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THE NEW FOURTH AMENDMENT VEHICLE DOCTRINE: STOP AND SEARCH ANY CAR AT ANY TIME

DAVID A. MORAN*

I. Introduction

Of the seven Fourth Amendment cases the Supreme Court decided during the 2000-2001 Term, the most unexpected holding came in Atwater v. City of Lago Vista. In Atwater, the Court held, by a 5-4 vote, that the police may, without violating the Fourth Amendment prohibition against unreasonable seizures, arrest and jail motorists who have committed minor traffic violations.

The result in Atwater was surprising because the case presented a perfect set of facts for the opposite holding. Unlike most Fourth Amendment litigation, Atwater did not involve a criminal defendant attempting to suppress evidence, but a generally law-abiding citizen angry about the treatment she had received from the police. A police officer pulled over Gail Atwater, a "soccer mom" with no criminal record and only one prior traffic citation, verbally abused her in front of her two young children, handcuffed her behind her back, placed her in a squad car, transported her to a police station, took away her shoes, eyeglasses and other possessions, took her "mug shot" and locked her in a jail cell for an hour—all for the

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2. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.").
3. See Atwater, 532 U.S. at 354 ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").
4. Several commentators have argued that the exclusionary rule has harmed Fourth Amendment values because judges are more likely to give the Fourth Amendment a grudging and narrow interpretation when a criminal defendant seeks to exclude probative evidence of her guilt than when a civil litigant seeks damages. See, e.g., Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 799 (1994) ("Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated."); George C. Thomas, III & Barry S. Pollack, Saving Rights from a Remedy: A Societal View of the Fourth Amendment, 73 B.U. L. Rev. 147, 168 (1993) ("If the only option when finding a violation is to suppress the evidence, judges may feel themselves hemmed in by the doctrine and may define the Fourth Amendment as necessary on a case-by-case basis to permit the use of seized evidence."); see also Rakas v. Illinois, 439 U.S. 128, 157 (1978) (White, J., dissenting) (arguing, in Fourth Amendment suppression case, that Court should reconsider validity of exclusionary rule "instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases").
fine-only offense of failing to secure herself and her children in seatbelts.\(^5\) The Supreme Court's conclusion that none of this violated Atwater's constitutional rights shocked much of the press and public.\(^6\) What made the outcome so unpopular is that a typical American motorist fully understands that he or she might be stopped someday for a minor traffic offense but, like Gail Atwater, would be humiliated and outraged if the officer took him or her into custody.\(^7\)

In retrospect, however, Atwater is not so surprising after all. On the contrary, it is now clear that the holding in Atwater was essential to the completion of what I shall call the Supreme Court's new, and greatly simplified, Fourth Amendment vehicle doctrine: the police may, in their discretion, stop and search any vehicle at any time.

In this Article, I shall argue that the Court's 1996 decision in Whren v. United States\(^8\) and its 1998 decision in Knowles v. Iowa,\(^9\) when combined with the result in Atwater, have effectively created this new vehicle doctrine. Viewed in this larger context, the Atwater result makes perfect sense. The case was not really about generally law-abiding drivers such as Gail Atwater, but was instead about the development of a new doctrine designed to make it easier for the police to catch criminals—a doctrine the Court has fully completed this Term in United States v. Arvizu.\(^10\)

I shall also argue that the war on drugs has fueled the development of this new vehicle doctrine in general and the Atwater decision in particular. Indeed, just one month after Atwater, a case that nominally had nothing to do with vehicle searches or drug interdiction, the Court issued a little-noticed decision, Arkansas v. Sullivan,\(^11\) that conclusively demonstrates that the Court was fully aware that its decision in Atwater would allow the police to search almost any vehicle for drugs.

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5. See Atwater, 532 U.S. at 323-24 (setting forth facts surrounding Atwater's arrest); id. at 368-70 (O'Connor, J., dissenting) (setting forth additional facts).

6. A NEXIS search of major U.S. newspapers revealed that in the month after the Atwater decision, at least seven newspapers published editorials criticizing the decision while only three published editorials supporting it; twelve published op-ed pieces, all of which were critical of the decision; and at least ten published letters from readers, the clear majority of which were opposed to the decision. See, e.g., Akhil Reed Amar, The Law: An Unreasonable View of the Fourth Amendment, L.A. TIMES, Apr. 29, 2001, at M1; Arrested Development: High Court Decision on Minor Traffic Stops Lamentable, HOUS. CHRON., May 1, 2001, at A22; Letters, ATLANTA CONST., Apr. 26, 2001, at 15A.

7. See, e.g., And This Is Reasonable?, ST. LOUIS POST-DISPATCH, Apr. 26, 2001, at B6 (editorializing against Atwater decision and observing that "[b]ecause most Americans can't imagine themselves in a criminal's shoes, they haven't paid much attention as the court has eviscerated Fourth Amendment protections against unreasonable searches. But a whole lot of people can imagine themselves in Gail Atwater's pickup.").

In Part II of this Article, I shall argue that an average, law-abiding American motorist before 1996 could reasonably expect that his or her car would not be subject to a lawful police search even though the Supreme Court, often motivated by the war on drugs, had already substantially limited the Fourth Amendment protections available to motorists. In Part III, I will show that this expectation is now unreasonable as the Supreme Court has created a new Fourth Amendment vehicle doctrine that will, when complete, effectively allow the police to stop and search any vehicle at any time. I shall argue that the result in Atwater is indefensible as a matter of logic and constitutional law and that, therefore, the result is best understood as a necessary step in the completion of the Court’s new vehicle doctrine. I will then explain how the Court’s decision in Sullivan confirms that view. Finally, in Part IV, I shall discuss how the recently-decided Arvizu case fits into the new vehicle search doctrine.

II. VEHICLE SEARCHES AND REASONABLE EXPECTATIONS BEFORE 1996

Even before 1996, the Supreme Court, largely in support of the war on drugs, had significantly limited the Fourth Amendment rights of motorists by creating a series of doctrines designed to facilitate police searches of vehicles. The Court created the first of these doctrines, the "automobile exception," in 1925. While recognizing that the Fourth Amendment protects occupants of automobiles against stops and searches without probable cause of illegality, the Court held that the ready mobility of the vehicle justified a stop and search without a warrant so long as the police did, in fact, have the requisite probable cause.

From the 1970s through the 1990s, the Court frequently reaffirmed and expanded the automobile exception. For example, the Court repeatedly held that the automobile exception automatically justifies warrantless searches of any vehicle for which probable cause to search exists, even if there is little or no chance that the vehicle could leave the jurisdiction before the police could obtain a warrant. The Court also expanded the

12. See Carroll v. United States, 267 U.S. 132 (1925). Carroll obviously predates the war on drugs, but did involve the equivalent crusade of the day, the war on intoxicating beverages.

13. See id. at 154 ("[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.").

14. See id. at 153. The Court justified the distinction between the:

search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id.

exception to include motor homes and other mobile living quarters, and the Court held that the exception applies even if the police know that the contraband is in a container that would be subject to the warrant requirement if it were not in a vehicle. Thus, by 1996, the police had long enjoyed the authority to stop any vehicle upon probable cause that the vehicle contained contraband or evidence of a crime and thoroughly search anywhere in the vehicle where the contraband or evidence might be found.

If the automobile exception did not apply because the police lacked probable cause, three other doctrines would frequently justify a search. If the police had arrested an occupant of the vehicle, the police could automatically perform a "Belton search" of the passenger compartment of the car incident to the arrest. If, on the other hand, the police had lawfully impounded the vehicle, the police could automatically search the entire vehicle pursuant to an inventory policy. Even if the police did not have probable cause to search a particular vehicle and did not have grounds to arrest an occupant of the vehicle or impound the vehicle, the police could still request the motorist to grant "consent" to search, a task made considerably easier by the Court's holding that the police need not inform the motorist that he could refuse the request.

less search and seizure of evidence from impounded car stored in secure area); Michigan v. Thomas, 458 U.S. 259, 261 (1982) (upholding warrantless search and seizure of marijuana and firearm from immobilized car); Texas v. White, 423 U.S. 67, 68 (1975) (upholding warrantless search of, and seizure of stolen checks from, seized car parked at police station); Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (upholding warrantless search of car and seizure of evidence even when car was impounded and occupants jailed).


18. In yet another case involving the discovery of narcotics in a vehicle, the Court later expanded the automobile exception to allow the police to search the belongings of passengers. See Wyoming v. Houghton, 526 U.S. 295, 306-07 (1999) (upholding warrantless search and seizure of methamphetamine from passenger's purse pursuant to automobile exception).


21. See Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (upholding consent search of automobile during traffic stop despite absence of warning to consentor that he could refuse). In 1996, the Court made it even easier for the police to obtain consent by holding that a police officer completing a traffic stop need not inform the motorist that he is free to go before requesting consent to search of the vehicle. See generally Ohio v. Robinette, 519 U.S. 33 (1996).
To put all of these vehicle search doctrines in perspective, consider a typical, law-abiding motorist in 1995, and the reasonable expectations she might have as to the probability that the police could lawfully stop and search her car. If she inadvertently committed a minor traffic violation, she might, of course, expect to be pulled over and ticketed or warned. She could reasonably expect, however, that her car would not be lawfully searched under the automobile exception so long as she gave the police no probable cause to believe that it contained criminal evidence or contraband. She could also reasonably expect that her car would not be subjected to a Belton search so long as she had not committed any offenses justifying arrest. She could reasonably expect that her car would not be inventoried so long as she did not abandon it on a public roadway or park it illegally. Finally, she could reasonably expect that the police could not conduct a consent search of her car so long as she had the fortitude to refuse such consent.

For a typical, law-abiding motorist, each of these expectations was entirely reasonable in 1995. Law-abiding motorists presumably do not provide the police with probable cause that their vehicles contain criminal evidence or contraband, they are not, by definition, likely to be arrested, and they do not usually leave their vehicles in places where they will be impounded. While typical, law-abiding motorists might consent to police searches of their cars, those with a heightened sense of privacy could refuse.

In the next section, I shall show that these reasonable expectations have become entirely unreasonable in the last five years. Instead, I shall argue that a typical, law-abiding motorist should now realize that a police officer could, if he so desires, lawfully stop and search her car at almost any time.

22. By "typical, law-abiding motorist," I mean to define a person who never commits any non-petty criminal offenses, who generally attempts to obey traffic regulations, but who may commit an occasional minor traffic violation.

23. By using the term "lawfully," I mean to exclude all police stops and searches that would not have been justified in 1995 under existing Fourth Amendment precedent. If my typical, law-abiding motorist were African-American, her reasonable expectation of actually being stopped and searched in 1995 would have been much higher than it would have been if she were white. See, e.g., Michael Higgins, Looking the Part, 83 A.B.A. J. 48, 49 (1997) (noting studies establishing that 73% of drivers stopped and searched in 1995-1996 on interstate highway in Maryland were African-American, even though only 14% of drivers on highway were African-American). Of course, stops and searches of cars that do not fit within Fourth Amendment doctrine and are undertaken solely because of the race or ethnicity of the driver are unlawful. See Whren v. United States, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.").
III. FROM WHREN TO ATWATER AND SULLIVAN: THE SLOW UNFOLDING OF A NEW FOURTH AMENDMENT VEHICLE DOCTRINE

In four decisions spanning five years, the Court has completely abolished the reasonable expectations that typical American drivers formerly enjoyed against non-consensual vehicle searches. In this section, I shall examine each of the decisions individually.

A. Whren: The Death of Pretext

The first big step in the Court's five-year march toward a new Fourth Amendment vehicle doctrine came in Whren.24 In Whren, the Court unanimously rejected the argument "that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."25 Instead, the Court held that a traffic stop is per se reasonable under the Fourth Amendment so long as the police have probable cause that the motorist has violated any portion of the traffic code.26 Thus, the Court upheld the seizure of illegal drugs found by plainclothes vice officers during a traffic stop, notwithstanding the defendants' argument that plainclothes officers do not normally stop cars for minor traffic violations and that, therefore, the stop was pretextual.27

The Court took pains to argue in Whren that its categorical rejection of the pretext doctrine was not new. Thus, the Court pointed to several earlier cases in which it had refused to examine an officer's subjective motives so long as probable cause existed for the police action at issue.28 The Court admitted, however, that there were statements, all of which the Court dismissed as dicta, in several of its precedents at least suggesting that the subjective intent of officers might matter.29

25. Whren, 517 U.S. at 813.
26. See id. at 819 ("Here the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment").
27. See id. at 808-09 (describing stop and resulting drug seizure); id. at 815 (citing local police regulation permitting plainclothes officer to perform traffic stop only for "grave" violations).
29. See id. at 812 (dismissing as dictum statement in Colorado v. Bannister, 449 U.S. 1, 4, n.4 (1980), that "there was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants"); id. at 815-16 (treating as dictum discussion in Abel v. United States, 362 U.S. 217, 226-27 (1960), regarding defendant's claim that arrest warrant issued pretextually to facilitate search of defendant's room); id. at 816 (rejecting as dictum statement in United States v. Robinson, 414 U.S. 218, 221 n.1 (1973), that defendant's arrest for driving without license "was not a departure from established police department practice[,]" and noting that Robinson had left open question whether departure from standard practice would matter). The Court also carefully distinguished several statements, each suggesting that an of-
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Whether the Court in Whren made new law by abolishing the pretext doctrine or simply reaffirmed longstanding precedent, as the Court claimed, is certainly open to debate.\(^{30}\) What cannot be denied is that the viability of the pretext doctrine was at least arguably unclear before Whren. Two federal circuits and at least two state supreme courts had adopted a test declaring a traffic stop to be unconstitutionally pretextual, despite the existence of a traffic or equipment violation, unless a reasonable officer "would have" stopped the vehicle for that particular violation.\(^{31}\)

By unequivocally and categorically rejecting the notion that a traffic stop could ever be unconstitutional so long as the officer could identify any traffic or equipment violation, no matter how petty or hypertechnical, Whren sent a clear and unmistakable message to the police: You may, in your complete discretion, stop almost any car at any time. As David Harris put it:

There is no detail of driving too small, no piece of equipment too insignificant, no item of automobile regulation too arcane to be made the subject of a traffic offense. Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic violation. Reading the codes, it is hard to disagree; the question is how anyone could get as far as three blocks without violating the law.\(^{32}\)

Traffic stop cases after Whren confirm that the police now fully understand that they have the power to stop virtually any car they choose for any pretextual traffic violation, no matter how minor.\(^{33}\) As in Whren itself, this

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\(^{30}\) For a forceful argument that the Court's reading of its precedent was strained and that the pretext question was unsettled until Whren, see David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 553-54 (1997).

\(^{31}\) See United States v. Cannon, 29 F.3d 472, 476 (9th Cir. 1994); United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986); State v. Izzo, 62 A.2d 1277, 1280 (Me. 1993); Alejandro v. State, 903 P.2d 794, 796-97 (Nev. 1995). On the other hand, nine other federal circuits, including the District of Columbia Circuit's decision in Whren, had held that a traffic stop was constitutional so long as an officer "could have" stopped a vehicle for that particular violation. See United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (en banc); United States v. Johnson, 63 F.3d 242, 246-47 (3d Cir. 1995); United States v. Scofo, 19 F.3d 777, 782-84 (2d Cir. 1994); United States v. Ferguson, 8 F.3d 385, 389-91 (6th Cir. 1993); United States v. Hassan El, 5 F.3d 726, 729-30 (4th Cir. 1993); United States v. Cummins, 920 F.2d 498, 500-01 (8th Cir. 1990); United States v. Trigg, 878 F.2d 1037, 1039 (7th Cir. 1989); United States v. Causey, 854 F.2d 1179, 1184 (5th Cir. 1987) (en banc).

\(^{32}\) Harris, supra note 30, at 557-58.

\(^{33}\) See, e.g., United States v. Chhien, 266 F.3d 1 (1st Cir. 2001) (upholding stop and search of car for following too closely and "blue-tinted aftermarket lights"
power is particularly useful when the officer wishes to use the traffic stop in order to search for illegal drugs.

After Whren, therefore, a typical law-abiding motorist could not reasonably expect that she would be stopped only for violations serious enough to normally merit such police intervention. On the contrary, she could now expect to be stopped for any trivial traffic or equipment violation if the officer was interested in investigating her further for any reason.

Even after Whren, however, the motorist still could reasonably expect that the officer could not lawfully search her car without her consent during such a traffic stop unless she or one of her passengers either committed an offense justifying arrest or provided probable cause to justify application of the automobile exception. But the Court's drive toward a new Fourth Amendment vehicle doctrine had only just begun.

B. Knowles: Rewarding Pretextual Traffic Arrests

The Court’s decision in Knowles v. Iowa\(^{34}\) seemed, at first glance, to reinforce the typical, law-abiding motorist’s reasonable expectations against having his or her car searched during a traffic stop. The police officer in Knowles pulled over a motorist for speeding and issued him a citation.\(^{35}\) The officer then searched Knowles’ car, finding marijuana, pursuant to a state statute authorizing a vehicle search incident to arrest even if the officer elected to issue a citation in lieu of arrest.\(^{36}\) On Knowles’ appeal from his resulting narcotics convictions, the Iowa Supreme Court upheld the constitutionality of the statute and, therefore, the search of Knowles’ car.\(^{37}\) The Iowa Supreme Court reasoned that because the officer could have taken Knowles into custody for speeding\(^{38}\) and searched his car incident to that custodial arrest, the officer’s discretionary decision to issue Knowles a citation in lieu of arrest did not defeat his authority to perform the Belton search.\(^{39}\)

\(^{34}\) See Knowles, 525 U.S. 113 (1998).
\(^{35}\) United States v. Escalante, 239 F.3d 678, 680-81 (5th Cir. 2001) (conceding that traffic stop “may have been pretextual” where officer admitted he was looking for smugglers, but upholding stop and subsequent search of car for crossing dividing line); United States v. Navarro-Camacho, 186 F.3d 701, 703, 705 (6th Cir. 1999) (upholding traffic stop for traveling sixty-eight miles per hour in sixty-five zone, and subsequent search of vehicle police suspected of drug trafficking); State v. Terry, 522 S.E.2d 275, 276-77 (Ga. Ct. App. 1999) (upholding stop of car for straddling lanes because officer investigating report believed that driver was intoxicated); see also People v. Patterson, 111 Cal. Rptr. 2d 896, 898 & n. 2 (Cal. App. 2001) (upholding traffic stop for missing rear view mirror).
\(^{36}\) See Knowles, 525 U.S. at 114.
\(^{39}\) See Iowa Code § 321.485(1)(a) (2001) (authorizing officers to arrest persons for traffic or equipment violations).
The United States Supreme Court unanimously reversed. The Court observed that the two concerns justifying searches incident to arrest—the need to protect the officer's safety and the need to protect and discover evidence—were diminished or absent when the officer did not actually perform an arrest. Thus, the Court rejected Iowa's invitation to extend the Belton rule "to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all."

On its face, Knowles certainly looked like a rare victory for the privacy rights of American motorists. To the typical, law-abiding driver who might expect to be ticketed once every five or ten years for a minor traffic or equipment violation, Knowles appeared to offer the important reassurance that the officer cannot exploit such a stop in order to search the car unless the driver consents.

The problem with this benign view of Knowles is that the Court left open a clear path for the police to circumvent the "protection" that the Court had supposedly provided. If, as the Iowa Supreme Court observed, the officer simply could have arrested Knowles for speeding and searched his car incident to that arrest, nothing in Knowles would prevent an officer from arresting a minor traffic violator, searching her car, and then, if the search turned out to be unproductive, giving her a "break" by letting her go with a citation or a warning.

Even worse, if an officer could, in his discretion, choose to arrest a minor traffic violator, Knowles actually gives the officer the incentive to do so in order to search the car. The fact that the arrest is entirely a pretext

40. See Knowles, 525 U.S. at 114.
41. See id. at 116-17 (listing the "two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial" (citing United States v. Robinson, 414 U.S. 218, 234 (1973))).
42. See id. at 117 (danger to officer from issuing traffic citation "is a good deal less than in the case of a custodial arrest"); id. at 118 (concluding that no further evidence of traffic offense would be found in car and possibility of finding evidence of other crimes "seems remote").
43. Id. at 119.
44. For examples of scholarly commentary praising the decision for upholding motorists' privacy, see William E. Hellerstein, Filling in Some Pieces: The Supreme Court's Criminal Law Decisions in the 1998-1999 Term, 16 Touro L. Rev. 305, 313 (1999) ("The idea that a person's car could be searched on nothing more than the issuance of a traffic citation appears to have been too much, even for a Court that has long found privacy in our cars and trucks largely unworthy of protection."); Wayne A. Logan, An Exception Swallows a Rule: Police Authority to Search Incident to Arrest, 19 Yale L. & Pol'y Rev. 381, 398-99 (2001) (characterizing Knowles as "a refreshing departure from the Rehnquist Court's tendency to reflexively endorse aggressive police behaviors").
45. As one commentator put it, as a result of Knowles, "[i]f police wish to search, on the basis of major and minor offenses alike, they must 'arrest' suspects, logically increasing the likelihood of arrests." Logan, supra note 44, at 404.
to search the car is, of course, irrelevant after Whren because an officer who observes a traffic offense is operating with probable cause.\textsuperscript{46}

This reading of Knowles and Whren has been confirmed by post-Knowles cases upholding vehicle searches incident to arrest even though the arrests were for very minor offenses.\textsuperscript{47} Even where there is every reason to believe that the arrest was purely a pretext for a car search, the search becomes lawful through the combined effect of Knowles and Whren.\textsuperscript{48}

In other words, Knowles actually diminished the Fourth Amendment rights of motorists because an officer who wants to search a particular car pulled over for a traffic violation may still do so simply by arresting the motorist, so long as local law does not prohibit an arrest for that particular violation.\textsuperscript{49} Such a motorist experiences not only a search of her car, but also all of the indignities associated with arrest, including physical seizure, the application of restraints, extended detention and a thorough search of her person.\textsuperscript{50}

Surely, one might have thought, the Court did not really intend for Knowles to encourage the police to arrest minor traffic violators. As one commentator put it, "The unanimous decision in Knowles simply would make no sense if probable cause to believe an offender had committed a traffic offense alone justified taking him into custody."\textsuperscript{51} Indeed, there was good reason to believe that the Court would soon address the perverse incentive to arrest it had created in Knowles. Just one Term before

\textsuperscript{46} See Whren, 517 U.S. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

\textsuperscript{47} See, e.g., United States v. Santana-Garcia, 264 F.3d 1188, 1192 & n.6 (10th Cir. 2001) (noting in dicta that officer could have arrested driver for suspended license and then searched vehicle); United States v. Herring, 35 F. Supp. 2d 1253, 1254, 1260 (D. Or. 1999) (upholding vehicle search after passenger, who threw cigarette butt out of car window, was arrested for "offensive littering"); Kearse v. State, 986 S.W.2d 423, 424-25 (Ark. Ct. App. 1999) (upholding search of car after driver was arrested for speeding); State v. Pallone, 596 N.W.2d 882, 883, 887 (Wis. Ct. App. 1999) (upholding search of car after driver was arrested for open beer container).

\textsuperscript{48} See Logan, supra note 44, at 402-03 (arguing that "synergy" of Knowles and Whren creates more pretextual minor offense arrests); see also Herring, 35 F. Supp. 2d at 1257-58 (relying on Whren to uphold search incident to littering arrest despite evidence arrest was pretextual, including statistics showing 90% of littering suspects not arrested).

\textsuperscript{49} See Atwater v. Lago Vista, 532 U.S. 318, 344-45, 352 (2001) (observing that all fifty states and the District of Columbia grant police power to make warrantless arrests for minor offenses not involving breach of the peace, but some states have placed limits on that power). Even if local law does prohibit the police from arresting for a particular offense, it is not at all clear that the Fourth Amendment would require the exclusion of any evidence found as a result of that illegal arrest. See infra note 87 (citing cases that upheld unlawful arrests under state law).

\textsuperscript{50} See United States v. Robinson, 414 U.S. 218, 221-24 (1973) (holding that officer may automatically search person of arrestee).

\textsuperscript{51} Wesley MacNeil Oliver, With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling, 74 TUL. L. REV. 1409, 1453 (2000).
Knowles, the Court had granted certiorari in Ricci v. Village of Arlington Heights, a case presenting the question of whether a custodial arrest for a very minor offense violated the Fourth Amendment reasonableness requirement. Unfortunately, the Court dismissed the certiorari grant after oral argument in Ricci, so the Court would have to wait for another case to resolve the anomaly it had created in Whren and Knowles. That vehicle came along just two years later in the person of Gail Atwater.

C. Atwater and Sullivan: The Other Shoe Finally Drops

1. Atwater v. City of Lago Vista

Civil libertarians would have been hard pressed to dream up a more sympathetic set of facts than those found in Atwater, the case that ultimately replaced Ricci. Instead of the typical Fourth Amendment claimant, a manifestly guilty criminal seeking to suppress the most damning evidence against her (usually drugs), Gail Atwater apparently was not transporting drugs, guns or any other kind of contraband in her pickup truck when Officer Bart Turek pulled her over and arrested her. Instead, Atwater, a small-town Texas “soccer mom,” was transporting her three-year-old son and five-year-old daughter home from soccer practice. Even better, the “offense” for which Officer Turek arrested Atwater was not just any minor traffic violation; the arrest was for a seatbelt violation, almost universally regarded as a very trivial violation, so minor that the violation subjected Atwater to a maximum penalty of a $50 fine. Finally, as if the facts were not sympathetic enough for Atwater, Officer Turek behaved thuggishly throughout the encounter, yelling at Atwater, jabbing

52. 116 F.3d 288 (7th Cir. 1997) (holding custodial arrest for operating business without license reasonable under Fourth Amendment), cert. granted, 522 U.S. 1038 (1998).


54. See Atwater, 532 U.S. at 323-26 (discussing facts).


56. Most, but not all, of the salient facts of Atwater are set forth in the majority opinion, 532 U.S. at 323-26, and in the dissent, id. at 368-71 (O’Connor, J., dissenting). Other facts, such as the fact that Ms. Atwater was taking her children home from soccer practice, are not mentioned in the Court’s opinions but are found in various newspaper accounts of the case. See, e.g., And This Is Reasonable?, supra note 7, at 86 (describing how Atwater told her children to remove their seatbelts on way home from soccer practice so they could peer out windows while looking for lost toy on street). Given Atwater’s importance to the vehicle search doctrine, it is curious that neither the majority opinion nor the dissent mentions whether or not the police searched Atwater’s pickup truck after her arrest.

57. See TEX. TRANSP. CODE ANN. § 545.413(d) (2002).
his finger in her face and traumatizing her children so severely that they continued to fear police officers long after the incident was over. 58

Further, the Fourth Amendment argument that Atwater presented was hardly farfetched or novel. On the contrary, the issue of whether the police may reasonably take a person into custody for a trivial traffic violation had remained open since 1973, when Justice Stewart had commented in his concurrence in Gustafson v. Florida 59 that “a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments.” 60 During the twenty-eight year gap between Gustafson and Atwater, the Court had confirmed the basic thrust of Atwater’s argument: that an arrest with full probable cause may still be unreasonable if performed in an unreasonable manner. 61 The limited scholarly commentary on the issue also favored Atwater’s position. 62

Given the highly sympathetic Fourth Amendment claimant and the fact that the Court had granted certiorari to her, not the government, one could be forgiven for thinking that Atwater’s case was a sure winner. I was almost as surprised as the press when the Court rejected Gail Atwater’s claim.

Worst of all from a civil liberties perspective, Gail Atwater did not lose on narrow grounds. Instead, the Atwater majority held that, “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” 63 Thus, the Court created a bright-line rule so broad that almost any American will be, at various times in his or her life, subject to arrest if he or she has the misfortune of encountering a police officer who wishes to exercise that prerogative.

What is even more striking than the outcome, however, is Justice Souter’s majority opinion. That opinion is chock full of very strange and unconvincing arguments, and it seems, on its face, as if Justice Souter was totally unaware of the broader implications of the holding, particularly as

58. See Atwater, 532 U.S. at 324 (majority opinion); id. at 368 (O’Connor, J., dissenting).
60. See Gustafson, 414 U.S. at 266-67 (Stewart, J., concurring). Justice Stewart went on to conclude, however, that the issue was not presented because Gustafson had conceded that the police could constitutionally arrest him. See id. at 267.
62. See, e.g., Wayne LaFave, 5 SEARCH AND SEIZURE § 5.1(h), at 63 (3d ed. 1996) (“[I]t is difficult to see how a physical taking of custody can be accepted as an inherently reasonable means for invoking the criminal process even in the instance of petty violations, especially those involving nothing more than non-compliance with municipal ordinances.”) (footnotes omitted); Barbara C. Salken, The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses, 62 TEMPLE L. REV. 221, 252-73 (1989) (arguing that Fourth Amendment limits arrests for minor traffic offenses).
63. Atwater, 523 U.S. at 354.
it affects vehicle searches and the drug war.\textsuperscript{64} It is worthwhile, therefore, to dissect that majority opinion in detail.

More than half of the Court's opinion consists of an elaborate historical review of the common law before and after the framing of the Constitution in an effort to determine whether custodial arrests for minor offenses were proscribed when the Fourth Amendment was ratified in 1791.\textsuperscript{65} The Court characterized Atwater's historical argument as "by no means insubstantial,"\textsuperscript{66} but, after recounting numerous historical precedents both supporting and rejecting Atwater's position, concluded that "[t]his, therefore, simply is not a case in which the claimant can point to a clear answer that existed in 1791 and has been generally adhered to by the traditions of our society ever since."\textsuperscript{67}

Whatever might be said for the exhaustiveness of this historical analysis, it was entirely beside the point. The Court's historical review purports to demonstrate that Atwater's argument found support in some, but not most, of the sources of the common law around the time of the framing. In other words, it may have been illegal under the common law to arrest minor offenders in 1791, or it may not have been. But it does not follow that a split of authority in 1791 as to the lawfulness of a police practice thereby makes that practice reasonable under the Fourth Amendment, nor has the Court ever so held.

In fact, in its prior decisions most directly analogous to Atwater—that is, cases involving challenges to the manner of seizures performed with full probable cause—the Court had repeatedly created rules governing the reasonableness of such seizures in the absence of clear common law authority or even when the clear common law authority would produce the opposite result. For example, the Court had held unreasonable the use of deadly force to seize all fleeing felons even while acknowledging that the common law at the time of the framing permitted such deadly force.\textsuperscript{68} Similarly, the Court had held that the police may reasonably hold a suspect arrested without a warrant as long as forty-eight hours before bringing him or her before a judicial officer, despite historical evidence that the common law in the early 1800's required the police to bring the suspect before a judge as soon as reasonably possible.\textsuperscript{69}

\footnotesize{\textsuperscript{64} As I shall argue below, the Court's opinion in \textit{Arkansas v. Sullivan}, 532 U.S. 769 (2001), issued just weeks after \textit{Atwater}, demonstrates that the Court was actually fully aware of \textit{Atwater}'s broader implications. See infra notes 79-85 and accompanying text.

\textsuperscript{65} See \textit{Atwater}, 532 U.S. at 326-45.

\textsuperscript{66} \textit{Id.} at 327.

\textsuperscript{67} \textit{Id.} at 345 (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting)).


\textsuperscript{69} See \textit{Riverside}, 500 U.S. at 54-55 (characterizing such historical evidence as "vague"). But see \textit{id.} at 62 n.1 (Scalia, J., dissenting) (arguing that common law is "not at all 'vague'" on this point).}
Indeed, the Atwater majority grudgingly acknowledged that its historical analysis did not end the inquiry. So the Court finally turned to the central question in the case: Was it reasonable to arrest Gail Atwater for a fine-only seatbelt violation? The Court began its answer to that question by conceding what happened to Ms. Atwater was indefensible:

If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrests were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater’s claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.

The highlighted language would seem to lead inevitably to the conclusion that Atwater was subjected to an unreasonable seizure. But the Court carefully avoided using the word “unreasonable” because, of course, a statement that Officer Turek’s conduct was “unreasonable” would have resolved the Fourth Amendment question in Atwater’s favor. Instead, the Atwater majority used a host of well-chosen synonyms for “unreasonable” ("gratuitous," "extremely poor judgment," "pointless") to describe the seizure.

The majority’s path from its concession that what happened to Atwater was “unreasonable” (by any other name) to the conclusion that what happened to Atwater was not “unreasonable” (within the meaning of the Fourth Amendment) is extremely unconvincing if not downright bizarre. The Court first expressed a preference for clear rules to guide the police and complained that officers could be sued for not knowing whether particular conduct constituted a minor or serious offense or whether a particular minor offense was jailable. This argument ultimately fails because, as Justice O’Connor pointed out in dissent, qualified immunity would protect officers from liability in any case in which a reasonable officer could have thought an arrest was justified.

70. See Atwater, 532 U.S. at 345-46. The Atwater Court recognized that Atwater asks us to mint a new rule of constitutional law on the understanding that when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness.

Id.

71. See id. at 346-47 (emphasis added).

72. See id. at 347-49.

73. See id. at 367 (O’Connor, J., dissenting). As O’Connor explained: If, for example, an officer reasonably thinks that a suspect poses a flight risk or might be a danger to the community if released, he may arrest
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Even more unconvincing, however, was the majority's next contention: the custodial arrest of Gail Atwater was not unreasonable enough to justify relief because she was unable to cite enough similar cases of police abuse. As the Court put it:

[W]hen Atwater's counsel was asked at oral argument for any indications of comparably foolish, warrantless misdemeanor arrests, he could offer only one. We are sure that there are others, but just as surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests. That fact caps the reasons for rejecting Atwater's request for the development of a new and distinct body of constitutional law. 74

There are many obvious objections to this reasoning. First, and most fundamentally, it makes no sense at all to state that a particularly abusive police practice becomes "unreasonable" only if enough officers imitate the abuse. One would certainly hope that the Court would agree that it would be unreasonable for officers to seize traffic violators by pouring battery acid on them. Would the Court hold that such a practice is not unconstitutional because the motorist could not identify other motorists subjected to the same practice? Second, as at least one commentator has documented, the practice of unnecessarily arresting minor offenders is nowhere near so rare as the Court indicated, especially after Knowles gave the police the incentive to make arrests in order to perform searches. 75 Third, even if the practice of unnecessary minor-offense arrests was as rare as the Court believed, that was almost certainly because the police themselves doubted that such arrests were constitutional. Now that the Court has removed any doubt, there is every reason to expect that the frequency of such abusive and unnecessary arrests will explode. 76

without fear of the legal consequences. Similarly, if an officer reasonably concludes that a suspect may possess more than four ounces of marijuana and thus might be guilty of a felony, the officer will be insulated from liability for arresting the suspect even if the initial assessment turns out to be factually incorrect.

Id. (internal citations omitted). But see id. at 351 n.22 (arguing that possibility of liability would inhibit police).

74. Id. at 353-54 (footnotes omitted); see also id. at 353 n.25 (explaining that "there simply is no evidence of widespread abuse of minor-offense arrest authority").

75. See Logan, supra note 44, at 403 & nn.137-49 (documenting recent arrests and searches for minor offenses, including, among others, littering, riding bicycle on sidewalk, truancy, speeding, public urination and riding bicycle with suspended driver's license).

76. As Justice O'Connor put it in her dissent:

[T]he relatively small number of published cases dealing with such arrests proves little and should provide little solace. Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest.
In addition to all of the strange reasoning it does contain, the majority opinion is almost equally striking for what it does not contain. Except for a single dismissive reference in a footnote, the majority ignored the effect that its ruling would have on Americans other than Gail Atwater.77 Moreover, there is not one word in the majority opinion about the power to search that follows automatically from a lawful arrest.78

After reading the majority opinion, therefore, one might think that the Court was simply unaware of any broader implications of its decision. That is, one could conclude that the majority believed minor offense arrests to be so rare and freakish that the decision would have no discernible impact on traffic stops in general and on police searches for drugs in particular.

In reality, the majority could not possibly have failed to realize that it had just created a tremendously useful tool for the police to find drugs on the nation’s roads and streets. It is not difficult to combine Atwater with Whren and Knowles. When one does so, the result is a new Fourth Amendment automobile doctrine that permits the police to stop almost any vehicle at any time, arrest the driver, and search the car.

2. Arkansas v. Sullivan

If there was ever any doubt that the Atwater majority understood exactly what it had done, that doubt disappeared in Sullivan, a little-noticed, per curiam decision issued just five weeks after Atwater. In Sullivan, the Court was confronted with a typical Fourth Amendment claimant in the drug war era, Kenneth Sullivan. The Arkansas Supreme Court had affirmed the trial court’s order suppressing the methamphetamine and drug paraphernalia seized from Sullivan’s car on the ground that the police had stopped Sullivan for speeding and an improperly tinted windshield as a pretext to search Sullivan’s car for evidence of narcotics crimes.79 After the stop, the officer had arrested Sullivan for speeding, improper window tinting, driving without registration and insurance papers, and carrying a weapon (a hatchet).80 The police then performed an inventory search of Sullivan’s car and discovered the narcotics and drug

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77. See id. at 353 n.25 (rejecting, as "speculative," argument that ruling would result in widespread harassment and abuse).

78. By contrast, Justice O’Connor’s dissent specifically recognized that the majority’s holding would empower an officer observing a minor traffic offense to “stop the car, arrest the driver, search the driver, search the entire passenger compartment of the car including any purse or package inside, and impound the car and inventory all of its contents.” Id. at 360 (O’Connor, J., dissenting) (citations omitted).

79. See State v. Sullivan, 16 S.W.3d 551, 553 (Ark. 2000). The officer had admitted that he was aware of “intelligence” regarding Sullivan’s involvement in narcotics. See id. at 552.

In suppressing the evidence, the Arkansas Supreme Court explained that it would not “sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity.”

Since the Arkansas Supreme Court’s holding that the officer’s pretextual motivation rendered the traffic stop unconstitutional was “flatly contrary” to Whren, it was hardly surprising that the United States Supreme Court peremptorily reversed. But Sullivan is highly significant because it is the first case to assemble all of the pieces of the Court’s new automobile doctrine. In less than a paragraph, the Court explicitly joined Atwater and Whren into a greater whole:

As an initial matter, we note that the Arkansas Supreme Court never questioned Officer Taylor’s authority to arrest Sullivan for a fine-only traffic violation (speeding), and rightly so. See Atwater v. Lago Vista. Rather, the court affirmed the trial judge’s suppression of the drug-related evidence on the theory that Officer Taylor’s arrest of Sullivan, although supported by probable cause, nonetheless violated the Fourth Amendment because Taylor had an improper subjective motivation for making the stop. The Arkansas Supreme Court’s holding to that effect cannot be squared with our decision in Whren, in which we noted our “unwilling[ness] to entertain Fourth Amendment challenges based on the actual [subjective] motivations of individual officers,” and held unanimously that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” That Whren involved a traffic stop, rather than a custodial arrest, is of no particular moment.

To put the new automobile doctrine bluntly, take any minor traffic or equipment violation, add a pretextual stop and a custodial arrest for the minor traffic violation, and voila, you get a lawful search of the automobile.

After Sullivan, the surprising result in Atwater suddenly made much more sense. What happened to Atwater was unreasonable as the Court essentially conceded. Nevertheless, the Court understood that if police

81. See id.
82. Sullivan, 16 S.W.3d at 552.
83. Sullivan, 121 S. Ct. at 1878.
84. Id. (quoting Whren v. United States, 517 U.S. 806, 813 (1996)) (citations omitted). Justice Ginsburg, joined by the other three Atwater dissenters, wrote a concurring opinion agreeing that reversal was compelled by Whren and Atwater. Id. at 1879 (recognizing and following “Court’s current case law”). However, the concurring justices urged the Court to reconsider Atwater if “experience demonstrates ‘anything like an epidemic of unnecessary minor-offense arrests.’” Id. (quoting Atwater v. Vill. of Lago Vista, 532 U.S. 318, 353 (2001)).
officers cannot arrest for trivial traffic offenses, then they may not have a lawful justification to search the cars of suspected drug criminals. In other words, while Atwater, on its face, had nothing to do with either drugs or car searches, Sullivan demonstrated that the outcome in Atwater had everything to do with drugs and car searches. The Court in Atwater thought it was more important to give the police the right to perform more searches of cars and to thereby find more drugs and convict more people like Kenneth Sullivan than it was to protect the Gail Atwaters of America from the indignities of unnecessary custodial arrest. To fight the drug war, the Court deemed expendable the privacy expectations of all generally law-abiding motorists.

3. Aftermath of Atwater and Sullivan

As Sullivan makes clear, the Court’s new automobile doctrine is now virtually complete. If the police wish to lawfully stop and search any vehicle, they only have to wait for the driver to commit any traffic or equipment violation, arrest the driver and search the car incident to arrest or pursuant to an inventory policy. Therefore, a generally law-abiding driver no longer has any reasonable expectation that her vehicle cannot be stopped and searched.

Atwater and Sullivan effectively rendered irrelevant the Court’s other major vehicle search case from the 2000-2001 Term, City of Indianapolis v. Edmond, in which the Court held that the police could not set up roadblocks for the primary purpose of catching motorists transporting narcotics. If an officer may stop any car she observes committing any traffic or equipment violation, arrest the motorist and search the car, there is no need to set up roadblocks. Indeed, it would obviously be much more efficient and productive for the police to single out “suspicious” motorists, stop and arrest them for trivial violations and thoroughly search their cars for narcotics than it would be to set up Indianapolis-style roadblocks, in which every vehicle is stopped and subjected to a dog sniff. Civil libertarians might justifiably have believed they had won a major victory in Edmond, but Atwater and Sullivan, issued just a few months later, proved that the Court is as determined as ever to sacrifice privacy rights of motorists to fight the drug war.

There remain, however, two possible limitations on the Court’s new automobile doctrine. First, as the Court acknowledged in Atwater, a particular jurisdiction may choose to limit the authority of the police to arrest for minor traffic offenses. But this limitation is hardly comforting for the great majority of motorists who travel in states without such limitations. Even in those states with statutes limiting police minor-offense arrest authority, it is not clear that an arrest violating such a statute would

86. See Atwater, 532 U.S. at 352 (citing statutory limitations on arrest power from eight states).
require exclusion of the evidence found incident to the arrest. The arrest is clearly reasonable under the Fourth Amendment after Atwater and Sullivan, and the prosecution would argue, probably successfully, that the constitutionally-based exclusionary rule is inapplicable when the arrest only violates state law. Indeed, several federal circuits have already accepted this precise argument in upholding searches incident to custodial arrests that were forbidden by state law.\textsuperscript{87} Given the Court's statement in Sullivan strongly suggesting that the officer's authority to arrest Sullivan and search his car derived not from Arkansas law but from Atwater,\textsuperscript{88} it is unlikely that the Court will suppress evidence seized after any custodial arrest, even when the state law defining the offense bars an officer from arresting a citizen for violating that law. If that analysis is correct, the police still will have every incentive to arrest motorists in order to search their vehicles even in those few states with statutory limitations on arrests for minor traffic offenses.

The only other limitation on the Court's new vehicle doctrine is the requirement that the motorist actually commit a traffic or equipment violation. Since almost every driver will, if given enough time, commit such a violation, this limitation is actually unimportant.\textsuperscript{89} Nonetheless, as I shall demonstrate in the next section, even this very modest limitation on the new doctrine has become irrelevant as the Court has expanded the authority of police to stop vehicles in the absence of probable cause.

IV. *Arvizu: The Completion of the New Vehicle Doctrine*

In light of Whren, Atwater and Sullivan, it is now clear that a police officer may stop and search any vehicle so long as the officer is able to articulate any kind of traffic or equipment violation. Suppose, however, the officer encounters an exceptional motorist who, miraculously, is able to avoid committing a single traffic violation of any kind the entire time

\textsuperscript{87} See, e.g., United States v. Lewis, 183 F.3d 791, 794 (8th Cir. 1999) (upholding search incident to arrest for open liquor violation despite state statute barring custodial arrest unless certain circumstances present because "the appropriate inquiry here is not whether Lewis's arrest was valid under Minnesota's criminal procedure statute, but rather under federal law."); United States v. Wright, 16 F.3d 1429, 1437 (6th Cir. 1994) (upholding search incident to arrest unlawful under state law, and holding that "[t]he fact that the arrest, search, or seizure may have violated state law is irrelevant as long as the standards developed under the Federal Constitution were not offended."). *But see* United States v. Mota, 982 F.2d 1384, 1387 (9th Cir. 1993) (suppressing evidence seized during search incident to arrest where state law barred arrest for minor offense because "whether an officer is authorized to make an arrest will ordinarily depend 'in the first instance, on state law.'") (quoting Michigan v. DeFillippo, 443 U.S. 31, 36 (1979)).

\textsuperscript{88} See Sullivan, 121 S. Ct. at 1878 ("[T]he Arkansas Supreme Court never questioned Officer Taylor's authority to arrest Sullivan for a fine-only traffic violation (speeding), and rightly so.").

\textsuperscript{89} See supra note 32 and accompanying text (noting how it is almost impossible for motorists to avoid committing traffic violations).
the officer observes her. Is there still a lawful way for the police to pull that motorist over?

The Court has emphatically answered that question in the affirmative in *Arvizu*. In *Arvizu*, the district court had upheld a Border Patrol agent’s decision to perform a *Terry* stop on a minivan travelling on a remote road in Arizona some thirty miles from the Mexican border because: (1) smugglers sometimes used that road to avoid a nearby border patrol station; (2) the minivan was on the road near the time that Border Patrol agents change shifts; (3) another minivan on the same road one month earlier was found to contain drugs; (4) smugglers sometimes use minivans; (5) the minivan slowed down as it approached the agent’s vehicle; (6) the driver, Arvizu, appeared stiff and did not acknowledge the agent as he drove by; (7) the agent did not recognize the minivan as a local vehicle; (8) children in the rear of the minivan had their knees raised, suggesting that their feet were resting on something on the floor; (9) the children waved for several minutes as the agent followed the minivan, but they did not look at him; and (10) the agent determined from the minivan’s license plate that it was registered to an address in a neighborhood notorious for smuggling. After the agent pulled the minivan over, Arvizu allegedly gave consent for the agent to look around the minivan, and the agent found marijuana in a duffel bag. Because the agent did not claim that Arvizu committed any traffic violations, the lawfulness of the stop turned entirely on whether the factors set forth above amounted to reasonable suspicion that criminal activity was afoot.

The Ninth Circuit concluded that these ten factors did not amount to reasonable suspicion and therefore reversed the denial of Arvizu’s suppression motion. The panel found seven of the factors were entitled to no

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90. See 122 S. Ct. 744 (2002).
93. See *Arvizu*, 122 S. Ct. at 750. Conspicuously missing from the Supreme Court’s otherwise thorough recitation of the facts is that both the voluntariness and the scope of Arvizu’s “consent” had been disputed in the district court. As the Ninth Circuit observed, Arvizu and his sister each testified that the agent had his hand on his gun as he asked for consent to look around, while the agent denied this allegation. See *Arvizu*, 232 F.3d at 1246. Arvizu also testified that he interpreted the agent’s request to “look around” to mean that the agent would examine only the outside of the van. See id. The district court, apparently resolving the disputed issues in favor of the agent, upheld the validity of Arvizu’s consent. See id. at 1247.
94. See *Arvizu*, 232 F.3d at 1249 (“We note that Agent Stoddard never claimed that Arvizu broke any traffic laws.”).
95. See United States v. Sokolow, 490 U.S. 1, 7 (1989) (citing *Terry*, 392 U.S. at 30, and finding *Terry* stop lawful only if officer has “reasonable suspicion supported by articulable facts that criminal activity may be afoot”) (internal quotation omitted).
weight as they were in no way suggestive of criminal activity. As for the three factors entitled to some weight—"that the road was sometimes used by smugglers, that Arvizu was driving on the road near the time that the Border Patrol shift changed, and that he was driving a minivan, a type of car sometimes used by smugglers[.]"—the panel concluded that they were "not enough to constitute reasonable suspicion either singly or collectively."

It would seem almost impossible to disagree with the Ninth Circuit's conclusion in Arvizu. Indeed, it would be hard to imagine less suspicious behavior than a man driving a minivan containing several children near a national monument in the middle of the afternoon, slowing down for a police car without looking at the officer, and then continuing on his way, scrupulously obeying all traffic laws while the children wave more or less in the direction of the officer. The Supreme Court, however, unanimously reversed.

The Court began its analysis by emphasizing that the reasonable suspicion standard requires application of a "totality of the circumstances"

96. See Arvizu, 232 F.3d at 1248-51. In particular, the Ninth Circuit found: (1) Arvizu's decision to slow down as he approached the agent's vehicle was "an entirely normal response that is in no way indicative of criminal activity;" (2) Arvizu's failure to acknowledge the agent "ordinarily does not provide a basis for suspecting criminal activity;" (3) the children's behavior "carries no weight in the reasonable suspicion calculus," because "[i]f every odd act engaged in by one's children while sitting in the back seat of the family vehicle could contribute to a finding of reasonable suspicion, the vast majority of American parents might be stopped regularly within a block of their homes;" (4) "[t]he fact that one minivan stopped in the past month on the same road contained marijuana is insufficient to taint all minivans with suspicion;" (5) "[t]he fact that the officer did not recognize the minivan as belonging to a local resident also fails to contribute to the reasonable suspicion calculus[,]" particularly because the road was used by visitors to reach a nearby forest and national monument; (6) "the fact that a van is registered to an address in a block notorious for smuggling is also of no significance" because "[o]therwise, persons forced to reside in high crime areas for economic reasons (who are frequently members of minority groups) would be compelled to assume a greater risk not only of becoming the victims of crimes but also of being victimized by the state's efforts to prevent those crimes;" and (7) "the fact that the children's knees were raised, while consistent with the placement of their feet on packages of illicit substances, is equally (if not more) consistent with the resting of their feet on a cooler, picnic basket, camping gear, or suitcase." Id. at 1249-50.

97. Id. at 1251. The Ninth Circuit explained why each of these three factors was entitled to little weight: (1) the fact that smugglers sometimes used the road in question was of little probative value because the road is also "used for a number of entirely innocuous purposes—including as a way of getting to camping grounds and recreational areas, and as a shortcut when travelling from one community to another[.]" (2) while smugglers sometimes use minivans to transport contraband, minivans "are among the best-selling family car models in the United States[.]" and (3) while smugglers may prefer to travel near the time of Border Patrol shift changes, "a car's travelling on a road in the general areas of a Border Patrol station three quarters of an hour before the actual shift change does not seem to us to add much to the mix." Id.

98. See Arvizu, 122 S. Ct. at 753.
test. The Ninth Circuit violated this test, the Court explained, by refusing to attach any weight to seven of the ten factors that the officer had cited. Thus, the Court explained, the fact that Arvizu slowed down and did not look at the officer “might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona).” Also, the officer “was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area’s inhabitants.” The Ninth Circuit similarly erred, according to the Court, by dismissing the fact that the children in the minivan waved in an “idiosyncratic” fashion because the district court had an opportunity to observe the officer as he physically demonstrated the waving motion.

What is most disturbing about the Court’s opinion is that the Court was not satisfied merely to reverse the Ninth Circuit’s judgment and demand the case with instructions to properly apply the “totality of the circumstances” test. Instead, the Court itself weighed the factors and proclaimed that the officer “had reasonable suspicion to believe that respondent was engaged in illegal activity.” The Court concluded that the officer reasonably could have suspected that Arvizu was driving on a little-used road to avoid an immigration checkpoint at a time when the immigration officers would be changing shifts, that it was unlikely that the family was heading for a picnic outing because Arvizu had turned away from known recreational areas, that the children’s elevated knees suggested concealed cargo and that the reactions of the family to the officer was notable.

Because the Court has now held that these facts are enough to amount to reasonable suspicion of criminal activity, then it follows immediately that almost no motorist could ever avoid arousing reasonable suspicion. That is, for any given motorist, an officer could almost always assemble a similar laundry list of completely innocuous facts and claim that they somehow amount to reasonable suspicion. Because the Court’s opinion in Arvizu repeatedly stresses that reviewing courts must grant great deference to an officer’s conclusion that apparently innocent facts

99. Id. at 747.
100. See id. As the Court explained,
Terry, however, precludes this sort of divide-and-conquer analysis. . . . The officer in Terry observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was “perhaps innocent in itself,” we held that, taken together, they “warranted further investigation.”
Id. at 747-48 (quoting Terry, 392 U.S. at 22).
101. Id. at 752.
102. See id.
103. Id.
104. See id.
105. Id. at 752-53.
are actually suspicious,\textsuperscript{106} a reviewing court will almost never be able to conclude that such a list is insufficient to justify a \textit{Terry} stop.

In other words, \textit{Arvizu} turned out to be the perfect case for the Supreme Court to complete its new vehicle doctrine. It is now clear that the police have complete discretion to stop any vehicle at any time, even if the driver is so skillful that he or she is able to avoid committing a single traffic or equipment violation. While the police will not be able to use \textit{Atwater} and \textit{Sullivan} to automatically search a car stopped on reasonable suspicion, the police, in most cases, will be able to search the stopped car by developing probable cause to believe the car contains criminal evidence or contraband, by arresting the driver or another occupant or, as in \textit{Arvizu} itself, by obtaining consent.

The Court's new vehicle doctrine is now complete: The police may lawfully stop any car at any time and virtually always search the car.

\section{Conclusion}

To put it simply, the damage had already been done, and a new vehicle doctrine was already in place even before \textit{Arvizu}. All that really was at stake in \textit{Arvizu} was the last remaining morsel of whatever privacy expectations American drivers used to have. Over the decades, the Court, largely motivated by the war on drugs, had already reduced those privacy expectations considerably, but in the last five years the Court has altogether effectively destroyed any remaining privacy expectations.

It is difficult to be optimistic that the Court will reverse course any time soon and restore the right of average American drivers to be left alone. Automobiles will continue to be obvious targets for police scrutiny so long as the war on drugs continues to rage. The terrorist attacks of September 11, 2001, may well inspire even more intrusive measures designed to prevent terrorists from using vehicles to transport weapons of mass destruction. It appears, therefore, that the Supreme Court's new vehicle doctrine is here to stay.

In practice, many Americans, particularly those who are not members of racial minorities or other groups likely to be singled out for police harassment, may never realize that their rights have been diminished. But as Gail Atwater's case demonstrates, even privileged and law-abiding mem-

\begin{footnotesize}
\begin{enumerate}
\item[106.] \textit{See id.} at 750-51 (stating that "totality of the circumstances" test "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" (quoting United States \textit{v.} Cortez, 449 U.S. 411, 418 (1981)); \textit{id.} at 752 (noting that officer "was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants"); \textit{id.} (finding reasonable conclusion that \textit{Arvizu} was evading immigration checkpoint based on officer's "observations, his registration check, and his experience as a border patrol agent").
\end{enumerate}
\end{footnotesize}
bers of our society have, in fact, lost their right to be secure in their vehicles against pretextual stops, arrests, and car searches. The casualties in the drug war continue to mount.