for driving with a suspended license. *Id.* The court allowed the search, which revealed drugs, because the officers had the authority to arrest for the traffic offense. *Id.* In State v. Pickett, 126 Ariz. 173, 613 P.2d 837 (1980), the arresting officer was en route to the police station just after having testified against the appellant before the grand jury on an unrelated possession of stolen property charge. *Id.* at 174, 613 P.2d 838. While driving, he recognized the appellant and observed him drinking a bottle of beer in front of a liquor store. *Id.* He told the appellant that he believed him to be in violation of a state law against drinking in public and placed him in the rear of the officer's vehicle. *Id.* During the inventory search of the defendant before he was incarcerated, incriminating evidence was discovered. *Id.* The defendant argued that this was an offense for which people were normally given a summons. *Id.* The Court said that the use of

exemplifies a pretextual arrest. While investigating street crime, including narcotics offenses, a police officer observed Holloway, whom the officer knew from more than twenty previous encounters and whom he had previously arrested for drug possession.[125] The officer arrested the defendant on a warrant for driving with a suspended license, which the officer happened to be carrying with him.[126] With no comment on why the officer, who was not assigned to enforce traffic offenses, happened to have an arrest warrant for a traffic offense in his pocket and happened to select this warrant from the undoubtedly thousands available at the stationhouse, the Michigan Supreme Court said:

> [t]he fact that the police officers effectuated the arrest also realizing that they might find narcotics or other evidence of illegal activity is entirely irrelevant, unless police officers primarily concerned with enforcing certain laws are prohibited from enforcing other laws as well. We are aware of no such constitutional proscription.[127]

Yet, there can be no serious doubt that the police officer arrested the defendant because the officer believed that the defendant was involved in narcotics trafficking and that he did not have probable cause to do so. He used the traffic offense warrant to effectuate an arrest and, as a result, had the authority to search Holloway, thereby discovering the narcotics for which he was actually charged. Obviously, the arrest on the warrant for

---

the citation/field release procedure is optional, not mandatory, and rejected the claim of pretext. *Id.* In State v. Leagea, 442 So. 2d 699 (La. Ct. App. 1983), a police officer was on special patrol, checking various bank branches within his zone. *Id.* at 699. He saw the defendant in a parked automobile speaking to another man in a car beside the defendant's car. *Id.* When the men noticed the police officer's approach, they both started to exit in separate directions. *Id.* at 700. The defendant made a motion as if he was either placing or moving something under the seat of the car. *Id.* The defendant left the parking lot and drove in a westerly direction. *Id.* The police officer followed and noticed that the defendant's license plates had expired. *Id.* The officer displayed his red lights, sounded his siren, and pulled the defendant over. *Id.* He then ordered the defendant out of his vehicle two or three times. *Id.* The defendant was arrested for possession of a weapon discovered in plain view on the floor of his vehicle. *Id.* The court ignored the pretextual aspects although they were raised by the defendant. *Id.*

124. 416 Mich. 288, 330 N.W.2d 405 (1982).

125. *Id.* at 289, 330 N.W.2d at 406.

126. *Id.*

127. *Id.* at 296, 330 N.W.2d at 407.

driving with a suspended license was a pretext to search for drugs.

Part of the difficulty may be that courts have trouble suppressing evidence when the police officers have acted within the letter of the law in conducting a search, but did so for the wrong reason; namely, in pursuit of evidence.[128] Suppose, for example, an officer suspects someone of being a narcotics peddler but lacks probable cause to arrest for a drug offense. Suppose also that the officer follows the suspect's automobile until the suspect changes lanes without signaling. Now the officer has probable cause to arrest for the traffic offense and does so. Courts may be uncomfortable telling the officer that his belief that the suspect is a drug dealer makes the otherwise perfectly legal arrest for the traffic offense illegal.[129] Although almost all evidence that is acquired in violation of the fourth amendment is acquired in pursuit of evidence, articulating that goal as a bad one may be troublesome.[130]

---

128. Haddad, *Another Viewpoint*, *supra* note 120, at 691.

129. *See, e.g.*, Abel v. United States, 362 U.S. 217, 253 (1960) (Brennan, J., dissenting), where Justice Brennan argued against relying on the motivation of the arresting officer to determine the validity of an arrest and subsequent search:

> Perhaps the question is how much basis the officers had to suspect the person of crime; but it would appear a strange test as to whether a search which turns up criminal evidence is unreasonable, that the search is more justifiable the less there was antecedent probable cause to suspect the defendant of crime.

Id.

130. This possibility was identified by Professor James Haddad, who has considered whether evidence discovered in a search that conforms to the letter of the law but was pretextual in that it was conducted for the wrong reason *ought* to be excluded. He concluded that there are four good reasons, including the textual discussion, for rejecting the pretext approach, in addition to the difficulty of proof. Haddad, *Another Viewpoint, supra* note 120, at 685-92. First is the difficulty of knowing what the correct motive is in a particular case. In order to determine whether a search was conducted with the proper motive, Professor Haddad points out that all of the proper rationales underlying every fourth amendment doctrine must be identified. But neither the Court nor the legislature necessarily makes these rationales clear. By way of example he offers the search involved in United States v. Villamonte-Marquez, 462 U.S. 579 (1983), in which marijuana was discovered when officers boarded a ship in order to check its documents. To determine whether the discovery of the marijuana in this case was the result of a pretextual search, it must be clear what the purposes of a document inspection are. Professor Haddad thinks that assisting in the investigation of smuggling is a legitimate goal of document checks. Haddad, *Another Viewpoint, supra* note 120, at 676. As a result, he does not think the case is one involving pretextual search

It is not clear whether the Supreme Court views searches or seizures as illegal just because an officer's reasons for using a specific fourth amendment power on a particular occasion are not the reasons advanced by courts for approving the doctrine which allows such fourth amendment activity.[131] While there is language in some older Supreme court decisions that supports the idea that evidence acquired with an improper motive might be suppressed, more recent decisions reject that idea. The case most frequently cited for Supreme Court disapproval of pretext is *United States v. Lefkowitz*,[132] where the Court said *in dicta* that "[a]n arrest may not be used as a pretext to search for evidence."[133] In *United States v. Jones*,[134] the Court suppressed ev-

---

conduct. *Id.* at 681. In contrast, the leading proponent of excluding evidence on a showing of pretext is Professor John Burkoff, who has argued that the Court ignored a pretextual search in *Villamonte-Marquez*. Burkoff, *Pretext, supra* note 120, at 538. Professor Burkoff's argument assumes that the justification for document checks does not include assisting in the investigation of smuggling. Haddad, *Another Viewpoint, supra* note 120, at 676 n.172. The inability to ascertain every rationale for many searches, particularly administrative searches, will make it impossible to use motivation to determine the claim of pretext.

Professor Haddad's second and third concerns are interrelated. In his view, directly attacking pretextual searches will inhibit the development of the law and will provide protection only for the suspected criminal, not the innocent citizen. *Id.* at 687-89. According to Professor Haddad, when the Court considers whether the police should have a power at all, it has always considered pretext as one of the factors relevant to that determination. When the Court makes what Haddad calls "hard choices," it factors in the risk that the government will abuse its power for the wrong reasons. Haddad, *Claims of Sham, supra* note 120, at 212-14. For instance, the Court has determined that police may not stop drivers indiscriminately to check for license or registration violations. *See* Delaware v. Prouse, 440 U.S. 648, 661 (1979) (police may not stop driver unless there is a reasonable suspicion that driver is unlicensed or vehicle is unregistered). Haddad states that if the Court had adopted the pretext approach, it might have allowed indiscriminate registration and license checks so long as a defendant could not establish that the officer's true motive when he was stopped was to gather evidence of a crime rather than to enforce the motor vehicle code. Haddad, *Another Viewpoint, supra* note 120, at 688. The result would have been a rule that offered much less fourth amendment protection and that only protected those suspected of criminal activity. *Id.* And, finally, Haddad points out that the pretext doctrine treats law-abiding police as wrongdoers. His view of the textual discussion is that the police officer's motive is irrelevant to the legality of his actions. Therefore, the pretextual activity discussed in the text is not illegal. *Id.* at 691.

131. *Compare* Burkoff, *Pretext, supra* note 120, at 544-48 (Supreme Court views pretextual searches as illegal) *with* Haddad, *Another Viewpoint, supra* note 120, at 653-73 (Supreme court has never viewed pretextual searches as illegal).

132. 285 U.S. 452 (1932).

133. *Id.* at 467.

idence acquired during a search under a warrant that the officers knew was invalid, notwithstanding the existence of facts justifying entry to arrest the defendant that would have permitted legal discovery of the evidence incident to that arrest.[135] Justice Harlan concluded that "the record fails to support the theory now advanced by the Government. The testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search for distilling equipment, and not to arrest."[136] In *Jones*, then, actual *motive* for the search made the search illegal.[137]

However, the Court's more recent decision in *Scott v. United States*[138] expressly rejects consideration of the officer's motives for conducting a search if there is an objectively justifiable basis to support the search.[139] "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."[140] *Scott* may thus have closed the door on the pretext approach.[141]

---

134. 357 U.S. 493 (1958).

135. *Id.* at 499-500.

136. *Id.* at 500.

137. For further discussion of early Supreme Court cases considering police motivation, *see* Burkoff, *Bad Faith, supra* note 120, at 75-81.

138. 436 U.S. 128 (1978). In *Scott*, government officials wiretapped a telephone pursuant to a warrant. *Id.* at 131. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 requires that wiretapping or electronic surveillance be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under that title. 18 U.S.C. § 2518(5) (1982) (current version at 18 U.S.C. § 2518(5) (Supp. IV 1986)). The officers admitted that they made no efforts to comply with the minimization requirement, yet the Court refused to suppress. 436 U.S. at 133. After evaluating the calls actually recorded, the Court accepted the court of appeals' conclusion that the recordings were proper since, in retrospect, it was reasonable for the officers to have recorded all of the conversations that they did. *Id.* at 141. Since there were no conversations recorded that could not have been justified if the officers had actually minimized, there was no constitutional violation.

139. 436 U.S. at 141.

140. *Id.* at 138.

141. United States v. Villamonte-Marquez, 462 U.S. 579 (1983), provides further evidence of the Court's resistance to suppressing evidence discovered during a search motivated for reasons that were not the ostensible justification for the search. The *Villamonte-Marquez* Court upheld a document inspection of a sailboat that uncovered narcotics in the face of defendant's assertion that the objective evidence supported a claim of pretext. The Court said:

As a practical matter, the individual-motivation approach is particularly unsuccessful as a limitation on arbitrary power. Not only is it difficult to prove, but it is also used so infrequently that it cannot be considered a serious force in deterring police conduct.[142] Rarely will an officer be deterred from pretextual arrests or searches because of the remote chance that a court might find the activity illegal.

> Respondents . . . contend in the alternative that because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation. This line of reasoning was rejected in a similar situation in *Scott v. United States*, . . . and we again reject it. Acceptance of respondents' argument would lead to the incongruous result criticized by Judge Campbell in his opinion in *United States v. Arra* . . . : 'We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers.'

Id. at 584 n.3 (citations omitted).

142. Even in the few jurisdictions that give lip service to prohibiting pretextual police activity, suppression of evidence of criminal activity found in a pretextual search is very rare. *Compare* State v. Florance, 270 Or. 169, 188, 527 P.2d 1202, 1211 (1974) ("We do not sanction . . . pretext arrests.") *with* State v. Tucker, 286 Or. 485, 492-94, 595 P.2d 1364, 1368 (1979) (arrest to ascertain identity of defendant after seeing defendant fail to stop his bicycle at stop sign was not pretextual even though officer had real interest in defendant for other suspicious conduct). After reviewing hundreds of cases arising from traffic arrests, with dozens of credible claims of pretext, only 10 states had suppressed evidence discovered incident to arrest for a traffic offense on the basis of pretext. *See* People v. Superior Court, 7 Cal. 3d 186, 208, 496 P.2d 1205, 1221, 101 Cal. Rptr. 837, 853 (1972) (evidence suppressed after stop for failure to use headlights at night); Wilhelm v. State, 515 So. 2d 1343, 1344 (Fla. Dist. Ct. App. 1987) (evidence suppressed after search of passenger compartment following stop for burned-out taillight); People v. Thomas, 75 Ill. App. 3d 491, 493-94, 394 N.E.2d 624, 626 (1979) (evidence suppressed after search of passenger compartment following traffic stop for failure to signal); Lane v. Kentucky, 386 S.W.2d 743, 745-46 (Ky. 1964) (evidence suppressed after search of trunk following stop for improper passing and arrest for not possessing valid license); People v. Seigel, 95 Mich. App. 594, 603, 291 N.W.2d 134, 139 (1980) (evidence suppressed where discovered during inventory search of car after defendant arrested on traffic warrant and car impounded from private property); State v. Hoven, 269 N.W.2d 849, 852 (Minn. 1978) (evidence acquired after search based on arrest on old warrants for traffic offenses suppressed); State v. Lahr, 172 Mont. 32, 35, 560 P.2d 527, 529 (1977) (evidence acquired after arrest from reckless driving suppressed); State v. Hayburn, 171 N.J. Super. 390, 396, 409 A.2d 802, 805 (1979) (evidence found in trunk following stop for speeding suppressed); People v. Grant, 126 Misc. 2d 18, 22, 480 N.Y.S.2d 1010, 1013 (Crim. Ct. 1984) (evidence suppressed after search of defendant's person following stop for playing his car radio too loud); State v. Sierra, 754 P.2d 972, 977 (Utah 1988) (evidence discovered in search of trunk after stop for driving in left lane suppressed).

B. *Limiting the Scope of Searches Incident to Arrest for Traffic Offenses*

Another potential restraint on pretextual searches is to limit the opportunity to conduct them. The court of appeals in *Robinson* sought to address the problem by restricting the scope of the search, thereby reducing its attractiveness as a pretext, but the Supreme Court rejected this solution.[143] The lower court had held that the proper scope of a search incident to an arrest for a traffic offense was a "frisk," since the only justification for the search was discovery of hidden weapons.[144] However, the Supreme Court reasoned that if the suspect was armed the danger to the officer might be greater than the protection afforded by a frisk.[145] Unlike the brief encounter associated with investigatory street stops where frisks are authorized, the traffic violator will be alone with the officer in the close proximity of an automobile for the extended period necessary to remove him to the stationhouse and complete the booking process. Relying on statistics from two studies that concluded that a significant number of police fatalities were the result of encounters with people in automobiles, the Court rejected the lower court's assumption that persons arrested for traffic offenses were less likely to possess dangerous weapons than those arrested for other crimes.[146]

---

143. *See* United States v. Robinson, 471 F.2d 1082 (D.C. Cir. 1972), *rev'd*, 414 U.S. 218 (1973). *See supra* notes 47-69 and accompanying text for a discussion of the court of appeals and Supreme Court decisions in *Robinson*.

144. *Robinson*, 471 F.2d at 1095.

145. *Robinson*, 414 U.S. at 234-35.

146. *Id.* at 234 n.5. The court observed that one study found that approximately 30% of all shootings of officers occur during traffic stops and that 11 of the 35 officer deaths reported by the Federal Bureau of Investigation's Uniform Crime Reports for a three month period occurred in the traffic stop context. *Id.* A closer look reveals that the three-month period referred to by the Court was a small slice of time that had a skewed percentage of deaths. Looking at those same statistics over a ten-year period indicated that the percentage of officer deaths occurring in traffic stop contexts was under 10%. Schaffer, Harmon, & Helbush, *Robinson at Large in the Fifty States: A Continuation of the State Bills Debate in the Search and Seizure Context*, 5 GOLDEN GATE U.L. REV. 1, 52 (1974) (statistical analysis for period from 1963 to 1973). It is also important to put this data in some perspective. When one considers how many traffic stops there are in comparison to other kinds of police encounters, the relative safety of traffic stops becomes apparent. For instance, during the same period as the quoted study, 26.5% of all officer deaths occurred during apprehension or arrest of robbery or burglary suspects. *Id.* In the year 1973 there were 561,530 arrests for robbery and burglary nationwide.

If one accepts the basic assumption that officers are in increased danger when they place a traffic offender in custody, controlling potential pretextual searches by limiting the scope of the permissible search presents practical difficulties.[147] It is hard to define a search of the person that is greater than a frisk, but that is still limited.[148] If a search is necessary to protect against the possible use of a razor blade, a very thorough search will be required. If such a thorough search is permitted, an officer who might be tempted to use the search authority permitted by a traffic arrest for a wrong reason will have the opportunity to do so.

Some states courts have rejected *Robinson* on state constitutional grounds and have limited the permissible scope of a search incident to an arrest for a traffic offense to a frisk.[149]

Id. This compares to 1,897,288 traffic arrests in the State of California alone. *Id.* Additionally, a detailed examination of all non-accidental officer deaths from 1960 to 1974 of the California Highway Patrol, the fifth largest police force in the nation and the only force of its size devoted exclusively to traffic law enforcement, reveals that all of the deaths involved firearms that even a limited frisk should have discovered and only one involved an individual who was in custody at the time. *Id.* at 55-60. However, the majority of states and commentators that have considered *Robinson* have accepted the Supreme Court's concern for police safety. *See, e.g.*, Note, *Search Incident to Arrest: United States v. Robinson—An Analytical View*, 7 CONN. L. REV. 346, 371 (1974) (views the decision to permit a full search in *Robinson* to be sound as a matter of public policy); Note, *Search of a Motor Vehicle Incident to a Traffic Arrest: The Outlook After* Robinson *and* Gustafson, 36 OHIO ST. L.J. 97, 113 (1975) [hereinafter Note, *Search of a Motor Vehicle*] (argues against extending search to automobile; no consideration of propriety of search of arrestee authorized in *Robinson*). Of the more than forty law review articles that have been written about *Robinson*, few have argued for a limitation on the scope of the search. *But see* Marks, United States v. Robinson *and* Gustafson v. Florida: *Extending the Boundaries in Searches and Seizure*, 1975 DET. C.L. REV. 211 (would restrict scope of search to that which is necessary to discover weapons, but admits defining permissible extent of such searches would be difficult); Comment, *Search Incident to Custodial Arrest for Traffic Violation*, 12 AM. CRIM. L. REV. 401, 407-08 (1974) (suggests frisk is sufficient to protect officers' safety if officers are also permitted to remove and detain other items that may contain weapons but are not guns or knives).

147. The scope of the search could be limited to a search of person. There is no reason why the search of the passenger compartment of the car must be permitted if the only issue is the safety of the officer. Note, *Search o of a Motor Vehicle*, *supra* note 146, at 113.

148. LaFave, *supra* note 17, at 155-56.

149. A few states have adopted provisions that limit the purpose of a search to the traditional *Chimel* justifications. For example, a Massachusetts statute provides:

Alaska,[150] California,[151] Hawaii,[152] Massachusetts,[153] Oregon,[154] and Washington[155] have done so without any reported increase in officer fatalities. Nonetheless, the overwhelming acceptance of the need for extensive searches to protect police officers makes it unlikely that either the Supreme Court or the thirty-five states[156] that have affirmatively accepted the rationale of

---

> A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.

MASS. GEN. LAWS ANN. ch. 276, § 1 (West Supp. 1988). This statute was adopted in direct response to the *Robinson* decision. Commonwealth v. Wilson, 389 Mass. 115, 118-19, 448 N.E.2d 1130, 1132 (1983). *See also* DEL. CODE ANN. tit. 11, § 2303 (1985) (search without warrant incident to arrest may be made to seize fruits of crime, means, weapons, or other evidence of crime); KAN. STAT. ANN. § 22-2501 (Vernon 1981) (search without warrant may be made to protect officer from attack, prevent person from escaping, or to discover fruits of crime); ARK. R. CRIM. P. 12.4(a) (if arrestee in vehicle or in vicinity of vehicle apparently in arrestee's control at time of arrest, officer may search vehicle for things connected with offense for which arrest made that officer reasonably believes are present).

150. Zehrung v. State, 569 P.2d 189, 199-200 (Alaska 1977) (warrantless search incident to arrest must be limited to search for weapons), *opinion modified on rehearing*, 573 P.2d 858 (Alaska 1978) (*Zehrung* rule need not be followed if exigent circumstances require otherwise).

151. People v. Superior Court (Simon), 7 Cal. 3d 186, 209, 496 P.2d 1205, 1222, 101 Cal. Rptr. 837, 854 (1972) (when arrested for traffic violation, arrestee may not be searched but must be transported directly to magistrate). *Accord* People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

152. State v. Enos, 720 P.2d 1012, 1014 (Haw. 1986) (scope of search is limited to that which is reasonably necessary to discover fruits or instruments of crime or to protect officer from attacks).

153. Commonwealth v. Wilson, 389 Mass. 115, 118, 448 N.E.2d 1130, 1132 (1983) (searches incident to arrest can only be made for purpose of seizing evidence of crime or to remove weapons from arrestee).

154. State v. Lowry, 295 Or. 337, 348, 667 P.2d 996, 1003 (1983) (seizures must be reasonably related to probable cause for arrest).

155. State v. Hehman, 90 Wash. 2d 45, 51, 578 P.2d 527, 529 (1978) (search of defendant because of minor traffic violation improper).

156. At least 34 states either accept *Robinson* expressly or admit evidence seized incident to an arrest for a traffic offense. The following 25 state courts have expressly accepted *Robinson*: Daniels v. State, 416 So. 2d 760, 762 (Ala. Crim. App. 1982); State v. Cooper, 130 Ariz. 348, 636 P.2d 126, 128 (1981); People v. Bischofberger, 724 P.2d 660, 662 (Colo. 1986); State v. Christian, 189 Conn. 35, 454 A.2d 262, 265 (1983); Traylor v. State, 458 A.2d 1170, 1174 (Del. Super. Ct. 1983); State v. Williams, 516 So. 2d 1081, 1083 (Fla . Dist. Ct. App. 1987); Whisnant v. State, 185 Ga. App. 51, 53, 363 S.E.2d 341, 342 (1987); Frasier v. State, 312

Robinson will reverse themselves soon. Like suppressing evidence on a showing of pretext, reducing the opportunity for pretextual searches by limiting the scope of such a search does not appear to have much chance of success.

C. *Excluding Evidence Other than Weapons Found During a Search Incident to a Traffic Arrest*

LaFave found the two remaining approaches to prevent pretext searches to be more useful. He suggested "remov[ing] the temptation to engage in pretext arrests by broadening the exclusionary rule so as to exclude from evidence anything but a weapon found in a search incident to an arrest for a [traffic violation]."[157] If the goal of the police in conducting the search is to

---

N.E.2d 77, 80 (Ind. 1974); State v. Farrell, 242 N.W.2d 327, 329 (Iowa 1976); State v. Press, 9 Kan. App. 2d 589, 593, 685 P.2d 887, 890 (1984); State v. Guidry, 442 So. 2d 1251, 1253 (La. Ct. App. 1983); Parker v. State, 66 Md. App. 1, 3-4, 502 A.2d 510, 512 (1986); People v. Jackson, 123 Mich. App. 423, 424, 332 N.W.2d 564, 565 (1983); State v. Martin, 253 N.W.2d 404, 405 (Min.. 1977); State v. Moomey, 581 S.W.2d 899, 901 (Mo. Ct. App. 1979); State v. Jetty, 176 Mont. 519, 520, 579 P.2d 1228, 1229 (1978); Carstairs v. State, 94 Nev. 125, 126, 575 P.2d 977, 978 (1978); State v. Miskolczi, 123 N.H. 626, 627, 465 A.2d 919, 921 (1983); State v. Evans, 181 N.J. Super. 445, 457, 438 A.2d 340, 343 (App. Div. 1981); State v. Rice, 69 Ohio St. 2d 422, 428, 433 N.E.2d 175, 180 (1982); King v. State, 562 P.2d 902, 903 (Okla. Crim. App. 1977); Commonwealth v. Henry, 358 Pa. Super. 306, 307, 517 A.2d 559, 561 (1986); State v. Lohff, 87 S.D. 693, 695, 214 N.W.2d 80, 82 (1974); Layton v. State, 738 S.W.2d 763, 766 (Tex. Ct. App. 1987); State v. King, 142 Wis. 2d 207, 208, 418 N.W.2d 11, 12-13 (1987). The following nine state courts have admitted evidence seized in a *Robinson* situation without referring directly to *Robinson*: Williams v. State, 23 Ark. App. 121, 122, 743 S.W.2d 402, 403 (1988) (search of person incident to arrest for traffic offense revealing drugs); Commonwealth v. Ramsey, 744 S.W.2d 418, 418 (Ky. 1987) (arrest for DWI justified search of person and passenger compartment of car); State v. Laplante, 534 A.2d 959, 959 (Me. 1987) (search of person and car incident to traffic arrest); State v. Roth, 213 Neb. 900, 901, 331 N.W.2d 819, 820 (1983) (search of person and truck incident to traffic arrest); State v. Cooper, 304 N.C. 701, 702, 286 S.E.2d 102, 103 (1982) (search of passenger in car incident to DWI arrest); State v. Hensel, 417 N.W.2d 849, 851 (N.D. 1988) (search of passenger compartment incident to arrest for DWI); Tennessee v. Halcomb (Tenn. Crim. App. Jan. 4, 1985) (LEXIS, States library, Tenn file) (search of defendant's person and locked glove compartment incident to arrest for traffic offense); State v. K.K.C., 636 P.2d 1044, 1045 (Utah 1981) (search of passenger compartment of car for arrest for open alcohol container).

157. LaFave, *supra* note 17, at 156. Following is an example of how the use-exclusion approach might work. A police officer stops a vehicle for going through a red light. He places the driver under arrest and then searches the driver, discovering cocaine in his shirt pocket and a gun in his jacket pocket. The gun is admissible because the justification for the power to conduct this search is to discover weapons, but the discovered cocaine is not. Two other commentators support this

discover evidence for criminal prosecution, this expansion of the exclusionary rule completely eliminates the incentive to engage in pretextual searches since any such evidence discovered cannot be used. LaFave proposed this approach as an especially effective deterrent even though it would sometimes result in the suppression of evidence in cases in which there was no police wrongdoing.[158]

Among the advantages of this approach are that it permits evaluation of police conduct without examining the officer's motive, an evaluation that is fraught with difficulties,[159] and that it does not compromise the officer's safety, as restricting the scope of the search might.[160] As long as a search is within the *Robinson / Belton* scope rule, the officers would be free to satisfy themselves as to their safety. The obvious disadvantage of this approach is that it will frequently result in the suppression of evidence when the officers have acted properly.[161]

---

approach. The first is Professor Anthony Amsterdam, who discussed it in relation to another but similar practice. Amsterdam, *supra* note 70, at 434-39. In his superb Holmes Lectures, delivered just six weeks after *Robinson* was decided, Professor Amsterdam suggested that such an expansion of the exclusionary rule would be appropriate to regulate police conduct in a wide variety of circumstances, particularly stop and frisk, but applicable whenever police engage in conduct: (1) that intrudes on a citizen's fourth amendment interests; (2) that is justified by a particular governmental need, *i.e.*, protection of police officers; and (3) where the power may in fact be exercised for some other purpose. *Id.* at 434. Also supporting this approach is Professor James B. White who, in the same issue of the *Supreme Court Review* in which Professor LaFave articulated his proposal, suggested the same solution. He proposed that "[t]he officer should have an automatic authority to make a full arms search incident to an arrest, even though this authority is inconsistent with the principle of particular justification, but nothing found in such a search should be admissible in a criminal trial of the person arrested." White, *supra* note 106, at 209.

158. LaFave, *supra* note 17, at 156-57.

159. *See supra* notes 116-17 and accompanying text.

160. *See supra* notes 143-56 and accompanying text.

161. To the supporters of this approach, however, this difficulty is outweighed because it would be consistent with the view of the exclusionary rule as "regulatory rather than atomistic." This phrase was first used by Professor Amsterdam, another supporter of the use-exclusion approach. *See* Amsterdam, *supra* note 70, at 367-72. Such a view recognizes that the exclusionary rule is a general deterrent device rather than "a personal constitutional right of the party aggrieved." LaFave, *supra* note 17, at 157 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). Although the court has not accepted this position and operates in an inconsistent fashion in this regard, *compare Calandra*, 414 U.S. at 348 (exclusionary rule is judicially created remedy designed to safeguard fourth amendment rights generally through its deterrent effect rather than personal constitutional

Professor James Haddad is the chief critic of this expansion of the exclusionary rule, which he labels the use-exclusion approach.[162] His opposition rests on three grounds. First, he objects to the "enormous" costs of such an approach, the extent of which will depend entirely on chance.[163] For instance, if a police officer stops a car for speeding and, as a result of a search incident to that arrest discovered marijuana, some might argue that the costs of suppressing that evidence are slight. However, if a bloody shirt or other evidence of a murder is found, that evidence too would be inadmissible. If, in addition, that evidence was the first link between the car owner and the murder, the derivative evidence rules might bar any prosecution at all.[164] Whatever effect the exclusion of this evidence might have

---

right of party aggrieved) *with* Rakas v. Illinois, 439 U.S. 128, 134 (1978) (proper to permit only defendants whose fourth amendment rights have been violated to benefit from rule's protections), both Professors LaFave and Amsterdam have argued for its acceptance. *See* Amsterdam, *supra* note 70, at 367-72; LaFave, *supra* note 17, at 156-57. Under the regulatory view,

> '[t]here is no necessary relationship between the violation of an individual's fourth amendment rights and the exclusion of evidence;' rather, the 'exclusionary rule is simply a tool to be employed in whatever manner is necessary to achieve the amendment's regulatory objective by reducing undesirable incentives to unconstitutional searches and seizure.'

LaFave, *supra* note 17, at 157 (quoting Amsterdam, *supra* note 70, at 437-39). If one accepts this view, "there is much to be said for excluding evidence other than weapons obtained incident to a traffic arrest, given the inherent difficulties in separating those searches which are in fact lawful from those which are not." *Id.*

162. Haddad, *Claims of Sham*, *supra* note 120, at 206-10.

163. *Id.* at 207.

164. *Id.* Traditionally, the Supreme Court has barred not only the evidence that was the direct product of the illegal police activity but any evidence that was discovered by exploitation of the initial illegality. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963). The fruits doctrine has been held to exclude a confession that was the product of an illegal arrest, and the discovery of contraband that was the product of the confession that was the product of the illegal arrest. *Id.* at 487-88. However, recent decisions of the Supreme Court have modified this principle somewhat. The Court has accepted three doctrines: attenuation, *see, e.g.*, United States v. Ceccolini, 435 U.S. 268, 279 (1978) (evidence from live witness discovered as direct product of police misconduct admissible); independent source, *see, e.g.*, Segura v. United States, 468 U.S. 796, 799 (1984) (evidence discovered pursuant to search warrant issued after police illegally entered premises but based on probable cause not derived from illegal entry admissible); and inevitable discovery, *see, e.g.*, Nix v. Williams, 467 U.S. 431, 448 (1984) (evidence discovered as product of illegally obtained admission admissible because it would have been inevitably discovered). These doctrines greatly limit the derivation evidence rules.

on regulating police officers generally, to many it does not outweigh the cost of nonprosecution of a murderer.[165]

Second, Professor Haddad thinks that "the use-exclusion approach would breed disrespect for the judiciary and would not survive a brief experimental life."[166] He believes that public support for the exclusionary rule depends, to some extent at least, on using it only to punish an officer for wrongdoing. Even courts accept this premise. "[R]ight or wrong, [some courts] have been emotionally unable" to exclude evidence that was the product of illegal conduct by an officer not associated with the subject prosecution but that was, nonetheless, the product of illegal activity.[167] Haddad thinks it is extremely unlikely that a rule that excludes evidence when there was no misconduct can survive.[168]

Finally, Professor Haddad suggests that use-exclusion would radically modify the plain-view doctrine.[169] This fourth amendment principle permits police officers to seize evidence without a warrant when they have discovered it inadvertently and without misconduct.[170] The classic example of plain view is when officers discover contraband while executing a valid warrant for some other evidence. The doctrine permits them to seize the contraband and use it as evidence. The use-exclusion doctrine is clearly inconsistent with this well-founded principle. Officers looking for a weapon in a search incident to an arrest for a traffic violation would be precluded from using what they had discovered in plain view. Professor Haddad fears that adoption of use-exclusion would necessarily affect any fourth amendment doctrine that permits officers to seize evidence that was uncovered while pursuing an unrelated matter.[171]

---

165. *See* Haddad, *Claims of Sham, supra* note 120, at 207-08.

166. *Id.* at 207.

167. *Id.* at 209.

168. *Id.* at 208-09.

169. *Id.* at 210.

170. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) (plain view allows admission of evidence found inadvertently if officer had prior justification for intrusion).

171. Haddad, *Claims of Sham, supra* note 120, at 210. As examples, Haddad offers search incident to an arrest for a crime and inventory searches. In the former, police are traditionally permitted to search for weapons and to prevent the destruction of evidence of the crime for which the suspect is arrested. If, during the course of that search, evidence of other crimes is discovered it is admissible.

The use-exclusion approach has received no support from either the Supreme Court or the states. And while its supporters are right that it eliminates any incentive to arrest a traffic violator to discover evidence for prosecution of other crimes, it would have no effect on decisions to arrest for other arbitrary and impermissible reasons. Given public sentiment on the use of the exclusionary rule in any context, further expansion of the rule would require a compelling reason and the absence of other alternatives. But there is another alternative; one that carries all of the benefits and none of the costs.

D. *Limiting the Power to Arrest for Minor Traffic Offenses*

> [I]t may well be that the overriding question presented by *Robinson* is not what degree of search may be conducted incident to arrest, but rather when an arrest itself is warranted so as to call for a full protective search. That is, if a full search for self-protection is necessary only in the event of arrest, then is not such a search unnecessary if the antecedent arrest was unnecessary?[172]

Professor LaFave concludes that the easiest and most efficient control "in an area with a high potential for undetectable abuse"[173] is to prohibit the arrest itself. Without the arrest there is simply no need to search. LaFave does not develop this solution in his *Robinson Dilemma* article beyond suggesting that either legislative or police regulations could define categories that justify arrest or preclude it.[174] He has, however, expanded on his theory in more recent writings.[175]

LaFave views a bad faith search as a search that would not have been made but for the underlying intent or motivation of

---

Use-exclusion would certainly alter this rule. "[U]nder the use-exclusion doctrine, only a weapon or evidence of *this* crime could be admitted. The cost of a search incident to arrest would be creation of an 'immunity shield' for unrelated evidence discovered in such a search and for any evidence derived through such discovery." *Id.* Likewise, inventory searches are conducted to prevent the theft of articles in automobiles by employees of the police or the bailee and to prevent false claims of loss by the owner. South Dakota v. Opperman, 428 U.S. 364, 369 (1976). Use-exclusion would prohibit the police from using anything discovered during these searches as evidence in a criminal trial.

172. LaFave, *supra* note 17, at 158.

173. *Id.* at 162.

174. *Id.* at 160-61.

175. *See* 1 W. LAFAVE, SEARCH AND SEIZURE § 1.4(e) (2d ed. 1987); 2 W. LAFAVE, SEARCH AND SEIZURE § 5.2(g) (2d ed. 1987).

the police. However, he does not think it is possible or profitable to attempt to identify the motive of the officer.

> The proper basis of concern is not with *why* the officer deviated from the usual practice in this case but simply that he *did* deviate. It is the *fact* of the departure from the accepted way of handling such cases which makes the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation.[176]

When the arrest of *X* for a traffic offense would have occurred even without the officer's impermissible underlying intent or motivation, there is no conduct that ought to have been deterred. LaFave reads the fourth amendment as requiring legislatures or administrators to establish standard procedures in areas such as traffic arrests and then to suppress evidence whenever an officer operates outside of the procedures, regardless of his or her motivation for doing so.[177] LaFave's solution departs from traditional fourth amendment analysis in that the Court will not make a determination, on a case-by-case basis, as to the reasonableness of an arrest. He would have the Court delegate to the police or the legislature the responsibility for determining whether it is reasonable to arrest for a particular offense when they establish the appropriate regulations.[178] Since a search or arrest conducted pursuant to standardized procedures would not be indiscriminate or arbitrary, the Court would uphold it against constitutional challenge.

The difficulty with this solution is that police procedures frequently do not sufficiently restrict police discretion. In the few circumstances where the Court does require standardized procedures, it has not evaluated whether the procedures used actually limited police discretion. *Colorado v. Bertine*[179] exemplifies the ineffectiveness of limiting arbitrary searches by requiring police regulations. *Bertine* involved the legality of an inventory search of an automobile, one of the areas in which the legality of the search depends on adherence to standardized procedures. Bertine was arrested for driving under the influ-

176. 1 W. LaFave, *supra* note 175, § 1.4(e), at 94.

177. *Id.* at 96.

178. 2 W. LaFave, *supra* note 175, § 5.2(g), at 463.

179. 479 U.S. 367 (1987).

ence of alcohol.[180] After his arrest, but before his vehicle was impounded, officers made an inventory search of his vehicle.[181] The officer searched a backpack found behind the front seat of the vehicle, discovering drugs in metal canisters inside a nylon bag.[182] Although there was some evidence that the inventory search did not follow prescribed procedures,[183] the bigger problem was presented by the absence of limitations on the police officer's discretion to impound the vehicle, thereby acquiring the authority to search it, or to park and lock it in a public parking lot, preserving Bertine's privacy interests in his vehicle and its contents.[184] The officer testified that Colorado law gives the officer complete discretion as to whether to impound.[185] Such unbridled discretion completely defeats the effectiveness of regulations in prohibiting arbitrary decisions to impound. To work as a limitation on the decision to impound, regulations must limit the exercise of discretion. But the Court was unwilling to evaluate administrative regulations in this fashion. "We conclude that here . . . reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."[186] As in the decision to impound, the decision to arrest a traffic offender carries with it the authority to search. That standardized procedures exist for either action does not prohibit the exercise of either power as a pretext to search. If LaFave's solution is to work, courts must be willing to evaluate the particular regulations under the fourth amendment, and to require that the regulations effectively restrict the officer's exercise of discretion. In *Bertine*, the Court declined that role.

---

180. *Id.* at 368.

181. *Id.* at 368-69.

182. *Id.* at 369.

183. *Id.* The inventory was at best slipshod. *Id.* The dissenters noted that the officer failed to list $150 in cash found in Bertine's wallet, $210 found in a sealed envelope, and other items of value found in the van. *Id.* at 383 (Marshall, J., dissenting).

184. *Id.* at 370.

185. *Id.* at 381.

186. *Id.* at 374.

Nonetheless, LaFave is correct in stating that limiting the power to arrest for a traffic offense is the best solution for prohibiting pretextual searches. In the fifteen years since *Robinson* was decided, however, very few legislatures have followed this route.[187] Twenty-eight of the fifty states have no limitations on police discretion to arrest for a traffic offense.[188] In

187. The failure of legislatures to develop rules regulating police conduct in the area of searches and seizures has been noted previously by commentators, including Professor LaFave. LaFave, *Improving Police Performance Through the Exclusionary Rule* (pt. 2), 30 MO. L. REV. 391, 556, 568-70 (1965). *See also* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 94 (1967) (few legislatures have defined how and under what conditions certain police practices are to be used); Amsterdam, *supra* note 70, at 378-79 (political suicide for legislatures to restrict police).

188. ARIZ. REV. STAT. ANN. § 13-3883 (1985) (warrantless arrest allowed when officer has probable cause to believe misdemeanor committed in his presence and probable cause to believe person to be arrested committed the offense); ARK. STAT. ANN. § 16-81-106 (1987) (warrantless arrest allowed when officer has probable cause to believe misdemeanor committed in his presence and probable cause to believe person to be arrested committed the offense); CONN. GEN. STAT. § 54-1f(a) (1985) (officer may arrest for any offense when person taken while committing offense and arrest made upon speedy information of others); DEL. CODE ANN. tit. 21, § 701 (1985) (warrantless arrest allowed when officer has probable cause to believe violation committed in his presence and probable cause to believe person to be arrested committed the offense); FLA. STAT. ANN. § 901.15 (West 1985) (warrantless arrest allowed if committed misdemeanor or violated ordinance in presence of officer); GA. CODE ANN. § 17-4-23 (1982) (officer has discretion to give citation rather than arrest); HAW. REV. STAT. § 803-5 (1985) (officer may without warrant arrest any person when officer has probable cause to believe person has committed any offense); IDAHO CODE § 19-603 (Supp. 1988) (warrantless arrest allowed if committed misdemeanor or violated ordinance in presence of officer); ILL. REV. STAT. ch. 38, para. 107-2 (Supp. 1988) (warrantless arrest allowed when officer has probable cause to believe misdemeanor committed in his presence and probable cause to believe person to be arrested committed the offense); IOWA CODE § 804.7 (1979) (officer can arrest if offense committed in officer's presence of officer has reasonable grounds to believe public offense committed); KAN. STAT. ANN. §§ 8-2104, 8-2105, 8-2106, 8-2109 (1982 & Supp. 1985) (officer has discretion to arrest or issue citation for misdemeanor motor vehicle offenses); ME. REV. STAT. ANN. tit. 15, § 704 (1964) (officer shall arrest and detain persons found violating any law, ordinance, or by-law, until legal warrant can be obtained); MICH. COMP. LAWS ANN. §§ 764.9c(1), .15(a) (West Supp. 1988) (warrantless arrest allowed if committed misdemeanor or violated ordinance in presence of officer, and officer has discretion to take into custody or issue citation); MISS. CODE ANN. § 99-3-7 (Supp. 1988) (warrantless arrest allowed if committed misdemeanor or violated ordinance in presence of officer); MO. ANN. STAT § 544.216 (Vernon 1986) (arrest if officer sees person committing violation or has reasonable grounds to believe person violated any law); MONT. CODE ANN. § 46-6-401[1(d)] (1987) (arrest if officer has reasonable grounds that person committed offense and existing circumstances require immediate arrest);

these states, a police officer can decide to arrest for the most minor offense. In the twenty-two states that have legislative limitations, many either retain provisions that give the officer broad discretion or only require the issuance of a citation in a small class of offenses,[189] leaving a great deal of room for police

---

NEV. REV. STAT. § 484.795 (1987) (officer may arrest at his discretion); N.H. REV. STAT. ANN. §§ 594:10(I)(a), :14 (1986) (officer may arrest without warrant upon probable cause for misdemeanor or violation committed in officer's presence, or may issue summons in lieu of arrest); N.J. STAT. ANN. § 39:5-25 (West Supp. 1988) (officer may arrest without warrant any person committing motor vehicle violation in officer's presence, and may issue summons instead of arresting); N.Y. CRIM. PROC. LAW § 140.10(1)(a) (McKinney 1986) (warrantless arrest allowed when officer has probable cause to believe misdemeanor committed in his presence and probable cause to believe person to be arrested committed the offense); N.C. GEN. STAT. § 20-183 (1983) (officer has power to arrest on sight any person found violating motor vehicle laws); *id.* § 150.20 (permits officer to issue a summons but does not require it); OHIO REV. CODE ANN. § 2935.03 (Baldwin 1988) (warrantless arrest allowed if committed misdemeanor or violated ordinance in presence of officer); 75 PA. CONS. STAT. § 6304 (1987) (state police officer may arrest anyone, and any other police officer may arrest nonresident, for any violation committed in presence); R.I. GEN. LAWS § 12-7-3 (1981) (warrantless arrest allowed when officer has probable cause to believe misdemeanor committed in his presence and probable cause to believe person to be arrested committed the offense); TEX. REV. CIV. STAT. ANN. art. 6701d, § 153 (Vernon 1977) (any officer can arrest without warrant any person found violating any provision of motor vehicle act); UTAH CODE ANN. § 77-7-2 (1982) (arrest if officer has reasonable cause to believe offense was committed and reasonable cause for believing person may flee, destroy evidence, or injure another); W. VA. CODE § 15-5-18 (1985) (warrantless arrest allowed if committed misdemeanor or violated ordinance in presence of officer); WYO. STAT. § 31-5-1204 to -1205 (1984) (officer may arrest upon reasonable and probable grounds to believe person has committed specified motor vehicle violations, including reckless driving).

189. The states that require the issuance of a citation in lieu of arrest in some circumstances are: ALA. CODE § 32-1-4 (1983) (when any person arrested for motor vehicle misdemeanor, officer shall release upon written bond to appear, unless officer has good cause to believe person has committed any felony, or person charged with offense resulting in injury or death or offense of DWI); ALASKA STAT. § 12.25.180(b) (1984) (when person stopped for infraction or violation, person shall be issued citation unless satisfactory evidence of identity not furnished or person refuses to accept citation or give written promise to appear); CAL. VEHICLE CODE § 40504 (West 1985) (officer must deliver copy of notice to appear to arrested person); COLO. REV. STAT. § 42-4-1501(4)(a) (1988) (officer must deliver copy of notice to appear to arrested person); IND. CODE ANN. § 9-4-1-131 (Burns 1987) (person arrested for motor vehicle misdemeanor must be released on written promise to appear, unless charged with offense contributing to injury or death, offense of DWI, failure to stop after accident causing injury or damage, or driving while license suspended or revoked); KY. REV. STAT. ANN. § 431.015(2) (Baldwin 1985) (officer must issue citation rather than arrest for motor vehicle violations, except for certain violations, for example, failure to drive in careful manner or DWI); LA. REV. STAT. ANN. § 32:391 (West 1988) (officer shall release on promise to appear

person arrested for motor vehicle violation, except in certain situations, for example, officer has good cause to believe person committed any felony or misdemeanor); MD. TRANSP. CODE ANN. § 26-202(a)(2) (1987) (officer may arrest without warrant for any traffic law violation if violation committed within officer's presence and person does not furnish satisfactory proof of identity or officer reasonably believes traffic citation will be ignored); MASS. GEN. LAWS ANN. ch. 90, § 21 (West Supp. 1988) (officer may arrest without warrant and keep in custody for not longer than 24 hours, persons who commit certain motor vehicle offenses); MINN. STAT. ANN. § 169.91 (West 1986 & Supp. 1989) (officer shall issue written notice to appear to person arrested for motor vehicle violation, but must bring person before judge in certain instances, for example, when there is reasonable cause to believe person will leave state); NEB. REV. STAT. §§ 29-427, -432, -435, 39-6,105 (1984-1985) (officer shall issue citation for traffic infraction, but can arrest and detain person if, for example, officer believes person will not appear, or will cause immediate harm if not detained, or person has no ties to community); N.M. STAT. ANN. § 66-8-123 (1987) (officer must issue summons with five exceptions); N.D. CENT. CODE § 39-07-07 (1987) (requires the issuance of a summons with some exceptions); OKLA. STAT. ANN. tit. 22, § 1115.1(A) (West Supp. 1989) (officer shall release on personal recognizance person arrested solely for misdemeanor traffic violation if, among other requirements, officer is satisfied as to person's identity); OR. REV. STAT. §§ 133.310(1), 810.410, 811.140 (1987) (officer shall not arrest person who commits traffic infraction and may issue citation instead; however, officer can arrest person for specified offense, for example, reckless driving); S.C. CODE ANN. § 56-25-30 (Law Co-op. Supp. 1988) (officer may release person on own recognizance who has accepted traffic citation issued by officer); S.D. CODIFIED LAWS ANN. § 32-33-2 (1984) (citation required whenever violation punishable as misdemeanor); TENN. CODE ANN. § 40-7-118(b)(1) (Supp. 1988) (use citation in lieu of continued custody); VA. CODE ANN. § 46.1-178 (Supp. 1988) (officer shall release upon written promise to appear person committing misdemeanor traffic offense, except in certain specified instances); WASH. REV. CODE ANN. § 46.63.020 (1989) (traffic infractions are not designated as criminal offenses, except for certain specified violations, for example, negligent or reckless driving); WIS. STAT. ANN. §§ 345.22 to .23 (West Supp. 1988) (officer shall release traffic regulation violator arrested without warrant under certain conditions, otherwise officer has discretion to take violator into custody); VT. R. CRIM. P. 3(a), (c) (officer who has grounds to arrest person for misdemeanor shall issue citation in lieu of arrest, but may arrest in certain specified instances, for example, if person fails to furnish adequate proof of identity, arrest is necessary to obtain nontestimonial evidence, or person has insufficient ties to community). For examples of statutes that provide ample opportunity for abuses despite apparent limits on the ability of an officer to arrest and take into custody, *see, e.g.*, Kentucky, which permits warrantless arrest for only a small class of offenses, KY. REV. STAT. § 431.005 (Baldwin 1985), but includes within that class any one who fails to operate his or her vehicle in a "careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway," *id.* § 189.290(1) (Baldwin 1982); Nebraska, which requires that anyone charged with a traffic infraction be issued a citation, NEB. REV. STAT. § 39-6,105 (1984), but then permits arrest if "the officer has reasonable grounds to believe that (1) the accused will refuse to respond to the citation, (2) such custody is necessary to protect the accused or others when his continued liberty would constitute a risk of immediate harm, (3) such action is necessary in order to carry out legitimate investigative functions, (4) the accused has no ties to the jurisdiction

pretext.[190] There is no evidence that police administrators have been any more forthcoming.[191] But controlling the power to arrest need not be relegated to legislatures or administrators.[192] The next section will show how the fourth amendment itself gives rise to a rule prohibiting arrests for minor traffic violations.

III. The Case for Constitutional Restrictions on the Power to Arrest for Traffic Offenses

The best and easiest solution to the pretext problem is to deny police officers the power to arrest for the ordinary traffic offense and to require that they issue a citation instead. If the police do not have the power to arrest, they do not need the power to search. If they do not have the power to arrest, there is no danger that they will arrest for the wrong reasons. Additionally, denying the power to arrest not only provides the bright-line standard that the Supreme Court and others have

---

reasonably sufficient to assure his appearance, or (5) the accused has previously failed to appear in response to a citation," *id.* § 29-427 (1985); and Tennessee, which has a long list of exceptions, including the "reasonable likelihood that the offense would continue or resume," TENN. CODE ANN. § 40-7-118(c)(2) (Supp. 1988), and two interesting variations, one which permits arrest in lieu of a citation when "[t]he prosecution of the offense for which there person was arrested, or of another offense, would thereby be jeopardized," *id.* § 40-7-118(c)(4) (Supp. 1988), and another which explicitly permits an officer to conduct the same search he would have been permitted had he arrested the accused, *id.* § 40-7-118(h) (Supp. 1988).

190. Texas, for example, only requires the issuance of a summons in lieu of arrest for speeding. TEX. REV. CIV. STAT. ANN. art. 6701d, § 148(d) (Vernon 1977).

191. I have made no effort to systematically examine whether police departments across the country have developed procedures that limit the officer's discretion to arrest. However, I have not found a single case in which a court has considered either adherence to or the presence of procedures as a factor in evaluating police conduct in this area. In an admittedly unscientific survey of local police departments in New York, I discovered that there were absolutely no procedures in effect. I inquired of the New York State Police, the Westchester County Police, the Town of Greenburgh Police, the City of New Rochelle Police, and the Village of Monticello Police. In each instance I was told that there were no written procedures to guide officers in making the decision to arrest for a traffic offense.

192. Some state courts have suppressed evidence when police officers have arrested a traffic offender and the court has viewed the arrest as either in contravention of a state statute or state policy. *See, e.g.*, Commonwealth v. Collini, 264 Pa. Super. 36, 42-43, 398 A.2d 1044, 1047 (1979) (state code generally requires citations for traffic offenses; searches of the person prohibited for all offenses except DWI or nonresidents); State v. Breaux, 329 So. 2d 696, 699 (La. 1976) (custody is not our customary practice).

felt so necessary to implement functional fourth amendment doctrine,[193] but also protects fourth amendment interests without subjecting police to unnecessary danger. Nonetheless, twenty-five years after *Robinson*, there is no jurisdiction that prohibits all arrests for traffic offenses and few that substantially limit them.[194]

Perhaps the solution to the problem created by *Robinson* lies in the fourth amendment itself, which guarantees freedom from unreasonable searches and seizures.[195] Although the Supreme Court has never considered whether a custodial arrest for a minor traffic offense is a violation of the fourth amendment, it has held that "a warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable."[196] And at least one Justice has thought custodial arrest for a traffic offense to be unreasonable under the fourth amendment. Justice Stewart, concurring in *United States v. Gustafson*,[197] stated: "[i]t seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner [Gustafson] for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made."[198] This section examines the claim that Gustafson failed to raise.

Three questions are relevant as to whether a particular practice violates the fourth amendment: whether the fourth amendment was designed to prevent the government activity complained of,[199] whether the practice complained of was accepted under the common law,[200] and whether the government's interest requiring the intrusion outweighs the individual's pri-

193. *See supra* note 107 and accompanying text for a discussion of Professor LaFave's advocacy of standardized procedures to limit police searches.

194. *See supra* notes 188-89 for statutes defining power to arrest for traffic offenses.

195. *See supra* note 1 for the text of the fourth amendment.

196. Payton v. New York, 445 U.S. 573, 585 (1980).

197. 414 U.S. 260 (1973).

198. *Id.* at 266-67 (Stewart, J., concurring).

199. *See, e.g.*, Payton v. New York, 445 U.S. 573, 583-90 (1980) (discussion of immediate evils that motivated adoption of fourth amendment).

200. *See, e.g., id.* at 591-98 (examination of common law understanding of an officer's authority to arrest); United States v. Watson, 423 U.S. 411, 418-22 (1976) (examination of cases construing the fourth amendment to allow peace officer to arrest without a warrant).

vacy interest.[201] The subsections following propose that custodial arrest for traffic offenses are unreasonable seizures under each of these criteria. Subsection A shows that arrests for minor traffic offenses are identical to the unlimited and arbitrary power of the court's messengers and custom inspectors that led to the adoption of the fourth amendment.[202] Subsection B considers whether custodial arrest for a minor offense was the accepted practice at the time the Constitution was adopted and demonstrates that it was not.[203] Subsection C balances the government's interest in custodial arrest for traffic offenses against the individual's privacy interest and concludes that in all cases other than intoxication where the driver can identify himself, the individual's interest in being free from seizure outweighs the government's interest in enforcing the traffic laws through custodial arrest.[204]

A. *The Fourth Amendment Was Designed to Prevent Unlimited and Arbitrary Exercise of Government Power to Search and Seize*

In determining whether a particular government practice is prohibited by the fourth amendment, the Court has frequently begun by considering whether the challenged activity creates the type of evil that the fourth amendment was designed to prevent.[205] The power to arrest for a minor traffic offense is precisely such an evil. The fourth amendment was designed to prevent the arbitrary and indiscriminate searches permitted by general warrants and writs of assistance.[206] General warrants and writs of assistance were harmful because they delegated to the officer the power to decide whom to search and for what to search.[207] They granted the power to search without a showing

201. *See, e.g.*, Michigan v. Summers, 452 U.S. 692, 701 (1981) (balancing probable cause for intrusion against individual's privacy).

202. *See infra* notes 205-39 and accompanying text.

203. *See infra* notes 240-53 and accompanying text.

204. *See infra* notes 254-354 and accompanying text.

205. *See, e.g.*, Payton v. New York, 445 U.S. 573, 583-90 (1980) (discussion of immediate evils that motivated adoption of fourth amendment).

206. *See infra* notes 234-39 and accompanying text for a discussion of the objectionable features of general warrants and writs of assistance.

207. *See infra* notes 209-33 and accompanying text for a discussion of historical events that led to adoption of fourth amendment.

of individualized suspicion that evidence of criminal activity would be found in a particular place. The power to search permitted officers when they arrest for minor traffic offenses is essentially that same delegation of discretion. The fact of arrest, like the grant of authority under general warrants, permits the officer to search without any showing of individualized suspicion that evidence of criminal of criminal activity will be found.

1. *The Political History Antecedent to the Fourth Amendment*

Unlike other provisions of the Constitution, the fourth amendment has had a clear history; it grew from events that led to the American Revolution.[208] The amendment was a direct response to the virtually unrestrained and judicially unsupervised searches pursuant to the virtually unrestrained and judicially unsupervised searches pursuant to general warrants and writs of assistance.[209] The early history of this search power began with the Tudors. In the late 1400s and the early 1500s the crown sought to suppress undesirable publications.[210] Henry VIII continued this practice by requiring that all publications receive the crown's license before printing. To enforce this censorship system, he created general warrants that provided vast powers of search and seizure.[211] Those engaged in ferreting out evidence of seditious publications were permitted to "'make search wherever it shall please them in any place . . . within our kingdom of England . . . and to seize, take hold, burn . . . those books and things which are or shall be printed contrary to the form of any statute, act, or proclamation.'"[212]

Things got even worse in the first half of the 1600s with the creation by James I of the first writs of assistance. The writs were different from general warrants because they went beyond papers and books and authorized searches for smuggled goods. They were called writs of assistance because they ordered all

208. J. LANDYNSKY, SEARCH AND SEIZURE AND THE SUPREME COURT 19 (1966).

209. *Id.* at 20.

210. *Id.* at 21.

211. *Id.*

212. *Id.* (quoting 1 E. ARBER, A TRANSCRIPT OF THE REGISTERS OF THE COMPANY OF STATIONERS OF LONDON, 1554-1640, at xxxi (London 1875)).

the officers of the crown to assist in their execution.[213] But it was not until the reign of Charles I that the writs became common.[214] He used them to collect a tonnage and poundage tax that provoked widespread resistance.[215]

Simultaneously, the crown continued its quest to suppress unwelcome printing. Three tribunals assisted in this endeavor: the King's or Queen's (Privy) Council, the Court of Star Chamber, and the ecclesiastical Court of High Commission.[216] These tribunals developed the search for forbidden materials into a fine art, ferreting out both evidence of crimes known and unknown.[217] They were empowered to make extensive searches and to seize indiscriminately.[218]

Abuses of the search power even survived the collapse of the all-powerful monarchy. After Cromwell, the new Parliament passed the same kinds of laws.[219] The press continued to be controlled by sanctions after publication.[220] The judiciary finally laid the groundwork for putting a halt to the general warrant. John Wilkes, who had printed a pamphlet violently attacking the government,[221] and John Entick, author of a critical newspaper,[222] had both been the object of general warrant searches. Each sued the government for trespass and won sub-

213. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 28-29 (1970).

214. J. LANDYNSKI, *supra* note 208, at 22-23.

215. N. LASSON, *supra* note 213, at 29-31.

216. *Id.* at 25-26.

217. One example of a Privy Council warrant authorized the search and seizure of "all bookes, papers, writinges, and other things whatsoever that you shall find in his house to be kept unlawfully and offensively, that the same maie serve to discover the offense wherewith he is charged." *Id.* at 26-27 (quoting 26 ACTS OF THE PRIVY COUNCIL 425 (J. Dasent ed. 1895)).

218. For instance, while Sir Edward Coke, the celebrated authority on the common law and one of the most influential of the Crown's opponents, was on his deathbed, his house was searched pursuant to a general warrant. The searchers seized not only all his writings, including the manuscripts of his great legal works and his will, but also his jewelry, money, and other valuables. *Id.* at 31. The seizure of these last items was as related to seditious libel as the contents of the crumpled cigarette box were to Gustafson's driving without a license.

219. *Id.* at 37.

220. J. LANDYNSKI, *supra* note 208, at 27. Between 1694 and 1792, people were prosecuted for seditious libel, which punished after publication rather than prohibited initial publication. *Id.*

221. Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763).

222. Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765).

stantial verdicts.[223] Upholding the verdicts, Lord Camden dismissed Star Chamber precedent as void,[224] thereby setting the stage for the end of the general warrant.[225] These events, however, did not affect the authority of the writs of assistance.[226]

Writs of assistance were used extensively in the colonies in the 1760s and were a principal irritant to the colonists.[227] The writs were even more offensive than the general warrants, which had at least been directed at the perpetrators of a particular offense; writs of assistance permitted unlimited discretion and were valid for the life of the sovereign.[228] The writs were used to enforce duties passed by Parliament and were designed to prevent the American colonies from trading outside the Empire. Smuggling to avoid the taxes had become extremely common.[229]

The first court challenge to the writs on this continent (possibly the first step toward the revolution) came in 1760, when George II died. The death of the Sovereign required that new writs be issued. Sixty-three Boston merchants decided to challenge the issuance of new writs and hired James Otis, Jr., to argue the case for them. Notwithstanding Otis's now-famous oratory, he lost.[230] Parliament then passed the Stamp Act, a new and more onerous tax that caused a riot in Boston.[231] The relationship of the revolution to the writs is clear. John Adams, who had been a young courtroom spectator during the argument in the writs-of-assistance case, later wrote:

> 'Mr. Otis' oration against the Writs of Assistance breathed into this nation the breath of life. [He] was a flame of fire! Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the

223. *See Entick*, 95 Eng. Rep. 818; *Wilkes*, 98 Eng. Rep. at 499.

224. *Entick*, 95 Eng. Rep. at 818; *Wilkes*, 98 Eng. Rep. at 499.

225. Immediately after judgment in Entick's case, and as a result of it and Wilkes' case, the House of Commons declared general warrants to be universally illegal. N. LASSON, *supra* note 213, at 49.

226. J. LANDYNSKI, *supra* note 208, at 30.

227. *Id.* at 31.

228. *Id.*

229. *Id.* at 30. In fact, John Hancock was once charged with smuggling and was defended by John Adams in a case that was eventually dropped. *Id.* at 30 n.49.

230. *Id.* at 33-35.

231. *Id.* at 36.

> first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free.'[232]

The fourth amendment was in direct response to these abuses, which had begun in England and which continued in the colonies.[233]

2. *The Relationship of Searches Following Traffic Arrests to the Practices that Caused Enactment of the Fourth Amendment*

The objectionable feature of general warrants was their indiscriminate character.[234] In his remarkable *Oliver Wendell Holmes Lectures* in 1974, Professor Anthony Amsterdam highlighted the evils of indiscriminate searches:

> The first is that they expose people and their possessions to interferences by government when there is no good reason to do so. The concern here is against *unjustified* searches and seizures: it rests upon the principle that every citizen is entitled to security of his person and property unless and until an adequate justification for disturbing that security is shown. The second is that indiscriminate searches and seizures are conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize. This latter concern runs against *arbitrary* searches and seizures: it condemns the petty tyranny of unregulated rummagers.[235]

As with general warrants and writs of assistance, both unjustified and arbitrary intrusions are presented when a police officer has the power to arrest for a minor traffic offense. First, such an arrest is *unjustified*. The indignity, powerlessness, and inconvenience occasioned by a custodial arrest for the violation of a *malum prohibitum* offense is excessive when the more civilized traffic citation will accomplish the same result. As will be

---

232. N. LASSON, *supra* note 213, at 59 (quoting 10 C. ADAMS, LIFE AND WORKS OF JOHN ADAMS 247-48, 276 (1856)).

233. Payton v. New York, 445 U.S. 573, 583-84 (1980).

234. Amsterdam, *supra* note 70, at 411. The "basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

235. Amsterdam, *supra* note 70, at 411.

discussed more fully below,[236] the mere violation of a traffic ordinance has not been shown to furnish "adequate justification for disturbing [a citizen's] security."[237] There is simply no governmental interest that justifies the extraordinary action of custodial arrest. As with ordinances prohibiting spitting on the sidewalk or improperly bagging one's garbage, or the myriad of other regulations that permit large groups of people to live together in relative harmony, enforcement of traffic regulations is expected, custodial arrest is not. A traffic offense does not subject the offender to the kind of penalty that might invite him to abscond, nor does it present the danger to society of a typical criminal case. Arrests for traffic offenses, like searches permitted by general warrants, are grants of authority without a showing that actions by the individual justify the intrusion.

Second, the authority to arrest for a traffic offense is the arbitrary power that the authors of the fourth amendment most feared. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials . . . 'to safeguard the privacy and security of individuals against arbitrary invasions.' "[238] In almost every state, police officers may choose to arrest or issue a citation for the vast majority of offenses. They may make this choice for good reason, bad reason, or no reason. This indiscriminate power to arrest brings with it the far-reaching power to search.[239] Like the searches pursuant to general warrants and writs of assistance, a search incident to an arrest for a traffic offense is not limited by probable cause to believe evidence of criminal conduct is present. Like the crown's messengers who could search anyone suspected of bad thoughts hoping to discover evidence of crimes they had no reason to believe the person being searched committed, police of-

236. *See infra* notes 310-54 and accompanying text for discussion of a state's interest in custodial arrest for traffic violations.

237. Amsterdam, *supra* note 70, at 411.

238. Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)). *See also* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); United States v. Ortiz, 422 U.S. 891, 895 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973).

239. *See supra* notes 45-105 and accompanying text for a discussion of Supreme Court opinions addressing searches incident to traffic violations.

ficers may, by virtue of the power to arrest for a traffic offense, conduct an exhaustive search of both defendants and their cars, thereby discovering evidence that the officers had no reason to think existed and that relates to crimes which they had no reason to suspect. Such a search is the rummaging of the customs inspector and the prying of the courts' messengers.

B. *Common Law Authority for Arrest for Minor Offenses*

One of the factors the Court considers when it evaluates the reasonableness of an intrusion is the historical roots of the practice.[240] Custodial arrest for minor offenses has developed in relatively recent times.[241] Early common law *prohibited* arrest for minor offenses.[242]

Prior to the mid 1800s,[243] although it was possible for a magistrate to order arrest in a summary case in this country,[244] the summons was the rule.[245] Even for misdemeanors,[246] for which a warrant could issue, it was common for a summons to

---

240. *See, e.g.*, United States v. Watson, 423 U.S. 411, 415-24 (1976) (review of history of common law rule that officer may arrest without warrant based upon probable cause); Payton v. New York, 445 U.S. 573, 591-98 (1980) (examination of common law on authority of officer to make warrantless arrest in home).

241. F. FEENEY, THE POLICE AND PRETRIAL RELEASE 12 (1982).

242. W. PALEY, THE LAW AND PRACTICE OF SUMMARY CONVICTIONS 19 (London 1814).

> For offences merely arising by penal statutes, and not connected with any breach of the peace, a justice has no authority, as necessarily incident to the cognizance of the offence, to apprehend the accused in the first instance, or even after a summons and default, but could only summon him to attend, and in default of his appearance proceed *ex parte*.

Id.

243. The extent of review of the common law's attitude toward traffic offenses is obviously limited since automobiles were not subject to regulation until they were invented.

244. Summary cases were those that could be tried by a magistrate without a jury and included "violations of law relating to liquor, trade and manufacture, labor, smuggling, traffic on the highway, the Sabbath, cheats, gambling, swearing, and dozens of others." F. FEENEY, *supra* note 241, at 12.

245. J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 417 (1944).

246. Misdemeanors encompassed a wide range of offenses. They included assault, even with the intent to rob, murder, or rape, abortion, bribing voters, compounding felonies, cheating by false weights or measures, eavesdropping, forgery, false imprisonment, forcible and violent entry, kidnapping, libel, mayhem, perjury, and many other offenses. Wilgus, *Arrest Without a Warrant* (pt. 1), 22 MICH. L. REV. 541, 572-73 (1924).

be used.[247] Not until the advent of a professional police force did arrest rules begin to change.[248] Legislatures then adopted statutes granting sweeping arrest powers.[249] Without considering whether the taking of immediate custody was necessary, legislatures began to authorize custodial arrests for minor crimes.[250] This change appears to have been aimed at making it easier to arrest without a warrant, but the effect was to authorize custodial arrests for many offenses, "such as ordinance and regulatory violations, that had previously not been subject to arrest at all."[251] By the time states began to regulate traffic offenses, most jurisdictions permitted custodial arrests for virtually all offenses.[252] When traffic laws were created, the states merely adopted the enforcement practices already in use for other violations.[253] Custodial arrest for a traffic offense developed in relatively recent times; it is not justified or foreshadowed by common law practice.

C. *A Balance of Individual Privacy Interests and Governmental Interests Does Not Reasonably Justify Custodial Arrest for Traffic Offenses*

Generally, the fourth amendment is satisfied whenever a search or seizure is based on probable cause[254] and is conducted

247. F. FEENEY, *supra* note 241, at 12.

248. *Id.* at 13.

249. *Id. See, e.g.*, the provision of the proposed Field Code of Criminal Procedure, which authorized a peace officer to arrest without warrant for any "public offense, committed or attempted in his presence." *Id.* at 13 n.22.

250. *Id.* at 13. As a general matter, very little attention is given to whether there is a need for custody when persons are arrested for any offense. In practice people are held until their first court appearance without any prior consideration of whether the initial taking into custody was necessary. W. LAFAVE, *supra* note 115, at 168.

251. F. FEENEY, *supra* note 241, at 11.

252. *Id.* at 13.

253. *Id.* For instance, Pennsylvania's motor vehicle act, enacted in 1903, provided that "[i]t shall be the duty of the constables and police officers of . . . this Commonwealth to arrest upon view and without a warrant, any person or persons violating [this act]." 1903 Pa. Laws 268, 270, § 10, *reprinted in* F. FEENEY, *supra* note 241, at 15.

254. The court's most quoted definition of probable cause is "facts and circumstances . . . such as to warrant a man of prudence and caution in believing that the offense has been committed." Stacey v. Emery, 97 U.S. 642, 645 (1878). Probable cause must be measured by the facts of the particular case. Wong Sun v. United States, 371 U.S. 471, 479 (1963).

pursuant to a properly issued warrant[255] or in circumstances that excuse the acquisition of one.[256] If there were no more to it, the arrest of a traffic offender would be constitutional on a showing of probable cause to believe that the driver had violated a traffic ordinance. But the Supreme Court has held that the mere existence of probable cause does not make a seizure reasonable; search or seizure can be unreasonable, notwithstanding the existence of probable cause, if the *manner* in which the evidence or person is seized is unreasonable.[257] Therefore, the custodial arrest of a traffic offender could be unconstitutional because the manner of the intrusion is unreasonable under the circumstances.

In *Schmerber v. California*,[258] the defendant was arrested at a hospital where he was being treated for injuries sustained in an automobile accident. A police officer ordered a physician to take a sample of Schmerber's blood for chemical analysis. On the basis of that analysis, Schmerber was convicted of driving under the influence of alcohol.[259] Schmerber challenged the introduction of the chemical analysis as a product of an unconstitutional search and seizure.[260]

The Court, in rejecting his claim, stated,

> [T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are

255. Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971).

256. *See supra* note 31 and accompanying text for a discussion of circumstances excusing the obtainment of warrant.

257. *See* Tennessee v. Garner, 471 U.S. 1 (1984) (seizure unreasonable where officers used deadly force to effectuate arrest of suspect for non-violent crime); Winston v. Lee, 470 U.S. 753, 758 (1985) (Court considered degree of intrusion when evaluating reasonableness of proposed surgical proceeding); Welsh v. Wisconsin, 466 U.S. 740, 748 (1983) (warrantless, nighttime entry of petitioner's home to arrest him for civil, non-jailable traffic offense was unreasonable notwithstanding presence of probable cause); Schmerber v. California, 384 U.S. 757 (1966) (Court considered manner of search as well as presence or absence of probable cause). For an interesting discussion of fourth amendment reasonableness in terms of the amount of force used, the time at which an intrusion occurs, and the duration of the intrusion, *see* Dix, *Means of Executing Searches and Seizures as Fourth Amendment Issues*, 67 MINN. L. REV. 89 (1982).

258. 384 U.S. 757 (1966).

259. *Id.* at 758-59.

260. *Id.* at 766. He also challenged the admissibility of the chemical analysis, alleging a violation of his due process rights, his fifth amendment privilege against self-incrimination, and his right to counsel. Each of these claims was found meritless. *Id.* at 759-66.

> not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the means and procedures employed in taking [Schmerber's] blood respected relevant Fourth Amendment standards of reasonableness.[261]

The Court considered more than the mere presence of probable cause since it began its analysis with the assertion that, "[h]ere, there was plainly probable cause."[262] The Court also held that a search without a warrant was permissible since the percentage of alcohol in the blood begins to diminish shortly after drinking stops and the time necessary to seek out a magistrate and secure a warrant would result in the loss of evidence.[263] But notwithstanding the Court's recognition that there was probable cause to believe the search would reveal evidence and that a warrantless search was permissible, it went on to consider the manner in which the blood was extracted. Although the Court upheld the search, it did so only after determining that the method of search was reasonable.[264] Extractions of blood samples "are commonplace . . . and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain."[265] Additionally, the Court noted that the blood was extracted by a physician in a hospital according to accepted medical practices.[266] *Schmerber* clearly indicates that a fourth amendment intrusion can be unconstitutional because the manner of the intrusion is unreasonable.

The mere existence of probable cause was also insufficient to justify a search in *Winston v. Lee*.[267] The defendant was ac-

---

261. *Id.* at 768.

262. *Id.*

263. *Id.* at 771. One of the recognized exceptions to the warrant requirement is an emergency in which the delay necessary to obtain a warrant would result in the loss or destruction of evidence. Vale v. Louisiana, 399 U.S. 30, 34 (1970).

264. *Schmerber*, 384 U.S. at 771.

265. *Id.* Among the circumstances that made this search reasonable was that the defendant was not "one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'breathalyser' test petitioner refused." *Id.* The Court expressly left open the question of whether a defendant could insist on the less intrusive procedure if he met any of those criteria. *Id.*

266. *Id.*

267. 470 U.S. 753 (1985).

cused of attempted armed robbery and was believed to have a bullet lodged in his chest.[268] In determining whether surgical removal should be permitted, the Court weighed Winston's interests in privacy and security against society's interest in conducting the procedure.[269] The Court's inquiry focused on "the extent of the intrusion on respondent's privacy interests and on the *State's need* for the evidence,"[270] and concluded that the medical risks of the operation, "although apparently not extremely severe," militated against finding the operation reasonable when balanced against the Commonwealth's failure "to demonstrate a compelling need for it."[271] In determining the State's need for the evidence, the Court considered the strength of the case against the petitioner.[272] In this instance, the government's failure to show that it *needed* this intrusive search resulted in the Court's finding the search unreasonable. Similarly, in considering the reasonableness of custodial arrests for minor traffic offenses, it is appropriate to consider the government's *need* for the intrusion.

In *Tennessee v. Garner*,[273] the Court considered the reasonableness of using deadly force to seize a suspect who was not armed and who had not committed a violent crime. In doing so it rejected the government's claim that the fourth amendment had nothing to say about *how* a seizure was made:[274]

> [Such a claim] ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the im-

268. *Id.* at 755.

269. *Id.* at 760.

270. *Id.* at 763 (emphasis added).

271. *Id.* at 766. It should be emphasized here that the individual's interest is in preserving his privacy (in this case the privacy of bodily integrity), not in suppressing evidence that might tend to convict him. Because the individual's privacy interest is so strong here, the government's need, *i.e.*, that it cannot convict without the evidence and conviction is important in this case, must be comparably strong to permit the intrusion.

272. *Id.* at 765.

273. 471 U.S. 1 (1985).

274. *Id.* at 7.

portance of the governmental interests alleged to justify the intrusion.'[275]

The Court pointed out that it has "described 'the balancing of competing interests' as 'the key principle of the Fourth Amendment' "[276] and that "[b]ecause one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out."[277] The Court concluded that, notwithstanding probable cause to arrest the suspect in this case, the use of deadly force was too intrusive for the offense violated.[278]

The Court's holding in *Garner* is particularly relevant to the consideration of the constitutionality of custodial arrests for traffic offenses. In *Garner*, the degree of intrusiveness in relation to the nature of the offense made the seizure unconstitutional. These are precisely the considerations that argue against the constitutionality of custodial arrests for traffic offenses. Custodial arrest, instead of citation or summons, is simply too intrusive for enforcement of an offense as minor as a traffic violation.

Finally, in *Welsh v. Wisconsin*,[279] the Court held that the fourth amendment prohibited a nighttime entry of petitioner's home to arrest him for a minor traffic offense. The Court found this intrusion unreasonable solely on the basis of the minor na-

---

275. *Id.* at 7-8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

276. *Id.* at 8 (quoting Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981)). The Court identified a number of other instances in which it had balanced the nature of the intrusion against the governmental interests to determine the constitutionality of a seizure. *Id.* (citing Hayes v. Florida, 470 U.S. 811, 813 (1985) (detention for fingerprinting without probable cause was unreasonable); Winston v. Lee, 470 U.S 753, 767 (1985) (surgery under general anesthesia to obtain evidence was unreasonable); United States v. Place, 462 U.S. 696, 700 (1983) (governmental interests did not support lengthy detention of luggage); Florida v. Royer, 460 U.S. 491, 500 (1983) (airport seizure was not carefully tailored to its underlying justifications); Davis v. Mississippi, 394 U.S. 721, 726 (1969) (detention for fingerprinting without probable cause was unreasonable)).

277. *Id.*

278. *Id.* at 11. The Court did not hold the statute that authorized the use of deadly force to arrest for felonies unconstitutional on its face. Rather it concluded that it was unconstitutional as applied. "If the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape . . . ." *Id.*

279. 466 U.S. 740 (1984).

ture of the offense.[280] A witness saw Edward Welsh driving erratically and swerving off the road into an open field. The witness spoke to Welsh and suggested that he wait for assistance but Welsh, abandoning his vehicle, walked a few blocks to his home. The witness waited by the vehicle, and when the police arrived a short time later, told them what he had seen and mentioned that the driver of the vehicle was either very inebriated or very sick. After checking the car's registration and learning that the owner lived close by, the officers entered Welsh's house and arrested him for driving while intoxicated.[281]

Welsh argued that the warrantless arrest in his home was illegal.[282] Although the Court had previously held that arrests inside private dwellings required a warrant,[283] it had also stated that evidence in the process of destruction was an exigent circumstance that excused a warrantless entrance into or search of a home.[284] In addition, *Schmerber* had held that the destruction of evidence by the metabolic processes of the blood was an emergency that excused a warrantless search for the alcoholic content of one's blood.[285] Yet the *Welsh* Court found this particular arrest unreasonable. Notwithstanding the fact that the evidence in Welsh's blood was being destroyed, the Court considered the minor nature of the offense in determining the reasonableness of the police conduct and concluded that Wisconsin's decision to classify this offense as a minor one

> is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest. . . . Given this expression of the State's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant. To allow a warrantless home entry on these facts would be

280. *Id.* at 754.

281. *Id.* at 742-43.

282. *Id.* at 747.

283. *See* Payton v. New York, 445 U.S. 573 (1980).

284. *See, e.g.*, Vale v. Louisiana, 399 U.S. 30, 35 (1970) (warrantless search justified if evidence is in the process of destruction); Johnson v. United States, 333 U.S. 10, 15 (1948) (warrantless search may be justified after hot pursuit of fleeing felon).

285. *See Schmerber*, 384 U.S. at 771.

> to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction.[286]

Although the intrusion in *Welsh* can be distinguished from the arrest for a normal traffic offense because of the additional entry of Welsh's home, the government's interest was also greater, for without the blood-alcohol test the chances of convicting Welsh were small.[287]

Thus, a seizure can be unreasonable because it is too intrusive or unjustified by the circumstances, notwithstanding the existence of probable cause. In determining whether a particular practice is reasonable, the court balances the nature of the individual's fourth amendment interests against the government's interest in the intrusion. The same balancing test may be applied to custodial arrests for traffic offenses. To evaluate the reasonableness of such action, the Court would first balance the nature and quality of the individual's interest in being free from custodial arrests against the government's interest in the custodial arrest of a traffic offender. Only if the government's interest is sufficient to justify the intrusion can custodial arrest for a traffic offense survive constitutional challenge.

1. *The Nature of the Intrusion*

A custodial arrest is a serious intrusion on a person's freedom and privacy.[288] In a society in which freedom and independence are valued, arrest is the gravest of indignities. One arrested is not only no longer free to walk away,[289] but also is suddenly in the control of another human being. If he resists, force will be used. A person arrested can no longer choose when

---

286. *Welsh*, 466 U.S. 754.

287. Not only would there be no scientific evidence of Welsh's intoxication, but there were no police witnesses. The sole witness thought the defendant was either very drunk or very sick. *See id.* at 742. Traffic arrests, on the other hand, are offenses observed by a police officer whose testimony is generally sufficient for conviction, and normally the government's interest in conviction is not furthered by custodial arrest.

288. *See* Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46 (loss of freedom and/or privacy results from even temporary detentions).

289. *See* United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (person is "seized" when freedom of movement is restrained by means of physical force or show of authority).

he eats, with whom he associates, where or whether he will sit or stand, or even when he may go the bathroom.

The physical restraint on freedom is not all that an arrested person suffers. Personal privacy is also violated. A person arrested is booked;[290] a record is made of the arrest, usually including fingerprints and sometimes photographs.[291] The record may be permanent, whether or not the individual is ultimately convicted of the offense for which he or she is charged.[292] The arrestee will certainly be searched.[293] Although the search may be limited to a frisk, it is nonetheless more than a "petty indignity"[294] as "the officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin . . . , and entire surface of the legs down to the feet."[295] Probably a more extensive search will be conducted.[296] In addition to a search of the person's body, the police may look in pockets, in any containers that may be in those pockets, and in a purse or briefcase.[297] The search of a traffic offender will extend to the person's car and anything inside the car.[298] The intrusion on privacy is complete.

---

290. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 228 (West 1967), which provides:

> It is the duty of every peace officer making arrest, or having an arrested person in his custody, promptly to conduct the person arrested to the nearest jail or police station and cause him to be booked. A person is booked by an entry, in a book kept for that purpose, showing his name and address, the offense charged against him, by whom he was arrested, a list of any property taken from him, and the date and time of booking. Every jail and police station shall keep a book for the listing of the above information as to each prisoner received. The book shall always be open for public inspection. The person booked shall be imprisoned unless he is released on bail.

291. *See, e.g.*, N.Y. CRIM. PROC. LAW § 160.10, at 410 (McKinney 1981) (authorizing fingerprinting and photographing of arrestees).

292. *See generally* Doernberg & Zeigler, *Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems*, 55 N.Y.U. L. REV. 1110, 1114 (even when case results in acquittal or dismissal, arrest record is frequently maintained and disseminated).

293. L. TIFFANY, *supra* note 114, at 121 (almost all arrestees searched if taken into custody and incarcerated at police station).

294. Terry v. Ohio, 392 U.S. 1, 17 (1967).

295. *Id.* at 17 n.13 (quoting Priar & Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 481 (1954)).

296. L. TIFFANY, *supra* note 114, at 142.

297. Priar & Martin, *supra* note 295, at 481-82.

298. *Id.* at 482.

The Court has recognized that there are different kinds of police interferences with individual freedom, a full custodial arrest being the most serious.[299] Arrest is the quintessential seizure.[300] For a custodial arrest and a trip to the stationhouse, the Court reserves its most demanding standard; only probable cause to believe the suspect has committed a crime can justify a custodial arrest.[301] In this way, the Court pays homage to the serious nature of the intrusion.

Miranda v. Arizona[302] exemplifies the Court's recognition that custody is a substantial dehumanizing force. The Court requires that a suspect be warned of the right to remain silent before he or she can be subjected to interrogation due to the inherently coercive environment of the stationhouse.[303] This is in sharp contrast to the Court's refusal to require *Miranda* warnings during a traffic stop. In *Berkemer v. McCarty*,[304] the Court acknowledged that a traffic stop significantly curtailed the freedom of a driver and his passengers and that in most states it would be a crime to ignore an officer's direction to

299. As noted earlier, more serious even than custodial arrest is the use of deadly force to effectuate that arrest. Such an intrusion requires probable cause plus a reason to think the person is armed or has committed a crime using violence or the threat of violence. *See* Tennessee v. Garner, 471 U.S. 1, 11 (1984). *See supra* notes 273-78 and accompanying text for a discussion of *Garner*. At the lower end of the intrusion scale is a non-detention encounter between a police officer and a citizen. A police officer may approach a person in a public place in order to ask questions. United States v. Mendenhall, 446 U.S. 544, 554-55 (1980). The average person may not feel free to walk away, but this intrusion is so slight, so similar to that involved in normal social discourse, that the Court requires no justification for it at all. LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 424-25 (1984). Police may approach a person and talk to him or her for good reasons, bad reasons, or no reasons. The police may also *insist* that the individual stop. Adams v. Williams, 407 U.S. 143 (1972) (reasonable suspicion is sufficient to permit forceable detention). Although a forceable stop is certainly a seizure, it may be permitted on less than probable cause if it is for a brief period of time and is based on reasonable suspicion. Terry v. Ohio, 392 U.S. 1, 30 (1968). But such an intrusion is more limited than a custodial arrest.

300. United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., dissenting).

301. Dunaway v. New York, 442 U.S. 200, 208 (1979) (standard of probable cause represents accumulated wisdom of precedent and experience as to the minimum justification necessary to make arrest reasonable).

302. 384 U.S. 436 (1966).

303. *Id.* at 457-58.

304. 468 U.S. 420 (1984).

stop.[305] While recognizing that a traffic stop is a seizure under the fourth amendment, the Court found that "circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police" and refused to require the warnings.[306] The Court noted two ways in which a traffic stop was less oppressive than a custodial arrest. First, it is presumptively temporary and brief:

> A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.[307]

Second, a motorist feels less vulnerable to police authority, partially because the encounter is in public and partially because the individual is usually confronted by only one or two officers, not the "police-dominated environment" of the stationhouse.[308] Although not the issue in *Berkemer*, the Court clearly assumed that custodial arrest was reserved for only the most serious traffic offenses.[309]

It is beyond dispute that a custodial arrest is a grave intrusion on an individual's fourth amendment interests. It is also certain that a traffic stop, while a seizure, is not of the same magnitude as a custodial arrest. Having established the seriousness of the intrusion on the individual's fourth amendment interest in being free from seizure, the governmental interests in custodial arrest must be examined to consider whether they justify this most serious intrusion on freedom.

---

305. *Id.* at 436.

306. *Id.* at 438.

307. *Id.* at 437.

308. *Id.* at 438-39.

309. *Id.* at 437 & n.26. The Court noted that no state requires that a detained motorist be arrested unless accused of specified serious crimes. *Id.* at 437 n.26. *Cf. id.* ("advocating mandatory release on citation of all drivers except those charged with specified offenses, those who fail to furnish satisfactory self-identification, and those as to whom officer has 'reasonable and probable grounds to believe . . . will disregard a written promise to appear in court' ") (quoting NATIONAL COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES, UNIFORM VEHICLE CODE AND MODEL TRAFFIC ORDINANCE §§ 16-203 to 16-206 (Supp. 1979)).

2. *The Nature of the Governmental Interests*

To examine the government's interest in custodial arrests for traffic offenses, one must first identify the government's interest in custodial arrest for any offense. Governmental interests in custodial arrests include: 1) insuring the presence of the suspect to answer the charges against him or her;[310] 2) obtaining evidence of the crime of which the suspect is accused;[311] 3) preventing future harm;[312] 4) providing certain social service functions;[313] and 5) maintaining the proper respect for law and the police.[314] *A fortiori* the government has no greater interest in arresting a traffic offender than it does in arresting a person suspected of committing a criminal offense. Although the interests may not be identical, the interests associated with arrests generally will be considered and traffic offenses examined within those terms.

a. *To insure the presence of the suspect at trial*

The government's interest in insuring the defendant's presence at the trial is strong and legitimate. The goals of regulation will be defeated if offenders are not subject to sanction. The relationship between the power to arrest and this governmental interest is recognized in many states' legislation. The vast majority of states that limit the power of a police officer to arrest for a traffic offense specifically preserve that authority if the officer has reason to think the arrestee will not appear.[315]

---

310. W. LAFAVE, *supra* note 115, at 177-82; Folk, *The Case for Constitutional Constraints Upon the Power to Make Full Custody Arrests*, 48 U. CIN. L. REV. 321, 330-31 (1979).

311. W. LAFAVE, *supra* note 115, at 186-89; Folk, *supra* note 310, at 331.

312. W. LAFAVE, *supra* note 115, at 193-95; Folk, *supra* note 310, at 332.

313. W. LAFAVE, *supra* note 115, at 198-99; Folk, *supra* note 310, at 332.

314. W. LAFAVE, *supra* note 115, at 199-202; Folk, *supra* note 310, at 332-33.

315. *See, e.g.*, KY. REV. STAT. ANN. § 431.015(2) (Baldwin 1985) (police officer may not make physical arrest for minor misdemeanor unless, if citation issued, there are reasonable grounds to believe that the defendant will not appear at designated time); LA. CODE CRIM. PROC. ANN. art. 211 (West Supp. 1988) (officer may give written summons instead of making arrest if officer reasonably believes that person will appear); NEB. REV. STAT. § 29-427 (1985) (officer may arrest with reasonable grounds to believe accused will not respond to the citation); OKLA. STAT. ANN. tit. 22, § 1115.1(A)(2) (West Supp. 1989) (officer shall issue citation unless there is a substantial likelihood that person will refuse to respond to a citation).

Obviously, the power to arrest can only completely *assure* appearance at trial if it is accompanied by the power to detain until judgment. This is a virtual impossibility in a traffic case.[316] Nonetheless, the state's interest in assuring appearance can be enhanced by arrest, because custodial arrest permits the state to firmly establish the suspect's identity through fingerprinting, record checking, or further investigation. It also provides an opportunity to investigate the defendant's ties to community, such as residence, employment, and family, all factors that are viewed as bearing on the probability that the accused will appear.[317] Finally, custodial arrest allows for the imposition of a bond or other conditions on release which are traditionally viewed as encouraging appearance.

Notwithstanding these legitimate concerns, it is not clear that custodial arrest is either necessary or sufficient to assure a defendant's presence at trial. As to the underlying assumption that failure-to-appear rates are influenced by a defendant's community ties, there is some evidence that this reliance has been misplaced.[318] Recent studies of failure-to-appear rates in nontraffic cases have not shown traditional factors such as age, length of residence, marital status, and employment status to be significant predictors of flight.[319]

The fear that out-of-state drivers will disregard a traffic citation is significant in traffic cases. But this danger has been eliminated to a large extent by the Nonresident Violator Compact of 1977.[320] Many states now enforce the traffic laws of

316. Serious substantive due process concerns would be implicated by such a rule because the government's interest in incarcerating a person for such a minor offense for the period necessary to adjudicate guilt or innocence is not sufficient to justify the deprivation of liberty involved. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 731 (1972) (person who has not been convicted of a crime cannot be held more than the reasonable period of time).

317. *See* W. LAFAVE, *supra* note 115, at 180-86.

318. *See* Whitcomb, Lewin & Levine, NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, CITATION RELEASE, 46 (1984) [hereinafter CITATION RELEASE] (some current research sheds doubt on earlier findings regarding community ties as predictor of flight).

319. *See* Eskridge, *Predicting and Protecting Against Failure in Pretrial Release: The State of the Art*, 4 PRE-TRIAL SERVS. ANN. J. 34, 35 (1981) (failure-to-appeal rates in non-traffic cases do not seem to correlate to traditional predictors of flight).

320. This is a uniform act, adopted by at least 37 states, designed to allow a nonresident motorist to accept a traffic citation and proceed without the entangle-

other states by suspending the licenses of their residents who have failed to respond to a summons of a sister-state until the driver resolves the traffic offense in the courts of the sister-state.[321]

Identifying the offender, probably the most important factor in securing future attendance, is more easily accomplished for a traffic violator than for other offenses. Every jurisdiction requires licensing of drivers and registration of vehicles.[322] Most drivers can prove their identity at the scene of the violation. Additionally, the increased use of computers, even by small police departments, permits checking the information supplied.[323] Obviously, the need for this information is crucial to the successful operation of any citation system. Consequently, it may be reasonable to subject a driver to custodial arrest because his or her identity is unknown.

Finally, the seriousness of the offense has always been considered a factor in the probability of appearance. "The offender who, at most, will receive a small fine is generally much more likely to appear than one who anticipates a severe prison sentence."[324] Traffic offenses, even the most serious, are almost always enforced by fines. Justification of the arrest of one charged with a minor offense, particularly if the individual's identity is known, requires a presumption that a person will not appear. Until the recent adoption of the federal preventive detention statutes,[325] the only justification for pretrial detention

---

ment of posting bond or being taken directly to court. "As of February 1986, the following jurisdictions had enacted the Compact: Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, D.C., and West Virginia." Maumee v. Gabriel, 35 Ohio St. 3d 60, 60-61 & n.3, 518 N.E.2d 558, 559-60 & n.3 (1988).

321. *See, e.g.*, N.Y. VEH. & TRAF. LAW § 517 (McKinney 1986).

322. *See, e.g.*, N.Y. VEH. & TRAF. LAW §§ 401, 501 (McKinney 1986).

323. *See* CITATION RELEASE, *supra* note 318, at 11.

324. W. LAFAVE, *supra* note 115, at 179.

325. Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. I, §§ 202-210, 98 Stat. 1837, 1976-87 (codified as amended principally at 18 U.S.C. §§ 3062, 3141-3150 (Supp. IV 1986)), *held constitutional in* United States v. Salerno, 107 S. Ct. 2095 (1987). This statute authorizes the detention of individuals to assure the safety of the community. 18 U.S.C. § 3142(e). Until the passage of this version of the statute, detention was only authorized to assure the *appearance* of the person

was to insure the presence of the suspect at trial.[326] For years, there has been a presumption in favor of release after arrest for people accused of federal crimes.[327] The same presumption ought certainly to exist for traffic offenders.[328] The minor nature of these offenses argues in favor of the use of a citation. The government's interest in assuring appearance cannot alone justify the serious fourth amendment intrusion of a custodial arrest in cases involving charges so minor that some states do not even make them crimes.[329]

b. *To obtain evidence of the crime for which the suspect is arrested*

In most criminal cases, the police expect to continue their investigation after the suspect is arrested.[330] At a minimum, they expect to search for any evidence the arrestee might have on his or her person or within his or her reach.[331] They may want to put the arrestee in a line-up or conduct some other identification procedure.[332] They probably hope to get a statement from the arrestee regarding his or her participation in the crime.[333] Except in the case of offenses involving drunk or drugged drivers, there is simply no evidence of the traffic of-

---

as required. Bail Reform Act of 1966, 18 U.S.C. § 3146 (a) (1982), *amended by* Bail Reform Act of 1984, 18 U.S.C. § 3142 (Supp. IV 1986).

326. W. LAFAVE, *supra* note 115, at 177.

327. Stack v. Boyle, 342 U.S. 1, 4 (1951) (since 1789, federal law "unequivocally" stated arrested person "shall" be admitted to bail for non-capital offense); Bail Reform Act of 1966, 18 U.S.C. § 3146(2) (1982) (any person charged with offense other than one punishable by death "shall" be released on recognizance or bail unless judicial officer determines such release will not reasonably assure appearance), *amended by* Bail Reform Act of 1984, 18 U.S.C. §§ 3142, 3146 (Supp. IV 1986).

328. The expectation in traffic cases is that the offender will not physically appear. Traffic enforcement systems are designed to permit the vast majority of cases to reach judgment by admitting guilt and paying a fine through the mail. *See, e.g.*, N.Y. VEH. & TRAF. LAW § 1805 (McKinney 1986) (traffic offender may mail guilty plea instead of appearing in court).

329. *See, e.g.*, OR. REV. STAT. § 153.505(2) (Supp. 1987) (traffic offender does not incur "disability" or "legal disadvantage" of criminal conviction).

330. W. LAFAVE, *supra* note 115, at 188.

331. *Id.* at 187.

332. *Id.* at 304, 312.

333. *Id.* at 304, 313-18.

fense to be gained through detention.[334] Although interrogation may result in an admission that the driver did commit an offense, it hardly seems appropriate to authorize custodial arrest for this purpose.[335] The government simply does not have a sufficient interest in further investigation of traffic offenses to justify the custodial arrest for a traffic offender.

c. *To prevent future harm*

The risk that the suspect will commit future crimes or be a danger to others is an important factor in the decision to arrest or release.[336] It is frequently the underlying justification for detaining people without bail or on high bail even though it is not a statutorily authorized ground.[337] Until the Supreme Court recently upheld the federal preventive detention statute,[338] the constitutionality of preventive detention was at least doubtful and certainly would not extend to traffic offenses. Whatever the government's interests in pre-trial preventive detention for criminal conduct,[339] the issues are considerably different in the case of traffic offenses.

---

334. United States v. Robinson, 471 F.2d 1082, 1094 (D.C. Cir. 1972), *rev'd*, 414 U.S. 218 (1973).

335. Permitting custodial arrest in order to permit further investigation invites use of a traffic offense as a pretext to investigate other activity. In fact, Professor LaFave pointed out in his study of arrest that police frequently use traffic offenses to arrest when they cannot do so for the crime they are investigating. W. LAFAVE, *supra* note 115, at 187.

336. W. LAFAVE, *supra* note 115, at 193.

337. *Compare* N.Y. CRIM. PROC. LAW § 510.30 (McKinney 1984) (providing specific factors and criteria for determination of bail and not including danger to community as appropriate consideration) *with* People v. Melville, 62 Misc. 2d 366, 376, 308 N.Y.S.2d 671, 680 (Crim. Ct. 1970) (remanding defendant without bail because court viewed him as danger to community notwithstanding provisions of statute).

338. *See* United States v. Salerno, 107 S. Ct. 2095, 2105 (1987) (pretrial detention provisions not unconstitutional because they protect society from persons arrested for serious felonies after hearing establishes threat to community). *See also supra* note 325 and accompanying text.

339. *See* Alschuler, *Preventive Pre-Trial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 548-50 (1986) (governmental interests are protection of community and prevention of flight); Foote, *The Coming Constitutional Crisis in Bail* (pts. 1-2), 113 U. PA. L. REV. 959, 1125, 1166 (1965) (basis for preventative detention is arrestees' failure to appear at trial and danger that arrestees may commit further crimes).

A number of states that limit the arrest power of police permit an arrest if "there is a reasonable likelihood that the offense would continue or resume, or that persons or property would be endangered by the arrested person."[340] Closer examination of this exception reveals that it permits arrest for a very large number of traffic offenses, offenses for which most of us would be surprised to be arrested. For instance, all equipment violations would fall into this group. As a rule these are the least serious of the motor vehicle offenses and should never be subject to arrest. yet, it is certainly true that a person driving a car with a broken headlight who is permitted to leave after the issuance of a citation will continue or resume the offense, at least until the car is parked. Violation of these regulatory provisions can occur without the driver even knowing about the defect, and the danger presented is often negligible. Impounding the car would be sufficient to meet any governmental need to prevent future harm from a serious and dangerous equipment failure. The state has an interest in regulating automobile equipment, but such interest is not sufficient to permit the custodial arrest of the driver of the car.

Likewise, individuals who commit license, registration, inspection, and insurance violations would be subject to arrest because such violations continue even after a citation is issued. But people who leave their licenses at home, drive after they have been suspended or revoked, or fail to pass the required examinations in the first place need not be arrested. The ultimate penalty for a license or registration violation will be more serious than that for an equipment violation, but there is no greater need to arrest.

The most troublesome group of offenses is moving violations. Speeding, reckless driving, going through a red light, and changing lanes improperly all conceivably endanger others, but the only reason to think these offenses will continue is that they happened in the first place. A driver who is reckless once is, arguably, likely to be reckless again. Although it is a much closer question, such offenses should not be predicates for custodial arrest. As with all traffic offenses, the offender will proba-

340. TENN. CODE ANN. § 40-7-118(c)(2) (Supp. 1988). *Accord* OKLA. STAT. ANN. tit. 22, § 1114.2a(c) (West 1986); LA. CODE CRIM. PROC. ANN. art. 211(2) (West Supp. 1988).

bly get a fine. He or she will be released after posting bail at the stationhouse or after appearing before a magistrate. When released, the offender is gong to get into his or her car and drive away. It is difficult to see why the state's interest in safety is better served by arresting and later releasing the offender than by issuing a citation and then letting him or her drive away. The reckless driver will be subject to the same sanctions whether he or she has been arrested or cited. Since the state's interest in safety is not enhanced by arresting this group of offenders, the interest cannot justify custodial arrest.

There is a class of traffic offense for which arrest is appropriate. Intoxicated drivers do present a danger to others that justifies arrest. The state's interest in removing a drunk driver from the road outweighs the individual's interest in freedom.[341] Unlike arrests for other motor vehicle offenses, an arrest in this instance accomplishes a legitimate and specific goal. The driver can be removed from the road for the limited period necessary for the effects of the intoxicant to wear off. There is universal agreement on the appropriateness of arresting a drunk driver. Every state permits such an arrest.[342] The state does have a legitimate interest in protecting the safety of its roads and arrest should be permitted when to do so promotes that interest. However, the state's interest in safety is furthered by arresting only one class of offenders, the intoxicated driver.

d. *To provide certain social service functions*

Custodial arrest may provide certain welfare services.[343] For instance, when an officer finds a juvenile drinking in a public park late at night, the officer could issue a citation as probably would be done if the offender were an adult. But for a fourteen year old, an arrest may be appropriate so that the of-

341. Even the driver who is not legally intoxicated but in possession of drugs or alcohol in plain view can be arrested. The arrest is for possession and is not a vehicle or traffic offense.

342. *See, e.g.*, ALA. CODE § 32-1-4(b) (1983) (traffic offender not released from custody if charged with "driving while under the influence"). *Accord* GA. CODE ANN. § 40-13-53(b)(1) (1985); IND. CODE § 9-4-1-130.1(3) (1987); KY. REV. STAT. ANN. § 431.015(2) (Michie/Bobbs-Merrill 1985).

343. W. LAFAVE, *supra* note 115, at 198 (medical services such as removing prostitutes from street and examining them); Folk, *supra* note 310, at 332 (protection of public health or suspect).

ficer can return the child to his or her parents. Similarly a police officer might arrest an intoxicated person on a cold night just to get the individual out of the cold. Whether it is ever appropriate to use the criminal justice system for these welfare services is debatable,[344] but arrest of a traffic offender is not justified by the need to provide these services. It is simply inapplicable here.

e. *To maintain the proper respect for the law and the police*

Arrest is one of the ways law enforcement officers maintain control and exercise their authority. The state has an interest in police officers' ability to function effectively. However, the authority to exercise unlimited discretion to arrest in situations where the police very infrequently arrest invites abuse of that discretion.[345] This is most common in the cases of traffic offenses or other minor crimes.[346] A frequent example is when a police officer stops a person for speeding with the intention of issuing a ticket but subsequently decides to arrest because the driver was belligerent or disrespectful.[347] The use of the police power in this way is subject to criticism.

Arrest should not be viewed as punishment, even in a more neutral context. For instance, the police might decide to arrest if speeding in a certain locale is rampant in order to show that it is a matter for official concern.[348] But, punishment is the job of

344. Folk, *supra* note 310, at 332.

345. *Cf., e.g.*, Thomas & Fitch, *The Exercise of Discretionary Decision-Making by the Police*, 54 N.D.L. REV. 61, 79 (1977) (police base decision to arrest on suspect's demeanor).

346. W. LAFAVE, *supra* note 115, at 147.

347. *Cf.* Thomas & Fitch, *supra* note 345, at 79-80 (suspect who is disrespectful to police officer more likely to be arrested). An interesting study on the factors that influence the decision to arrest revealed that officers were just as likely to arrest the obsequious offender as the antagonistic one. The arrest rate for very deferential suspects was as high as the arrest rate for the disrespectful. *Id.* at 80 (citing Black & Reiss, *Police Control of Juveniles*, 35 AM. SOC. REV. 63, 74-75 (1970)). Thus, "[s]hould the suspect, for whatever reason, overreact in either the direction of too much or too little deference to police authority, the probability of his arrest, quite independently of what he has done or the evidence that is available . . . , is influenced." *Id.* at 81.

348. This kind of occasional beefing up of enforcement efforts is frequently seen on the lower end of criminal offenses, simply to remind everyone that the offense is still a crime. *See* W. LAFAVE, *supra* note 115, at 148.

the judge. If enforcement in a particular area or for a particular offense needs enhancing, the sentence imposed at conviction can be increased. The role of the police is to initiate the process that results in enforcement. Delegating the entire enforcement process to the police is not necessary to maintain proper respect for the law or the police. The state's interest in maintaining respect for the police is improperly satisfied if custodial arrest for traffic offenses is permitted for this purpose.

3. *The Result of the Balance*

Any hypothesized state interest in arrest is undercut by consideration of the costs of arrest. In 1984, the National Institute of Justice released a report concluding that citation release offered substantial cost savings over custodial arrest.[349] Among the advantages were reductions in patrol officer time[350] and transportation,[351] and booking[352] and detention costs.[353] Citation release procedures were also found to contribute to reduced

---

349. CITATION RELEASE, *supra* note 318, at 4-5 (field release saves money).

350. *Id.* at 17-18. Citation release returns the officer to duty much faster than custodial release. One study found that field release saved from 4 to 46 minutes over traditional arrests. NATIONAL INST. OF CORRECTIONS, COUNTYWIDE CITATION RELEASE PROGRAMMING 26-27 (prepared by J. Needle & W. Busher, American Justice Institute 1982). The Nassau County Police Department found that it saved 10,242 officer hours in 1976 when it instituted a field release procedure for shoplifting arrestees. CITATION RELEASE, *supra* note 318, at 18 (citing NASSAU COUNTY POLICE DEP'T, CRIMINAL JUSTICE FOR THE NON-CRIMINAL 9-10 (prepared by D. Wolf 1977)). This "street time" saved will be even more marked in those jurisdiction which use two-officer cars. *Id.* at 17.

351. CITATION RELEASE, *supra* note 318, at 17-18. There are transportation costs in addition to the time involved. This is particularly true for traffic offenses since it is usually necessary to take the offenders to the stationhouse individually in a patrol car rather than using a van or wagon to transport a number of individuals. Fuel costs can mount, particularly in jurisdictions that are geographically dispersed. *Id.*

352. *Id.* at 18.

353. *Id.* The amount saved in detention costs can be substantial. The amount depends on the cost of detention in the jurisdiction and on whether the particular jurisdiction's procedure permits release by the officer at the station or provides that the defendant be arraigned before a magistrate. Examples of detention costs are: care and custody at the Boulder County jail at $45 a day; payment of a booking fee of $58 per misdemeanor plus, after the first 12 hours, a subsistence fee of $7.50 for each six hours by the Minneapolis Police Department; detention costs of $42 a day in San Francisco. *Id.*

jail populations and reduced complaints from defendants about jail conditions or maltreatment by arresting officers.[354]

The balancing test is designed to evaluate the reasonableness of a particular governmental activity in relation to the restrictions required by the fourth amendment. The nature of the fourth amendment interest at issue in arrest is the most fundamental one—freedom. Custodial arrest is unreasonable unless the governmental interests require this action. The government's interest is in enforcing its traffic laws and providing for safe use of the roads and highways; that interest does not require custodial arrest for the ordinary traffic offense. Common experience testifies to the adequacy of a summons or citation. Millions of Americans receive tickets each year and subsequently pay the required fines. The infrequency with which the government chooses to arrest for a traffic offense suggests that even the police do not think it is generally necessary to do so. Imagine the uproar if police began to arrest every driver who violates a traffic law. Although the government does have a legitimate interest in assuring the presence of the defendant at trial, this interest is only minimally forwarded by custodial arrest, and then only in those instances where the offender cannot provide evidence of identity. Other interests associated with arrests for more serious crimes are less relevant for traffic offenses. For instance, the government's interest in discovering evidence is absent since there is generally no evidence of traffic offenses that can be discovered by search. Similarly, the government's interest in preventing future crime is only forwarded by custodial arrest in the case of intoxicated drivers. In this instance, incapacitation long enough for the effects of the alcohol to wear off has its obvious benefits. For other traffic offenses, custodial arrest only delays release of the offender until he or she has bee arraigned or has posted bail, at which point the offender may or may not continue the unlawful conduct. Therefore, custodial arrest can be justified only in those instances where the suspect cannot provide identification or has been driving while intoxicated. It is only in these instances that the government can show any need for the significant intrusion of a custodial arrest.

354. *Id.* at 19-20.

Conclusion

Robinson, Gustafson, and *Belton* have authorized far-reaching search power for a common police-citizen encounter—the traffic offense. With no more than probable cause to believe that a driver has committed a traffic offense, a police officer may, after arrest, search the driver, the personal items in his or her possession, and the passenger compartment of the car he or she was driving. The officer need have no reason to believe that any weapon or evidence of a crime will be found. The authority to conduct these wide-ranging searches is the byproduct of the power to arrest. It has no independent justification. Yet the decision to arrest is generally within the sole discretion of the officer. In most jurisdictions the officer may arrest for the most minor offense and need have no reason for doing so. The danger inherent in this situation is that an officer may use this arrest power to harass or to search a person without sufficient independent justification. Empirical evidence demonstrates that such searches frequently occur. They are both unjustified and indiscriminate, the twin evils that the fourth amendment was designed to prevent. Efforts to control this conduct directly, by suppressing evidence acquired on a showing of pretext, are unsuccessful because proving an officer's motive to arrest is very difficult. Efforts to reduce the scope of the permissible search are not welcome due to the fear that properly motivated officers will be endangered by close, extended contact with arrestees without adequate opportunity to discover hidden weapons. This argument fails to take into account the fact that the officer is in close extended contact with the traffic violator only because the officer has arrested the individual. If the offender is not arrested, the potential for improper or pretextual searches vanishes.

But legislatures have not restricted the discretion of the officer to arrest for a minor offense in most jurisdictions. Twenty-eight states grant complete authority to the officer to decide whether to arrest or issue the normally expected traffic ticket.[355] The fourth amendment was designed to prevent just such discretion. The search that occurs as a result of a traffic

355. *See supra* note 188 for a list of the twenty-eight states that give police officers complete discretion to decide whether to arrest or issue a citation.

arrest is similar to the search permitted by the writs of assistance and general warrants in that it is not justified by any reason to believe that evidence of criminal activity is present. As with the power of the writs of assistance, the power to conduct the search (which is derivative from the power to arrest) is the product of a grant of authority that permits indiscriminate and arbitrary exercise. The searcher under a writ of assistance could decide, from the entire population, whom he wanted to search. The officer may make that same decision from almost an identical pool—the population of licensed drivers. Such indiscriminate power to seize and thereby search seems, on its face, to be prohibited by the fourth amendment admonition against unjustified and arbitrary searches and seizures. Yet the power to arrest survives constitutional challenge only if it is reasonable.

Whether custodial arrest for a traffic offense is reasonable depends on whether the governmental interests served outweigh the individual's interests sacrificed. Government's interest in custodial arrest for most traffic offenses is trifling. Enforcement of the traffic laws simply does not require the unique and humiliating experience of arrest. A search or seizure can be unreasonable, even if justified by probable cause, if it is unreasonably accomplished. The government's interest in enforcing its traffic regulations is satisfied by issuing a citation whenever the driver can provide adequate identification, except in the case of an intoxicated driver. In every other circumstances, custodial arrest is unnecessary and excessive, and presents the opportunity for, and thereby the danger of, arbitrary and unjustified searches.

The constitutional basis for limiting the power to arrest for traffic offenses is clear. That such a limitation is the best solution to the danger created by *Robinson* is also clear. Prohibiting indiscriminate decisions to arrest forestalls unjustified searches and provides a clear rule that police officers can easily follow. It requires no probing for evidence of motive. It does not place the officer in danger. It recognizes both " 'that the Fourth Amendment's commands, like all constitutional requirements, are

practical and not abstract,' "[356] and that " '[t]he basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' "[357] Custodial arrest for a minor traffic offense is an infringement on individual freedom that is prohibited by the fourth amendment.

356. LaFave, *supra* note 17, at 163 (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965)).

357. *Id.* at 163 (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)).