



10 Ways a Roadside Police Stop Can Go Wrong

Jacob Sullum

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"These days," Charles Glover's lawyers noted in a Supreme Court brief last year, "traffic safety is so pervasively regulated that it is difficult to drive on a regular basis without violating some law. When an officer observes an infraction—*any* infraction—he can initiate a traffic stop."

Glover was challenging the police practice of automatically stopping cars that are registered to drivers whose licenses have been suspended. While the assumption that the registered owner is behind the wheel might seem reasonable, it could prove to be wrong in the vast majority of cases, since those cars can be legally driven by relatives, friends, and neighbors. Condoning such traffic stops, as Kansas urged the justices to do in a case they heard last November, therefore would expose many drivers to the constant threat of police harassment even when they're doing nothing illegal.

The Court sided with Kansas in April, giving police one more excuse to stop drivers. But it's not as if they really needed one. State transportation codes include hundreds of rules governing the operation and maintenance of motor vehicles. Many of them are picayune (e.g., specifying acceptable tire wear, restricting window tints, and dictating the distance from an intersection at which a driver must signal a turn) or open to interpretation (e.g., mandating a "safe distance" between cars, requiring that cars be driven in a "reasonable and prudent" manner, and banning any windshield crack that "substantially obstructs the driver's clear view").

"The upshot of all this regulation," University of Toledo law professor David Harris observed in a 1998 *George Washington Law Review* article, "is that even the most cautious driver would find it virtually impossible to drive for even a short distance without violating some traffic law. A police officer willing to follow any driver for a few blocks would therefore always have probable cause to make a stop."

In the 1996 case *Whren v. United States*, the Supreme Court said such stops are consistent with the Fourth Amendment's ban on unreasonable searches and seizures even when the traffic violation is merely a pretext for investigating other matters. If an officer stops a car for a traffic violation in the hope of finding illegal drugs or seizable cash, for instance, that is perfectly constitutional, even without any evidence of criminal conduct. Thanks to *Whren* and other rulings, Harris concluded, "the Court has conferred upon the police nearly complete control over almost every car on the road and the people in it."

Once police stop you, a ticket is the least of your worries. Here is a guide to some of the roadside hazards created by giving cops the discretion to mess with just about anyone who dares to travel in an automobile.

1. You Might Lose Your License

Your license could be suspended following a traffic stop because your latest offense puts you above a specified number of points, because you were caught with marijuana or other illegal drugs (which triggers an automatic six-month suspension in Texas and a one-year suspension in Florida, for example), or because you declined to blow into a breathalyzer for a cop who thought you were drunk (which can earn you a six-month or one-year suspension, depending on the state). Your license also might be suspended for various reasons unrelated to traffic safety or even to driving, such as unpaid parking tickets or overdue child support. Once your license has been suspended, you will face fines or jail if you continue driving and happen to be stopped.

2. You Might Be Arrested

"In Texas," Dallas criminal defense attorney Paul Saputo warns on his website, "you can be arrested for almost any traffic violation—even minor traffic violations that are not punishable by jail time." Other states generally give police less authority to arrest drivers, but some classify minor traffic offenses, such as speeding, rolling stops, and failing to turn on your headlights, as misdemeanors, meaning they can result in an arrest.

While police usually issue citations for minor traffic offenses, the risk of arrest is not merely theoretical. The reform group Just Liberty estimates that more than 45,000 Texas drivers were arrested during traffic stops in 2016 for Class C misdemeanors—traffic and city ordinance violations that are typically handled with citations.

The Supreme Court approved such arrests in *Atwater v. City of Lago Vista*. That 2001 case involved a woman named Gail Atwater, who was arrested in 1997 after a Lago Vista, Texas, police officer, Bart Turek, saw her driving a pickup truck. She was unrestrained by a seat belt, and so were two young children sitting in the front seat.

Outraged by Atwater's negligence, Turek berated her, handcuffed her, and hauled her to the local police station, where officers forced her to remove her shoes, her jewelry, her eyeglasses, and the contents of her pockets before taking her mug shot. She was released on bail after spending an hour in a jail cell—all for an offense that at the time was punishable only by a fine of \$25–\$50.

In the majority opinion, Justice David Souter conceded that "the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment." The Court nevertheless concluded that arresting Atwater was reasonable under the Fourth Amendment, thus declining to establish a rule that it's unconstitutional to jail people for offenses that are not punishable by jail.

Sandra Bland, a 28-year-old woman, was pulled over in Prairie View, Texas, in 2015 for failing to signal a lane change. Thanks to *Atwater*, State Trooper Brian Encinia could have arrested her just for that. But what really ticked him off, dashcam and cellphone video of the incident showed, was her refusal to put out her cigarette, which prompted him to demand that she "get out of the car, now!" When she did not comply, Encinia forcibly removed her, tackled her, and arrested her for assaulting a police officer. Three days later, she committed suicide in jail.

Although Encinia was fired after that incident for violating the Texas Department of Public Safety's "procedures regarding traffic stops" and its "courtesy policy," he was on firm legal ground in demanding that Bland exit her car. In the 1977 case *Pennsylvania v. Mimms*, the Supreme Court said cops may order legally detained motorists out of their cars at will, based on general concerns about officer safety. Two decades later, the Court extended that rule from drivers to passengers in *Maryland v. Wilson*.

3. You Might Be Strip-Searched

While Gail Atwater's "gratuitous humiliations" did not include a strip search, that would have been OK too, judging from the Supreme Court's 2012 ruling in *Florence v. County of Burlington*. That case involved Albert Florence, who was arrested by a New Jersey state trooper during a routine traffic stop in 2005 based on an erroneous warrant involving a fine he had already paid. Florence endured strip searches at both the Burlington County Detention Center and the Essex County Correctional Facility, which struck him as unreasonable given the nature of his alleged offense.

The Court disagreed. In light of legitimate concerns about weapons and contraband, the majority said, it is reasonable for jails to strip-search all arrestees. The Court noted that "persons arrested for minor offenses may be among the detainees processed at these facilities," citing its decision in *Atwater*.

4. You Might Be Interrogated

"Officers will often engage you in casual conversation," says Steve Silverman, founder and executive director of Flex Your Rights, an organization that educates Americans about the constitutional issues raised by police encounters. "If they start asking you, 'Where are you going? Is there anything in your car that you shouldn't have?'—that's when the warning lights should go off in your head, to be ready to cut off that conversation. Always stay calm, stay cool. Say things like, 'Officer, I know you're just doing your job, but I'd really rather not answer any questions and be on my way, if that's OK.'"

Once friendly chitchat has morphed into a criminal investigation, most drivers probably will be keen to allay suspicion by being as cooperative as possible. But that approach may not always work out for the best, since it opens the door to inspections by drug-sniffing dogs and car searches that will prolong the stop and may prove embarrassing even if they turn up nothing incriminating.

Last year, the Oregon Supreme Court said this sort of fishing for evidence of a crime is not permissible under that state's constitution. "All investigative activities, including investigative inquiries, conducted during a traffic stop are part of an ongoing seizure and are subject to both subject-matter and durational limitations," it said. "Accordingly, an officer is limited to investigatory inquiries that are reasonably related to the purpose of the traffic stop or that have an independent constitutional justification."

Federal courts applying the Fourth Amendment generally have taken a more lenient approach, letting police ask whatever questions they want on the theory that drivers can always decline to answer. But the notion that such interactions are truly consensual is hard to take seriously given the intimidating power imbalance created when an armed agent of the state detains a driver.

5. Your Car Might Be Searched

The same goes for the consent that drivers supposedly give when officers ask to search their cars. A 2016 Cato Institute survey found that 80 percent of Americans understand they have a right to refuse such requests. But as Silverman notes, "it's challenging" to assert that right.

"The initial friendly chat helps put the driver in the frame of mind of responding to the trooper on a friendly basis, making cooperation and the giving of consent more likely," Harris noted in his 1998 *George Washington Law Review* article. "And it usually works. Whether out of a desire to help, fear, intimidation, or a belief that they cannot refuse, most people consent."

Drivers who have just denied that there is anything illegal in their cars may worry that refusing permission for a search will look suspicious. But the general pattern of compliance is especially striking in cases where someone allows a search that he knows will discover illegal drugs. Why would anyone in his right mind agree to a search, knowing it will result in his arrest, if he truly believes he is free to refuse?

Even while maintaining the fiction that such searches are voluntary, the Supreme Court has rejected the idea that police should have to inform people that they have a right to say no. In the 1996 case *Ohio v. Robinette*, the Court deemed such a rule "unrealistic" even when the original purpose of a traffic stop has been accomplished and the driver is theoretically free to go.

In that case, Montgomery County Sheriff's Deputy Roger Newsome stopped Robert Robinette for speeding and, after giving him a warning, added a Columbo-esque query: "One question before you get gone: Are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"

Robinette said no, which was predictably followed by Newsome's request to search his car. Robinette "consented," even though he had marijuana and an MDMA tablet in the car, which led to his arrest. In the Supreme Court's view, Robinette should have understood that he was no longer being detained after he got the warning for speeding, meaning he was under no obligation to stick around, let alone allow a search he knew would send him to jail.

Even if a constitutionally savvy driver says no to a car search, that need not be the end of the matter if a drug-detecting dog is available. The Supreme Court has said that deploying a canine narc does not count as a search and therefore requires no special justification.

The Court has approved the use of such dogs during routine traffic stops, provided it does not "unreasonably" prolong the driver's detention. And the Court has said an alert by a properly trained dog is enough to provide probable cause for a search, notwithstanding substantial evidence that such alerts are often erroneous, imagined, invented, or triggered by the handler's subconscious cues. In practice, these rulings mean that when a driver declines to allow a search, an officer can still get permission from a dog.

6. You Might Be Incriminated by a Bogus Drug Test

Dogs are not the only technology that police can use to implicate you in a drug offense. Drug field tests can magically turn sugar into methamphetamine and soap into cocaine.

On a Friday afternoon in December 2015, Cpl. Shelby Riggs-Hopkins, an Orlando officer, stopped Daniel Rushing after he picked up a friend at the 7-Eleven where she worked.

The official reason: Rushing failed to make a complete stop while leaving the convenience store parking lot and subsequently exceeded the speed limit. The real reason: Riggs-Hopkins erroneously suspected him of involvement in "drug activity."

After pulling Rushing over, the eagle-eyed, street-savvy cop "observed in plain view a rock-like substance" on the floor of the car. She reported that she "recognized, through my eleven years of training and experience as a law enforcement officer, the substance to be some sort of narcotic." Rushing "stated that the substance is sugar from a Krispy Kreme Donut that he ate," but Riggs-Hopkins knew better: Two field tests gave "a positive indication for the presence of amphetamines."

Rushing made bail and was released after 10 hours in jail. Three days later, after a lab test found no illegal substance in the evidence collected by Riggs-Hopkins, the charges against Rushing were dropped. (The lab test was not specific enough to identify which brand of donut the glaze came from.)

Alexander Bernstein and Annadel Cruz, who were riding in a rented Mercedes-Benz driven by Cruz when a Pennsylvania state trooper pulled the car over in 2013, were not so lucky. The official reason for the stop: Cruz was driving five miles per hour above the speed limit and hugged the side of the lane for half a mile. A more plausible reason: The sight of a young Latina driving an expensive car made the trooper's heart leap at the thought of finding contraband or seizable cash.

A search of the trunk (totally consensual, of course) discovered "two brick-size packages...covered in clear plastic wrap and red tape." They contained a white powder and together weighed a bit more than five pounds. After a field test supposedly showed that the powder was cocaine, Bernstein and Cruz were arrested. They spent a month in jail because they could not afford bail, which was initially set at \$500,000 and \$250,000, respectively. Lehigh County prosecutors dropped the cocaine charges after a lab test confirmed that the white powder was homemade soap, as Cruz had said all along.

Experiments have shown that commonly used drug field tests provide false positives for a wide variety of legal substances. Cops who fail to follow directions or misinterpret results also contribute to the problem.

Although these tests generally are not admissible in court, they are used to justify arrests, obtain search warrants, and pressure defendants into plea deals. Based on a 2016 investigation of cases in Harris County, Texas, *ProPublica* reporters Ryan Gabrielson and Topher Sanders estimated that incorrect field test results have led to "thousands of wrongful drug convictions."

7. You Might Have To Prove Your Sobriety

Given the "substantial government interest" in catching drunk drivers, the Supreme Court ruled in the 1990 case *Michigan Department of State Police v. Sitz*, the "minimal" intrusion entailed by sobriety checkpoints at which cars are randomly stopped for that purpose is consistent with the Fourth Amendment. Under the program challenged in that case, each driver was "briefly examined for signs of intoxication." If police suspected a driver was drunk, he "would be directed to a location out of the traffic flow where an officer would check the motorist's driver's license and car registration and, if warranted, conduct further sobriety tests."

The same thing can happen if you are stopped for a traffic violation and the officer perceives "signs of intoxication." The standard field sobriety test consists of three parts: the walk-and-turn test, which requires you to take nine steps in a straight line, walking heel to toe, pivot, and do the same thing in the other direction; the one-leg stand test, which requires you to stand on one foot for 30 seconds while counting aloud (1,001, 1,002, etc.) until told to stop; and the horizontal gaze nystagmus (HGN) test, which requires you to visually track a moving object such as a pen or flashlight while the officer looks for eye jerks that are characteristic of alcohol intoxication.

All this is pretty humiliating, especially if the officer was mistaken in thinking you were drunk. Furthermore, while the HGN test is well-validated as an indicator of alcohol consumption, performance on the other two tests varies from one individual to another, and some people do poorly even when they're perfectly sober.

Drivers generally are not legally required to participate in these sobriety tests. But if you refuse, the officer probably will ask you to blow into a breathalyzer. Every state has an "implied consent" law that imposes penalties on drivers who refuse to take breathalyzer tests.

While blood alcohol concentration corresponds pretty well to impairment, that is not true of THC blood levels. For that reason, relying on THC in the blood to define driving under the influence of marijuana, as 18 states do, irrationally and unfairly punishes cannabis consumers who were not actually intoxicated when they were pulled over. A dozen states have "zero tolerance" laws that equate any amount of THC with impairment, and nine of them also count inactive metabolites, which have no effect on driving ability, as conclusive evidence of driving under the influence.

Currently the leading alternative to that approach is a 12-step protocol administered by officers who are trained as "drug recognition experts" (DREs). While their findings are generally admissible in U.S. courts, some independent experts argue that the protocol, which includes an interview, vital sign measurements, eye examinations, and modified sobriety tests, has never been properly validated. The National Highway Traffic Safety Administration, which helped develop the DRE curriculum, says "there are currently no evidence-based methods to detect marijuana-impaired driving." The agency is sponsoring research aimed at filling that gap.

8. You Might Be Robbed

Thanks to civil asset forfeiture laws, police have a license to steal cash they come across during a traffic stop by alleging that it is connected to illegal drug activity. Once the cash is seized, the owner bears the burden of challenging the forfeiture, a process that often costs more money than the cops took. "Generally," Silverman says, "they won't reach into your wallet and pull \$40 or \$100 out. But if they find a stack, or a wad of cash, in a lot of jurisdictions, they're going to snatch that."

The experience of William Davis and John Newmerzhycky, Californians who were stopped by Iowa state troopers in 2013 while returning home from a World Series of Poker event in Joliet, Illinois, was unusual because of the size of the heist and because they ultimately got their money back. But the circumstances were otherwise pretty typical.

Trooper Justin Simmons, who was part of an "interdiction team" looking for contraband and money to seize, ostensibly stopped the two men because Newmerzhycky, who was driving,

failed to signal properly as he passed another car. Simmons let Newmerzhycky off with a warning, meaning he was notionally free to go. But Simmons was not really done.

"Hey, John?" he said as Newmerzhycky started returning to his car. "Do you have time for a couple of questions? Do you have something illegal in the car?"

Things quickly went downhill from there. Newmerzhycky denied having any contraband; Simmons asked for permission to search the car; Newmerzhycky said no; Simmons summoned an officer with a drug-sniffing dog, which supposedly alerted to the trunk, justifying a search that turned up \$100,000 in poker winnings; and the cops seized the money on the theory that large sums of cash are inherently suspicious.

Davis and Newmerzhycky challenged the forfeiture in federal court. More than three years after the seizure, the state settled the lawsuit by agreeing to return all of the money and pay the men another \$50,000 for their trouble.

9. You Might Be Sexually Assaulted

After police in Deming, New Mexico, pulled David Eckert over for failing to stop completely at a stop sign in January 2013, he was forcibly subjected to two X-rays, two digital probes of his anus, three enemas, and a colonoscopy, none of which discovered the slightest trace of the drugs he was suspected of hiding inside himself. Adding insult to injury, the Gila Regional Medical Center, the hospital where these procedures were performed, charged Eckert \$6,000 for its services. This degrading ordeal was authorized by a search warrant based on the following evidence: Eckert seemed nervous and stood "erect" with his legs together; a police dog supposedly alerted to the driver's seat of his pickup truck; and a detective claimed Eckert "was known to insert drugs into his anal cavity," which Eckert's lawyer said was a baseless rumor.

Another New Mexico man, Timothy Young, underwent a similarly rigorous search at the same hospital in October 2012 after Hidalgo County sheriff's deputies stopped him for failing to signal a turn. Like Eckert, Young was billed for his involuntary "treatment," which discovered no drugs. The same police dog, whose certification had lapsed, was involved in both cases.

At least the cops in New Mexico bothered to get a warrant. In 2015, the Texas legislature felt compelled to pass a law requiring police to obtain search warrants before probing the anuses or vaginas of drivers or passengers during traffic stops. Legislators were responding to a series of complaints from women who were subjected to warrantless (and fruitless) roadside cavity searches after state troopers stopped them for offenses such as speeding and littering.

10. You Might Be Killed

In 2017, a jury acquitted Jeronimo Yanez, the St. Anthony, Minnesota, police officer who fatally shot Philando Castile during a 2016 traffic stop, of second-degree manslaughter. But dashcam video of the encounter, which was released after the trial, shows that Yanez panicked and killed an innocent man who had calmly informed him that he was carrying a gun, which he was licensed to do.

Yanez officially stopped Castile because of a faulty brake light. But the real reason, the officer testified, was that he thought Castile resembled a robbery suspect: Both had dark skin, a wide nose, dreadlocks, and glasses.

Yanez never told Castile not to move, never told him to keep his hands in plain view, and never told him to put them on the dashboard. Instead he asked Castile for his driver's license, which Castile apparently was trying to retrieve when Yanez said, "Don't pull it out," referring to the handgun. "I'm not pulling it out," Castile assured Yanez. "He's not pulling it out," Castile's girlfriend, a passenger in the car, reiterated. At that point, Yanez freaked out, screaming, "Don't pull it out!" He immediately drew his pistol and fired seven rounds at Castile, who managed to say "I wasn't reaching for it" before he died.

While some of these scenarios are more likely than others, they all highlight the danger of letting police stop motorists more or less at will, using trivial traffic offenses as a pretext for investigations they otherwise would not be allowed to conduct. Drivers can try to shut down those investigations by politely asserting their rights, but that strategy may be psychologically difficult. It may also be risky, since the same officer who is seeking your cooperation is also deciding whether to let you off with a warning, write a ticket, or arrest you.

Silverman nevertheless hopes that people will consider the broader consequences of meek compliance. "The more people assert their rights," he says, "the more they are creating a sense that there are lines police should not cross."

Traffic Stops in Black and White

After the Oregon Supreme Court imposed new limits on police authority to grill drivers during routine traffic stops last year, Bobbin Singh of the Oregon Justice Resource Center called the decision "incredibly important for communities of color." While white drivers may assume that getting a ticket is the worst thing that can happen when they're pulled over for a traffic violation, Singh told Oregon Public Radio, "there's not really any expectation of where the limits are" when people with darker complexions find themselves in the same situation.

Research confirms the impression that racial minorities tend to be treated differently during traffic stops. A 2018 analysis of stops in Portland, Oregon, found that black drivers were subjected to discretionary searches 9 percent of the time, compared to a rate of 3 percent for white drivers.

Information collected by the Pennsylvania State Police reveals similar disparities. "Year after year," *The Philadelphia Inquirer* reported in January, "troopers were roughly two to three times more likely to search black or Hispanic drivers than white drivers." And when searches were conducted, "troopers were far less likely to find contraband" if the drivers were black or Hispanic rather than white, suggesting that the evidentiary threshold for searching blacks and Hispanics was lower.

Such differential treatment seems to be a nationwide phenomenon. In a 2017 analysis of data from 20 states, researchers at Stanford University found that "white drivers are searched in 2.0% of stops, compared to 3.5% of stops for black motorists and 3.8% for Hispanic motorists." After the researchers controlled for stop location, date and time, and driver age and gender, they calculated that "black and Hispanic drivers have approximately twice the odds of being searched relative to white drivers." They were also twice as likely to be arrested. The study found that "black and Hispanic drivers are searched on the basis of less evidence than white drivers, suggestive of bias in search decisions."

In a 2016 National Bureau of Economics paper, Harvard economist Roland Fryer analyzed information about police encounters from New York City's "stop and frisk" program, from a nationally representative survey of the general public, and from reports on incidents in which officers fired their weapons, based on records provided by law enforcement agencies in Austin, Dallas, Houston, six Florida counties, and Los Angeles County. Although he found no evidence of racial disparities in shootings, he reported that "blacks and Hispanics are more than fifty percent more likely to experience some form of force," such as grabbing, handcuffing, slapping, baton strikes, pepper spraying, and pushing to the ground or against a wall.

After surveying drivers in the Kansas City area in 2003 and 2004, Charles Epp and two other researchers at the University of Kansas classified police encounters based on the legal justification (or lack thereof) and the amount of discretion involved. They found that black drivers were no more likely than white drivers to report clear-cut "traffic safety stops" (e.g., for running a red light or stop sign, driving at night with headlights off, or exceeding the speed limit by seven or more miles an hour) but were nearly three times as likely to report seemingly pretextual "investigatory stops" (e.g., for an unilluminated license plate, driving too slowly, or no reason mentioned by the officer).

During investigatory stops, Epp and his colleagues reported, black drivers were five times as likely as white drivers to be searched. They were also more likely to be handcuffed and threatened with arrest, and more likely to describe the officer's demeanor as rude, hostile, or insulting. Blacks perceived investigatory stops as less legitimate than traffic safety stops, while whites made no such distinction. The more stops black drivers had experienced, the less they trusted the police, an effect that was not apparent among white drivers.

"Drivers are well aware of the profound racial disparities in police stops, and this awareness shapes perceptions of the police and their own place in society," Epps et al. write in their 2014 book *Pulled Over*. "Police stops confirm whites' common assumption that they are full citizens deserving respect and leniency; they teach African Americans that they are targets of suspicion."