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*RODRIGUEZ V. UNITED STATES***

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ANTHONY AMSTERDAM'S *PERSPECTIVES ON THE FOURTH AMENDMENT*, AND WHAT IT TEACHES ABOUT THE GOOD AND BAD IN *RODRIGUEZ v. UNITED STATES*

Tracey Maclin\*

INTRODUCTION

Anthony Amsterdam's article, *Perspectives On The Fourth Amendment*<sup>1</sup> is one of the best, if not the best, law review article written on the Fourth Amendment. Thus, *Minnesota Law Review* on its hundredth anniversary fittingly recognizes and honors Professor Amsterdam's article in its Symposium edition, "*Standing on the Shoulders of Giants: Celebrating 100 Volumes of the Minnesota Law Review*."<sup>2</sup> I am flattered that the *Law Review* invited me to participate in this Symposium.

Like his mentor and former boss, Justice Felix Frankfurter, Anthony Amsterdam is a self-described "fourth amendment buff."<sup>3</sup> *Perspectives On The Fourth Amendment* is probably the most famous of Professor Amsterdam's contributions to the development of American constitutional criminal procedure. But Professor Amsterdam has been involved with (and influenced) many of the Supreme Court's landmark criminal procedure and constitutional law cases.<sup>4</sup> For example,

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Thanks to Wayne LaFave and Lauryn Gouldin for their comments and insights after reading a draft of this article. Also, thanks to Elizabeth Parker, Kaileigh Callender and Chris Daley for their assistance in the preparation of this article.

<sup>1</sup> Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

<sup>2</sup> \_\_\_ MINN. L. REV. \_\_\_ ( ).

<sup>3</sup> Amsterdam, *supra* note 1 at 349. Justice Frankfurter's devotion to the Fourth Amendment was legendary. According to one scholar, "Frankfurter always considered himself something of an expert on the Fourth Amendment." MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 157 (1991). In 1947, Justice Frankfurter told his colleagues that he was obsessed with the Fourth Amendment: "I am nuts about it because there is no provision of the Constitution more important to be nuts about. There is nothing more important in the Bill of Rights than search and seizure." Frank Murphy, Conference Notes on *Harris v. United States* (undated), Frank Murphy Papers, Library of Congress, Manuscript Division, Reel 135. Ten years later, in a letter to Chief Justice Earl Warren, Frankfurter confessed his devotion to the Fourth Amendment when he wrote: "To the extent that I am charged, not by you, with being 'a nut' on the subject of the 'knock at the door,' I am ready to plead guilty." Felix Frankfurter, Letter to Earl Warren 3 (April 19, 1957). Felix Frankfurter Papers, Library of Congress, Manuscript Division, Box 92.

<sup>4</sup> Professor Amsterdam co-authored the brief and argued the three most important death penalty cases of the 1970's. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976) (Professor Amsterdam co-authored the petitioner's brief and argued on behalf of Gregg; *Gregg* ruled that Georgia's new death penalty law, which provided for bifurcated proceedings (a "guilt-phase" and a "penalty-phase") and guided the discretion of the sentencing jury during the "penalty-phase" proceeding, was constitutional); *Furman v. Georgia*, 408 U.S. 238 (1972) (Professor Amsterdam co-authored the petitioner's brief and argued on behalf of Furman; *Furman* ruled that, as applied in Georgia, the death penalty violated the Eighth Amendment's ban against cruel and unusual punishment). Professor Amsterdam was also the co-author of the briefs in *Gregg*'s companion cases *Roberts v. Louisiana*, 431 U.S. 633 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); and *Proffitt v. Florida*, 428 U.S. 242 (1976). Finally, Professor Amsterdam also co-authored the petitioner's brief and argued *Lockett v. Ohio*, 438 U.S. 586 (1978), where a plurality concluded that "the Eighth and Fourteenth Amendments require that the sentencer [in a death penalty case] not be precluded from considering, *as a mitigating*

Professor Amsterdam's intelligence and insight into the Court's thinking was evident in the American Civil Liberties Union (ACLU) amicus brief he co-authored in *Miranda v. Arizona*.<sup>5</sup> Although the Court did not embrace the brief's argument that providing counsel to all arrestees was the only way to adequately and effectively protect an arrestee's Fifth Amendment privilege against compelled self-incrimination in the police station, the brief's impact was apparent in the resulting opinion in *Miranda*.<sup>6</sup> As Professor Yale Kamisar explained, "[t]he failure of the [*Miranda*] Court to deal explicitly with (if only to reject) the ACLU contention is surprising, for in all other respects the ACLU amicus brief presents 'a conceptual, legal and structural formulation that is practically identical to the majority opinion – even as to use of language in various passages of the opinion.'"<sup>7</sup>

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*factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604 (footnotes omitted) (Opinion of Burger, C.J.).

Professor Amsterdam's article, *The Void-For-Vagueness Doctrine In The Supreme Court*, 109 U. PA. L. REV. 67 (1960), has been cited by the Supreme Court in fifteen cases: *Whisenhunt v. Spradlin*, 464 U.S. 965, 970 (1983) (Brennan, J., dissenting); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 n.14 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 290 n.12 (1982); *Sewell v. Georgia*, 435 U.S. 982, 986 (1978) (Brennan, J., dissenting); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976); *Smith v. Goguen*, 415 U.S. 566, 572 n.7 (1974); *Parker v. Levy*, 417 U.S. 733, 775 n.5 (1974) (Douglas, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 91, 92 (1973) (Brennan, J., dissenting); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 166 n.8 (1972); *United States v. Vuitch*, 402 U.S. 62, 78 (1971) (Douglas, J., dissenting in part); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 685 n.11 (1968); *Zwickler v. Koota*, 389 U.S. 241, 257 (1967); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 n.5 (1965); *Dombrowski v. Pfister*, 380 U.S. 479, 501 n.4 (1965) (Harlan, J., dissenting); *Cox v. Louisiana*, 379 U.S. 559, 568 (1965).

Another of Professor Amsterdam's articles, *Search, Seizure, And Section 2255: A Comment*, 112 U. PA. L. REV. 378 (1964), has been cited by the Supreme Court on eight occasions: *Kimmelman v. Morrison*, 477 U.S. 365, 396 n.3 (1986) (Powell, J., concurring); *Segura v. United States*, 468 U.S. 796, 829 n.23 (1984) (Stevens, J., dissenting); *Stone v. Powell*, 428 U.S. 465, 487 n.24 (1976); *United States v. Janis*, 428 U.S. 433, 454 n.29 (1976); *Schneekloth v. Bustamonte*, 412 U.S. 218, 262 n.16 (1973) (Blackmun, J., concurring); *Williams v. United States*, 401 U.S. 667, 691 (1971); *Harris v. Nelson*, 394 U.S. 286, 304 (1969) (Harlan, J., dissenting); *Kaufman v. United States*, 394 U.S. 217, 241 n.8 (1969) (Black, J., dissenting).

Lastly, Professor Amsterdam's article, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal And Habeas Corpus Jurisdiction To Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965), has been cited by the Court in three cases: *Wainwright v. Sykes*, 433 U.S. 72, 106 n.8 (1977) (Brennan, J., dissenting); *State of Georgia v. Rachel*, 348 U.S. 780, 786 n.4 (1966); *City of Greenwood v. Peacock*, 384 U.S. 808, 852 (1966) (Douglas, J., dissenting).

<sup>5</sup> Brief for American Civil Liberties Union as Amicus Curiae, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 759), 1966 WL 100516.

<sup>6</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966). Years later, scholars have advocated for the remedy urged by the ACLU brief. See, e.g., Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal To Mirandize Miranda*, 100 HARV. L. REV. 1826, 1830 (1987) (offering "a per se rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney").

<sup>7</sup> Yale Kamisar, *A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 67 n. 47 (1966), quoting Samuel Dash, *Foreword to RICHARD J. MEDALIE, FROM ESCOBEDO TO MIRANDA: THE ANATOMY OF A SUPREME COURT DECISION* xvii (1966).

Two years later, Professor Amsterdam co-authored, with the NAACP Legal Defense Fund and the ACLU, an amicus brief in *Terry v. Ohio*.<sup>8</sup> That brief urged the Court to adhere to probable cause as the legal standard for deciding the constitutionality of police seizures and searches of persons falling short of a custodial arrest and search incident to arrest. If the probable cause test were abandoned, the brief argued that police stop and frisk techniques would become a tool of police oppression.<sup>9</sup> *Terry*, of course, did abandon the probable cause standard and ruled that police may frisk a person if they reasonably suspect the person is armed and dangerous.<sup>10</sup> The brief's prediction that Court approval of stop and frisk practices would generate hostility within black communities and diminish the Fourth Amendment rights of black citizens was prescient.<sup>11</sup>

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<sup>8</sup> Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), 1967 WL 113672.

<sup>9</sup> NAACP Brief at 34 (arguing that “the ‘balancing’ theory of Fourth Amendment rights and the *Stop-Frisk Model* that is built upon it show themselves to be mere fine, scholastic pretexts for oppression. . . . [T]he ‘balance’ scale which they purport to employ is invariably tipped by the police commissioner’s thumb; and their consequence is nothing more or less than a police dictatorship of the streets.”).

<sup>10</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>11</sup> In 1974, Professor Amsterdam observed: “The pressures upon policemen to use the stop-and-frisk power as a device for exploratory evidence searches in [urban areas is] intense. Police can justify virtually any exercise of the power because these are ‘high-crime’ areas where all young males, at least, are suspect.” Amsterdam, *supra* note 1, at 438 (footnotes omitted). Almost forty years later, a federal judge found that the New York City Police Department’s stop and frisk practices violated the Fourth and Fourteenth Amendment rights of black and Hispanic individuals. *See Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). The federal court in *Floyd* also commented on the resentment generated by the NYPD’s stop and frisk policy. *Id.* at 556, 557: (“The New York Police Department (‘NYPD’) made 4.4 million stops between January 2004 and June 2012. Over 80% of these 4.4 million stops were of blacks or Hispanics. . . . Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police.”).

Fourteen years prior to the *Floyd* ruling, the New York Attorney General issued a report, based on NYPD’s records, regarding the effects of the NYPD’s stop and frisk practices. *See OFFICE OF THE ATTORNEY GENERAL, THE NEW YORK CITY POLICE DEPARTMENT’S STOP AND FRISK PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK 94-95* (1999) (finding, “blacks comprised 25.6% of the City’s population, yet 50.6% of all persons ‘stopped’ were black. Hispanics comprised 23.7% of the City’s population yet, 33.0% of all ‘stops’ were of Hispanics. By contrast, whites comprised 43.4% of the City’s population, but accounted for only 12.9% of all ‘stops.’” Therefore, according to the Attorney General’s Report, “blacks were over six times more likely to be ‘stopped’ than whites in New York City, while Hispanics were over four times more likely to be ‘stopped’ than whites in New York City.”) (footnotes omitted). The Report later observed that “crime rates do not fully explain the higher rate at which minorities are ‘stopped’ by the NYPD.” *Id.* at 119. Tellingly, the Attorney General’s Report found that the NYPD’s utilization of stop and frisk tactics “in minority neighborhoods was identified as a particular flash point in the matrix of police-community relations.” *Id.* at 8.

Others have documented and described the tension produced by stop and frisk practices. *See, e.g.,* Bob Herbert, *The Police Bullies*, N.Y. TIMES, March 7, 1997 (“The stories are endless. If you go into a predominately black or Latino neighborhood all you have to do is talk to young people at random. They will tell you how they are stopped, frisked, searched, threatened with arrest if they don’t produce identification, cursed at, slapped around, spread-eagled on the ground, thrown against walls, run off of street corners, threatened with weapons. Inevitably some are falsely arrested. Some are brutalized.”); *see also* David Kocieniewski, *Success of Elite Police Unit Exact a Toll on the Streets*, N.Y. TIMES, February 15, 1999 (quoting one NYPD officer: “‘There are [officers] who are willing to toss anyone who’s walking with his hands in his pockets,’ said an officer, who spoke on the condition of anonymity. ‘We frisk 20, maybe 30 people a day. Are they all by the book? Of course not; it’s safer and easier to just toss people. And if it’s the 25th of the month and you haven’t got your gun yet? Things can get a

Though it was published in 1974, the themes analyzed in *Perspectives On The Fourth Amendment* remain relevant to many of the Fourth Amendment issues decided by judges today. In a smooth, but elegant style,<sup>12</sup> Professor Amsterdam discussed myriad search and seizure topics, including, why the Fourth Amendment is essential to a free society; the text and history of the amendment; whether the Framers' understanding of the amendment should control or influence modern search and seizure rulings; the Supreme Court's mindset when interpreting the applicability and scope of the amendment; the problems associated with the so-called "exclusionary rule," which suppresses evidence illegally obtained by the police; why the exclusionary rule is necessary; and why "police discretion to conduct search and seizure activity [should] be tolerably confined by either legislation or police-made rules and regulations, subject to judicial review for reasonableness."<sup>13</sup>

I will focus on a few themes raised by Amsterdam that have resonated with me since I first read his article thirty years ago. (I have re-read his article several times in my thirty years as a law professor.) After listing those themes, I will discuss why those themes are relevant to an area of Fourth Amendment law that affects millions of Americans and has been the subject of a recent Supreme Court ruling, namely, traffic stops.

Early in his article, Professor Amsterdam cautions his readers that he will not be proposing "any single, comprehensive theory of the fourth amendment."<sup>14</sup> Rather, he intends to "identify and to discuss a number of basic issues that complicate the development of a single, comprehensive fourth amendment theory."<sup>15</sup> Similarly, while he devotes considerable space to discussing the history of the Fourth Amendment, Amsterdam does not rely solely on the Framers' vision of the amendment to explain its meaning for today's world. He explains that there are two ways of understanding the amendment: it could be "viewed as a restriction upon only particular methods of law enforcement or as a restriction upon law enforcement practices generally."<sup>16</sup> Later, he concludes history should not control the amendment's meaning. "[H]istory is a standoff: there is certainly nothing in it to suggest, let alone require, a narrow or static view of the fourth amendment's broad language."<sup>17</sup> Moreover, Amsterdam recognized that even if we wanted to "take exclusive counsel of the framers" on the Fourth Amendment's meaning for our times,<sup>18</sup> advancing technology and science provide law enforcement officials the

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little desperate."); Elizabeth Kolbert, *The Perils of Safety*, THE NEW YORKER, March 29, 1997 (describing that the NYPD's emphasis on getting guns off the streets "put the cops in an ambiguous relationship with the people they were supposed to be protecting: virtually everyone became a potential suspect."). For a historical account of the NYPD's stop and frisk practices during the 1990's to the present, see Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495 (2014).

<sup>12</sup> Amsterdam's article was the basis of the Oliver Wendell Holmes Lectures, delivered at the University of Minnesota Law School on January 22-24, 1974.

<sup>13</sup> Amsterdam, *supra* note 1, at 409.

<sup>14</sup> Amsterdam, *supra* note 1, at 352.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 361-62.

<sup>17</sup> *Id.* at 401.

<sup>18</sup> *Id.* at 401.

ability to search and seize in ways unimaginable to the Framers. Although his example seems quaint in an era when cell phones act like computers<sup>19</sup> and GPS tracking is capable of constantly monitoring an individual's whereabouts,<sup>20</sup> Amsterdam put it nicely when he observed: "Miniscule microphones are not the only wonder of our lives that the framers did not know."<sup>21</sup>

Because Professor Amsterdam insisted he was not proposing "any single, comprehensive theory of the fourth amendment,"<sup>22</sup> I assume that he might worry if his article prompted someone to propose a general theory of the Fourth Amendment. Yet, that is just the impact his article has had on my view of the Fourth Amendment. Twenty years ago, I wrote that the "central meaning of the Fourth Amendment is distrust of police power and discretion."<sup>23</sup> My view of the amendment was inspired, in part, by several passages in Amsterdam's article. For example, he asserted that "The Bill of Rights in general and the fourth amendment in particular are profoundly anti-government documents."<sup>24</sup> Acknowledging that "policing the police"<sup>25</sup> is an endeavor that "most judges would prefer to avoid," and a task that some judges view as none their business,<sup>26</sup> Amsterdam nonetheless observed: "[r]ecognition that the fourth amendment is quintessentially a regulation of the police – that, in enforcing the fourth amendment, courts *must* police the police – serves to counteract that sense" that judges should defer to police authority.<sup>27</sup> Finally, Amsterdam opined, echoing Justice Frankfurter, that there are "few constitutional issues more important than defining the reach of the fourth amendment – the extent to which it controls the array of activities of the police."<sup>28</sup>

Professor Amsterdam also helped introduce to me the importance and relevance of the Fourth Amendment's history. A former law clerk for Justice Felix Frankfurter, Amsterdam described Frankfurter as one "who more than any other of the Justices sought the fourth amendment's meaning in its history."<sup>29</sup> Although he was no proponent of originalism as a theory for deciding constitutional issues,<sup>30</sup>

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<sup>19</sup>See *Riley v. California*, 134 S. Ct. 2473, 2489 (2014) ("The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also have the capacity to be used as a telephone.").

<sup>20</sup> See *Grady v. North Carolina*, \_\_\_ U.S. \_\_\_, \_\_\_ (decided March 30, 2015) (*per curiam*) (requiring a sex-offender to wear a satellite-based monitoring device at all times constituted a search under the Fourth Amendment; the state "program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search.").

<sup>21</sup> Amsterdam, *supra* note 1, at 401.

<sup>22</sup> *Id.* at 352.

<sup>23</sup> Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993).

<sup>24</sup> Amsterdam, *supra* note 1, at 353.

<sup>25</sup> *Id.* at 370, citing Fred Inbau, *The Social and Ethical Requirements of Criminal Prosecution*, 52 J. CRIM. L.C. & P.S. 209, 212 (1961).

<sup>26</sup> *Id.* at 370.

<sup>27</sup> *Id.* at 371.

<sup>28</sup> *Id.* at 377.

<sup>29</sup> *Id.* at 397.

<sup>30</sup> *Id.* at 362 (noting that "the Constitution 'states or ought to state not rules for the passing hour, but principles for an expanding future'"), quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 83 (1921); *id.* at 416 ("The police in this country are no longer ragged bands of volunteers

Amsterdam’s article helped me realize that studying the history of the amendment—not the type of historical focus that asks whether the Framers condemned or approved specific types of governmental searches or seizures, but a focus on history that seeks to understand the Framers’ general vision of the amendment—is valuable to our understanding of the Fourth Amendment today. Professor Amsterdam is not an academic theorist out of touch with the real world views of judges and politicians; he recognized that the Framers were not solely concerned with protecting the rights of criminals. But he also understood, paraphrasing Vince Lombardi, “that, while winning isn’t everything, losing is nothing.”<sup>31</sup> According to Amsterdam, “The revolutionary statesmen were plainly and deeply concerned with losing liberty. That is what the Bill of Rights is all about.”<sup>32</sup> One quote from Amsterdam illustrates how awareness of the Framers’ experience with arbitrary search and seizure practices can affect how judges interpret the amendment today: “[T]he authors of the Bill of Rights had known oppressive government. I believe they meant to erect every safeguard against it. I believe they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit.”<sup>33</sup>

In the pages that follow, I will connect two perspectives from Amsterdam’s article—the Fourth Amendment’s concern with discretionary police power and the Framers’ vision of the Fourth Amendment to bar arbitrary and ruleless searches and seizures<sup>34</sup>—to an aspect of modern American society that affects millions of people: traffic stops by the police.<sup>35</sup> This past Term, the Supreme Court decided *Rodriguez v. United States*.<sup>36</sup> At issue was whether the Fourth Amendment “tolerates a dog sniff conducted after the completion of a traffic stop.”<sup>37</sup> The Court, in a 6-3 ruling, held that “a police stop exceeding the time needed to handle the matter for which the stop was made” violates the Fourth Amendment.<sup>38</sup> While certainly a temporary victory for Mr. Rodriguez,<sup>39</sup> I submit that *Rodriguez* is a vexing decision on several fronts.

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bearing flintlocks, and there is no reason to deal with today’s police problems with a flintlock Constitution.”).

<sup>31</sup> *Id.* at 400.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 417 (“A paramount purpose of the fourth amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures. . . . Arbitrary searches and seizures are ‘unreasonable’ searches and seizures; ruleless searches and seizures practiced at the varying and unguided discretion of thousands of individual peace officers are arbitrary searches and seizures; therefore, ruleless searches and seizures are ‘unreasonable’ searches and seizures.”) (footnote omitted).

<sup>35</sup> Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 874 (2001) (“Every day, millions of cars are stopped for one of the myriad of regulations governing our use of public streets. As soon as you get into your car, even before you turn on the ignition key, you have subjected yourself to intense police scrutiny. So dense is the modern web of motor vehicle regulations that every motorist is likely to get caught in it every time he drives to the grocery store. . . . It is by the good graces, or inattention, of a police officer that you escape a traffic stop and a ticket, or worse.”).

<sup>36</sup> 135 S. Ct. 1609 (2015).

<sup>37</sup> *Rodriguez v. United States*, No. 13-9972, slip op. at 1, (U.S. Apr. 21, 2015).

<sup>38</sup> *Id.*

<sup>39</sup> Although the Court vacated the Court of Appeals decision affirming Rodriguez’s conviction, the Court remanded the case to the appellate court to determine “whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation.” *Id.* at 9. There is no doubt in my mind that the appellate court – urged on by Justice Thomas’s dissent, *see id.*

As I will explain below, *Rodriguez* is a significant ruling because it rejects the argument that police can prolong a traffic stop to pursue a drug investigation. At the same time, however, *Rodriguez* blesses two troublesome investigative techniques that have been utilized in the country's seemingly never-ending "War on Drugs" and that are, in my view, inconsistent with Fourth Amendment freedoms and contrary to Professor Amsterdam's insights on the amendment.

Imagine you are driving on an interstate highway or country road ten miles-per-hour faster than the posted speed limit. Or, you fail to stay in the right-lane while driving on an empty interstate highway, or temporarily veer onto the shoulder of the road while changing the station on your car radio. Or, unbeknownst to you, your vehicle has a broken taillight. The next thing you know, the blue lights of a police cruiser appear in your rear-view mirror. The officer approaches your vehicle and begins a routine that occurs on countless occasions every day.

After obtaining your driver's license, vehicle registration, and proof of insurance, the officer asks you to accompany him to the patrol car. You comply without asking why you are being moved from your vehicle. While inside the police cruiser, the officer contacts a police dispatcher or uses his computer to run a check on your documents. He may also check whether there are outstanding warrants for your arrest, or request a criminal history report on you. While these checks are proceeding, a remarkable phenomenon occurs. The officer begins asking "itinerary" or "context-framing" questions.<sup>40</sup> Where are you coming from? How long were you

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at 10-12 (Thomas, J., dissenting) (although the appellate court did not address the issue, concluding that the officer's observation and smell of an air freshener, the passenger's nervousness and the officer's skepticism about the reasons for Rodriguez's travels, provided reasonable suspicion of criminal activity), will ultimately find on remand that there was reasonable suspicion to detain Rodriguez.

Furthermore, on remand, the prosecution will undoubtedly argue that the drugs discovered as a result of the illegal seizure are admissible under the good-faith exception to the exclusionary rule. Prior to the Court's ruling in *Rodriguez*, the Eighth Circuit routinely upheld extending a traffic stop to permit a dog sniff, provided the extension of the stop was *de minimis*. See, e.g., *United States v. Rodriguez*, 741 F.3d 905, 907 (8th Cir. 2014) ("A brief delay to employ a dog does not unreasonably prolong the stop . . . and we have repeatedly upheld dog sniffs that were conducted minutes after the traffic stop concluded."). See also *United States v. Alexander*, 448 F.3d 1014, 1017 (8th Cir. 2006) (four minute delay upheld as a *de minimis* intrusion); *United States v. Martin*, 411 F.3d 998, 1002 (8th Cir. 2005) (upholding two minute delay); *United States v. Morgan*, 270 F.3d 625, 632 (8th Cir. 2001) (delay of "well under ten minutes" upheld). On remand, the prosecutor will certainly argue that under *Davis v. United States*, 131 S. Ct. 2419 (2011), the evidence unlawfully acquired from Rodriguez's trunk is admissible because the police were relying upon binding judicial precedent that was subsequently overruled.

<sup>40</sup> See *United States v. Riley*, 684 F.3d 758, 761 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 800 (2012) ("Once in the patrol car, Trooper Rutledge began to ask Riley about his travel itinerary."); *United States v. Digiovanni*, 650 F.3d 498, 510 (4th Cir. 2011) ("[The officer] asked Digiovanni numerous questions concerning his travel history and travel plans, only a few of which possibly related to the justification for the stop."); *United States v. Everett*, 601 F.3d 484, 494 (6th Cir. 2010) (stating that asking "context-framing questions will rarely suggest a lack of diligence" on the part of a detaining officer); *United States v. Olivera-Mendez*, 484 F.3d 505, 509 (8th Cir. 2007) (finding that "[w]hen police stop a motorist for a traffic violation, an officer may detain the occupants of the vehicle while the officer 'completes a number of routine but somewhat time-consuming tasks related to the traffic violation.' . . . While the officer performs these tasks, he may ask the occupants routine questions, such as the destination and purpose of the trip.") (citation omitted); *United States v. Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001) (finding that "travel plans typically are related to the purpose of a traffic stop because the motorist is

there? Where are you going? How long do you plan on staying at your destination? Who will you visit? How long have you known that person? Where does she work? Has she ever been arrested for drug trafficking?

At some point, you realize that what began as an ordinary traffic stop has morphed into a criminal investigation and you are the target. Surely, you think, this questioning violates your rights. After all, you were stopped for speeding, or momentarily veering onto the shoulder, or a broken taillight. While verifying your driver documents is a valid task aimed at determining if you are properly licensed and that your vehicle is entitled to be on the road,<sup>41</sup> what is the justification for the questioning? What do these questions have to do with a broken taillight? The questioning has absolutely nothing to do with the traffic infraction which was the only basis for the stop.

It may surprise some, but the Supreme Court, the institution in charge of “policing the police”<sup>42</sup> and upholding our Fourth Amendment rights under our constitutional democracy, without ever directly addressing the issue, has approved this type of police questioning. Indeed, in its most recent ruling on the powers of police during routine traffic stops, *Rodriguez v. United States*, the Court explained that the Fourth Amendment tolerates certain unrelated investigations that do not lengthen a roadside detention.<sup>43</sup> *Rodriguez*’s endorsement of police questioning was unnecessary and regrettable. It was gratuitous because the issue before the Court—whether police can detain a motorist to use a drug-sniffing canine after the completion of a traffic stop—had nothing to do with unrelated questioning during a traffic stop. The Court’s comments were lamentable for two reasons. First, the practice of questioning motorists about matters unrelated to the traffic stop is inconsistent with the same legal framework the Court relied upon to invalidate the detention and dog sniff at issue in *Rodriguez*. Second, there was no reason for the Court to provide its imprimatur on a criminal investigative technique that police regularly use to arbitrarily interrogate motorists during routine traffic stops.

On a deeper level, *Rodriguez*’s dicta about police questioning during traffic stops is disappointing for its failure to appreciate the fundamental value of the Fourth Amendment. As Professor Amsterdam has taught us, “the fourth amendment is quintessentially a regulation of the police – that, in enforcing the fourth amendment, courts *must* police the police.”<sup>44</sup> More specifically, Professor Amsterdam’s article

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traveling at the time of the stop. For example, a motorist’s travel history and travel plans may help explain, or put into context, why the motorist was weaving (if tired) or speeding (if there was an urgency to the travel).”).

<sup>41</sup> *Delaware v. Prouse*, 440 U.S. 648, 658-59 (1979) (explaining that the States “have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and that licensing, registration, and vehicle inspection requirements are being observed”).

<sup>42</sup> Amsterdam, *supra* note \_\_\_, at 370, citing Fred Inbau, *The Social and Ethical Requirements of Criminal Prosecution*, 52 J. CRIM. L.C. & P.S. 209, 212 (1961).

<sup>43</sup> 575 U.S. \_\_\_, \_\_\_ (2015); *Rodriguez v. United States*, No. 13-9972, slip op. at 6, (U.S. Apr. 21, 2015) (“An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop.”).

<sup>44</sup> Amsterdam, *supra* note 1, at 371.

teaches that controlling the discretionary power of officers while they are effectuating searches and seizures is essential to protecting Fourth Amendment freedoms.<sup>45</sup> Police seize millions of Americans every year during traffic stops.<sup>46</sup> Traffic stops are rife with the potential for arbitrary and discriminatory police power.<sup>47</sup> “Once an officer stops a motorist for a traffic offense, the officer has the discretion to transform that traffic stop into an investigation of other serious crimes without the check of reasonable suspicion or probable cause.”<sup>48</sup> If the Justices want to protect the Fourth Amendment rights of millions of American motorists, they should recognize that police interrogation of motorists about subjects unrelated to the reason for the traffic stop provides police with unchecked discretion to pursue a criminal investigation and is beyond the scope of an ordinary traffic stop.

This Article proceeds in two parts. Part I explains the result and legal reasoning of *Rodriguez*. It also explains the legal standard, first announced in 1968, that courts have traditionally used to judge the constitutionality of police conduct during investigative detentions, which includes traffic stops. Part II discusses recent rulings of the Court that have been read to authorize police to pursue criminal investigative practices—such as dog sniffs and interrogation unrelated to the reason for the stop—during ordinary traffic stops, provided those practices do not prolong the traffic stop. Part II also explains why those rulings—*Illinois v. Caballes*,<sup>49</sup> *Muehler v. Mena*,<sup>50</sup> and *Arizona v. Johnson*<sup>51</sup>—have been misread and misapplied to allow arbitrary police interrogation during routine traffic stops.

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<sup>45</sup> *Id.* at 415 (“The pervasiveness and discontrol of police discretion is everywhere acknowledged: policemen make hundreds of thousands of decisions daily that ‘can affect in some way someone’s dignity, or self-respect, or sense of privacy, or constitutional rights’”) (footnotes omitted).

<sup>46</sup> According to a report issued by the Department of Justice, in 2011, “[a]bout 10% of the 212.3 million U.S. drivers age 16 or older were stopped while operating a motor vehicle during their most recent contact with police.”

LYNN LANGTON & MATTHEW DUROSE, U.S. DEP’T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, 3, (Sept. 2013), available at <http://www.bjs.gov/content/pub/pdf/pbtss11.pdf>.

<sup>47</sup> Cf. David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment* 1997 SUP. CT. REV. 271, 273 (“Since virtually everyone violates traffic laws at least occasionally, the upshot of [four rulings decided in the 1997 Term] is that police officers, if they are patient, can eventually pull over anyone they choose, order the driver and all passengers out of the car, and then ask for permission to search the vehicle without first making clear the detention is over.”); David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY, 544, 545 (1997) (explaining that traffic codes “regulate the details of driving in ways both big and small, obvious and arcane. In the most literal sense, no driver can avoid violating *some* traffic law during a short drive, even with the most careful attention. Fairly read, *Whren* [*v. United States*, 517 U.S. 806 (1996), which ruled that police motives are constitutionally irrelevant in determining the validity of a traffic stop] says that any traffic violation can support a stop, no matter what the real reason for it is; this makes any citizen fair game for a stop, almost any time, anywhere, virtually at the whim of police.”).

<sup>48</sup> Lewis R. Katz, “*Lonesome Road*”: *Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413 (2013).

<sup>49</sup> 543 U.S. 405 (2005).

<sup>50</sup> 544 U.S. 93 (2005).

<sup>51</sup> 555 U.S. 323 (2009).

## PART I

The facts in *Rodriguez v. United States* were straightforward. Rodriguez and a passenger were driving after midnight when their vehicle veered onto the shoulder of a Nebraska state highway “for one or two seconds and then jerked back onto the road.”<sup>52</sup> A K-9 police officer, Morgan Struble, stopped the vehicle. Struble obtained Rodriguez’s driving documents and asked Rodriguez to accompany him to the police cruiser. Rodriguez asked if he was required to do so, Struble said no, so Rodriguez waited in his vehicle. After checking Rodriguez’s documents, Struble returned to Rodriguez’s vehicle, asked the passenger for his driver’s license, and “began to question him about where the two men were coming from and where they were going.”<sup>53</sup> Struble then checked the passenger’s record and called for a second officer. Struble began writing a warning ticket for Rodriguez.

After Struble issued a warning and returned to Rodriguez and his passenger their documents, the tasks associated with the traffic stop were completed. Rodriguez should have been free to depart the scene. Struble, however, did not consider Rodriguez free to leave, nor allow him to leave. Instead, he asked permission to walk his drug-sniffing dog around Rodriguez’s vehicle. When Rodriguez denied permission, Struble ordered him “to turn off the ignition, exit the vehicle, and stand in front of the patrol car to wait for the second officer.”<sup>54</sup> After the second officer arrived, Struble retrieved his dog and twice walked him around Rodriguez’s vehicle. The dog alerted. A search of the vehicle disclosed methamphetamine. “All told, seven or eight minutes had elapsed from the time Struble issued the written warning until the dog indicated the presence of drugs.”<sup>55</sup>

After Rodriguez was charged with possession with intent to distribute fifty grams or more of methamphetamine, he moved to suppress the drugs found in his vehicle. The lower federal courts denied the motion. The Court of Appeals for the Eighth Circuit concluded that the seven or eight minute delay between when the traffic stop should have ended and the dog’s alert to the presence of drugs was a “*de minimis* intrusion on Rodriguez’s personal liberty,” and thus reasonable under the Fourth Amendment.<sup>56</sup>

Like several of the Court’s recent traffic stop cases, *Rodriguez v. United States* presented a narrow issue: “whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop.”<sup>57</sup> The majority opinion written by Justice Ginsburg held that “a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.”<sup>58</sup> Reaffirming that a traffic stop is ““more analogous to a so-

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<sup>52</sup> *Rodriguez v. United States*, No. 13-9972, slip op. at 1, (U.S. Apr. 21, 2015).

<sup>53</sup> *Id.* at 2.

<sup>54</sup> *Id.* at 3.

<sup>55</sup> *Id.*

<sup>56</sup> *United States v. Rodriguez*, 741 F.3d 905, 908 (8th Cir. 2014)

<sup>57</sup> *Rodriguez*, slip op. at 1.

<sup>58</sup> *Id.*

called ‘*Terry* stop’ . . . than to a formal arrest,”<sup>59</sup> Justice Ginsburg explained that “the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s ‘mission’ – to address the traffic violation that warranted the stop, and attend to related safety concerns.”<sup>60</sup> In what seems intended as a quasi-brightline or *per se* rule to assess future cases, Justice Ginsburg wrote: “Authority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.”<sup>61</sup>

When this standard is applied to the facts in *Rodriguez*, it is plain that Officer Struble’s continued seizure of Rodriguez was unreasonable. Once Officer Struble issued the warning ticket and returned the motorists’ documents, “the tasks tied to the traffic infraction [were] completed.”<sup>62</sup> The authority for the traffic stop had elapsed and Rodriguez should have been free to leave. Instead, Struble prolonged the stop, first by asking whether Rodriguez would consent to walking the dog around his vehicle, and then when consent was refused, by ordering Rodriguez out of his vehicle to await the arrival of the second officer. Unless there was some individualized suspicion for this continued detention, detaining Rodriguez to allow a dog sniff constituted an unreasonable seizure.

Justice Ginsburg rejected the argument that continuing the stop to allow a dog sniff for narcotics was reasonable because it was a *de minimis* amount of time—seven or eight minutes—and promoted the government’s interest in detecting illegal narcotics. Acknowledging that *Pennsylvania v. Mimms*<sup>63</sup> had embraced a similar *de minimis* rationale when it upheld an officer’s authority to order a driver out of his vehicle during an ordinary traffic stop without reasonable suspicion of danger, Justice Ginsburg explained that the exit order approved in *Mimms* promoted officer safety and was tied to completing the mission of the traffic stop.<sup>64</sup> By contrast, detaining a motorist—even for a minimal amount of time—to allow a dog sniff is done to detect criminality. Moreover, a dog sniff is not “an ordinary incident of a traffic stop;” it lacks a “close connection to roadway safety”<sup>65</sup> in the same way that an exit order promotes officer safety. Thus, a dog sniff for narcotics “is not fairly characterized as part of the officer’s traffic mission.”<sup>66</sup>

Nor was the majority persuaded by the government’s contention that an officer may prolong a stop to perform a dog sniff provided “the officer is reasonably

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<sup>59</sup> *Id.* at 5 (citations omitted).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* Professor Orin Kerr describes this statement as “[t]he most important sentence in the opinion.” Orin Kerr, *Police can’t delay traffic stops to investigate crimes absent suspicion, Supreme Court rules*, THE VOLOKH CONSPIRACY (April 21, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/21/police-cant-delay-traffic-stops-to-investigate-crimes-absent-suspicion-supreme-court-rules/>.

<sup>62</sup> *Rodriguez*, slip op. at 5.

<sup>63</sup> 434 U.S. 106 (1977) (*per curiam*).

<sup>64</sup> *Rodriguez*, slip op. at 7 (“the government’s ‘legitimate and weighty’ interest in officer safety outweighs the ‘*de minimis*’ additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle”).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances.”<sup>67</sup> In other words, the government argued that officers who are especially efficient in completing the tasks related to the traffic stop can earn “bonus time” to conduct unrelated criminal investigations. Justice Ginsburg’s response to this argument was direct and simple: the reasonableness of a seizure “depends on what the police in fact do.”<sup>68</sup> Here, Officer Struble completed the tasks of the traffic stop when the warning was issued. Because the dog sniff prolonged the stop beyond that point, it was unreasonable. To leave no doubt that the rule announced by the majority did not turn on *when* an officer chose to sequence a dog sniff, Justice Ginsburg added: “The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket, as [the dissent] supposes, but whether conducting the sniff ‘prolongs’ – *i.e.*, adds time to – ‘the stop.’”<sup>69</sup>

*Rodriguez*’s holding that police may not extend—even temporarily—a completed traffic stop to perform a dog sniff for narcotics is important because it rejects the reasoning of many lower courts which had allowed police, without individualized suspicion, to extend traffic stops for criminal investigative purposes.

*Rodriguez*, however, does not create “new law” or announce an innovation in the Court’s Fourth Amendment doctrine. Rather, *Rodriguez*’s holding is based on legal norms nearly forty years old. Indeed, although it may not have been obvious to the casual reader, the reasoning and result in *Rodriguez* closely tracks search and seizure doctrine for investigative detentions that dates back to the late 1960s. In fact, the logic of Justice Ginsburg’s opinion in *Rodriguez* parallels the reasoning of her dissent in *Illinois v. Caballes*, where a majority of the Court ruled that the Fourth Amendment does not require reasonable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.<sup>70</sup> Dissenting in *Caballes*, Justice Ginsburg applied the familiar standard of review announced in *Terry v. Ohio*<sup>71</sup> to find that a dog sniff had impermissibly broadened the scope of an ordinary traffic stop into an unlawful drug investigation.<sup>72</sup> But before I explain why Justice Ginsburg’s dissenting opinion in *Caballes* was more faithful to the Court’s precedents than the *Caballes* majority opinion, I will describe why *Rodriguez*’s holding is consistent with forty years of Fourth Amendment rulings involving investigative detentions.

While the Court considers a routine traffic stop a seizure subject to Fourth Amendment restraints, it has not treated a traffic stop as the equivalent of an arrest even when police have probable cause to believe that a traffic offense has occurred.<sup>73</sup>

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<sup>67</sup> *Id.* at 8 (citing Brief for the United States at 36-39, *Rodriguez v. United States*, 135 S. Ct. 1609 (No. 13-9972)).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 543 U.S. 405 (2005).

<sup>71</sup> 392 U.S. 1 (1968).

<sup>72</sup> *Caballes*, 543 U.S. at 417 (Ginsburg, J., dissenting). Tellingly, the *Caballes* majority did not challenge or question Justice Ginsburg’s analysis on this point.

<sup>73</sup> In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), however, the Court ruled that the Fourth Amendment does not bar the custodial arrest of a person who commits a minor traffic offense.

Because a traffic stop is assumed to be a brief seizure by the police, the Court views a traffic stop as “more analogous to a so-called a ‘*Terry* stop’ than a formal arrest.”<sup>74</sup> *Terry v. Ohio*, which addressed whether police could frisk a person for weapons when an officer reasonably suspects that the person is armed and dangerous, specified a two-prong standard for assessing the constitutionality of police conduct not amounting to an arrest or full-scale search of a person. *Terry* explained: “In determining whether the seizure and search were unreasonable our inquiry is a dual one – [first] whether the officer’s action was justified at its inception, and [second] whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>75</sup> When this standard is applied to traffic stops, the first prong considers whether the traffic stop was validly commenced—did the police have probable cause or reasonable suspicion to stop the motorist? The second prong—the scope prong—encompasses two factors. As the Court’s subsequent cases have clarified, the second prong considers both the *length* of the seizure and the *manner* or *methods* used by the police to effectuate the stop.<sup>76</sup>

For example, in 1975, the Court looked to *Terry*’s framework to decide the constitutionality of investigative detentions of vehicles near the border for immigration offenses. In *United States v. Brignoni-Ponce*, the Court stated that when vehicles are stopped for detentions, under *Terry*, “the stop and inquiry must be ‘reasonably related in scope to the justification for their initiation.’”<sup>77</sup> Accordingly, a border agent may question the driver and his passenger “about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.”<sup>78</sup>

*Brignoni-Ponce* was not the only Burger Court decision to utilize *Terry*’s two-prong test to judge the validity of investigative detentions. In 1983, Justice White’s plurality opinion in *Florida v. Royer* asserted: “an investigative detention

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<sup>74</sup> *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), *reaffirmed in* *Knowles v. Iowa*, 525 U.S. 113, 117 (1998). While the seizures that occurred in the Court’s initial investigative seizure cases – *Terry* and *Adams v. Williams*, 407 U.S. 143 (1972) – were brief as a temporal matter, the typical investigative detention is a lot longer than the seizures upheld in those cases. Indeed, the Court has acknowledged that the so-called *Terry* stop “is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*.” *Michigan v. Summers*, 452 U.S. 692, 700 (1981) (footnote omitted). Further, although the overwhelming majority of traffic stops are based on probable cause, as Professor LaFave tells us, most lower courts have assumed that traffic stops can also be initiated on reasonable suspicion, a lower degree of evidence than probable cause. Wayne R. LaFave, *The “Routine Traffic Stop” From Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1848 (2004) (hereinafter *The “Routine Traffic Stop”*). The Court has not decided whether this assumption is correct. *See id.* at 1850-52.

<sup>75</sup> *Terry*, 392 U.S. at 19-20.

<sup>76</sup> *Cf.* LaFave, *The “Routine Traffic Stop”*, *supra* note \_\_\_\_, at 1863 (explaining that when courts have applied the *Terry* test to cases involving reasonable suspicion of criminal wrongdoing, rather than in cases involving ordinary traffic stops, “courts have enforced both the temporal and intensity limits”); *United States v. Digiovanni*, 650 F.3d 498, 511 (4th Cir. 2011) (explaining that the government’s position “fails to recognize that investigative stops must be limited both in scope and duration.”).

<sup>77</sup> 422 U.S. 873, 881 (1975) (citing *Terry*, 392 U.S. at 29).

<sup>78</sup> *Id.* at 881-82. Ultimately, *Brignoni-Ponce* ruled that stops must be supported by reasonable suspicion of criminal activity. Stopping a vehicle solely on the Mexican ancestry of a vehicle’s occupant was impermissible, but the “Mexican appearance” of an occupant is “a relevant factor” in the reasonable suspicion calculus. *Id.* at 887.

must be temporary and last no longer than necessary to effectuate the purpose of the stop.”<sup>79</sup> Furthermore, a majority of the Justices in *Royer* ruled that the prosecution has the burden of establishing that an investigative seizure was “sufficiently limited in scope and duration.”<sup>80</sup>

Two years later, in 1985, *United States v. Sharpe* clarified that judges should analyze investigative detentions to determine “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.”<sup>81</sup> Likewise, in *United States v. Hensley* the Court instructed that the constitutionality of an investigative detention is assessed by determining whether the facts “justified the length and intrusiveness of the stop and detention that actually occurred.”<sup>82</sup>

Even the Rehnquist Court applied the *Terry* framework to evaluate the reasonableness of police procedures that begin as investigative detentions. In *Hiibel v. Sixth Judicial District Court*, the Court upheld a statute that authorized police to arrest a person who refuses to identify himself during a valid *Terry* stop.<sup>83</sup> The Court upheld the law, but only after determining that “the request for identification was ‘reasonably related in scope to the circumstances which justified’ the stop.”<sup>84</sup> Indeed, at the start of its analysis of *Terry*’s requirements, *Hiibel* quoted the two-prong *Terry* test,<sup>85</sup> noted that an officer’s conduct during an investigative detention must satisfy *Terry*’s scope prong,<sup>86</sup> and ultimately concluded that the challenged conduct in *Hiibel* satisfied *Terry*’s scope prong because the officer’s request for identification was related in scope to the reason for the stop, and “not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence.”<sup>87</sup> These rulings establish, as Justice Ginsburg noted in her *Caballes* dissent, that the second prong of the *Terry* test—the scope prong—“is not confined to the duration of the seizure; it also encompasses the manner in which the seizure is conducted.”<sup>88</sup>

Judged against this long line of cases, the result in *Rodriguez* was undoubtedly correct. While the facts in *Rodriguez* satisfy the first prong of the *Terry* test because Officer Struble had probable cause to stop Rodriguez’s vehicle for a traffic offense, the officer’s conduct violated the second prong of *Terry*. Once Struble issued the warning, the purpose for the traffic stop ended. Further detaining Rodriguez to pursue a dog sniff was in no way “reasonably related in scope to the

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<sup>79</sup> 460 U.S. 491, 500 (1983) (plurality opinion).

<sup>80</sup> *Id.*

<sup>81</sup> 470 U.S. 675, 686 (1985) (citations omitted).

<sup>82</sup> 469 U.S. 221, 235 (1985).

<sup>83</sup> 542 U.S. 177 (2004).

<sup>84</sup> *Id.* at 188-89 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

<sup>85</sup> *Id.* at 185 (citations omitted).

<sup>86</sup> *Id.* at 188 (after acknowledging the petitioner’s concern that the stop-and-identify law circumvents the probable cause requirement by allowing police to arrest a person for being suspicious, the Court explained that the petitioner’s concerns “are met by the requirement that a *Terry* stop must be justified at its inception and ‘reasonably related in scope to the circumstances which justified’ the initial stop.”) (citation omitted).

<sup>87</sup> *Id.* at 189 (citation omitted).

<sup>88</sup> *Illinois v. Caballes*, 543 U.S. 405, 419 (Ginsburg, J., dissenting) (citations omitted).

circumstances which justified the interference in the first place.”<sup>89</sup> No Court precedent authorizes police to extend—even for a *de minimis* period of time—a *Terry* stop for criminal investigative purposes after the legitimate purposes of the stop have been satisfied. Put differently, *Rodriguez* did not announce new or expanded Fourth Amendment protections.<sup>90</sup> Rather, it simply applied a standard first announced in 1968, and subsequently applied by the Burger and Rehnquist Courts, to find that detaining a motorist to conduct a drug investigation without reasonable suspicion of criminality was an unreasonable seizure.

## PART II

The legal analysis described above in Part I was enough to resolve the only issue presented in *Rodriguez*. Although unnecessary to decide *Rodriguez*, Justice Ginsburg read *Illinois v. Caballes*<sup>91</sup> and *Arizona v. Johnson*<sup>92</sup> to allow police to conduct “unrelated investigations” (e.g., dog sniffs and police interrogation) during routine traffic stops, provided such investigations do not prolong a roadside detention.<sup>93</sup> During routine traffic stops, dog sniffs and police questioning are aimed at detecting criminal conduct<sup>94</sup> and as Justice Ginsburg conceded, have no nexus to the traffic stop. The traffic stop, in other words, provides the pretext for a criminal investigation. Justice Alito’s dissent recognized this; indeed, Justice Alito welcomed the majority’s approval of police interrogation during traffic stops. After asserting that the Court “reaffirmed” that police may undertake certain unrelated investigative steps during traffic stops, Justice Alito remarked that “it remains true that police may ask questions aimed at uncovering other criminal conduct and may order occupants

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<sup>89</sup> *Terry*, 392 U.S. at 20.

<sup>90</sup> The point that *Rodriguez* does not expand Fourth Amendment protections is not meant to downplay the importance of the ruling or criticize Justice Ginsburg’s opinion. As noted earlier, *Rodriguez*’s holding is highly significant because it shuts down the approach, adopted by a majority of federal and state courts, of flouting *Terry*’s temporal restriction. See 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 9.3(b) at 504 (2012) (noting that “most of the lower courts that have squarely confronted [challenges based on *Terry*’s temporal limitation] have concluded, in effect, that minor violations of the *Terry* temporal limitation may simply be ignored.”) (footnote omitted). Indeed, “[t]he fact of the matter is that many federal and state courts had massaged the temporal limitation so that police were given *additional* time to pursue investigations of matters other than the traffic violation. That *Rodriguez* hopefully closed down that operation is important.” Wayne R. LaFave, e-mail to author, July 24, 2015.

<sup>91</sup> 543 U.S. 405 (2005).

<sup>92</sup> 555 U.S. 323 (2009).

<sup>93</sup> *Rodriguez v. United States*, No. 13-9972, slip op. at 5, (U.S. Apr. 21, 2015) (explaining that *Caballes* and *Johnson* “concluded that the Fourth Amendment tolerated certain unrelated investigations that did not lengthen the roadside detention.”).

<sup>94</sup> See, e.g., David A. Harris, *Car Wars: The Fourth Amendment’s Death On The Highway*, 66 GEO. WASH. L. REV. 556, 572-73 (1998) (hereinafter *Car Wars*) (“Police officers can use the dogs either to handle searches when there is a refusal, or to short circuit the whole process by using the dog as soon as the car is stopped, without even seeking consent. Once the dog indicates the presence of narcotics by characteristic barking or scratching, that information itself constitutes probable cause for a full-scale search. This activity constitutes a picture not of traffic enforcement but of drug interdiction. That is obviously what all of this is about; police use traffic infractions as excuses to initiate these encounters, and the Court’s cases concerning automobiles and their drivers provide the legal underpinnings for wide-ranging searches.”)

out of their car during a valid stop,”<sup>95</sup> without acknowledging the proviso that questioning not add time to the stop.

As I explain below, Justice Ginsburg’s approving comments regarding *Caballes* and *Johnson* take dicta from those cases to endorse arbitrary police conduct. *Caballes* and *Johnson* were self-described narrow holdings that did not apply or address *Terry*’s scope prong. More importantly, police interrogation about matters unrelated to the traffic stop violates *Terry*’s scope prong. Arguably, police questioning (and dog sniffs) unrelated to the purpose of a traffic stop can be performed within the limits of *Rodriguez*’s holding; in the future, officers will no doubt attempt to sequence their “itinerary” questions (and dog sniffs) before the conclusion of the traffic stop.<sup>96</sup> But as Justice Ginsburg’s dissent in *Caballes* demonstrated, police deployment of a drug-sniffing canine cannot be reconciled with the *Terry* test.<sup>97</sup> If using a drug-sniffing dog is inconsistent with *Terry*’s scope prong, police interrogation would seem to be *a fortiori* inconsistent with the scope prong; such conduct is inevitably longer and more personally intrusive than the typical canine sniff. Also, by approving police interrogation unrelated to the traffic stop, so long as such questioning does not prolong the stop, Justice Ginsburg has endorsed a rule that lacks standards and will be difficult for judges to enforce.

Paradoxically, in the same opinion that strikes down an unconstitutional police investigative technique, the *Rodriguez* Court provides a “green light” for another unconstitutional investigative technique. If the Court intended to limit the discretionary power of police during traffic stops, it failed. “Drug sniffing dogs are brought around [by police] on occasion, but officers ask questions outside the scope

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<sup>95</sup> *Rodriguez*, slip op. at 4 (Alito, J., dissenting).

<sup>96</sup> Justice Alito appears to encourage as much regarding dog sniffs. See *Rodriguez*, slip op. at 3-4 (Alito, J., dissenting) (“The rule that the Court adopts will do little good going forward. It is unlikely to have any appreciable effect on the length of future traffic stops. Most officers will learn the prescribed sequence of events even if they cannot fathom the reason for that requirement.”). Justice Alito’s subtle advice to officers on how to avoid the impact of *Rodriguez* during future traffic stops is unpersuasive. In his analysis of *Rodriguez*, Professor LaFave recognizes that there may be future cases not directly controlled by *Rodriguez*’s holding. For example:

(i) the officer, needing only three more minutes to complete the ‘mission’ by writing up the warning ticket, instead delays that step while awaiting backup and putting his dog through his paces, taking eight minutes, resulting in the discovery of drugs and arrest of the driver at that point; and (ii) the officer instead uses the eight minutes at the very outset of the traffic stop, so that the discovery of drugs and arrest (terminating the traffic stop) occur at that early point.

4 LAFAVE, *supra* note \_\_\_, at 47 (Supp. 2015-2016). However, if *Rodriguez*’s explanation that the “critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket, . . . but whether conducting the sniff ‘prolongs’ – i.e., adds time to – ‘the stop’” *Rodriguez*, slip op. at 8, then *Rodriguez*’s holding should cover *both* hypotheticals. A contrary result would give officers engaged in pretextual traffic stops “the benefit of a no-lose situation,” and “*Rodriguez* would stand alone as the only Supreme Court decision in which the Fourth Amendment status of a police investigative technique can be determined *only* with the benefit of hindsight.” *Id.* at 47-48.

<sup>97</sup> *Illinois v. Caballes*, 543 U.S. 405, 421 (2005) (Ginsburg, J., dissenting) (“Injecting [a drug-detection dog] into a routine traffic stop changes the character of the encounter between the police and the motorist. The stop becomes broader, more adversarial, and (in at least some cases) longer.”). Tellingly, Justice Ginsburg observed: “The question whether a police officer inquiring about drugs without reasonable suspicion unconstitutionally broadens a traffic investigations is not before the Court.” *Id.* at 421, n.3.

of the traffic [violation] all the time.”<sup>98</sup> The remainder of this Part explains why *Caballes* and *Johnson* do not support police questioning during routine traffic stops and why a “no prolongation” standard will not check the discretionary power of police during traffic stops.

#### A. *Illinois v. Caballes*

Professor Wayne LaFave has described *Caballes* as a “puzzling decision.”<sup>99</sup> An Illinois State Trooper stopped Roy Caballes’ vehicle for driving seventy-one miles-per-hour on an interstate road with a sixty-five miles-per-hour limit. Although his assistance was not requested, a second trooper with a drug-detection dog came to the scene. The second trooper walked the dog around Caballes’ vehicle while Caballes was sitting in the patrol car of the first trooper awaiting the issuance of a warning ticket.<sup>100</sup> The dog alerted and a search of the trunk revealed marijuana.<sup>101</sup> The Illinois Supreme Court, relying on the two-prong *Terry* test, found no basis for suspecting that Caballes was transporting drugs and thus ruled that the dog sniff “unjustifiably enlarge[d] the scope of a routine traffic stop into a drug investigation.”<sup>102</sup>

Justice Stevens’ majority opinion described the issue in *Caballes* as “narrow: ‘Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.’”<sup>103</sup> The *Caballes* Court ruled that individualized suspicion of wrongdoing is not required to justify using a drug-sniffing canine. The sum and substance of the Court’s reasoning is captured in the following sentence: “In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed [Caballes’] constitutionally protected interest in privacy.”<sup>104</sup>

Although many judges have read *Caballes* as granting nearly *carte blanche* authority to utilize a dog sniff during a traffic stop,<sup>105</sup> the passage from *Caballes*

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<sup>98</sup> Kerr, *supra* note \_\_\_\_, at 5.

<sup>99</sup> 4 LAFAVE, *supra* note \_\_\_\_, § 9.3(b) at 485 .

<sup>100</sup> See *People v. Caballes*, 802 N.E.2d 202, 203 (Ill. 2003) (stating that while in the patrol car, the trooper asked Caballes “where he was going and why he was so ‘dressed up.’” And after confirming that Caballes’s license was valid, the officer requested a criminal history check, “then asked [Caballes] for permission to search his vehicle” and “asked if Caballes had ever been arrested.”). From the record it appears that only after receiving the results of Caballes’s criminal history check did the officer begin to write a warning ticket. *Id.*

<sup>101</sup> *Illinois v. Caballes*, 543 U.S. 405, 406 (2005).

<sup>102</sup> *Id.* at 407, quoting *People v. Caballes*, 802 N.E.2d 202, 205 (Ill. 2003).

<sup>103</sup> *Id.* at 407, quoting Pet. for Cert. i.

<sup>104</sup> *Id.* at 408.

<sup>105</sup> See, e.g., *Rodriguez v. United States*, No. 13-9972, slip op. at 6, (U.S. Apr. 21, 2015). (Thomas, J., dissenting) (explaining that “*Caballes* expressly anticipated that a traffic stop could be *reasonably* prolonged for officers to engage in a dog sniff.”). Justice Thomas went on to explain that *Caballes* drew the “dividing line” between legal and illegal stops based on “whether the overall duration of the stop exceeded ‘the time reasonably required to complete th[e] mission,’” and not on whether the length of the stop exceeded the time needed to complete traffic-related questioning. *Id.*, quoting *Caballes*, 543 U.S. at 407. The lower courts have also read *Caballes* broadly. See e.g. *United States v. Campbell*, 511 F. Appx. 424, 427 (6th Cir. 2013) (citing *Caballes* in writing: “The Supreme Court has stated

quoted above is a thin reed to support that conclusion, and most importantly, does not address the holding and reasoning of the Illinois Supreme Court. As Professor LaFave explains, the decision below “was grounded in the straightforward proposition that the temporal and scope limitations adopted in *Terry* and its progeny are equally applicable to traffic stops.”<sup>106</sup> Moreover, the *Caballes* Court’s willingness to “accept the state court’s conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop,”<sup>107</sup> utterly fails to address whether employing the dog was “reasonably related in scope to the circumstances which justified [the traffic stop] in the first place.”<sup>108</sup> Concededly, that a second officer immediately came to the scene and deployed the dog before the first officer finished writing the warning ticket explains why there may have been no prolongation of the detention. But that determination does not end the constitutional inquiry. As Justice Ginsburg correctly observed in her *Caballes* dissent, “[i]t is hardly dispositive that the dog sniff . . . may not have lengthened the duration of the stop.”<sup>109</sup> As the discussion above in Part I revealed, *Terry* and its progeny mandate consideration of *both* the length and scope of an investigative detention.

The scope-prong of the *Terry* test was violated in *Caballes* because using the dog, without individualized suspicion of criminality or consent of the driver, broadened the incident “from a routine traffic stop to a drug investigation.”<sup>110</sup> Why? Deploying a dog during an ordinary traffic stop “changes the character of the encounter between the police and the motorist. The stop becomes broader, more adversarial, and (in at least some cases) longer.”<sup>111</sup> The motorist understands that he

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categorically that the use of dogs during routine traffic stops does not infringe on one’s constitutionally protected privacy interests.”); *United States v. Walker*, 719 F. Supp. 2d 586, 599 (W.D. Penn. 2010) (citing to *Caballes* in arguing, “[t]here is nothing remarkable about a canine sniff of the exterior of a vehicle during a traffic stop even absent reasonable suspicion that the vehicle contains contraband.”).

<sup>106</sup> 4 LAFAVE, *supra* note \_\_\_, § 9.3(b) at 487.

<sup>107</sup> *Caballes*, 543 U.S. at 408. As one commentator has noted, the basis and meaning of this statement is unclear “given that none of the state courts made such a holding explicitly, and the Illinois Supreme Court never so much as intimated that conclusion.” Harold Krent, *The Continuity Principle, Administrative Constraint, and the Fourth Amendment*, 81 NOTRE DAME L. REV. 53, 81 (2005). Moreover, Justice Stevens’ opinion never explains why the trooper’s interrogation of Caballes regarding his attire, running a criminal history check, asking for permission to perform a consent search and inquiring whether Caballes had ever been arrested, *see* note \_\_\_ *supra* at \_\_\_, “was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop.” *Caballes*, 543 U.S. at 408.

<sup>108</sup> *Terry*, 392 U.S. 1, 20 (1968).

<sup>109</sup> *Caballes*, 543 U.S. at 420 (Ginsburg, J., dissenting).

<sup>110</sup> *Id.* at 421 (Ginsburg, J., dissenting).

<sup>111</sup> *Id. See, e.g., United States v. Santillian*, No. 13 Cr. 138(RWS), 2013 WL 4017167, at \*4-\*8 (S.D.N.Y. Aug. 7, 2013) (forty minutes spent waiting for a dog to arrive on scene as part of a one hour and seventeen minute traffic stop; sniff upheld because the motorist granted officers permission to search the vehicle, and the forty minutes spent waiting is simply deemed a consequence of granting that permission); *United States v. Mason*, 628 F.3d 123, 126-32 (4th Cir. 2010), *cert. denied*, 132 S. Ct. 329 (2011) (detaining officer issued a warning ticket for excessively tinted windows, then after being refused consent to search the vehicle “informed Mason that he believed that there were drugs in the car and that he was going to have a dog sniff the car.” Another officer on scene performed a dog sniff about five minutes later. The court upheld the sniff as a *de minimis* delay supported by reasonable suspicion); *United States v. Blair*, 524 F.3d 740, 752 (6th Cir. 2008) (ruling a dog sniff violated the Fourth Amendment because it “extended the scope and duration of the stop beyond that necessary to issue a

has been targeted by the police; it is “an accusatory act” that is likely to be “upsetting to the innocent motorist because it will appear that he has been singled out as a drug suspect for reasons about which he can only speculate.”<sup>112</sup> The fact that the dog sniff did not amount to a “search” or additional “seizure” under the Fourth Amendment is legally irrelevant.<sup>113</sup> It was enough that the dog sniff did not promote the purpose of the traffic stop; “that alone establishes a scope violation.”<sup>114</sup> Put simply, the dog sniff had no nexus to Caballes’s speeding violation; it was, to paraphrase *Rodriguez*, solely aimed at discovering criminality.<sup>115</sup>

It is an understatement to say that the reasoning and result in *Caballes* was disappointing. Professor LaFave, the greatest scholar on the Fourth Amendment in American history and someone not prone to hyperbolic language,<sup>116</sup> described the *Caballes* opinion as abrupt and without legal analysis.<sup>117</sup> One could interpret *Caballes* for the rule that only activity that amounts to a search or seizure under the Fourth Amendment triggers *Terry*’s scope prong. But Justice Stevens never makes that assertion. Further, it is baffling that *Caballes*, in reversing the Illinois Supreme Court ruling “never even cited *Terry* or any of [*Terry*’s progeny] discussing [the

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citation for a tag-light violation.”); *United States v. Pruitt*, 174 F.3d 1215, 1217-21 (11th Cir. 1999) (upon being denied consent to search, the detaining officer “picked up his police radio to declare that, ‘I have a refusal’—a code phrase indicating to the other officers that they should bring a drug-sniffing dog to the scene.” The dog took “more than fifteen minutes” to arrive and the court invalidated the sniff as an unreasonable prolongation beyond the scope of a speeding violation); *United States v. Wood*, 106 F.3d 942, 944 (10th Cir. 1997) (“after having failed to obtain voluntary consent to search, [the officer] told Mr. Wood that he was detaining the car and its contents in order to subject it to a canine sniff.”).

<sup>112</sup> 4 LAFAVE, *supra* note \_\_\_, § 9.3(f) at 546.

<sup>113</sup> The fact that neither a dog sniff nor police questioning constitute a search or seizure does not change the application of *Terry*’s scope-prong. While one might argue that because neither a dog sniff nor police questioning triggers Fourth Amendment safeguards, a motorist has no constitutionally protected interest against this type of police conduct. That position, however, ignores the constitutional rule that even a lawful intrusion can be unreasonably exacerbated by police conduct that may not be either a search or seizure and does not prolong a legitimate police seizure, but is nonetheless unrelated or unnecessary to the accomplishment of the lawful intrusion.

For example, in *Wilson v. Layne*, 526 U.S. 603 (1999), police, while executing an arrest warrant in a private home, invited members of the press to accompany them. The Court ruled that this action violated the Fourth Amendment because “the presence of the reporters inside the home was not related to the objectives of the authorized intrusion.” *Id.* at 611. The result in *Wilson* did not turn on a finding that the presence of reporters constituted a separate search or seizure apart from the initial intrusion. The logic of *Wilson* shows that the absence of a separate search or seizure does not mean that arbitrary interrogation of a detained motorist is without constitutional significance.

<sup>114</sup> 4 LAFAVE, *supra* note \_\_\_, § 9.3(b) at 489.

<sup>115</sup> *Rodriguez v. United States*, No. 13-9972, slip op. at 6, (U.S. Apr. 21, 2015) (“A dog sniff . . . is a measure aimed at ‘detect[ing] evidence of ordinary criminal wrongdoing.’”) (citations omitted). *See also* 4 LAFAVE, *supra* note \_\_\_, § 9.3(f) *supra* note \_\_\_ at 545 (“the question is not whether any of the drug-seeking tactics are themselves Fourth Amendment searches, for the point is that they taint the stop purportedly made only for a traffic violation because they have absolutely *no* relationship to traffic law enforcement.”).

<sup>116</sup> *See* Jerold H. Israel & Yale Kamisar, *Wayne R. LaFave: Search & Seizure Commentator at Work and Play*, 1993 U. ILL. L. REV. 187, 189 (stating that “it would be fair to say nobody in American history has done more [or better]” writing and analysis of search and seizure doctrine than Professor LaFave).

<sup>117</sup> 4 LAFAVE, *supra* note \_\_\_, § 9.3(b) at 488 (“The abruptness of the Court’s decision and the virtually total lack of analysis might appear even to raise some doubt as to what the basis of the decision actually is.”).

temporal and scope] limitations, and, for that matter, *never cited any prior Supreme Court decision at all to justify its holding!*<sup>118</sup>

In light of Justice Stevens' lack of legal analysis, a judge might read *Caballes* as requiring judicial attention only to the length of a traffic stop. Careful consideration of *Caballes*, however, demonstrates why that interpretation should be rejected. Indeed, there are several reasons why *Caballes* should not be viewed as announcing a constitutional rule that considers only the duration of a traffic stop, or as eliminating judicial examination of police conduct unrelated to the purpose of the stop. Such an interpretation conflicts with *Terry*, which emphasized that “[t]he manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all.”<sup>119</sup> Put simply, it is wrong to read *Caballes* as standing for the view that the scope prong of *Terry* means duration and nothing more. That view not only requires ignoring four decades worth of cases relying on the two-prong *Terry* test, but also requires ignoring the text of Justice Stevens' opinion. Justice Stevens plainly states that a valid traffic stop “can violate the Fourth Amendment if its *manner of execution* unreasonably infringes interests protected by the Constitution.”<sup>120</sup> This language instructs judges to examine the scope and intrusiveness of the police conduct. In the very next sentence, Justice Stevens then focuses on temporal concerns. He asserts that a stop “can become unlawful if it is *prolonged* beyond the time reasonably required to complete that mission.”<sup>121</sup> Thus, when one considers: 1) the fact that *Caballes* never cites *Terry*, let alone hints at overruling the decades-old two-prong *Terry* test; 2) other language in *Caballes* consistent with the *Terry* test's scope prong; 3) the lack of an explanation on why the reasoning of the Illinois Supreme Court, which applied the scope prong consistently with the Court's prior precedents, is wrong; and 4) the fact that Justice Stevens characterized the issue before the Court as “narrow,” it makes no sense to interpret *Caballes* as restricting the scope inquiry to duration and nothing else.<sup>122</sup>

If the above analysis is correct, how, then, should one interpret *Caballes*? The holding in *Caballes* should be confined to the narrow proposition that a dog sniff is not a “search” within the meaning of the Fourth Amendment. Justice Stevens devoted much of his opinion to explaining that precedents established that “[p]olice conduct that does not ‘compromise any legitimate interest in privacy’ is not a search subject to the Fourth Amendment.”<sup>123</sup> In his brief, counsel for *Caballes* sought to

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<sup>118</sup> *Id.* at 487.

<sup>119</sup> *Terry v. Ohio*, 392 U.S. 1, 28 (1968).

<sup>120</sup> *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (emphasis added).

<sup>121</sup> *Id.* (emphasis added).

<sup>122</sup> Finally, unless his views had changed by the time he authored *Caballes*, Justice Stevens' dissent in *Ohio v. Robinette*, 519 U.S. 33 (1996), shows that he believes that *Terry*'s scope-prong *does* apply to *police questioning* during ordinary traffic stops. In *Robinette*, Justice Stevens cited *Royer* and *Brignoni-Ponce* for the constitutional principles that investigative seizures must be temporary and last no longer than necessary to satisfy the purpose of the stop, and that an officer's inquiries during an investigative stop must be reasonably related in scope to the justification for the stop. *Robinette*, 519 U.S. at 50, n.8 (Stevens, J., dissenting). Eight years later, in another dissent, Justice Stevens cited *Terry* for the rule that “an officer's inquiry [to someone being detained] ‘must be reasonably related in scope to the justification for [the stop's] initiation.’” *Hiibel v. Sixth Judicial Dist.*, 542 U.S. 177, 193 (2004) (Steven, J., dissenting) (citation omitted).

<sup>123</sup> *Caballes*, 543 U.S. at 408, quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984).

distinguish those precedents from the dog sniff at issue in *Caballes*.<sup>124</sup> That effort did not persuade a majority of the Justices.<sup>125</sup> Justice Stevens' majority opinion reaffirmed those precedents and concluded that their reasoning was applicable to the context of routine traffic stops. Therefore, *Caballes* found that a dog sniff "conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."<sup>126</sup> This was a reaffirmation of the Court's first canine-sniffing case, *United States v. Place*,<sup>127</sup> where the Court described a dog sniff as a *sui generis* investigative tactic because, *inter alia*, it "discloses only the presence or absence of narcotics, a contraband item,"<sup>128</sup> and therefore is immune from constitutional scrutiny. *Caballes* is best viewed as following the rule announced in *Place* and nothing more.

### B. *Muehler v. Mena* and *Arizona v. Johnson*

Police typically question motorists about topics beyond the scope of a traffic stop for two reasons: they are seeking consent to search the vehicle or they are trying to develop reasonable suspicion of criminal conduct, which would justify a more intrusive detention and investigative methods.<sup>129</sup> Either way, the point of the

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<sup>124</sup> Counsel argued that *United States v. Place*, 462 U.S. 696 (1983), should not be read as holding a general principle that dog sniffs are not searches. Brief for Respondent at 13, *Illinois v. Caballes*, 543 U.S. 405 (2005) (No. 03-923). He contended that *Place* was a "careful contextual" ruling limited to situations where law enforcement had reasonable suspicion that a person's luggage might contain illegal narcotics. *Id.* Moreover, counsel for *Caballes* contended that *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), which in the course of invalidating a narcotics roadblock acknowledged that a dog sniff was not a search under the Fourth Amendment, "had no occasion to decide what sort of Fourth Amendment justification might be necessary for a dog sniff under any other circumstances." *Id.* at 11. And counsel tried to limit *United States v. Jacobsen*, 466 U.S. 109 (1984) (concluding that, relying on *Place*, a chemical field test of white powder, which only revealed whether the powder was contraband or not, was not a search under the Fourth Amendment), to the specific case where a chemical field test "could reveal nothing about noncontraband items." *Id.* at 12 (citation omitted). In sum, counsel argued that the Court's prior rulings could not "fairly be read as having removed dog sniffs from the ambit of the Fourth Amendment altogether." *Id.* at 13. At the oral argument, counsel did not get the chance to argue that use of the dog exceeded the scope-prong of *Terry*. He was, however, vigorously questioned about the Court's prior dog sniff rulings, and was directly asked by Justice O'Connor, the author of *Place* and *Edmond*, if he was asking the Court to overrule those precedents. He replied that he was not asking that either *Place* or *Edmond* be overruled. Transcript of Oral Argument at 30-31, *Illinois v. Caballes*, 543 U.S. 405 (2005) (No. 03-923).

<sup>125</sup> Justice Souter's dissent, by contrast, concluded that "using the dog for the purposes of determining the presence of marijuana in the car's trunk was a search unauthorized as an incident of the speeding stop and unjustified on any other ground." *Caballes*, 543 U.S. at 410 (Souter, J., dissenting).

<sup>126</sup> *Id.*

<sup>127</sup> 462 U.S. 696 (1983). *Place* was relied upon in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), another dog sniff case, and in *United States v. Jacobsen*, 466 U.S. 109 (1984), a case involving a chemical field-test that only revealed whether a substance was cocaine.

<sup>128</sup> *Place*, 462 U.S. at 707.

<sup>129</sup> See, e.g., CAL. STATE ASSEMBLY DEMOCRATIC CAUCUS TASK FORCE ON GOV'T OVERSIGHT, OPERATION PIPELINE: CALIFORNIA JOINT LEGISLATIVE TASK FORCE REPORT \_\_\_\_ (Sept. 29, 1999), available at <http://www.aclunc.org/discrimination/webb-report.html>. (concluding that California Highway Patrol [CHP] "reports make clear that [Operation] Pipeline units exist for one reason only – narcotics interdiction – and that traffic safety, which is the primary function of the [CHP], is only a minor part of their jobs. ... Pipeline teams are able to pull over a great many cars to find drivers who fit established 'profiles' of what drug couriers are supposed to look and act like. Once a profile fits,

questioning is to investigate crime, and has nothing to do with the traffic stop. When this type of interrogation produces criminal evidence and is later challenged, courts have generally concluded, before *Rodriguez*, that such questioning does not infringe the Fourth Amendment because it did not unduly prolong the traffic stop, or merely constituted a minor intrusion after the traffic stop should have concluded.<sup>130</sup> When judges consider itinerary questioning as a trivial inconvenience, they have their heads in judicial sand. Consider one description of such questioning:

The officer is trained to subtly ask [motorists] questions about their registration papers, their destination, their itinerary, the purpose of their visit, the names and addresses of whomever they are going to see, etc. Officers are trained to make this conversation appear as natural and routine part of the collection of information incident to a citation or warning. They are advised to interrogate the passengers separately, so their stories can be compared. The officer will apply more “indicators” at this point, including how long it took them to answer the questions, how they acted, how consistent their stories were and what kind of eye contact they made. . . .

[In] approximately 30 hours of [actual] videotaped stops . . . [t]he questioning that was done was intense, very invasive and extremely protracted. It was not uncommon to see travelers spending 30 minutes or more standing on the side of the road, fielding repeated questions about their family members, their occupations, their marital status, their immigration status, their criminal histories and their recreational use of drugs and alcohol.

During the training sessions . . . officers were advised to take the motorist’s pulse during the interrogation, to see if the motorist’s heart is beating rapidly. During the videotaped . . . stops, the officer was repeatedly seen taking motorists’ pulse, pronouncing them “way up there,” and then demanding to know why the motorist was so nervous. Pulse-taking was also used in conjunction with questions regarding the motorist’s possible use of intoxicating drugs, particularly methamphetamines, and a high pulse rate was cited on several occasions as the officer’s reasons for requiring a field sobriety test.<sup>131</sup>

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then the officer’s goal becomes to search the car and the occupants.”); LaFave, *The “Routine Traffic Stop,” supra* note \_\_\_, at 1885-86 (explaining that police “questioning is sometimes profitable; the interrogatee may actually admit to the possession of drugs, or his staunch denial may produce what is deemed consent to a search when the officer responds that then the driver will not mind if the officer looks in the vehicle.”) (footnotes and citations omitted).

<sup>130</sup> 4 LAFAVE, *supra* note \_\_\_, § 9.3(d) at 528 (footnotes omitted).

<sup>131</sup> CAL. ASSEMBLY TASK FORCE REPORT, *supra* note \_\_\_, at 13-15. Consider also this excerpt and officer’s description of traffic stop questioning: “the officer will ask you a series of questions about your travel plans. He’ll be friendly and polite: Where are you heading? How long will you be there? He’ll ask what you do for a living, or something equally innocuous. ‘And when I’m doing this, you know, I’m not sitting there grilling you,’ [officer] Mangelson said. ‘I’m doing it in a way that you probably don’t even realize what I’m doing.’ What he’s doing is called an interrogation, and your responses are being watched very closely. Did you have to think before answering? Did you repeat his questions? Are you being too helpful, too cooperative, or too talkative? Those are all bad signs, as bad as monosyllabic answers. If you have a passenger, the passenger will be taken off to the side and

When upholding this type of questioning, it comes as no surprise that “typically no explanation is offered as to why it is proper to hold someone longer than would otherwise be required because some of the time was taken up questioning the driver about matters totally unrelated to the traffic stop.”<sup>132</sup> I agree with Professor LaFave that these results “are dead wrong!”<sup>133</sup> They are wrong because such questioning fails the scope prong of the *Terry* test.<sup>134</sup>

After *Caballes* and prior to the announcement of *Muehler v. Mena*<sup>135</sup> the federal courts of appeals were divided over whether police questioning unrelated to the purpose of a traffic stop was constitutional.<sup>136</sup> The Sixth Circuit acknowledged the existence of a split by noting that some federal circuits had ruled that police could not question motorists about drugs or guns without reasonable suspicion that such items were in the car,<sup>137</sup> while other circuit courts permitted “officers to subject motorists to some degree of unrelated questioning as a matter of course.”<sup>138</sup> The Sixth Circuit concluded that *Mena* resolved this split and “gave its imprimatur to wide-ranging questioning during a police detention.”<sup>139</sup>

Since *Mena*, lower courts have continued to allow unrelated police interrogation, and now rely upon *Mena* and *Arizona v. Johnson*<sup>140</sup> for support.<sup>141</sup> After Justice Ginsburg’s comments approving police interrogation in *Rodriguez*, future courts will have little reason to address the constitutionality of police

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interrogated separately. The officer will check to see if your stories match.” Gary Webb, *Driving While Black*, ESQUIRE, April 1999, at \_\_\_\_.

<sup>132</sup> 4 LAFAVE, *supra* note \_\_\_, § 9.3(d) at 528-29.

<sup>133</sup> *Id.* at 529.

<sup>134</sup> *Id.* (“Rather, what should be the correct rule is that followed by some other courts, is that in strict accordance with *Terry* and its progeny, questioning during a traffic stop must be limited to the purpose of the traffic stop and thus may not be extended to the subject of drugs.”) (footnote omitted). In a 2004 law review article, Professor LaFave said the following: Judicial rulings allowing unrelated police questioning during traffic stops “are totally at odds with the *Terry* line of Supreme Court decisions on the limits applicable to temporary detentions, and amount to nothing more than an encouragement to police to engage in pretextual traffic stops so that they may engage in interrogation about drugs in a custodial setting (albeit not custodial enough to bring even the protections of *Miranda* [v. *Arizona*, 384 U.S. 436 (1966)] into play).” LaFave, *The “Routine Traffic Stop,” supra* note \_\_\_, at 1887 (footnote omitted).

<sup>135</sup> 544 U.S. 93 (2005).

<sup>136</sup> See Amy L. Vazquez, “Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car?” *What Questions Can a Police Officer Ask During a Traffic Stop?*, 76 TUL. L. REV. 211, 223 (2001) (noting the disagreement among the federal circuit courts: a minority of courts hold that police “may ask any question, and there will not be a Fourth Amendment violation unless the questioning unreasonably extends the duration of the traffic stop,” while the majority of federal circuit courts have ruled that police “cannot expand the scope of questioning beyond any reasonable or articulate suspicion.”) (footnotes omitted).

<sup>137</sup> *United States v. Everett*, 601 F.3d 484, 489 (6th Cir. 2010).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (asserting that “the Supreme Court [in *Mena*] gave its imprimatur to wide-ranging questioning during a police detention.”); *id.* at 490 (conceding that *Mena* is not a traffic stop case, but concluding that its reasoning logically applies “and the federal courts of appeals readily extended its holding to the traffic-stop context.”).

<sup>140</sup> 555 U.S. 323 (2009).

<sup>141</sup> 4 LAFAVE, *supra* note \_\_\_, § 9.3(b) at 530, n.267 (citing cases).

interrogation on topics outside the scope of a traffic stop, provided the questioning does not “measurably extend the duration of the stop”<sup>142</sup> or “add[] time”<sup>143</sup> to the stop. The rest of this section explains why *Mena* and *Johnson* do not support this result.

*Mena* is a curious precedent to support police interrogation about subjects beyond the scope of a traffic stop. First, *Mena* did not involve a traffic stop. It was a § 1983 civil rights case. Iris Mena claimed, *inter alia*, that police violated her Fourth Amendment rights by questioning her about her immigration status while she was being detained inside her home while police executed a search warrant for weapons and evidence of gang membership. Chief Justice Rehnquist’s opinion for the Court rejected this claim because the Court’s precedents had established that mere police questioning does not constitute a seizure.<sup>144</sup> The precedents the Chief Justice was referring to involved police-citizen encounters that the Court deemed consensual. Chief Justice Rehnquist also relied upon *Caballes*, and explained that because Mena’s detention was not prolonged by the interrogation, there was no additional seizure, and thus no reason to require independent suspicion for the interrogation.<sup>145</sup>

Although Mena’s brief argued that the questioning violated the two-prong *Terry* standard,<sup>146</sup> the premise of *Mena*’s holding—police interrogation does not implicate the Fourth Amendment—should not be reflexively extended to the very different context a traffic stop. Why? Because *Mena* certainly did not say, let alone hold, that *Terry*’s scope prong applies to duration and nothing else. Furthermore, the investigative detention at issue in *Mena* is very different from the typical traffic stop. To be sure, police exercise some discretion when effectuating the type of detention in *Mena*. However, the authority granting police access to the premises in a case like *Mena*, a judicial warrant, is conferred by a neutral official who has found probable cause that the home contains evidence of a crime or persons suspected of criminal conduct. Moreover, that judicial warrant is designed to focus and narrow the objects sought by the police. Accordingly, the Court has concluded that the existence of the warrant “provides an objective justification for the detention.”<sup>147</sup> Put differently, the judicial warrant impliedly supports the conclusion that police have reasonable suspicion to connect occupants of the premises to the criminal activity they are investigating.

By contrast, when police question motorists on topics unrelated to a traffic stop, they are on a fishing expedition without objective evidence of criminal conduct. “One of the truisms of American life is that the police may, if they want, stop just

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<sup>142</sup> *Johnson*, 555 U.S. at 333, citing *Muehler v. Mena*, 544 U.S. 93 (2005).

<sup>143</sup> *Rodriguez v. United States*, No. 13-9972, slip op. at 8, (U.S. Apr. 21, 2015).

<sup>144</sup> *Mena*, 544 U.S. at 101, citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991) and *INS v. Delgado*, 466 U.S. 210, 212 (1984).

<sup>145</sup> *Id.*

<sup>146</sup> Brief for Respondent at 46-48, *Mena*, 544 U.S. 93 (No. 03-1423). During oral argument, *Terry* was mentioned only in passing and there was no discussion of *Terry*’s two-prong test. Transcript of Oral Argument at 38-49, *Muehler v. Mena*, 544 U.S. 93 (2005) (No. 03-1423).

<sup>147</sup> *Michigan v. Summers*, 452 U.S. 692, 703 (1981).

about any car that is driving down the highway.”<sup>148</sup> Even police acknowledge their near absolute authority to seize a motorist.<sup>149</sup> Not only do police have virtually unlimited power to stop cars, the initiation of the stop expands their discretionary options. Of course, officers decide whether to issue a ticket, issue a warning or simply let the motorist go. But they also decide many other matters:

On the one hand, police officers are not required to arrest suspects or to conduct searches when they have probable cause to do so, and frequently they don’t. On the other hand, . . . even in the absence of probable cause, police officers have complete discretion to take many intrusive nonconsensual actions short of a full-blown “search.”<sup>150</sup>

The point is that police have tremendous discretion during traffic stops; they possess more discretion than when seizing occupants of a home while executing a search warrant. For Fourth Amendment analysis, such discretionary power distinguishes a traffic stop from the investigative detention at issue in *Mena*.

In sum, the detention in *Mena* was incident to a police power conferred by a neutral judge, and did not involve the various discretionary decisions police make when conducting traffic stops. Mechanically extending *Mena* to traffic stops, as many lower courts have done,<sup>151</sup> ignores a fundamental point under Fourth Amendment analysis: “In perhaps no setting does law enforcement possess greater discretion than in the decision to conduct a traffic stop.”<sup>152</sup> Thus, there is good reason for not extending *Mena*’s holding to the far different context of arbitrary questioning during a traffic stop. Further, there is no reason to interpret *Mena* as confining *Terry*’s scope inquiry to temporal concerns. The best that can be said for applying *Mena*’s reasoning to the traffic stop context is that Chief Justice Rehnquist’s opinion

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<sup>148</sup> Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 670 (2002). See also David A. Harris, *The Stories, The Statistics, And The Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 311-12 (1999) (“Since no one can drive for even a few blocks without committing a minor violation-- speeding, failing to signal or make a complete stop, touching a lane or center line, or driving with a defective piece of vehicle equipment-- . . . police officers can stop any driver, any time they are willing to follow the car for a short distance. In other words, police know that they can use the traffic code to their advantage, and they utilize it to stop vehicles for many nontraffic enforcement purposes.”).

<sup>149</sup> Gross & Barnes, *supra* note \_\_\_ at 671 (“As one California Highway Patrol Officer put it: “‘The vehicle code gives me fifteen hundred reasons to pull you over.’”), quoting Gary Webb, *DWB\**, Esquire, April 1999, at 118, 123; Harris, *Car Wars*, *supra* note \_\_\_, at 567-68 (“Witness these statements by police officers, which date back to the 1960’s: ‘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.’ ‘You don’t have to follow a driver for 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.’ ‘In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search.’”).

<sup>150</sup> Gross & Barnes, *supra* note \_\_\_, at 675.

<sup>151</sup> See, e.g., *United States v. Everett*, 601 F.3d 484, 490 (6th Cir. 2010) (noting that “the federal courts of appeals readily extended [*Mena*’s] holding to the traffic-stop context.”).

<sup>152</sup> Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1107 (2000).

relied, in part, upon *Caballes*, an actual traffic stop case. But given what has been said above about *Caballes*, *Mena* provides weak support for concluding that unrelated police interrogation is permissible during routine traffic stops, let alone, concluding that the scope prong of *Terry* is satisfied provided such questioning does not prolong the traffic stop.

The police seizure in *Arizona v. Johnson*, in contrast to *Mena*, did begin as a traffic stop. At the end of a unanimous opinion written by Justice Ginsburg, the Court stated: “An officer’s inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.”<sup>153</sup> *Johnson* addressed the authority of police to frisk a passenger detained during a traffic stop. Lemon Montrea Johnson was a backseat passenger in a vehicle that was stopped for an insurance-related traffic offense by several officers of a state gang task force. One officer ordered Johnson out of the vehicle and began questioning him about matters unrelated to the traffic infraction. Johnson’s behavior and answers lead the officer to suspect that Johnson might be armed. The officer frisked Johnson and discovered a weapon.

An Arizona appellate court ruled that the interaction between the officer and Johnson, which began as a seizure of Johnson, evolved into a consensual encounter immediately prior to the frisk. According to the state court, absent reason to believe Johnson was involved in criminal activity, the officer lacked authority to frisk Johnson even if she had reason to believe that he might be armed and dangerous. The Supreme Court reversed this ruling and explained that Johnson remained detained at the time of the frisk, and a frisk was permissible if the officer suspected that Johnson was armed and dangerous, even if she did not reasonably suspect that he was engaged in criminal activity immediately prior to the frisk. As noted, at the end of the opinion Justice Ginsburg wrote that the officer’s questions about matters unrelated to the traffic stop did not alter the lawful status of the detention “so long as those inquiries do not measurably extend the duration of the stop.”<sup>154</sup>

It is plain that *Johnson*’s language about unrelated questioning is pure dictum. The holding in *Johnson* dealt with the authority of police to frisk someone subject to detention due to a traffic stop, when the police suspect the person is armed and dangerous but lack suspicion to believe he or she has committed a specific crime. Unrelated questioning has nothing to do with the Court’s holding. Justice Ginsburg’s dictum is a bit surprising in light of the fact that *Johnson*’s brief only mentions the questioning in passing, and focuses entirely on the lawfulness of the frisk.<sup>155</sup> Furthermore, Justice Ginsburg made no effort to reconcile her dictum with the scope

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<sup>153</sup> *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (citing *Muehler v. Mena*, 544 U.S. 93, 100-101 (2005)).

<sup>154</sup> *Id.*

<sup>155</sup> Following the lead of the court below, *Johnson*’s brief argued that the encounter between Johnson and the officer was consensual. Brief for Respondent at 35, *Johnson*, 555 U.S. 323 (No. 07-1122). The brief also argued that during a consensual encounter, two conditions are required to authorize a frisk: An officer may conduct a frisk if he is aware of facts “which lead him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous.” *Id.* at 15 (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

prong of the *Terry* test as it has been interpreted by the Court. True, just as the dog sniff in *Caballes* did not prolong the traffic stop, the officer's interrogation did not prolong the seizure of Johnson until the weapon was found; but *Terry* requires judges to examine *both* the length and manner of a seizure. As Justice Ginsburg recognized in *Caballes*, "*Terry*, it merits repetition, instructs that any investigation must be 'reasonably related in *scope* to the circumstances which justified the interference in the first place.'"<sup>156</sup> Such examination was absent in *Johnson*.

It is ironic, to say the least, that Justice Ginsburg would insert this dictum into her opinion in *Johnson*. After all, it was Justice Ginsburg who rightly recognized in *Caballes* that the Court had not yet answered the "question whether a police officer inquiring about drugs without reasonable suspicion unconstitutionally broadens a traffic investigation."<sup>157</sup> That question was not resolved in *Caballes*, as evidenced by the federal circuit court split described earlier, nor was it addressed in *Mena*.

Again, it is constitutionally irrelevant that unrelated police questioning does not amount to a search or separate seizure. Indeed, in *City of Indianapolis v. Edmond*,<sup>158</sup> the Court confronted an analogous situation when it addressed the constitutionality of drug roadblocks. At the challenged checkpoint, thirty police officers stopped a predetermined number of vehicles. An officer approached each vehicle and informed the motorist that he was being stopped briefly at a drug checkpoint. License and registration were requested and the officer looked for signs of impairment and conducted an "open-view examination of the vehicle from the outside."<sup>159</sup> A drug-detection dog was walked around the outside of each vehicle stopped at the checkpoint.

*Edmond* acknowledged that the dog sniff was not a search.<sup>160</sup> That finding, however, did not prevent the Court from holding that the roadblock itself violated the Fourth Amendment. As conceded by the City, the "checkpoint program unquestionably has the primary purpose of interdicting illegal narcotics."<sup>161</sup> That purpose distinguished the Indianapolis roadblock from previous roadblocks upheld by the Court whose primary purposes were traffic enforcement or road safety.<sup>162</sup> Ultimately, the Indianapolis checkpoint was unconstitutional because its "primary purpose was to detect evidence of ordinary criminal wrongdoing."<sup>163</sup> Just as the roadblock in *Edmond* was designed to detect illegal drugs, so too police questioning unrelated to a traffic stop is aimed at detecting ordinary criminal conduct. Thus, it is constitutionally irrelevant in cases like *Caballes* and *Johnson* that a dog sniff or police questioning does not amount to a separate search or seizure. Instead, "the point

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<sup>156</sup> *Illinois v. Caballes*, 543 U.S. 405, 420 (2005) (Ginsburg, J., dissenting) (quoting *Terry*, 392 U.S. at 20).

<sup>157</sup> *Id.* at 421, n. 3.

<sup>158</sup> 531 U.S. 32 (2000).

<sup>159</sup> *Id.* at 35.

<sup>160</sup> *Id.* at 40.

<sup>161</sup> *Id.*

<sup>162</sup> *See, e.g., Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding roadblock aimed at detecting drunk driving); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (dictum noting the permissibility of roadblocks that question "all oncoming traffic" for safety and regulatory reasons).

<sup>163</sup> 531 U.S. at 42

is that they taint the stop purportedly made only for a traffic violation because they have absolutely *no* relationship to traffic law enforcement.”<sup>164</sup>

### C. Enforceable Standards

Mindful of the power of officers during traffic stops, Justice Kennedy once noted that “[t]raffic stops, even for minor violations can take upwards of 30 minutes.”<sup>165</sup> Justice Kennedy’s observation was offered in *Maryland v. Wilson* to highlight the “serious” consequences faced by a passenger who is ordered to exit a vehicle during a traffic stop.<sup>166</sup> Justice Kennedy also acknowledged that when *Whren v. United States*,<sup>167</sup> which ruled that police motives do not control the lawfulness of a traffic stop, is combined with *Wilson*’s holding, “the Court puts tens of millions of passengers at risk of arbitrary control by police.”<sup>168</sup>

Justice Kennedy’s concerns about arbitrary police conduct are apropos to the context of unrelated police interrogation during traffic stops. As Justice Kennedy has acknowledged, because traffic stops offer police myriad discretionary options, neutral principles are required to protect the Fourth Amendment rights of motorists, which means the Justices must provide legal standards that check the discretionary authority of police during routine traffic stops.<sup>169</sup> Interestingly, the Justices have a clear standard to determine whether police interrogation during a traffic stop violates the Fourth Amendment. Over forty years ago, *Terry* instructed judges to determine whether the police conduct was “reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>170</sup> By contrast, the standards employed by the Court today are inadequate, vague and unenforceable.

For example, in *Caballes*, the Court stated a “seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is *prolonged beyond the time reasonably necessary required to complete the mission*.”<sup>171</sup> In *Johnson*, the Court asserted that police inquiries “into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, *so long as those inquiries do not measurably extend the duration of the stop*.”<sup>172</sup> Arbitrary and discriminatory police interrogation during routine traffic stops will not be deterred by Fourth Amendment rules like the ones offered in *Caballes* and *Johnson*.<sup>173</sup>

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<sup>164</sup> 4 LAFAVE, *supra* note \_\_\_, § 9.3(f) at 545.

<sup>165</sup> *Maryland v. Wilson*, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting).

<sup>166</sup> *Id.*

<sup>167</sup> 517 U.S. 806 (1996).

<sup>168</sup> *Wilson*, 519 U.S. at 423 (Kennedy, J., dissenting).

<sup>169</sup> *Cf. id.* (“It does no disservice to police officers, however, to insist upon exercise of reasoned judgment. Adherence to neutral principles is the very premise of the rule of law the police themselves defend with such courage and dedication.”).

<sup>170</sup> *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

<sup>171</sup> *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (emphasis added).

<sup>172</sup> *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (emphasis added).

<sup>173</sup> *Cf. LaFave, The “Routine Traffic Stop,” supra* note \_\_\_ at 1867 (“In short, Fourth Amendment limitations upon ‘routine traffic stops’ would be grossly inadequate if expressed solely in terms of the permissible duration of the stop.”) (footnote omitted).

A “no prolongation” or “do not measurably extend” rule is a rule without standards. Implicit in such statements is the belief that the routine traffic stop has a fixed temporal limit, which police cannot exceed. Not surprisingly, neither the Court nor any lower court has articulated what that time limit is. In 2000, a Maryland appellate court observed that there is no “set formula for measuring in the abstract what should be the reasonable duration of a traffic stop.”<sup>174</sup> Fifteen years later, no court or judge has offered a test for measuring the acceptable length of a routine traffic stop.<sup>175</sup> During the oral argument in *Rodriguez*, Justice Breyer suggested the following rule: “It is the time necessary to effectuate the purpose of the stop or it is the time that is reasonably required to complete the mission. We can’t do better than that. How can we?”<sup>176</sup> Of course, this proposal does not help. If police questioning or dog sniffing is deemed part of the “mission,” just as doing a license and registration check or requesting a criminal history report, are considered part of the mission, then judges have no gauge to determine whether a traffic stop has been unduly prolonged.<sup>177</sup> Although the Court has not directly addressed the permissible duration of a traffic stop, the search for a serviceable and clear standard has not been advanced by the fact that the Court has twice rejected arguments to establish fixed time limits for investigative detentions involving *Terry* stops.<sup>178</sup> If there is no discernible timeline beyond which a traffic stop may not extend, how will judges

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<sup>174</sup> *Charity v. Maryland*, 753 A.2d 556, 566 (Md. App. 2000).

<sup>175</sup> In a recent article, Professor Katz noted that “[s]ome state courts have held that processing an ordinary traffic stop should last only fifteen minutes, which is probably the short end of that duration; other courts have indicated that a detention of twenty to twenty-five minutes during a traffic stop is reasonable.” Katz, *supra* note \_\_\_, at 1458 (footnotes omitted).

<sup>176</sup> Transcript of Oral Argument at 29, *Rodriguez v. U.S.*, 135 S. Ct. 1609 (2015) (No. 13-9972).

<sup>177</sup> Consider the exchange between Justice Scalia and counsel for Rodriguez during the oral argument of *Rodriguez*:

Justice Scalia: [Y]ou apparently embrace the assumption that checking on whether you have a . . . proper license, checking whether the car is stolen, all of these things are embraced within the mission when the only basis for the stop is you have a broken taillight. How does that have anything to do with the broken taillight?

Mr. O’Connor: Those are things, Your Honor, that have been accepted as part of - -

JUSTICE SCALIA: I see.

MR. O’CONNOR; - - the process.

JUSTICE SCALIA: Well, then maybe dog sniffing should be too, right? Dog sniffing is accepted, so long as it’s done before what? Before completion of - -

MR. O’CONNOR: Before completion of the mission.

JUSTICE SCALIA: Which includes not just a broken taillight, but also inquiring into your license, inquiring into prior arrests? That’s all part of the mission?

MR. O’CONNOR: Yes, Your Honor, it is.

JUSTICE SCALIA: Why don’t you make the dog sniff part of the mission and that will solve the problem?

. . .

MR. O’CONNOR: You expand the mission, Your Honor, for everything that comes within the tasks that are part of the traffic stop. The dog sniff - -

JUSTICE SCALIA: It’s a broken taillight. That’s the only thing that comes within the traffic stop. All the rest is added on. . . .

*Id.* at 8-10.

<sup>178</sup> *United States v. Place*, 462 U.S. 696, 709 (1983) (questioning the “wisdom of a rigid time limitation”); *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (acknowledging *Place*’s unwillingness to adopt a *per se* time limit on investigative detentions, and favorably quoting it for the proposition that the Court will not adopt a “hard-and-fast” time limit for a valid *Terry* stop).

know when police have prolonged (or measurably extended) a traffic stop by arbitrarily interrogating motorists about topics unrelated to the stop?

Another problem with a “no prolongation” rule was identified by the former Chief Justice of the California Supreme Court:

This rule is unworkably vague. How is it possible to determine what amount of time would have been ‘reasonably necessary’ for an officer to discharge the duties he or she had with respect to the traffic infraction itself? I submit, it is not possible. [A ‘no prolongation’ or ‘do not measurably extend’ rule] requires the officer and judge to determine the duration of a past event *which never occurred*, i.e., the length of time the traffic detention *would* reasonably have required if the officer had not [subjected the motorist to a dog sniff or arbitrary questioning]. Not only must past history be thus reorganized, but a determination must be made as to how many of the officer’s actions that never occurred would have been reasonably ‘necessary’ to perform duties that may have been only partly performed.<sup>179</sup>

And when judges attempt to identify other facts that signal the end of a traffic stop, for example, an officer’s issuance of a citation and return of a motorist’s driving documents, as a way to enforce a “no prolongation” rule, “[a] clever officer could always ward off the foreclosing effect of [such a rule] by deliberately delaying his final termination of the traffic stop.”<sup>180</sup> Finally, because some forms of interrogation during traffic stops entail a *de minimis* amount of time, and the opportunities to delay or extend the tasks associated with the traffic stop are ample, a “no prolongation”

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<sup>179</sup> California v. McGaughan, 601 P.2d 207, 216-17 (Cal. 1979) (*en banc*) (Bird, C.J., concurring and dissenting).

<sup>180</sup> *Charity*, 753 A.2d at 565-66. The Justices recognize this as well; consider the following exchange between counsel for Rodriguez and some of the Justices:

MR. O’CONNOR: As a policy question, if you could end it [the traffic stop] with the handing of the ticket, that would be acceptable. If we tie - - if we tie the traffic ticket as the end of the - - end of the justification for the stop, then we - -

JUSTICE ALITO: If we hold that it’s okay to have a dog sniff so long as it’s before the ticket is issued, then every police officer other than those who are uninformed or incompetent will delay the handing over of the ticket until the dog sniff is completed. So what has that - - accomplish?

...

MR. O’CONNOR: What it accomplishes is the - - is the enforcement of the Fourth Amendment. Once the stop is done, once the purpose is done, the justification is done, the person should be free to go.

...

JUSTICE GINSBURG: Well, then the police can just say, I’m going to defer that a few minutes until the dog sniff occurs. It just seems that you’re not going to accomplish any protection for individuals if that’s your position, that - - that it was just a question of when do it. So if you do it during the stop, before the ticket issued, it’s okay and if you do it two minutes after, it’s not okay.

MR. O’CONNOR: Your Honor, it is - - it is okay when the traffic stop is done. When the mission is complete -

JUSTICE SCALIA: You can’t possibly mean that. You can’t possibly mean that.

MR. O’CONNOR: Oh, yes, sir, I do.

JUSTICE SCALIA: The stopping officer says, I’m done, I got my ticket here. It’s all written out. However, before I give it to you, I want to have a dog sniff, I’m going to call in to headquarters. They’re going to send out a dog. It’s going to take maybe 45 minutes. You just sit there because the traffic stop is not - - is not terminated until I give you your ticket. You’re going to allow that?

Transcript of Oral Argument at 11-13, Rodriguez v. U.S., 135 S. Ct. 1609 (2015) (No. 13-9972).

rule provides police unchecked discretion to question motorists about almost any topic whether related to the scope of the traffic stop or not.<sup>181</sup>

When judges interpret *Caballes, Mena* and *Johnson* as holding that “scope” means duration and nothing else, it is understandable why they have been unable to articulate a clear and workable rule. If the scope prong is confined to examining only the length of a stop, then no such rule exists. During the oral argument in *Rodriguez*, Justice Sotomayor pushed for what she considered to be a “simple rule”—“[I]f you’re going to do a stop, you can’t reasonably extend or pass the time it takes to deal with a ticket, correct?”<sup>182</sup> I do not believe that this “simple” rule will work either, so long as police are permitted to do all the discretionary tasks—such as checking on outstanding warrants, requesting criminal history reports, seeking consent to search a motorist’s vehicle, and questioning motorists about topics unrelated to the traffic stop—that courts currently allow.<sup>183</sup> Concededly, the temporal restriction of the second prong of the *Terry* test does not exhibit bright-line qualities; that’s because “the permissible length of time can only be ascertained upon assessing the facts and circumstances of the particular case.”<sup>184</sup> However, if judges desire clarity and guidance in this area, they will not find it in a “no prolongation” or “do not measurably extend the duration of the stop” standard.<sup>185</sup>

Unfortunately, Justice Ginsburg’s refinement of these rules in *Rodriguez* fares no better than the original “no prolongation” rule. Responding to the dissent’s claim that in future cases police will conduct dog sniffs before concluding a stop, Justice Ginsburg stated: “The critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket, as Justice Alito supposes, but whether conducting the sniff ‘prolongs’ – *i.e.*, adds time to – ‘the stop.’”<sup>186</sup> In the typical case where a motorist remains inside his vehicle, of course, police questioning about matters unrelated to the traffic stop (or conducting a dog sniff) will “add time” to the

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<sup>181</sup> See *Salmeron v. State*, 632 S.E.2d 645, 648 (Ga. 2006) (Sears, C.J., dissenting).

<sup>182</sup> Transcript of Oral Argument at 30, *Rodriguez*, 135 S. Ct. 1609 (No. 13-9972). The *Rodriguez* majority seems to adopt Justice Sotomayor’s “simple rule” when it states: “Authority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.” *Rodriguez v. United States*, No. 13-9972, slip op. at 5, (U.S. Apr. 21, 2015).

<sup>183</sup> Although again unnecessary to its holding, the *Rodriguez* Court gave its imprimatur to criminal history and outstanding warrant checks, when it noted that traffic stops are “‘especially fraught with danger to police officers,’ so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely.” *Id.* at 7. The Court then cited to dicta from *United States v. Holt*, 264 F.3d 1215, 1221-22 (10th Cir. 2001) (recognizing police safety reasons for criminal history and outstanding warrant checks). Tellingly, *Holt* held that the government’s compelling interest in police and bystander safety justified asking a motorist about the presence of weapons in his vehicle after being stopped for a seatbelt violation. *Id.* at 1226. See also LaFave, *The “Routine Traffic Stop,”* *supra* note \_\_\_\_ at 1876-78 (noting that lower courts have approved the general practice of conducting warrant checks during routine traffic stops); *id.* at 1880-81 (stating that most courts have found that a criminal history check is a valid part of a traffic stop, even for an innocuous traffic offense such as unsignaled lane change).

<sup>184</sup> 4 LAFAVE, *supra* note \_\_\_\_, § 9.3(b) at 506 (footnote omitted).

<sup>185</sup> *Cf. id.* at 544 (“There should be no need for the complex and often nearly impossible task of calculating just when the time should be deemed to have expired in the case of a particular traffic stop and, often, the equally bedeviling task of heading down the slippery slope to determine just how much extra time after the proper ending of the traffic stop should be excused on some de minimis theory.”).

<sup>186</sup> *Rodriguez*, slip op. at 8.

stop. How can an officer question a motorist about unrelated topics without adding time to the stop? And if the officer wants to question a passenger to look for inconsistencies between what the driver has said, such questioning will “add time” to the stop. Justice Ginsburg points to *Caballes* and *Johnson* for support because the dog-sniff and questioning in those cases “did not lengthen” the stops.<sup>187</sup> But the facts in *Caballes* and *Johnson* were atypical for a routine traffic stop. In *Caballes*, a second officer, who immediately came to the scene after hearing about the stop on his police-radio, performed the sniff procedure while Caballes sat in the stopping-officer’s patrol car awaiting the issuance of a warning ticket. In *Johnson*, three officers from an anti-gang unit stopped a vehicle with three occupants. Each officer dealt separately with an occupant, which allowed the officer questioning Johnson to conduct her interrogation while her colleagues questioned the remaining two occupants.

To be sure, if an officer interrogates a single motorist inside a patrol car while checking the motorist’s documents, or awaiting a criminal history or outstanding warrant check, brief questioning may not prolong the stop. But the cases indicate that police interrogation is seldom brief.<sup>188</sup> In fact, there is objective evidence to suggest that police interrogation, particularly when performed by drug-interdiction officers who use traffic offenses as a pretext to conduct criminal investigations, “is intense, very invasive and extremely protracted.”<sup>189</sup> The most

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<sup>187</sup> *Id.* at 5.

<sup>188</sup> See e.g. *United States v. Riley*, 684 F.3d 758, 762 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 800 (2012) (in the 54 minutes between the stop’s initiation and a dog sniff, the officer asked all sorts of questions unrelated to “crossing the center line,” for example: where the driver was coming from, how long he had been there, what he thought of the hotel portion of the Hard Rock Casino, what floor of the hotel he had stayed on, and if he’d ever been in trouble before); *Maxell v. State*, 785 So. 2d 1277, 1279 (Fla. Dist. Ct. App. 2001) (motorist stopped for driving five miles per hour over the speed limit, officer asked the motorist: “Do you have any drugs in the car? When was the last time you used marijuana? Have you ever been arrested for drugs? Has anyone been in your car recently with drugs? Do you object to a search of your car? Do you object to the drug dog walking around your car? Do you have any guns in your car? Have you had any firearms violations?”). *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1998) (defendant and his wife were stopped because officer suspected defendant was not wearing a seat belt; after determining that defendant was properly driving vehicle, officer interrogated defendant about his destination, whether *his wife was employed, when the couple were married*, and whether they were carrying any large sums of money). If the detained vehicle contains passengers, the passengers often are separated for individual questioning in order to compare answers, prolonging the traffic stop further. See, e.g., *United States v. Coney*, 546 F.3d 850, 853, 854 (8th Cir. 2006) (when the officer detained a car containing three brothers, the driver was immediately taken into the squad car for questioning, then another brother was taken off to the side of the road to a ditch for questioning, leaving the third brother in the car alone for questioning).

<sup>189</sup> CAL. ASSEMBLY TASK FORCE REPORT, *supra* note \_\_\_ at \_\_\_:

Key to the program is the use of “verbal warnings” to pull over suspicious-looking motorists in order to question and, if need be, search them. Verbal warnings are regarded by drug interdiction troopers as a tool of [the] trade, and by their superiors as a measure of the trooper’s productivity and aggressiveness in the search for drugs. Since Pipeline officers are not expected to write many tickets, and occasionally are discouraged from doing so, there can be no legitimate reason why they would stop and detain thousands of motorists simply to warn them against insignificant vehicle code infractions. There can be little doubt that verbal warnings have been used by CHP drug interdiction teams as pretexts to investigate motorists for drug crimes. As a result, many motorists have been subjected to intense, invasive and extremely protracted roadside interrogations.

*Id.* at \_\_\_.

practical and clearest rule is the standard that was established in *Terry*: whether the police conduct was “reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>190</sup> When this rule is applied to police interrogation unrelated to the purpose of a traffic stop, the answer is clear—such questioning violates the Fourth Amendment because it has nothing to do with a routine traffic stop.

## CONCLUSION

In 1984, *Berkemer v. McCarty*<sup>191</sup> addressed whether roadside questioning of a motorist during a traffic stop requires the giving of *Miranda* warnings. The defense argued, *inter alia*, that unless warnings are provided, police “will simply delay formally arresting detained motorists, and will subject them to sustained and intimidating interrogation at the scene of their initial detention.”<sup>192</sup> Writing for a unanimous Court, Justice Marshall commented that the Court was “confident that the state of affairs projected by respondent will not come to pass.”<sup>193</sup> Well, thirty years later one can conclude that the Court was wrong; police routinely subject some motorists to persistent and intimidating interrogation unrelated to the purpose of a traffic stop. Although the questioning in *McCarty* was related to the reason for the stop, the law reports are full of cases demonstrating that questioning about a motorist’s itinerary, drugs, or guns is arbitrary and done in the absence of individualized suspicion of criminality.

Regrettably, the Court has never directly addressed whether police questioning unrelated to the purpose of a traffic stop is consistent with the Fourth Amendment. The Court’s neglect to confront this issue is unfortunate because the bulk of arbitrary police interrogation is borne by innocent motorists who will often allow police to search their vehicles due to fear or ignorance of their constitutional rights.<sup>194</sup> It is sometimes said that “the Fourth Amendment has become constitutional

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<sup>190</sup> *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

<sup>191</sup> 468 U.S. 420 (1984).

<sup>192</sup> *Id.* at 440.

<sup>193</sup> *Id.*

<sup>194</sup> *Cf. Gross & Barnes, supra note \_\_\_* at 667 & 672 (explaining that the results of an empirical study of highway stops by the Maryland State Police from January 1995 through June 2000 show that “[t]wo-thirds of the cars searched by the Maryland State Police carried no illegal drugs, or at least none were found,” and that “when consent was requested [by the Maryland State Police] consent was given, 96% of the time statewide and 97% of the time on [the northern portion of Interstate 95 from Baltimore to the Delaware border].” *See also*, CAL. ASSEMBLY TASK FORCE REPORT, *supra note \_\_\_*, at \_\_\_ (“While [Operation Pipeline] sometimes results in large drug or cash seizures, it also consumes hundreds of man-hours in fruitless and intimidating searches of motorists who, for the most part, are Latino and are guilty of nothing more than a minor traffic infraction, if that. The program also falls heavily upon tourists and vacationers. CHP routinely exploits differences in state motor vehicle laws regarding window tinting and license plates to stop out-of-state vehicles and interrogate the passengers.”). The California report specifically analyzed one trooper’s reports over the first nine months of 1998, which showed 1,264 verbal warnings issued, 163 searches, and only 18 finds; meaning “about 1% of all the stops he made” resulted in the discovery of contraband. *Id.* at \_\_\_. A report from the New Jersey Attorney General’s Office on traffic stops and consent searches conducted by New Jersey State Troopers on a section of the New Jersey Turnpike made similar findings. *See INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING*33 (April 20, 1999), available at [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf) (finding that in New Jersey, “most of the consent

law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all.”<sup>195</sup> If the Court wants to counter that perception, it should abandon the dictum offered in *Rodriguez* and announce that arbitrary police interrogation during routine traffic stops is inconsistent with the central meaning of the Fourth Amendment, which, as Professor Amsterdam’s article brilliantly teaches, was designed to restrain police discretion when conducting searches and seizures.

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searches that we considered did not result in a positive finding, meaning that they failed to reveal evidence of a crime... major seizures of significant drug shipments are correspondingly rare.”)

<sup>195</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting).